PUBLIC EMPLOYMENT AND THE RELATIONSHIP BETWEEN LABOUR AND ADMINISTRATIVE LAW

by

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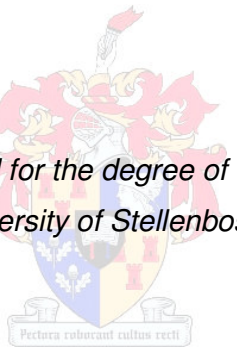

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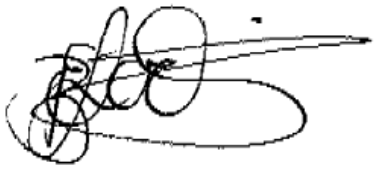
Signature: 

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ABSTRACT

The focus of this study is the rights-based normative overlap of labour and administrative law in public employment. As the judiciary appeared to be unable to agree on a unified approach to the application of the rights to fair labour practices and just administrative action to public employment, it was clear that the complexity and multi-dimensional character of the debate required analysis of existing approaches to the regulation of the public employment relationship. The following initial research question was formulated: To what extent does (and should) the constitutionalised rights to fair labour practices (s 23) and just administrative action (s 33) simultaneously find application in the regulation of public employment relationships?

In answering this question, certain realities had to be acknowledged, the most important being that the debate in question jurisprudentially revealed itself to be a jurisdictional turf-war between the Labour and High Courts, rather than proper consideration of the relevant substantive arguments and underlying normative considerations. This called for an additional dimension to be added to the research question, namely consideration of the extent to which the ss 23 and 33 rights are informed by variable and possibly different normative principles and whether these rights allow for cooperative regulation of public employment in accordance with the doctrine of interdependent fundamental rights.

This became the primary focus of the study. In an attempt to simplify the debate, a deliberate decision was taken to limit the scope of the normative study to South Africa with its own historic influences, structures and constitutional considerations. The study shows that both labour and administrative law (as constitutionally informed) share concern for equity-based principles. This is evident from the flexible contextually informed perspectives of administrative law reasonableness in relation to labour law substantive fairness, as well as a shared concern for and approach to procedural fairness. Once simplified, and in the absence of any undue positive law complexity, the public employment relationship, at both a normative and theoretical level, furthermore shows no substantive status difference with private employment relationships. It is, however, accepted that there are job and sector-specific contextual differences. In the absence of substantive normative conflict between these branches of law and in the absence of a fundamental (as opposed to contextual) difference between public and private employment, there appears to be no reason to ignore the constitutional jurisprudential calls for hybridity, otherwise termed the doctrine of interdependence. The idea of normatively interdependent rights expresses the Constitution's transformative vision (through the idea of flexible conceptual contextualism) and recognises that human rights may overlap. This also means that where such

overlap exists, rights should be interpreted and applied in a mutually supportive and cooperative manner that allows for the full protection and promotion of those rights. In giving expression to the interdependent normative framework of constitutional rights, these norms (absent any substantive rights-based conflict) should then be used by the judiciary as an interpretative tool to align specific labour law and general administrative law in the regulation of public employment relationships.

OPSOMMING

Die fokus van hierdie studie is die regsgebaseerde normatiewe oorvleueling van arbeids- en administratiefreg in die openbare diensverhouding. Aangesien dit blyk dat die regsbank nie kon saamstem oor ‘n eenvormige benadering tot die toepassing van die regte op billike arbeidspraktyke en regverdige administratiewe optrede op die openbare diensverhouding nie, het die kompleksiteit en multi-dimensionele karakter van die debat dit genoodsaak om bestaande benaderings tot die regulering van die openbare diensverhouding te analiseer. In die lig hiervan is die volgende aanvanklike navorsingsvraag geformuleer: Tot watter mate vind die grondwetlik neergelegde regte tot billike arbeidspraktyke (a 23) en regmatige administratiewe optrede (a 33) gelykmatig toepassing in die regulering van die openbare diensverhouding en tot watter mate hoort die regte gelykmatig toepassing te vind?

In antwoord op die vraag is sekere realiteite geïdentifiseer, waarvan die belangrikste is dat die debat in die regspraak grootliks neergekom het op ‘n jurisdiksionele magstryd tussen die Arbeids- en Hooggeregshowe, eerder as werklike oorweging van die relevante substantiewe argumente en onderliggende normatiewe oorwegings. Dit het die byvoeging van ’n verdere dimensie tot die navorsingsvraag genoodsaak, naamlik oorweging van die mate waartoe die aa 23 en 33 regte deur buigsame en moontlik verskillende normatiewe beginsels beïnvloed word, en ook of hierdie regte ruimte laat vir mederegulering van die openbare diensverhouding in terme van die leerstuk van interafhanklikheid van fundamentele regte?

Laasgenoemde het die primêre fokus van die studie geword. In ‘n poging om die debat te vereenvoudig, is doelbewus besluit om die strekking van die normatiewe studie te beperk tot Suid-Afrika, met eiesoortige historiese invloede, strukture en grondwetlike oorwegings. Soos die normatiewe studie ontvou het, wys die studie dat beide arbeids- en administratiefreg (soos grondwetlik beïnvloed) ‘n gemeenskaplike belang in billikheids-gebaseerde beginsels openbaar. Daar is ‘n versoenbaarheid tussen die kontekstueel beïnvloedbare en buigsame redelikheids-perspetief van die administratiefreg, soos gesien in vergelyking met substantiewe billikheid in die arbeidsreg. Voorts heg beide die arbeids- en administratiefreg ‘n gemeenskaplike waarde aan, en volg beide ‘n gemeenskaplike benadering tot, prosedurele billikheid. Terselfdertyd, en in die afwesigheid van onnodige positiefregtelike kompleksiteit, blyk daar op beide ‘n normatiewe en teoretiese vlak geen substantiewe verskil in status tussen die openbare diensverhouding en die privaat diensverhouding te wees nie. Dit word egter aanvaar dat daar wel werk- en sektor-spesifieke kontekstuele verskille bestaan. In die afwesigheid van substantiewe normatiewe konflik tussen die twee vertakkinge van die reg en in die afwesigheid

van ‘n fundamentele (in vergelyking met kontekstuele) verskil tussen diensverhoudings in die openbare en privaatsektore, blyk daar geen rede te wees om die grondwetlike jurisprudensiële vereiste van hibriditeit, ook genoem die leerstuk van die interafhanklikheid van grondwetlike regte, te ignoreer nie. Die idee van normatiewe interafhanklike regte gee uitdrukking aan die Grondwet se visie van transformasie (via die idee van buigsame konsepsuele kontekstualisme) en erken dat menseregte soms oorvleuel. Dit beteken ook dat waar so ‘n oorvleueling bestaan, regte ïnterpreteer en toegepas moet word in ‘n wedersyds ondersteunende en samewerkende wyse wat voorsiening maak vir die volle beskerming en bevordering van daardie regte. Erkenning van die interafhanklike normatiewe raamwerk van grondwetlike regte hoort daartoe te lei dat die regsbank daardie norme (in die afwesigheid van regsgebaseerde konflik) as interpretasie-hulpmiddel gebruik om die spesifieke arbeidsreg met die algemene administratiefreg te versoen in die regulering van die openbare diensverhouding.

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LIST OF ABBREVIATIONS

1956 LRA	Labour Relations Act 28 of 1956
1993 PSLRA	Public Service Labour Relations Act 102 of 1993
1994 PSLRA	Public Service Labour Relations Act 105 of 1994
AJ	Acting Judge
AJA	Acting Judge of Appeal
AJA Newsletter	Administrative Justice Act Newsletter
AJHR	African Journal on Human Rights
AJIL	American Journal of International Law
Am J Soc	American Journal of Sociology
American J Comp L	American Journal of Comparative Law
American J Pol Sc	American Journal of Political Science
American Pol Sc Rev	American Political Science Review
ASSAL	Annual Survey of South African Law
Auckland ULR	Auckland University Law Review
BCEA	Basic Conditions of Employment Act 75 of 1997
California LR	California Law Review
Cambrian LR	Cambrian Law Review
CCMA	Commission of Conciliation Mediation and Arbitration
CCR	Constitutional Court Review
CEPPWAWU	Chemical, Energy, Paper, Printing, Wood and Allied Workers Union
CILSA	Comparative and International Law Journal of Southern Africa
Cf	Compare
CJ	Chief Justice
CLOSA	Constitutional Law of South Africa
CLP	Current Legal Problems

COHRE	Centre on Housing Rights and Evictions
Colum Hum Rts L Rev	Columbia Human Right Law Review
Colum LR	Columbia Law Review
Commw L Bull	Commonwealth Law Bulletin
Comp Labour Law and Pol'y Journal	Comparative Labour Law and Policy Journal
Cornell L Rev	Cornell Law Review
CWIU	Chemical Workers Industrial Union
Dalhousie LJ	Dalhousie Law Journal
DCJ	Deputy Chief Justice
Econ Hist Rev	Economic History Review
ed(s)	editor(s)
EEA	Employment Equity Act 55 of 1998
Employment LJ	Employment Law Journal
ESR Review	Economic and Social Rights Review
FAWU	Food and Allied Workers Union
Fla J Int'l L	Florida Journal of International Law
fn	footnote
Ga J Int'l & Comp L	Georgia Journal of International and Comparative Law
GIWUSA	General and Allied Workers Union of South Africa
HLR	Harvard Law Review
HOSPERSA	Health and Other Service Personnel Trade Union of South Africa
Hous L Rev	Houston Law Review
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILJ (UK)	Industrial Law Journal (United Kingdom)
ILJ	Industrial Law Journal
ILR	Industrial Law Review

IMATU	Independent Municipal and Allied Trade Union
Indicator SA	Indicator South Africa
Indus & Lab R Rev	Industrial and Labor Relations Review
Int J Comp Socio	International Journal of Comparative Sociology
Int LR	International Labour Review
Int Rev Admin Sc	International Review of Administrative Sciences
J	Judge
JA	Judge of Appeal
J Organiz Behav	Journal of Organizational Behavior
JAL	Journal of African Law
J Modern Afr Stud	Journal of Modern African Studies
JBL	Juta's Business Law
JP	Judge President
JQR	Juta's Quarterly Review
LAWSA	Law of South Africa
LJ	Lord Justice
LRA	Labour Relation Act 66 of 1995
LQR	Law Quarterly Review
Macquarie LJ	Macquarie Law Journal
Malaya L Rev	Malaya Law Review
Man LJ	Manitoba Law Journal
MAWU	Metal and Allied Workers Union
McGill LJ	McGill Law Journal
Md Bar J	Maryland Bar Journal
MDE	Managerial and Decision Economics
MLR	Modern Law Review
NAAWU	National Automobile and Allied Workers Union
NAPTOSA	National Professional Teachers' Association of South Africa

NCBAWU	National Construction Building and Allied Workers Union
NCGLE	National Coalition for Gay and Lesbian Equality
NDPP	National Director of Public Prosecution
NEHAWU	National Education Health and Allied Workers Union
NEWU	National Entitled Workers' Union
NIWUSA	National Industrial Workers' Union of South Africa
NULAW	National Union of Leather and Allied Workers
NUM	National Union of Mineworkers
NUMSA	National Union of Mineworkers South Africa
NUPSAW	National Union of Public Service and Allied Workers
NUPSW	National Union of Public Service Workers
NUTESA	National Union of Technikon Employees of South Africa
OCGAWU	Oil, Chemical and General Allied Workers Union
Ohio St J on Disp Resol	Ohio State Journal on Dispute Resolution
Osgoode Hall LJ	Osgoode Hall Law Journal
OUCLJ	Oxford University Commonwealth Law Journal
Oxford J Legal Stud	Oxford Journal of Legal Studies
P	President
PAJA	Promotion of Administrative Justice Act 3 of 2000
par(as)	paragraph(s)
PAR	Public Administration Review
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
PER	Potchefstroom Electronic Law Journal
Phil & Publ Aff	Philosophy & Public Affairs
POPCRU	Police and Prison Civil Rights Union
PSA	Public Servant Association
PSCBS	Public Service Co-ordinating Bargaining Council
Publ Admin Rev	Public Administration Review

Publ Law	Public Law
QLR	Quarterly Law Review
Queen's LJ	Queen's Law Journal
Resp Mer	Responsa Meridiana
Rev of Const Studies	Review of Constitutional Studies
RSA	Republic of South Africa
s	section
ss	sections / subsection
SA Merc LJ	South African Mercantile Law Journal
SAA	South African Airways
SAAPAWU	South African Agriculture, Plantation and Allied Workers' Union
SABC	South African Broadcasting Corporation
SACCAWU	South African Commercial Catering and Allied Workers Union
SACTWU	South African Clothing and Textile Workers Union
SACWU	South African Chemical Workers Union
SAJHR	South African Journal on Human Rights
SAJHRM	South African Journal of Human Resource Management
SALGA	South African Local Government Association
SALGBC	South African Local Government Bargaining Council
SALJ	South African Law Journal
SAMWU	South African Metalworkers Union
SANDU	South African National Defence Union
SAPL	South African Public Law
SAPO	South African Police Office
SAPS	South African Police Service
SAPU	South African Police Union
SARFU	South African Rugby Football Union

SM	Senior Member
Social Psych Quart	Social Psychology Quarterly
Stanford LR	Stanford Law Review
Stell LR	Stellenbosch Law Review
Tex L Rev	Texas Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir Suid-Afrikaanse Reg
TOWU	Transport and Omnibus Workers' Union
UAMAWU	United African Motor & Allied Workers Union
UCT	University of Cape Town
Univ Penn LR	University of Pennsylvania Law Review
Univ Toronto LJ	University of Toronto Law Journal
UWC	University of the Western Cape
UWCUWU	University of the Western Cape United Workers Union
WVaLQL	West Virginia Law Quarterly
Yale JL & Feminism	Yale Journal of Law and Feminism
Yale LJ	Yale Law Journal

CHAPTER ONE

THE APPROACH TO THE STUDY OF THE INTERACTION BETWEEN LABOUR AND ADMINISTRATIVE LAW IN THE CONTEXT OF PUBLIC EMPLOYMENT

1 INTRODUCTION

Both labour and administrative law comprise of rules regulating legal relationships characterised by unequal power distribution: The employer holds managerial power over the employee, while the State holds public power over the citizen. Both regulate areas of interest to society in general. However, neither lends itself to precise definition. Attempts by authors to define these branches of law can best be labelled descriptions from a personal academic perspective or focus.

Labour law can loosely be described as the body of rules designed to regulate the employment relationship through the application of the concept of fairness, of which the most explicit recognition is to be found in section 23(1) of the Constitution.[1] In its purest sense, administrative law is seen as "a framework of normative principles of general application to administrative and executive bodies which guide them in their acts and decisions and provide the basis for their supervision".[2]

The application of administrative law to employment disputes has become a controversial topic over the past few years.[3] Historically, administrative law principles

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[1] As a body of legal rules, Basson et al *Essential Labour Law* 2 describes labour law's focus as the regulation of "relationships between employers and employees, between employers and trade unions, between employers' organisations and trade unions, and relationships between the State, employers, employees, trade unions and employers' organisations".

[2] Galligan *Administrative procedures and administrative oversight: their role in promoting public service ethics* Multi-country Seminar on Normative and Institutional Structures Supporting Public Service Ethics, Paris 5 November 1997 http://www.oecd.org/dataoecd/45/59/1850585.htm (2005/02/21). As a result, of the broad scope of administrative law, it influences a vast range of administrative areas, as well as an abundance of institutions and agencies of an administrative nature. See Hoexter *New Constitutional and Administrative Law: Volume Two* 4.

[3] See *PSA obo Haschke v MEC for Agriculture* 2004 (8) BLLR 822 (LC) at par 5.

were called upon to protect employees' rights in areas where labour law in itself was not yet sufficiently developed to advance labour rights.[4] Over time labour law incorporated administrative law notions of rationality and fair process.[5] As labour law, in its earlier form, was primarily based on common law principles,[6] legislation was eventually called upon to address the deficiencies of the common law. Although fairness was the catalyst for these developments, it was not specifically acknowledged as such until the specific integration of the concept of fair labour practices into the employment relationship by the Wiehahn Commission. Through these evolutionary steps, the focus of labour law on fairness gradually gained significance with the adoption of consequential regulatory legislation, promoting an employment-specific notion of fairness.[7] The adoption of the interim and later final Constitution of South Africa altered the historical position fundamentally.[8] Both the right to just administrative action (s 33),[9] and the right to fair labour practices (s 23)[10] are now enshrined in the Bill of Rights. As far as administrative action is concerned, PAJA[11] gives legislative effect to s 33 of the Constitution, while, as far as labour practices are concerned, the LRA remains the most important piece of

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[4] See *PSA obo Haschke v MEC for Agriculture* 2004 (8) BLLR 822 (LC) at par 11. See also Editor 2004 20(5) *Employment LJ* (Electronic Version).

[5] See Editor 2004 20(5) *Employment LJ* (Electronic Version); *Carephone (Pty) Ltd v Marcus NO* 1998 (11) BLLR 1093 (LAC).

[6] See Grogan *Workplace Law* 1.

[7] A very important development in the post-1995 era for labour legislation can be found in the inclusion of the Public Service under the scope of both the LRA and the BCEA. Section 213 of the LRA specifically provides that a person qualifies as a protected employee in term of the LRA if he or she works for the State. Consequently, the State is now regarded as an 'employer'. See Basson et al *Essential Labour Law Volume One: Individual Labour Law* 119; Grogan *Dismissal, Discrimination and Unfair Labour Practices* 14.

[8] This 'historical position' refers to labour law's common law basis, as left unaltered by the labour legislation put in place by the legislator. See also Editor 2004 20(5) *Employment LJ* (Electronic Version).

[9] Section 33(1) holds that *everyone* has the right to administrative action that is lawful, reasonable and procedurally fair.

[10] Section 23(1) proclaims that *everyone* has the right to fair labour practices.

[11] In *Simelela v Member of the Executive Council for Education, Province of the Eastern Cape* 2001 (9) BLLR 1085 (LC) at par 40, the Labour Court acknowledged that the provisions of PAJA "reflect a codification of the principles of administrative law developed by our courts under the common law and the Constitution".

legislation. PAJA regulates the conduct (administrative action)[12] of organs of state.[13] On the other hand, the LRA[14] focuses on the regulation of employment relationships, whether private or public.[15] Upholding the distinction between the regulation of State conduct as regulator in terms of PAJA and conduct of the State as employer in terms of the LRA proves problematic, as many employment decisions taken by the State can potentially be categorised as administrative action.[16] It is therefore possible for labour law and administrative law rules to find application in the same circumstances.

Recent experience[17] serves as an example of the rights-based normative overlap between labour law and administrative law. The overlap primarily exists in regulation of the public employment relationship, as well as control over the activities of so-called labour tribunals, supposedly designed to deal speedily and efficiently with labour matters. The focus of this dissertation falls specifically on the overlap found in the context of public employment regulation. This overlap raises questions about the compatibility of the rights-based normative structure of labour and administrative law.

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[12] In terms of PAJA, an action will only qualify as an administrative action if it is "a decision of an administrative nature made under an empowering provision by an organ of state (or a private person when exercising a public power) that adversely affects rights that has direct external legal effect and that is not specifically excluded by the list of exclusions in subparas *(aa)* to *(ii)* of the definition of 'administrative action'". See Currie and De Waal *Bill Of Rights Handbook* 501. Hoexter *The New Constitutional and Administrative Law: Volume Two* 3 proclaims that "'[a]dministrative action' refers broadly to the conduct of the public administration".

[13] In terms of s 239 of the Constitution: "'organ of state' means-

(a) any department of state or administration in the national, provincial or local sphere of government; or

(b) any other functionary or institution-

(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer".

[14] The LRA along with other labour legislation (the BCEA and the EEA) give effect to the constitutional right to fair labour practices.

[15] See Editor 2004 20(5) *Employment LJ* (Electronic Version).

[16] See Editor 2004 20(5) *Employment LJ* (Electronic Version).

[17] See for example *POPCRU v Minister of Correctional Services* 2006 (4) BLLR 385 (E), *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC), *Nakin v MEC, Department of Education Cape Provinces* 2008 (5) BLLR 489 (Ck).

2 RESEARCH QUESTION

As articulated in *MEC, Department of Roads and Transport, Eastern Cape v Giyose*[18] by Froneman J, the determination of the relationship between labour and administrative law requires the following considerations:

> [W]hether the right to a procedurally fair and substantively rational decision should, in ... [a public] employment dispute, be viewed as an employment dispute or as dispute about the right to just administrative action, a question upon which there is not much clarity in our law at present.[19]

The determination of the scope of the relationship between labour and administrative law requires consideration of the differences in origin and context in which the different dimensions of fairness as a norm developed. This, in turn, requires answers to two specific questions: firstly, whether administrative and labour law recognise fairness in a complementary fashion and, secondly, whether fairness so understood contemporarily and interdependently enriches constitutionally based labour law?[20] For purposes of the current research, the following specific research question can be formulated: To what extent does the constitutionalisation of fair labour practices and just administrative action, as informed by variable normative principles, allow for a cooperative regulation of public employment in accordance with the doctrine of interdependent fundamental rights?

3 RELEVANCE OF THE STUDY

In *Gcaba v Minister for Safety and Security*,[21] the Constitutional Court recently handed down a judgment that appears to render the current research moot, not only because this study examines the legal relationship between labour and administrative law, but also because the issue was, on the face of it, finally dealt with by the Court.[22] However,

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[18] 2008 (5) BLLR 472 (E).

[19] *MEC, Department of Roads and Transport, Eastern Cape v Giyose* 2008 (5) BLLR 472 (E) at par 1.

[20] See *MEC, Department of Roads and Transport, Eastern Cape v Giyose* 2008 (5) BLLR 472 (E) at par 2.

[21] 2009 (12) BLLR 1145 (CC). This judgment is discussed in detail in Chapter Nine.

[22] Subsequent judgments fall outside the ambit of this study.

a closer evaluation of the issues underlying the research question and the impact of the study emphasises its necessity.

Firstly, the Constitutional Court's judgment in *Gcaba v Minister for Safety and Security*[23] is open to criticism, due to legal and logical flaws in the reasoning of the court.[24]

Secondly, the inherent conflict in the judgment has already led to reaction in the lower courts,[25] illustrating that the case has not provided the sought after clarity, to the same degree - if not more - than was the case after *Chirwa v Transnet Ltd*.[26] As it is a well known fact that the "State is the largest single employer",[27] clarity as to the proper regulatory scope of labour and administrative law in the public employment context remains crucial.

Thirdly, although the scope of the research question may limit the focus of the research to public employment, it contributes to the understanding of the proper interpretative approach to constitutional rights at a wider level. The study evaluates the generally required approach to the relationship between constitutional rights.

Fourthly, the study emphasises the fact that the judiciary has yet to properly and completely accept and adopt the supremacy of the Constitution. The study emphasises that the cause of this problem, namely the neglect of the judicial duty to promote and

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[23] 2009 (12) BLLR 1145 (CC).

[24] See *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC).

[25] See for example the recent Supreme Court of Appeal judgment, *City of Tshwane Metropolitan Municipality v Engineering Council of SA* [2009] ZASCA 151 at paras 37 and 38 per Wallis AJA (giving a narrow reading to the *Gcaba*-judgment as a contextual finding of the absence of administrative action specific to Mr Gcaba's dispute), and the Labour Court judgment, *Setlhoane v Department of Education: North-West Province* [2009] ZALC 119 at paras 15 – 18 per Molahlehi J (creating the impression that, regardless of the Constitutional Court's recent ruling the Labour Court can still review employment decisions based on the principle of legality in terms of s 158(1)(h) of the LRA). A discussion of these cases however falls outside the time frame of the material considered in this study.

[26] 2008 (2) BLLR 97 (CC).

[27] Basson et al *Essential Labour Law* 35. The ILO provides the following data proof of the enormity of the State as employer: "[T]he statistics from more than 75 countries give a rough estimate of the public sector employment … as 435 million, of which 260 million workers were in public administration and the remaining 175 million in public corporations and enterprises." See *Public Service: Employment* 1 http://www-ilo-mirror.cornell.edu/public/english/dialogue/sector/sectors/pubserv/emp.htm (2008/10/31).

protect the spirit and purport of the Constitution, lies primarily with the Constitutional Court's failure to act in terms of the normative approach it holds as yardstick for the lower courts.

Finally, at a more philosophical level, the general importance of the study lies in the evaluation of the conflict between substance and form, and principle and practice that translates into the judiciary's continuing problem to break with traditional formalistic thinking. Transformative constitutionalism requires, and in fact demands, such a judicial mind shift.

4 SPECIFIC FOCUS ON SOUTH AFRICA AND ITS TRANSFORMATIVE CONTEXT

The ILO recognises that the traditional distinction between the private and public sector, often upheld for political reasons, prevented uniform treatment of all employees regardless of sector.[28] However, the contemporary dividing line between private and public employment is less precise and the fading distinction is the cause of a shift in political perspectives.[29] In reaction, countries have acknowledged the need for

[28] Within this context, the ILO describes the public service as follows: "The Public Service' is understood here to cover not only public administration but also various services being provided in the public or general interest, whether they are delivered publicly or privately. Traditionally, such services have mainly been delivered publicly, but the private sector has increased its share in managing and delivering certain services against the backdrop of increased deregulation and reform of the public sector across the world." See *Public Service: Background – Sectoral Activities* 1 http://www-ilo-mirror.cornell.edu/public/english/dialogue/sector/sectors/pubserv.htm (2008/10/31).

[29] Oluwu 1999 (37) *J Modern Afr Stud* 1 explains that the private and public sector are undeniably linked: "[A]n effective state is vital for the provision of the goods and services – and the rules and institutions – that allow markets to flourish and people to lead healthier, happier lives. Without it, sustainable development, both economic and social is impossible." The ILO therefore proclaims that the public service plays "a key role in the social and economic development of any country". See *Public Service: Background – Sectoral Activities* 1. Staats 1988 (48) *Publ Admin Rev* 601 at 603 further explains that "[t]he private sector cannot be strong without able public servants to conduct trade negotiations, [and] develop accurate economic data". Consequently, "[t]he notion that the public and private sectors are necessarily in conflict could not be more wrong, misleading, or unproductive" as Staats explains that "[a] strong, productive private sector is a cornerstone of a free economy and essential to maintenance of democratic institutions ... [as] government would not have the resources to carry out its mission" without

transformation of the public service.[30] A shift away from the notion of the supreme power of the Crown or State, "towards democratic systems governed by the rule of law"[31] is globally noticeable. Although the need for transformation is universally recognised, that does not imply standardised or identical transformation in all jurisdictions.

> The current debates centre around the questions of how far the State should and can introduce market-type mechanisms, involve private contractors, or privatise in order to ensure an effective and efficient provision of services in the public interest. *There is no one-fit-all answer* [to public employment transformation].[32]

The historic influences, the structure[33] and Constitutional provisions of every specific country must be taken into account when the transformation of the public service is evaluated from a country specific legal perspective.[34] For this reason, a comparative country analysis will not be undertaken in this study. The focus falls on a South African specific contextual evaluation[35] with reference to the constitutional relationship between

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it. Cf Schulz and Klemmer *Employment Services* http://www.ilo.org/public/english/employment/skills/empserv/publ/shulz.htm (2008/10/31).

[30] See Hodges-Aberhard *Comparative Study of contents of Civil Service Statutes* 7 http://www.ilo.org/public/english/dialogue/ifpdial/downloads/gllad/cs.pdf (2008/10/31).

[31] Hodges-Aberhard *Comparative Study of contents of Civil Service Statutes* 6.

[32] *Public Service: Background – Sectoral Activities* 1. Emphasis added.

[33] Structure is an important distinguishing characteristic, as some countries have quasi-judicial tribunals that hear disciplinary matters, while others approach the courts directly. Hodges-Aberhard *Comparative Study of contents of Civil Service Statutes* 9 explains that, "[d]epending on the constitutional framework, some institutions must report to the Council of Ministers (for example, the State Administrative Commission in Bulgaria)". Structure however does not merely imply legal structure, but also functional structure as the ILO notes that "[s]tructural adjustment is part of a process of global reform based on increased reliance on market forces and reduced role of the State in the economies". See *Public Service: Structural Adjustment and Efficiency* 1 http://www-ilo-mirror.cornell.edu/public/english/dialogue/sector/sectors/pubserv/struc.htm (2008/10/31).

[34] See Hodges-Aberhard *Comparative Study of contents of Civil Service Statutes* 8.

[35] Every country has its own plurality and diversity to take into consideration, along with its own historic and contemporary problems. See Longo *Comparative Institutional Diagnosis of Civil Service Systems* 2 http://www.iadb.org/IDBDocs.cfm (2008/10/31). The form and scope of public employment legislation

two rights not generally found in the structure of a traditional Bill of Rights. The right to just administrative action and fair labour practices carry specific historic meaning in the South African context, as does the judicial treatment of the overlap between labour and administrative law in the context of public employment.[36] This state of affairs cannot contextually be associated with other countries.

5 TERMINOLOGY IMPORTANT TO THE STUDY

5 1 Contextualism and Formalism

The rights and rules regulating the unequal power relationships with which labour and administrative law are concerned are based on core concepts. Conceptualism[37] has always been part of the judiciary's approach to resolving labour and administrative problems.[38]

Prior to the Constitution, the judiciary embraced formalistic conceptualism. In placing the focus squarely on concepts as theoretically and academically developed, the judiciary during this period assumed "that the law applicable to a particular case can be discovered by simple syllogistic reasoning"[39] in the absence of outside influences.[40]

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varies from country to country due to variables such as "rational … behaviour of political and socio-economic actors … the institutional constraints and … changing economic and demographic context", as Pennings 1999 (40) *Int J Comp Socio* 332 explains. Consequently, the Australian or United States specific transformation experience for example cannot be regarded as applicable in South Africa, merely because those countries have transformed their public employment perspective, as the contextual needs of every country's employment needs differ.

[36] Hodges-Aberhard *Comparative Study of contents of Civil Service* Statutes 11 appropriately emphasises that the legislative regulation of the public service of every country is "usually crafted around the provisions of a country's basic law", namely the Constitution.

[37] Howard 1965 (44) *Tex L Rev* 35 notes that conceptualism without context amounts to legal fiction.

[38] See Hoexter 2004 (4) *Macquarie LJ* 165 at 168.

[39] David *The Oxford Companion to* Law 266 as referred to in Hoexter 2004 (4) *Macquarie LJ* 165 at 168.

[40] Cox 2003 (36) *ILR* 57 at 60 explains the reliance of formalists on conceptualism is based on three things: "First, legal concepts … [can] be identified through *induction* … Second, they [believe] … that more particular rules could then be derived 'logically' from the concepts induced from the caselaw. Third, they [believe] … that the result … [to] be a self-contained, internally consistent, systemized and rationalized law, rather like geometry, and therefore that, correct legal answers could be given to any

Formalists embrace conceptualism in the abstract "as a refuge from the inherent difficulty of most of the moral and social judgments"[41] jurists are required to make.[42] Hoexter describes this as "a judicial tendency to rely on technical or mechanical reasoning instead of substantive principles and to prefer formal reasons to moral, political, economic or other social considerations".[43] Formalism, so understood, pre-constitutionally allowed judges to manipulate legal concepts to fit their perspective.

However, contextualised conceptualism counters such manipulation, as it acknowledges that "[w]hat is needed instead … is a concrete focus upon considerations of social advantage and disadvantage"[44] in the context of every case. The juristic formalist will merely enquire: What does administrative justice or fair labour practices require? Hoexter explains that a legal question so formulated means "that hardly any effort … [goes] into the essential task of working out the *appropriate content* of lawfulness, reasonableness and fairness *in particular cases*".[45] In contrast, the juristic contextualist will formulate a contextual enquiry: What does administrative justice or fair labour practices require *in the particular case*? Within a contextual evaluation, the relevant concept(s) must achieve the status of a legal problem in itself, so as not to

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questions by reference to the logic of this system." Admittedly, variations to this classical perspective of formalism have developed in the works of legal philosophers over the years.

[41] Howard 1965 (44) *Tex L Rev* 35 at 37.

[42] Howard 1965 (44) *Tex L Rev* 35 at 37. Cox 2003 (36) *ILR* 57 at 59 – 60 explains that the classical perspective of formalism reveals conceptualism as autonomous conceptualism. This formalistic perspective denies the relative character of conceptual autonomy in that it disregards the relevance of contextual evaluation, in preference for the 'logical' abstract. At its most radical, formalism reveals "a nominalist belief that concepts do not have real world referents, or that real world referents are insufficiently identical to be captured by any concept". A moderate perspective of formalism holds "that only narrow concepts drawn at lower levels of abstraction can be serviceable for formalist law". For the purpose of the study, the definition of "formalism as autonomous conceptualism" is sufficient to contrast it with contextualism and to identify the fact that formalism views conceptualism in the abstract.

[43] Hoexter 2004 (4) *Macquarie LJ* 165 at 168.

[44] Cox 2003 (36) *ILR* 57 at 61.

[45] Hoexter 2004 (4) *Macquarie LJ* 165 at 169. Emphasis added. Howard 1965 (44) *Tex L Rev* 35 at 36 explains that such formalistic conceptualism "contributes more by way of obfuscation than enlightenment. Not infrequently it leads straight up a blind alley".

become trapped in its own abstraction.[46] With proper consideration of the context, judges "are engaged in willing the results they reach in the particular cases they decide".[47]

This contextually influenced approach is a consequence of constitutionalism. Constitutionalism endorses the idea that the circumstances of every case will differ and accordingly that legal answer(s) may not always be black or white, but may reside somewhere in the grey area due the social, political and economic environment in which the question to which the concept(s) apply is formulated.[48] Within the South African context, constitutionalism takes on a specific transformative character and requires a contextual application of the constitutional justice concepts: lawfulness, reasonableness and fairness.[49] Law is not static.[50] The undeniable presence of and worth found in flexible principles and contextual evaluation has brought about "important changes in juristic thought".[51]

The shift in perspective emphasises the importance of the realisation that "abstract formalist concepts should be replaced with context dependent sensitivity of social

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[46] See Howard 1965 (44) *Tex L Rev* 35 at 37; *NCGLE v Minister of Justice* 1998 (12) BCLR 1517 (CC) at par 117 per Sachs J.

[47] Cox 2003 (36) *ILR* 57 at 60. Cf Botha 2003 (1) *TSAR* 20 at 21.

[48] See Howard 1965 (44) *Tex L Rev* 35.

[49] According to Klare 1998 (14) *SAJHR* 146 at 150, one of the elements of transformative constitutionalism is the transformation of power relationships as it "connotes an enterprise of inducing large-scale social change" in both the public and private sphere. Seidman-Makgetla 2000 (17) *Indicator SA* 18 at 23 elucidates that "[l]abour inputs in shaping the transformation of the state are particularly important" in the realisation of social change, as citizens spend the majority of their lifetime within the workforce. Transformation in labour relations is necessary for social change, as "[l]abour relations must overcome a long legacy of bitterness and distrust".

[50] Michelman 1989 (27) *Cornell L Rev* 256 at 259 (with reference to Fiss 1986 (72) *Cornell L Rev* 1 at 15) elucidates that "law appears as generative of public values as it is dependent upon them".

[51] Pound 1936 (42) *WVaLQL* 81 at 90. Pound 1936 (42) *WVaLQL* 81 at 94 elaborates: "If co-operation [or interdependence] is not to be the whole idea, it is to be a large part of it. But I prefer to think that the recognition of co-operation and new emphasis upon it in all connection is a step towards some ideal involving organized human effort along with free spontaneous individual initiatives and I seem to see such an ideal in the ideal civilization." For a general summary of these changes throughout different jurisdictions, see Pound 1936 (42) *WVaLQL* 81 at 90 – 94.

practice".[52] Social change cannot become a reality in the abstract of a formalistic yes/no answer to homogenous questions that do not take into consideration the change or transformed environment in which the questions call for evaluation.[53] Unfortunately, jurists get trapped in the safety of tradition as is evident from the formalistic approach associated with what Klare describes as "South African jurisprudential conservatism".[54] Traditional South African jurisprudential conservatism, while recognising that "legal practices are *situated*",[55] disregards the fact that circumstances change with the passage of time and that a clear rule that brought about a just result in a set of facts 50 years ago may not bring with it similar justice in a contemporary legal milieu. This does not imply that South African jurists should not act with caution, but caution should "not connote any unwillingness to take bold steps or to rock the boat".[56] If caution brings about legal stagnation, constitutional transformation will suffer.[57]

5 2 Doctrine of Interdependence

The General Assembly of the United Nations is generally credited as the creator of the doctrine of the interdependence of human rights.[58] In Resolution 41/117 of 4 December

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[52] Cox 2003 (36) *ILR* 57 at 61, with reference to Llewellyn *The Common Law Tradition, Deciding Appeals* 127, elaborates on the reasoning of Llewellyn: "Law should be specific to situation types [for example public employment] … and should incorporate the norms of real people in the real world."

[53] A formalistic perspective of the Constitution encourage the judiciary to "confine itself to a technical construction" as merely another legal document, removed from "the social and political implications of" decisions based on the provisions of Constitution. See Howard 1965 (44) *Tex L Rev* 35 at 36. See also Cox 2003 (36) *ILR* 57 with reference to Glimore *The Ages of American Law* 41 – 67.

[54] Klare 1998 (14) *SAJHR* 146 at 169.

[55] Klare 1998 (14) *SAJHR* 146 at 167.

[56] Klare 1998 (14) *SAJHR* 146 at 171.

[57] See Klare 1998 (14) *SAJHR* 146 at 171. In *Bato Star (Pty) Ltd v Minister of Environmental Affairs* 2004 (7) BCLR 678 (CC) at par 35, O'Regan explained that "transformation can be achieved in a myriad of ways ... [as no] one simple formula for transformation" can be prescribed.

[58] See Scott 1989 (27) *Osgoode Hall LJ* 769 at 771. The doctrine can also be linked to the principle of universality, which allows for a margin of appreciation (and consequently an element of relative autonomy) in that it leaves room for interpretation in the application of human rights. See Türmen *Contemporary Issues in Human Rights* 3 http://www.sam.gov.tr/perceptions/Volume2/March-May1997 (2008/10/15).

1986 the General Assembly gave recognition to the "indivisibility and interdependence of economic, social, cultural, civil and political rights".[59] With reference to the UN understanding, Scott explains that the "term interdependence attempts to capture the idea that values seen as directly related to the full development of personhood cannot be protected or nurtured in isolation".[60] The doctrine of interdependence therefore attempts to realise the fact that rights should be rendered as effective as possible.[61]

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[59] This resolution emphasises that the traditionally separated first and second generation rights, can no longer be regarded as detached and finding application in isolation. The interdependence between first and second generation right are further supported by the Unity Resolution 421(V) and the Separation Resolution 543(VI) of the United Nations. Article 13 of the 1968 Proclamation of Tehran incorporates a similar understanding: "Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible." See also art 1(b) of the GA Resolution 32/130; Scott 1989 (27) *Osgoode Hall LJ* 769 at 867.

[60] Scott 1989 (27) *Osgoode Hall LJ* 769 at 779 – 783 explains that interdependence "may be understood as having two senses: organic and related interdependence". Organic interdependence (referred to as direct permeability when given practical application) regards interdependent rights as "inseparable or indissoluble in the sense that one right (the core right) justifies the other (the derivative right)". In other words, "[t]o protect right *x* will mean directly protecting right *y*". See also Raz 1984 (93) *Mind* 194 at 197. Two types of organic rights have developed: logical or semantic entailments (such as identified in *Golder Case* (1975) 1 EHRR 524) and effectivist or foundational permeability. Scott holds that the logical kind of organic interdependence requires that the "derivative right must be a more specific form of the ... general core right" while the effectivist perspective argues that "[t]he goal is to render rights meaningful and non-illusionary [as] ... [t]he relationship is justificatory in nature". The main difference falls on "a different understanding of what form of necessity is required in order that one right be implied ... into another". The second sense of interdependence (as opposed to organic interdependence) is found in related interdependence of what academics regard as neighbouring rights. Although this approach recognises that while rights are distinct, they are also regarded as mutually reinforcing and dependent, the emphasis falls on the relative autonomy of rights. Rights are regarded as equally important and complimentary, yet separate. When translated into practical application, this approach is referred to as indirect permeability when applied in practice. This perspective of mutually reinforcing rights is identifiable in the jurisprudence of the Constitution Court.

[61] Scott 1989 (27) *Osgoode Hall LJ* 769 at 810. Regardless of the sense of interdependence endorsed, one fact remains constant rights are hybrid in character and therefore undeniably interdependent. See Scott 1989 (27) *Osgoode Hall LJ* 769 at 783. In the *National Union of Belgium Police Case* (1975) 1 ECHR 578 at paras 59 and 60, the European Commission of Human Rights emphasised the hybrid nature of human rights. According to the Commission, this hybrid element is undeniably present in the

The doctrine of interdependence is not a perfect one-size-fits-all principle. It is not intended "to create the impression of relationships between rights as entities with some kind of objective existence that goes beyond intersubjective understandings".[62] The relationship of rights, as envisaged within the doctrine of interdependence, develops "not for the sake of rights but for the sake of persons".[63] As such, the idea of interdependence cannot be relied upon "to conceal an ideological split but [to reveal] an accurate reflection of the realities of the situation".[64] The relative autonomy of the rights involved come into play, as the one right determines the contextual boundaries in which the other can give expression to its individualism and vice versa.[65] Furthermore, where two rights justifiably overlap, the normative principles informing the rights must be compatible for interdependence to be a functional reality. Within the area of overlap "'cross-fertilization' may help create a symbiotic relationship between the [rights or statutes] ... and may foster subtler, more sophisticated and more creative understandings of human rights and their interrelationships".[66] As a result, the judicial focus must move towards an emphasis on overlapping normative principles.[67] Through

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relationship between "a traditional liberal right or civil liberty, and an economic right". On the facts of the case (relating to a strike situation), the Commission consequently held that the existence of apparently separate first and second generation rights "[did] not exclude a construction to the effect that certain obligations with respect to trade union freedom may be incumbent upon the State, even in its capacity as an employer".

[62] Scott 1989 (27) *Osgoode Hall LJ* 769 at 786.

[63] Scott 1989 (27) *Osgoode Hall LJ* 769 at 786.

[64] Scott 1989 (27) *Osgoode Hall LJ* 769 at 787.

[65] The contemporary recognition of the fact that rights now carry the character of relative (in contrast to absolute) autonomy is a consequence of the fact that "[t]he Constitution also relativises the distinction between private law and public law", as Botha 2003 (1) *TSAR* 20 at 21 explains. See also *Fose v Minister of Safety and Security* 1997 (7) BCLR 851 (CC) at par 57 per Ackerman J.

[66] Scott 1989 (27) *Osgoode Hall LJ* 769 at 849. Govender in Corder and Van der Vijver *Realising Administrative Justice* 47 explain that for this creative purpose or advantage "[j]udges in the United States have used the due process clause to give content to a right to compensate for perceived shortcomings and deficiencies in the bill of rights".

[67] See Govender in Corder and Van der Vijver *Realising Administrative Justice* 48.

all this, society's interests in fundamental rights are given expression in the social meaning of the doctrine of interdependence.[68]

5 3 The State as Regulator and Employer

A reading of s 239 of the Constitution reveals that one is dealing with an organ of state as soon as one considers the rights and responsibilities of the employer in the public employment context.[69] The incorporation of the State as employer within the scope of labour legislation post-constitutionally is a political strategy.[70] It creates the fictional image of the State to be of 'ordinary' character.[71] Two elements render "the State fundamentally different from the individual ... [namely] coercive resources and duties of governance".[72] As regulator, the State "is required to act in the public interest";[73] "to

[68] Scott 1989 (27) *Osgoode Hall LJ* 769 at 786 explains: "From the vintage point of the underside of history, the intimate relationship between all human rights has a potential grounding in social experience and a relevant meaning that may be far ahead of understandings generated in less oppressive conditions".

[69] In *MEC for Transport KwaZulu-Natal v Jele* 2004 (12) BLLR 1238 (LAC), the Labour Appeal Court considered s 239, along with the Public Service Act 103(P) of 1994, and concluded that employees of an organ of state are employees of the State, as the State is a single employer. See Basson et al *Essential Labour Law* 35 – 36. In *Botha v Department Education, Arts, Culture and Sport, Northern Province* [1999] ZALC 110, the Labour Court referred with approval to the judgment in *SAAPAWU v Premier (Eastern Cape)* 1997 (9) BLLR 1226 (LC) at 1232 in which Landman J stated: "Various references are made in the Constitution, 1996, to an organ of State. It would seem to be clear that the founding parties of the Constitution envisaged a broad conception of the State to include not only the State as it is traditionally known but also to include other functionaries or institutions ... exercising a public power or performing a public function in terms of legislation." The State will therefore not be describable as such without the presence of public power. The scope of s 239 was also considered by the Constitutional Court in *Independent Electoral Commission v Langeberg Municipality* 2001 (9) BCLR 833 (CC).

[70] O'Byrne 1991 (14) *Dalhousie LJ* 487 at 488 elaborates: "Politically, the goal is to protect the individual from overarching State power, to reconcile … conflict between the individual sovereignty of each citizen … with the reality of an institutional and coercive State … [It] combines the liberal idea of maximizing liberty with the objective of attaining a fair outcome in legal contest between individual and State." A fair outcome between employer and employee is what labour law covets in a legal contest, and administrative law desires a similar result in a legal contest between citizens and the State. Therefore, this political move should be acceptable to both labour and administrative law.

[71] See O'Byrne 1991 (14) *Dalhousie LJ* 487 at 488.

[72] O'Byrne 1991 (14) *Dalhousie LJ* 487 at 490.

ensure the presence of justice in the community";[74] to "exercise its powers in the interest of the common good";[75] and to "always have due regard for the quality of its actions".[76] It is difficult to argue that these considerations can be disregarded by the State when it acts as employer. However, where the State is bound as if it were an individual, it also carries a "duty to abide by and obey the law in all its parts, and enjoys no ... immunity".[77]

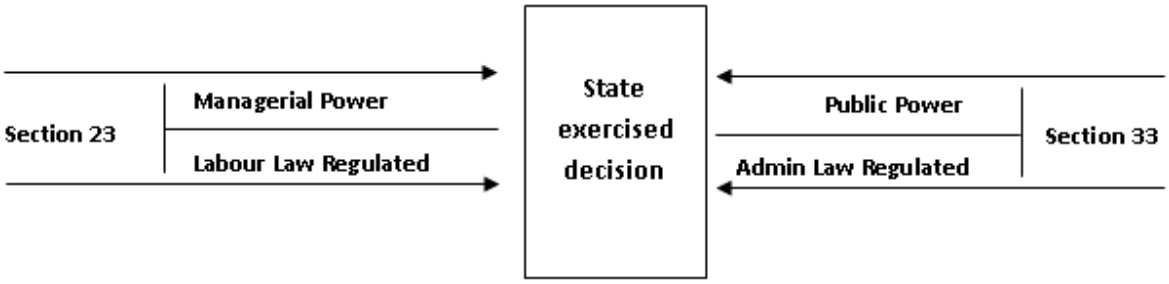

Illustration 1: Control of State exercised decisions

The reality is that the State as employer exercises managerial power,[78] which is linked to public power in the context of public employment. From this perspective, labour law regulates the exercise of managerial power by the State, while administrative law focuses on the exercise of public power. As illustrated, labour law and administrative law rights collectively keep the State, when contextually required, in line with the ideals of constitutional justice.[79]

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[73] O'Byrne 1991 (14) *Dalhousie LJ* 487 at 491.

[74] O'Byrne 1991 (14) *Dalhousie LJ* 487 at 492.

[75] O'Byrne 1991 (14) *Dalhousie LJ* 487 at 492.

[76] O'Byrne 1991 (14) *Dalhousie LJ* 487 at 492.

[77] O'Byrne 1991 (14) *Dalhousie LJ* 487 at 490. Footnotes omitted.

[78] Within the public sector context (as is the case in the private sector) Seidman-Makgetla 2000 (17) *Indicator SA* 18 at 19 explains that managerial power comes down to the following: "Within broad national standards, departmental managers have considerable discretion about work organization, the working environment and employment."

[79] The Constitution (specifically s 8(1)) also binds an organ of state acting as agent of the State as employer to protect and promote the rights in the Bill of Rights in terms of s 8(1). Burns and Beukes *Administrative Law* 96 explains the impact of this provision: "This means that all organs of state must

6 OUTLINE OF THE STUDY

In the chapters to follow, the evaluation of the relationship between labour and administrative law in the context of public employment is divided into three sections or focus areas, to emphasise the distinct aspects that underlie proper consideration of the research question.

The first part of the study introduces and describes the three main areas of influence traditionally drawn into the public employment debate, namely labour law (Chapter Two), administrative law (Chapter Three), and the character of the public service (Chapter Four). Chapters Two and Three look into the development of the normative basis of labour and administrative law. In this exercise, the broad concept of fairness (both substantive and procedural) is identified as the core concept of labour law, while it is illustrated that administrative law relies on three conceptual pillars, namely lawfulness, reasonableness and procedural fairness. The theoretical basis dealt with in the first section is completed with the evaluation, in Chapter Four, of the traditional assumptions underlying the apparent difference between public and private employment, which leads to the conclusion that in reality the difference is contextual rather than fundamental. Collectively, these chapters illustrate that public employment does not require a substantively distinct regulatory approach as traditionally assumed.

The second part of the study sets out to prove the functional potential of a substantively similar regulatory approach to public and private employment relationships, while taking into account the impact of contextual considerations on the understanding and application of the underlying and unifying normative principles of labour and administrative law. The normative interaction between substantive fairness and reasonableness is evaluated in Chapter Five, leading to a finding that the underlying rationale of both concepts allows for easy cooperation between the constitutional rights to fair labour practices and just administrative action. Both labour and administrative law acknowledge that, at a substantive level, the context informs the content of the

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protect, promote and fulfil the rights protected by the Bill of Rights, including the right[s] to just administrative action [and fair labour practices]. Where any person is of the view that any of the rights contained in the Bill of Rights have been infringed by an organ of state … that person may approach a competent court for relief."

applicable regulatory concept. While this realisation is recent and largely constitutionally informed, the similarities in procedural fairness addressed in Chapter Six illustrate a long tradition of cross-fertilization between labour and administrative law. Chapters Five and Six together illustrate the existence of normative overlap between labour and administrative law through a shared recognition of the duty to act fairly. This normative overlap is a crucial element for the practical application of the constitutionally endorsed doctrine of interdependence, as explained in Chapter Seven. This core constitutional principle is 'supported' by two additional constitutional principles, namely flexibility and specificity. Flexibility addresses the pre-constitutional problem of formalism in that it allows for the context of every case to inform the content of the applicable rule and ultimately the outcome. Specificity acknowledges the necessity of specific rules to be recognised and applied in relation to the corresponding specific branch of law. If specificity is understood as relative in nature, the principle of flexibility can cooperate with it, provided that the pre-contextualised specific rules associated with different branches of law and which grant a measure of legal certainty are not set in stone and are variable to the extent that justice in every case requires. Specificity can accordingly only truly function as a constitutional principle if understood as subject to the interdependent spirit and purport of the Constitution. Absolute specificity is merely formalism under a different name, allowing specific rules to trump interdependent application of fundamental rights. A cooperative approach requires flexibility to direct the content, degree and impact of a rule in the context of every case.

The third part of the study illustrates how the idea of absolute specificity-as-formalism (masquerading as a constitutionally endorsed principle) has contributed to the confusion and uncertainty in the judicial debate about the relationship between labour and administrative law. It shows that absolute specificity, translating into formalistic separatism has, in fact, taken the focus away from substantive considerations and transformed it into a jurisdictional debate subject to interpretative manipulation of the 'intent' of the legislature and drafters of the Constitution. The theoretical focus of the first section and the normative interdependent focus of the second section are accordingly balanced with a critical evaluation of the judicial approach to normative interdependence in the context of public employment. While Chapter Eight emphasises the absence of a unified approach in focusing on initial judicial developments, Chapter

Nine reveals the reason for this judicial flaw through an analysis of the recent jurisprudence of the Supreme Court of Appeal and the Constitutional Court. The logic underlying the reasoning of the Supreme Court of Appeal is the standard by which the Constitutional Court's recent attempt at fulfilling its constitutional duty is measured and found wanting. The persuasive value of the constitutional jurisprudence is brought into question in Chapter Nine. In conclusion, Chapter Ten emphasises that the endorsement of a constitutional relationship between the rights to fair labour practices and just administrative action has been hindered by an operational divide between the principled conceptual theoretical basis, and the judicial experience in the (mis)application of that theoretical basis. In conclusion of the study as a whole, Chapter Ten ultimately takes the first steps towards the development of "an appropriate analytical methodology"[80] to a value-based interdependent understanding of fundamental rights in the public employment context.

[80] *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 151.

CHAPTER TWO

THE DEVELOPMENT, GOAL AND FUNDAMENTAL TENETS OF LABOUR LAW IN SOUTH AFRICA

1 INTRODUCTION

Within the broader context of the evaluation of the relationship between labour and administrative law, the goal of this chapter is to identify the essential, core and (perhaps) idiosyncratic values of contemporary labour law that underlie the s 23 constitutional right to fair labour practices.[81] This progressive and unique constitutional right informs the contemporary legislative and judicial attempts to develop a coherent labour law system.[82]

The labour law analysis in this chapter allows for comparison between these values and the core values of administrative law.[83] Ultimately, the identification of these characteristics supports the proper evaluation of the compatibility, if any, of these two branches of law. In part 2, this chapter explores labour law's multi-faceted and reactive nature through an analysis of its development as influenced by social, economic and political variables and places this development within the new constitutional milieu. Part 3 will illustrate that labour law, as constitutionally informed, has undergone a paradigm shift away from separatism towards the idea(l) of equitable uniformity,[84] primarily

[81] See Cheadle, Davis and Haysom *South African Constitutional Law* 18–8(1); Currie and De Waal *Bill of Rights Handbook* 499; Davis, Cheadle and Haysom *Fundamental Rights in the Constitution* 212; *NEHAWU v UCT* 2003 (2) BCLR 154 (CC) at par 33 per Ngcobo J.

[82] See *NEHAWU v UCT* 2003 (2) BCLR 154 (CC) at par 16 per Ngcobo J.

[83] Chapter Three focuses on the identification of the characteristics of administrative law.

[84] The idea of separatism has infiltrated labour law at various stages of its development and has revealed itself in various forms. Initially separatism informed the structure of the labour system in drawing a regulatory distinction between white and African workers. Later this idea of separate regulatory structures translated into the idea that the perceived difference between private and public employment relationships called for separate and distinct regulation. Equal access to labour fairness was initially sought by African workers and later pursued by public sector employees. Equitable uniformity is therefore regarded as the philosophical and practical antidote to the negative effects and limitations associated with a separatistic approach to the regulation of labour relations. Unfortunately, the idea of separatism has

through the introduction of s 23 of the Constitution. Part 4 provides further examples (with reference to dispute resolution and remedies) of how the equity-based approach has translated into practice. Ultimately, the discussion will illustrate that labour law, as it developed, shunned the shackles of separatism, compartmentalism and formalistic conceptualism, through its pursuit of a unified system that embraces fairness and social justice.

2 DEVELOPMENT: KEY MOMENTS

2 1 The Master-Servant Relationship, Industrialisation and Separatism

Initially, the focus of the South African economy fell on the paternalistic and individualistic nature of the master-servant relationship.[85] The common law's inadequacy in regulating disputes between masters and servants resulted in the introduction of the first labour legislation.[86] As a result, the common law regulated the master-servant relationship, subject only to the Masters and Servants Acts aimed at protecting "illiterate workers from employer abuse".[87]

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been revived by those jurists who wish to confine the application of the constitutional rights to fair labour practices (s 23) and just administrative action (s 33) to the separate legal spheres of labour and administrative law respectively. The idea of separatism will be explored throughout Chapters Two, Four and Eight.

[85] See Wiehahn *Aantekeninge* par 3.1.

[86] During this time, legislation aimed at regulating the contract of employment made the breach thereof a criminal offence. In theory, people of all races fell within the reach of these laws, but the courts interpreted it to regulate only unskilled workers. Masters and Servants Acts remained in force until after the establishment of the Union. The following are pre-Union territory examples of master-servant legislation: Masters and Servants Act 15 of 1856 (C); Masters, Servants and Apprentices Ordinance 2 of 1850 (N); Masters and Servants Law 13 of 1880 (T); Masters and Servants Ordinance 7 of 1904 (O). Section 51 of the Second General Law Amendment Act 94 of 1974 later repealed the Master and Servants Acts. See Hahlo and Kahn *The Union of South Africa* 773. See also Basson et al *Essential Labour Law: Volume One* 7; *Chronology of Apartheid Legislation* http://www.stanford.edu/class/history48q/Documents/EMBARGO/1chap13.htm (20/03/2006);

[87] Vettori (LLD UP 2005) 32.

The industrial revolution was the next developmental milestone, as it brought with it the awareness that work encompasses "more than a means of survival".[88] Although academics and historians have debated whether this era is characterised by "the restricted piecemeal nature of the process of industrialization",[89] or a gradual change better described as an evolution rather than a revolution, it is objectively undeniable that it signified change at an industrial, social, economic and intellectual level.[90]

Labour law initially merely reflected the developments brought about by the industrial (r)evolution, without attempting to control or anticipate the transition.[91] As a result, De Foucauld describes the (r)evolution of labour law as "[a] disorderly reflection of social change".[92] The second industrial revolution in the 19th and 20th century eventually inspired the creation of "contemporary labour law ... [as] the outcome of a gradual process of construction, concomitant with that of productive organization itself, within national boundaries".[93]

As the interests of society evolved, labour law in the South African context was required to adopt a broader perspective. Accordingly, labour law revealed a developmental tendency to strengthen "statutory requirements and collective contractual relations at the expense of rights and obligations created by individual employment relationships".[94] This development was the result of labour law's reaction to societal demands for job security in a time of economic and political uncertainty.[95]

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[88] De Foucauld 1996 (135) *Int LR* 675

[89] Hoppit 1990 (43) *Econ Hist Rev* 173 at 174.

[90] Hoppit 1990 (43) *Econ Hist Rev* 173 at 174 and 188 best describes this (r)evolution "as a *transition*, involving interconnected changes and continuities, in which whole tenor, direction, and possibilities of economic life were transformed". Emphasis added.

[91] See De Foucauld 1996 (135) *Int LR* 675 – 676, who further points out that labour law is regarded as the descendent of the industrial revolution.

[92] De Foucauld 1996 (135) *Int LR* 675.

[93] Morin 2005 (144) *Int LR* 5. For a discussion of the historic phases of the industrial revolution, see *Industrial Revolution* http://www.search.eb.com/eb/article-9042370 (2008/10/18); Rothman *The Evolution of Labour Law and Significance of Workchoices*. Paper delivered at the 15th Annual Law Conference: Workplace Research Centre and Sydney Law School, The University of Sydney, 10 August 2006.

[94] Jenks and Schregle *Labour Law.*

[95] See De Foucauld 1996 (135) *International Labour Review* 675 at 676.

However, the development of South Africa's labour law was tempered by Government's laissez faire approach in the early 1900s, as government supported industrial leaders and "intervened as little as possible".[96] In the absence of regulatory mechanisms for workplace conflict, strike action followed.[97] In turn, this resulted in the first form of separatism, as legislation such as the Mines and Works Act 12 of 1911[98] introduced the concept of job reservation.

The First and Second World War placed further pressure on the development of labour law. During that time, the collective exercise of power and inequality in the workplace were clearly present. African mine workers countered the recognition of white trade unions by means of strike action.[99] In response, Government in 1920 tightened pass laws, which in turn led to massive strike action by African workers.[100] This tension ultimately culminated in the 1922 Rand Revolt,[101] to which Government responded with force.[102] However, it became evident that force could not make up for the lack of a unified regulatory structure for the workforce.

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[96] Bendix *The Basics* 29.

[97] See Bendix *The Basics* 29, Wiehahn *Aantekeninge* par 3.6.

[98] With this Act, Government reserved 32 types of jobs for white workers only. See Basson et al *Essential Labour Law: Volume One* 8. Bendix *The Basics* 29 explains that this development was a government reaction to the dominant European employee groups present in the mining industry, as they brought with them "trade unionism … [with the] intent [of] … protecting their interests".

[99] The strike action was aimed at the improvement of employment conditions. See Bendix *The Basics* 30.

[100] See Bendix *The Basics* 30.

[101] The Rand Revolt was a violent uprising of white miners during the reign of an unstable white minority government that contested democracy and feared revolt by the African population. See Basson et al *Essential Labour Law: Volume One* 8; Bendix *The Basics* 30; Chanock *Legal culture, state making and colonialism*, Lecture presented at the Post-Graduate Research Seminar, Stellenbosch University, 4 August 2006; Wiehahn *Aantekeninge* par 3.6.

[102] Bendix *The Basics* 30 notes that "[o]ne hundred and fifty-three mineworkers were killed and five hundred wounded [with a further] … [f]ive thousand … arrested and four hanged for treason". The author explains that the hard-handed approach to trade union and employee demands led to the downfall of the Smuts Government in 1922.

Government realised that its laissez faire approach was ineffective and adopted the Industrial Conciliation Act 11 of 1924,[103] aimed at the prevention of industrial unrest by means of collective bargaining.[104] The Act also enforced separatism through job reservation by excluding all "'pass-bearing natives' from the definition of an employee".[105] The 1924 Act was the predecessor of the Industrial Conciliation Act 28 of 1956 (later renamed the Labour Relations Act). The 1956 LRA set out "to control black workers to an even greater extent"[106] and further expanded on the separatistic approach in only providing for a system for white worker trade union representation.[107]

The growing struggle against workforce inequality in the form of "pressures of black unionism"[108] and "renewed pressure for change both from within and outside South Africa",[109] forced Government to call upon the thirteen-member Wiehahn Commission to investigate the state of labour legislation. This was a defining moment in the development of South African labour law.[110]

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[103] See Bendix *The Basics* 30. The promulgation of the first Industrial Conciliation Act by the Pact Government (a coalition of the Labour Party and the Afrikaner National Party) was a direct consequence of the 1922 strikes. The Act created a statutory industrial council system along with a system for the (compulsory) registration of unions, employer's organisations and industrial councils. Even though the Act did not directly exclude African employees from its scope, it did so indirectly (through the wording of definition of "employees") with the effect that African workers from the Transvaal and Natal were excluded. Those African employers working in the other provinces were so few in number that they feared that they would be overpowered. As a result, they did not feel welcome within the statutory union system and did not make use of this right to associate. In reality, African unions existed from as early as 1917, although the Botha Commission Report UG 62/1951 claimed the date to be 1918. See Bendix *The Basics* 31; Wiehahn *Aantekeninge* par 3.6. This 1924 Act was also the predecessor of the Industrial Conciliation Act 28 of 1956 (later renamed the Labour Relations Act). See Basson et al *Essential Labour Law: Volume One* 8.

[104] Bargaining bodies (called Industrial Councils) were put in place. See Bendix *The Basics* 31.

[105] Bendix *The Basics* 31.

[106] Basson et al *Essential Labour Law: Volume One* 9.

[107] Basson et al *Essential Labour Law: Volume One* 9 explain that another system was created "for black workers in terms of the Bantu Labour Relations Regulation Act".

[108] Basson et al *Essential Labour Law: Volume One* 9.

[109] Bendix *The Basics* 40.

[110] See Jones 1985 (6) *MDE* 217.

2 2 The Introduction of the Concept of Fair Labour Practices

By the time of the Wiehahn Commission, South Africa's labour law system was not systematised.[111] In its report, the Wiehahn Commission recommended "that South Africa should seek to align its labour and industrial relations law and practices to the fullest possible extent with international labour conventions, recommendations and other international instruments".[112] The Commission also identified that there has to be minimum interference by the State in the private affairs between employers and employees, and that they should manage their own affairs.[113] The opinion was held that the State should not dominate the labour market with its own political interest.[114]

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[111] This opinion is advocated by Poolman *Principles of Unfair Labour Practice* 1 and further endorsed by the mandate of the Wiehahn Commission, namely to recommend necessary changes for a more effective and sound labour system. Legislation under consideration included the four basic labour acts: the Industrial Conciliation Act 28 of 1956, the Wage Act 5 of 1957, the Shop and Offices Act 75 of 1964 and the Factory, Machinery and Building Work Act 22 of 1941. See De Kock 1980 (1) *ILJ* 26 at 29; Luckhardt and Wall *Working for Freedom: Black trade union development in SA throughout the 1970s*.

[112] Cassim 1984 (5) *ILJ* 278 fn 66.

[113] See Wiehahn *Aantekeninge* par 4.41. This recommendation must be viewed from the perspective of the State's role as regulator.

[114] This recommendation focussed on the State's abuse of labour regulation to further its own political agenda and power in its capacity as regulator. Within this context, the Wiehahn Commission saw a functional opportunity for a tripartite structure. The Commission based its idea of tripartism on the ideal of a situation where all role-players in labour relations, namely employers, employees and government, could deal directly with one another (or their representatives), to discuss problems and injustices and so strive towards the formation of a labour system representative of "all interests for the advancement of social justice". The characteristics of this structure can be described as open negotiations, decision-making of a democratic nature and the backing of collective interests. In other words, as Poolman *Principles of Unfair Labour Practice* 18 explains, the trilateral relation between the three role-players "implies collaborative relations between the social partners in sharing the broad objective of promoting and preserving harmonious relations in the work environment and the country as a whole". In theory, tripartism is aimed at transforming the unequal employment actors (workers, employers and government) into equal social partners and empowered them to effectively tackle and address important policy issues. See Mandela 1994 (15) *ILJ* 732 – 734, Poolman *Principles of Unfair Labour Practice* 7, Wiehahn *Aantekeninge* par 4.41.1.

These recommendations dramatically changed the design of South African labour law, as they were based on an equity-based understanding of labour law.[115] The legislature responded by introducing the idea of (un)fair labour practices, which brought with it the flexible concept of fairness.[116]

The creation of the Industrial Court was a consequence of the fairness-inspired reform of labour law. In terms of the amended 1956 LRA, the Industrial Court was granted jurisdiction to determine what constituted an unfair labour practice within the scope created by a very wide definition.[117] The concept of (un)fair labour practices was fleshed out in the judgments of the Industrial Court.[118] The decisions of the court were based on considerations of equity and fair play, taking into account the manner in which an event took place, the reason underlying conduct and the effect conduct would have on good industrial relations.[119] The Industrial Court, in exercising its equity jurisdiction,

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[115] The Commission's recommendations extended freedom of association to all persons by rejecting the idea of job reservation. This change was reflected in the Labour Relations Amendment Act 94 of 1979. See Basson et al *Essential Labour Law: Volume One* 9, Bendix *The Basics* 40, Lee 1983 (82) *African Affairs* 461, Van Eck 2005 *Obiter* 549 at 553. Cassim 1984 (5) *ILJ* 275 at 280 notes that the changes following the Wiehahn Commission were the result of the "convergence of politics, sociology, economics and law" in labour relations. See also Jones 1985 (6) *MDE* 217 at 224.

[116] See Poolman *Principles of Unfair Labour Practice* 1. Cassim 1984 (5) *ILJ* 275 at 293 declares that this "concept 'unfair labour practices' [was] … designed to promote collective bargaining … subject to … orderly and acceptable employment practices … [while also] positively … entitling the individual employee to claim, as a right, protection against unfair dismissal". See Chapters Five and Six for a discussion of the meaning and impact of the concept of fairness within the context of both labour and administrative law from a substantive and procedural perspective.

[117] Cooper 2005 (26) *Comp Labour Law and Pol'y Journal* 199 at 207 holds that an unfair labour practice was therefore "any labour practice which in the opinion of the industrial court is an unfair labour practice". The result being that "[e]very case … potentially creates new laws and guidelines of fairness and contributes towards the establishment of a 'labour code' – by judicial precedent developing a body of case law of fair employment guidelines". See Jones 1985 (6) *MDE* 217 at 223.

[118] See Currie and De Waal *Bill of Rights Handbook* 501.

[119] The 'manner' links to the procedural perspective, while 'reason' and 'effect' considerations link to the substantive perspective. See Jones 1985 (6) *MDE* 217 at 223. Van Eck 2005 *Obiter* 549 at 554 notes that the Industrial Court, through this process, redirected labour law towards recognition of the following: "(i) employees with their inferior status are in need of special protection; (ii) the law of contract (and the common law) is not suited to regulate the employment relationship without the creation of a floor of rights

developed a set of legal rules regulating the substantive and procedural components of fair labour practices in line with international standards.[120] By 1982, considerations underlying substance fairness crystallised in case law[121] in accordance with the understanding that the concept of unfair labour practices should be "read in terms of an effect approach".[122]

Grogan explains that the adoption of the concept of unfair labour practices also changed the perspective that ordinary employees could not claim a right to be heard prior to dismissal, because the Industrial Court's insistence on procedural fairness in case of dismissal was also based on "considerations of equity and fairness".[123] Through this step, principles of natural justice gained the status of an intrinsic component of the concept of fair labour practices.[124]

One blemish on the 'new' equity approach was the exclusion of the public sector from the ambit of the 1956 LRA and the jurisdiction of the Industrial Court. As such, the Wiehahn Commission's recommendation to regulate the employment relationship of all employers and employees through the same relevant legislation was not given full effect.

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for workers; (iii) the common law is largely ignorant as to the rights to freedom of association and the right to strike".

[120] See Currie and De Waal *Bill of Rights Handbook* 502; Takirambudde 1995 (39) *JAL* 39 at 52.

[121] See Cassim 1984 (5) *ILJ* 275 at 290 – 291.

[122] The Industrial Court in *UAMAWU v Fodens (SA)* 1983 (4) ILJ 213 (IC) at 227 confirmed the necessity of "a flexible approach to industrial relations". See also *NAAWU v Pretoria Precision Castings (Pty) Ltd* 1985 (6) ILJ 369 (IC) at 377; Cameron 1986 (7) *ILJ* 183 at 191.

[123] Grogan 1992 (109) *SALJ* 186 at 193. See *Nchanaleng v Director of Education (Transvaal)* 1954 (1) SA 432 (T); *Van Coller v Administrator, Transvaal* 1960 (1) SA 110 (T); *Grundling v Beyers* 1967 (2) SA 131 (W).

[124] Cassim 1984 (5) *ILJ* 275 at 292 explains that the application of the Industrial Court's equity-based jurisdiction furthermore clarified that substantive and procedural fairness are based on the underlying assumption that "an employee has a legally protected right to his job". Consequently, "substantive and procedural rules are applicable even if the contract of employment has been lawfully terminated".

2 3 The Impact of Natural Justice on Public Employment

Although the Wiehahn Commission's equity-based recommendations led to the amendment of the 1956 LRA, the Act specifically excluded public sector employees from the equity jurisdiction of the Industrial Court and its pursuit of substantive and procedural fairness in labour relations.[125] As a result, public sector employees relied on the principles of natural justice[126] (as already developed within the procedural fairness structure of administrative law)[127] as an alternative means to protect their interests.[128] This provided impetus for the heightened application of natural justice so understood, as a matter of principle and logic.[129]

In *Langeni v Minister of Health & Welfare*,[130] the court reasoned that "the public character of the employee was alone enough to bring [public employment decisions] … within the compass of administrative law",[131] regardless of the employment contract.[132]

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[125] Public servants, found themselves regulated by the Public Service Act 111 of 1984. This forced sectoral separatism is the root of the current day classification problem of the public sector as administrative or labour law regulated. See Grogan 1991 (108) *SALJ* 237 at 244, Pretorius and Pitman 1990 *Acta Juridica* 133.

[126] Baxter 1979 (96) *SALJ* 607 at 638 describes this form of justice: "Natural justice is entirely a creation of the common law. In its vigour and especially in its new-found vitality, as clothed in the duty to act fairly, it is little short of a miracle of judicial creativity."

[127] It must be noted that natural justice is not an incident of administrative law, but a development of common law. Administrative law, like other areas of the law, is merely a vehicle for its application. See *Administrator, Transvaal v Zenzile* 1991 (1) SA 21 (A). Grogan 1991 (108) *SALJ* 599 at 603 points out that "[t]he disciplinary element of an administrative action has been singled out primarily for purposes of extending the scope of the audi principle beyond the restrictions imposed by the 'prior-'rights' doctrine and the equally stultifying principle that audi never applies in a 'contractual context'".

[128] Ganz 1967 (30) *MLR* 288 explains that, although the principles of natural justice historically "evolved in respect of relationships" other than between employer and employee, its logic undeniably finds application to employment relationships.

[129] This perspective is evident in the judgments of *Administrator, Transvaal v Zenzile* 1991 (1) SA 21 (A) and *Administrator, Natal v Sibiya* 1992 (4) SA 532 (A), as discussed by Grogan 1991 (108) *SALJ* 237.

[130] 1998 (9) ILJ 389 (W) at 396 – 397.

[131] Grogan 1991 (108) *SALJ* 237 at 241. See also *Administrator, Transvaal v Zenzile* 1991 (1) SA 21 (A) at 29.

[132] In the *Zenzile*-judgment, the court clearly condemned "the view that the requirements of natural justice can never apply to a contractual relationship". See Grogan 1991 (108) *SALJ* 237 at 242.

The judiciary could revert to such reasoning, as the rules of natural justice are flexible in nature and susceptible to such interpretation "in circumstances of extreme urgency".[133] Natural justice was a good fit to grant public servants a sense of procedural fairness, as the State could not contract out "of the obligation to observe the rules of natural justice".[134]

In response, the State adopted the view that "the decision to dismiss does not affect the employee's legal rights … [as there is] no legal entitlement to remain in employment beyond the expiration of [the] … notice period … [if] duly given".[135] The judiciary reacted by interpreting natural justice to embrace the doctrine of legitimate expectation. In *Administrator Transvaal v Traub,*[136] it was explained that "a person's right to a hearing no longer [was depended] … on proof that a legal right [had] … been infringed".[137] With this approach, the judicial focus in considering the "question whether a public official is bound to adhere to the rules of natural justice"[138] shifted to fairness considerations in contrast to proof of "actual or potential infringement"[139] of a legal right.[140] In a certain (limited) sense, the *Traub*-decision was the public sector's equivalent of the Wiehahn Commission's recommendations. Both the Appellate Division and the Commission embraced the concept of fairness. Consequently, as declared by Grogan, "[t]here is no magic to the distinction between 'private' and 'public' institutions"[141] in the pursuit of fairness.[142]

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[133] Grogan 1991 (108) *SALJ* 237 at 244. See also *Administrator, Transvaal v Zenzile* 1991 (1) SA 21 (A) at 40.

[134] Grogan 1991 (108) *SALJ* 237. See for example, *Staatsdiensliga van Suid-Afrika v Minister van Waterwese* 1990 (2) SA 440 (NK); *Administrator, Transvaal v Zenzile* 1991 (1) SA 21 (A); *Administrator, Natal v Sibiya* 1992 (4) SA 532 (A). See also Grogan 1991 (108) *SALJ* 588 at 599 – 600.

[135] Grogan 1991 (108) *SALJ* 237 at 242.

[136] 1989 (4) SA 731 (A). Grogan 1992 (109) *SALJ* 186 at 192 explained that "[t]he court in *Traub* made it clear that it did not see fairness in the context of principles of natural justice of legitimate expectation as exclusively linked to the actions of public organs." See *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A) at 761.

[137] Grogan 1991 (108) *SALJ* 237 at 242.

[138] Grogan 1991 (108) *SALJ* 599 at 601.

[139] Grogan 1991 (108) *SALJ* 599 at 601.

[140] See Grogan 1991 (108) *SALJ* 599 at 601.

[141] Grogan 1992 (109) *SALJ* 186 at 188.

2 4 Constitutionally Reformed Labour Law

2 4 1 Recognition of the Right to Fair Labour Practices

Building on the fairness (r)evolution, labour law gained (public law) momentum with the coming into force of the interim and final Constitutions.[143] The Constitution paved the way for greater respect for labour rights within the general scope of human rights to prevent unjustified limitation and differentiation in the labour market.[144]

A Bill of Rights is traditionally aimed at the regulation of "legislation and public power, [and] not the conduct [or managerial power] of employers".[145] The right to fair labour practices has therefore been described as a progressive,[146] but also "an odd right to include in a Bill of Rights".[147] This unique constitutional right, born from a specific political climate, was "inserted in the Interim Constitution as part of the package of provisions to secure the support of the public service for the new constitutional dispensation".[148] The inclusion of a specific labour relations provision also "envisages the development of a *coherent system of law* that is shaped by the Constitution".[149]

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[142] This is in line with the opinion of Baxter 1979 (96) *SALJ* 607.

[143] See Basson et al *Essential Labour Law: Volume One* 10.

[144] Section 27 of the interim Constitution was replaced by s 23 of the Constitution. Any limitation of labour rights will only be regarded as constitutional if the limitation complies with the requirements in the general limitation clause, s 36 of the Constitution.

[145] Currie and De Waal *Bill of Rights Handbook* 501 – 502.

[146] See Currie and De Waal *Bill of Rights Handbook* 499.

[147] Davis, Cheadle and Haysom *Fundamental Rights in the Constitution* 212. In *NEHAWU v UCT* 2003 (2) BCLR 154 (CC) at par 33, Ngcobo J emphasised the unique character of the right to fair labour practices. See Cheadle, Davis and Haysom *South African Constitutional Law* 18–8(1).

[148] Davis, Cheadle and Haysom *Fundamental Rights in the Constitution* 212. Cooper 2005 (26) *Comp Labour Law and Pol'y Journal* 199 at 200 also emphasises the inclusion of the right to fair labour practices as a political compromise: "[A] demand by public sector employees for access to the unfair labor practice law on dismissal developed under the 1956 Labour Relations Act (LRA) as a means of protecting their jobs during the transition to a new political dispensation." In the constitutional dispensation this concern led to the embedding of this right in Constitutional principle XXVII and its subsequent appearance as a fundamental right in both the interim and final Constitution." See also Constitutional principle XXVII; Chaskalson et al *CLOSA* 30–15.

[149] *NEHAWU v UCT* 2003 (2) BCLR 154 (CC) at par 16 per Ngcobo J. Emphasis added.

Although this specific objective underlies the inclusion of the right in the Bill of Rights, it attracts a degree of uncertainty. Section 23(1) of the Constitution is described as open-ended[150] and "incapable of precise definition".[151] This characteristic is intentional and not a mere drafting flaw.[152] The uncertainty is balanced through "the equitable and unbiased protection of both employers and employees".[153] Consequently, the apparent vagueness of s 23 protects the flexibility of the concept of fair labour practices.[154] This approach aims at countering formalistic application of the right, by allowing the concept to be adaptable to the factual situation and the specific interests at play in every individual employment relationship.[155]

The protection of the contextual application of the right to fair labour practices is necessary, as the interests of an employer and employee differ in focus. Employer-interests are "underpinned by the right to the economic development of their enterprises through enhanced production and efficiency",[156] while employee-interests are informed by "the principle of social justice in the workplace".[157] Even though s 23(1) attempts to balance employment interests through the promotion and protection of fair labour practices, it "does not identify where the balance between these interests should be

[150] See Cheadle et al *South African Constitutional Law* 18–8(1).

[151] *NEHAWU v UCT* 2003 (2) BCLR 154 (CC) at par 33.

[152] See Cohen 2004 (20) *SAJHR* 482.

[153] Cohen 2004 (20) *SAJHR* 482 at 483.

[154] Within the ambit of this flexible concept lie other variable components, such as fairness and reasonableness, requiring more than mere lawfulness.

[155] Cooper 2005 (26) *Comp Labour Law and Pol'y Journal* 199 at 200 – 201 points out that in interpreting the right to fair labour practices a creative approach must be adopted in determining its content and scope, but that the Constitution also provides pointers through its values, language, context, historical origin, along with consideration of foreign and international law. See Chapters Seven and Nine for examples of how the idea of interdependence (or connexity as it is referred to in international law) reveals itself as a constitutional pointer in the relationship between the rights to fair labour practices and just administrative action.

[156] Cooper 2005 (26) *Comp Labour Law and Pol'y Journal* 199 at 212. The State (in conformity with the Constitution) requires the public administration to function efficiently.

[157] Cooper 2005 (26) *Comp Labour Law and Pol'y Journal* 199 at 212. The promotion of social justice is included in the aim of the LRA.

struck in any situation".[158] Consequently, the right to fair labour practices should be generously interpreted.[159] As a minimum, it is safe to say that s 23(1) entitles the right-holder[160] "to fair treatment within the context of fair labour relations".[161]

2 4 2 Legislative overhaul in response to the Constitution

A consequence of this flexible approach was the enactment of a new LRA. A constitutional facelift of the 1956 LRA (which excluded public sector employees from its protective ambit) would not suffice.[162]

Post-constitutional labour legislation primarily gives effect to the fundamental right to fair labour practices as enshrined in s 23(1).[163] Accordingly, the principal labour statutes, namely the LRA, the BCEA and the EEA must be regarded as a legislative package of s 23(1) sub-rights:[164] the rights to fair terms and conditions, fair differentiation in contrast to discrimination, fair negotiations, fair disciplinary action and fair dismissal. Of this package, the LRA is the primary legislative instrument that gives effect to s 23(1) and the underlying normative values of the Constitution.[165] It was enacted with a specific focus: the regulation of labour relations between employees and employers.[166]

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[158] Cooper 2005 (26) *Comp Labour Law and Pol'y Journal* 199 at 213.

[159] See Cooper 2005 (26) *Comp Labour Law and Pol'y Journal* 199 at 204.

[160] The right-holder is also referred to as the beneficiary.

[161] Currie and De Waal *Bill of Rights Handbook* 499. This minimum can be derived from a consideration of the content of the concept of unfair labour practices as phrased in the 1991 amendment of the 1956 LRA, as this was the definition available to the drafters of the Constitution at the time of its enactment. See Vettori (LLD UP 2005) 301 – 302.

[162] See *Natal Die Casting Co (Pty) Ltd v President, Industrial Court and Others* 1987 (8) ILJ 245 (D) at 253 – 254 per Kriek J; Basson et al *Essential Labour Law: Volume One* 10.

[163] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 9.

[164] The BCEA and the EEA are regarded as complementary to the LRA, as the EEA and the BCEA also give effect to constitutional rights relevant to the employment context. However, for the purposes of the dissertation, the focus will fall on the LRA as it specifically includes the State as employer within its ambit and aims to give effect to s 23(1) in an attempt to grant public servants access to the concept of fair labour practices. See Currie and De Waal *Bill of Rights Handbook* 502; Grogan *Dismissal, Discrimination and Unfair Labour Practices* 9; Grogan *Workplace Law* 6.

[165] Klare 1997 (18) *ILJ* 588 notes that the LRA is "one of the most democratic, participatory, inclusive, and accessible labour statutes in the world … resolving several critical labour rights issues at the

Hepple explains that the success of the LRA is dependent on "social consensus, social need, an open … legal culture".[167] A misinterpretation of this functional purpose of labour law will render it less effective in achieving its goals.[168] To prevent such a misinterpretation, s 1 of the LRA unequivocally states that it is "[t]he purpose of the Act … to advance economic development, social justice, labour peace and the democratisation of the workplace by … [giving] effect to and regulat[ing] the fundamental rights conferred … in the Constitution".[169]

This focus of the LRA brings a human rights element[170] into a labour law system that has generally focused on rights-based[171] and goal-based[172] justification.[173] As a result,

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constitutional level". The LRA's simplified regulation of collective labour law is proof of this. See Basson et al *Essential Labour Law* 228.

[166] See Cohen 2004 (20) *SAJHR* 482 at 485. In *NEWU v CCMA* 2004 (2) BLLR 165 (LC) at 169, Landman J explained that, although the LRA is inclusive in nature, it does not look "to regulate exhaustively the entire concept of fair labour practices as contemplated in the Constitution",[166] as labour law is "too wide to be contemplated by a single statute". Accordingly, it is in theory possible for PAJA to find application alongside the LRA where the latter falls short of the protection granted by the former. Both these pieces of legislation have to be interpreted in conformity with the Constitution and should therefore not be in conflict with one another as the interdependent constitutional rights in ss 23 and 33 are both protected in the Bill of Rights. In *NEWU v CCMA* 2004 (2) BLLR 165 (LC) at 169, Landman J further opined that where a labour practice falls short of the regulation by conventional statutes (such as the LRA and PAJA), reliance can be placed on s 23 of the Constitution. Such an approach would also allow the influence of s 33 constitutional considerations, as ss 23 and 33 are interrelated. See Chapter Seven, part 2 2 for a discussion on the doctrine of interdependence.

[167] Hepple 1999 (20) *ILJ* 9 at 12.

[168] See Vettori (LLD UP 2005) 21.

[169] See also Vettori (LLD UP 2005) 61.

[170] See Olivier *Reshaping private and public employment in South Africa: The impact of the Constitution and the Bill of Rights*, Paper delivered at the Public Law Conference, Stellenbosch University – Alexander von Humboldt Foundation, 8 – 10 September 2005.

[171] Collins *Justice in Dismissal* 82 states that labour law's rights-based justification is rooted in "the common law of wrongful dismissal by suggesting that employees forfeit their rights to their jobs when they commit serious breaches of their contracts of employment". This has to be distinguished from the rights-based approach recognised under South Africa's constitutional approach.

[172] Collins *Justice in Dismissal* 90 identifies two forms of goal-based justification: "A narrow form identifies the relevant goal as that of the employer's interest in the productive efficiency of each member of the

every aspect of an employment relationship is infused with the constitutional promise of fair labour practices and its application cannot be ousted without justification that is reasonable "in an open and democratic society based on human dignity, equality and freedom".[174] Landman J, in *NEWU v CCMA,*[175] noted that even the value of dignity is protected by the legislatively regulated concept of unfair labour practices, as "an expression of the consciousness of modern society of the value for the rights, welfare, security and dignity of the individual and groups".[176] This understanding of unfair labour practices as socially unjustified practices, which can occur in both an individual or collective context,[177] is reflected in the fact that the LRA's regulatory focus falls on both individual and collective labour law.[178] Apart from giving both a collective and individual labour law understanding to the right to fair labour practices, the equity-based LRA also draws a distinction between unfair dismissals and unfair labour practices.[179]

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workforce. A broad form envisages the goal as the interest of the firm, which encompasses, as well as the efficient use of labour, such matters as product market success, reputation, and customer loyalty."

[173] See Collins *Justice in Dismissal* 82 – 90.

[174] Section 36 of the Constitution.

[175] *NEWU v CCMA* 2004 (2) BLLR 165 (LC).

[176] *NEWU v* CCMA 2004 (2) BLLR 165 (LC) at 167, quoting Poolman *Principles of Unfair Labour Practice* 11. This once again emphasises the personal element of labour law. See *Re Wilson and Medical Services Commission of British Columbia* (1988) 53 DLR (4th) 171 (BCCA). See also Chaskalson et al *CLOSA* 30–19 fn 4.

[177] See Cassim 1984 (5) *ILJ* 275 at 294.

[178] See Botha and Mischke 1997 (41) *JAL* 134 at 139; Brassey *The New Labour Law* 149; Cassim 1984 (5) *ILJ* 275 at 293; Chaskalson et al *CLOSA* 30–30; Grogan *Workplace Law* 315; Van der Merwe 1988 (9) *ILJ* 749 at 754.

[179] The LRA understanding of and approach to unfair dismissals and unfair labour practices will inform the labour dimension of the comparative discussion in Chapters Five and Six. The s 23 constitutional right to fair labour practices, the basis of the LRA, implies that an employee has a fundamental right to not be unfairly dismissed. See Basson et al *Essential Labour Law* 94. Basson et al *Essential Labour Law* 77 explain that the 1956 LRA lacked a specific definition of an unfair dismissal. A decision or conduct was merely viewed as "unfair if it met the general criteria of an unfair labour practice, as defined". Under the constitutionally influenced scheme, s 186(1) of the LRA specifically defines a dismissal, while s 188 requires a dismissal to be both substantively and procedurally fair. The inclusion of separate provisions in the LRA dealing with unfair dismissal does not render the regulation of the s 186(2) LRA defined 'unfair labour practice' (any unfair act or omission that arises between an employer and an employee)

2 4 3 Constitutional Impact on the Common Law

The Constitution replaces the common law as the basis of South Africa's legal system. This does not imply that pre-constitutional common law jurisprudence is of no contemporary value. It must merely in terms of s 39(2) be allowed to adapt to the spirit, purport and object of the Constitution.[180] The judiciary has a duty to develop the common law in such a manner.[181] However, in *Carmichele v Minister of Safety and Security*,[182] the Constitutional Court made it clear that the s 39(2) development of common law concepts does not merely call for the evaluation of its consistency in terms of the written provisions of the Bill of Rights, but also the normative value system that underlie the provisions of the Constitution.[183] When so adapted, the common law can inform the broad provisions of the Constitution.[184]

The common law of employment has not been unaffected by the Constitution and its s 39(2) directive.[185] Traditionally, even though the "contract of employment has always

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redundant. Therefore, the focus is again placed on the relationship's character and consequently the mutual interests at play. A 'labour practice' can only arise in the context of an employment relationship that in turn can be divided, as Basson et al *Essential Labour Law* 184 explain, into three stages: "the beginning (when the employee is an applicant for employment), a middle (as long as the relationship continues) and an end (dismissal, resignation or retirement)".

[180] See *NCGLE v Minister of Justice* 1999 (3) BCLR 280 (C) at 288 – 289; *Carmichele v Minister of Safety and Security* 2002 (10) BCLR 1100 (CC) at par 54; *S v Thebus* 2003 (6) SA 505 (CC) at par 31. See also Currie and De Waal *Bill of Rights Handbook* 69 fn 152.

[181] See *Jonker v Okhahlamba Municipality* 2005 (6) BLLR 564 (LC) at par 23.

[182] 2002 (10) BCLR 1100 (CC).

[183] See *Carmichele v Minister of Safety and Security* 2002 (10) BCLR 1100 (CC) at par 54. In casu, the Constitutional Court declared that the concept of "reasonableness on which the legal convictions of the community are based is now to be found in the Constitution and not in some vague notion of public sentiment or opinion". In *Nakin v MEC, Department of Education Cape Province* 2008 (5) BLLR 489 (Ck) at par 35, Froneman J emphasised that "the fundamental constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms underlie ... the direct and indirect development of the common law contract of employment under either sections 8 or 39(2) of the Constitution, in whatever court this might happen".

[184] It is the nature of a Constitution (and specifically a Bill of Rights) to rely on broad provisions, to allow for its application in a diverse set of circumstances and to prevent it from becoming dated.

[185] See *MEC, Department of Roads and Transport, Eastern Cape v Giyose* 2008 (5) BLLR 472 (E) at par 25 per Froneman J.

imposed mutual obligations of confidence and trust between employer and employee",[186] the concept of fairness was "virtually unknown to the common law of employment".[187] However, in *Fedlife Assurance Ltd v Wolfaardt*,[188] Nugent AJA for the majority noted that "it *might* be that an implied right not to be unfairly dismissed was imported into the common-law employment relationship by ... section 23(1) of the present Constitution ... even before the 1995 Act was enacted".[189] The judiciary has taken to read the *Fedlife*-judgment as authority for the proposition that "irrespective of whether a right is claimed under the common law or legislation it must be consistent with the overarching authority of the Constitution".[190] In line with this perspective, Cameron J in *Murray v Minister of Defence*[191] declared that the common law of employment (developed to promote the spirit, purport and objects of the Bill of Rights) "must be held to impose *on all employers* a duty of fair dealing *at all times* with their employees – even those that the LRA does not cover".[192] Thus, the Constitution imposes on the common law of employment "a continuing obligation of fairness towards the employee on ... the employer when he makes decisions affecting the employee in his work".[193] This constitutionally informed fairness dimension of common law realises

[186] *Murray v Minister of Defence* 2008 (6) BLLR 513 (SCA) at par 5 per Cameron J.

[187] Grogan *Dismissal, Discrimination and Unfair Labour Practices* 9. The common law placed reliance on the principle of legality as understood within the contract of employment, as associated with the concept of unlawfulness. The legislative recognition of the concept of fair labour practices introduced an equity focus. The Constitution now embraces a broader concept of legality as associated with the rule of law. See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 1 and 6.

[188] 2001 (12) BLLR 1301 (SCA).

[189] *Fedlife Assurance Ltd v Wolfaardt* 2001 (12) BLLR 1301 (SCA) at par 13. Emphasis added.

[190] *Jonker v Okhahlamba Municipality* 2005 (6) BLLR 564 (LC) at par 26. The enactment of legislation giving effect to the provisions of the Bill of Rights spurs on constitutional development of the common law. See *Nakin v MEC, Department of Education Cape Province* 2008 (5) BLLR 489 (Ck) at par 36 per Froneman J.

[191] 2008 (6) BLLR 513 (SCA).

[192] *Murray v Minister of Defence* 2008 (6) BLLR 513 (SCA). Emphasis added.

[193] *WL Ochse Webb and Pretorius (Pty) Ltd v Vermeulen* 1997 (18) ILJ 361 (LAC) at par 366 per Froneman J as referred to by Cameron J in *Murray v Minister of Defence* 2008 (6) BLLR 513 (SCA) at par 11.

the obligation of fairness at "both a formal procedural and substantive dimension",[194] as it is "encapsulated in the constitutional right to fair treatment in the workplace".[195]

In the recent judgment of *SA Maritime Safety Authority v McKenzie*,[196] a judgment difficult to fault for its reasoning, Wallis AJA highlighted certain limitations on the duty to develop the common law in the employment context (as reflected in the *Murray*-judgment). Wallis AJA explained (with reference to *Mohlaka v Minister of Finance*),[197] that the judiciary should only act on the obligation (as reflected in ss 8(3), 39(2) and 173 of the Constitution) if necessary.[198] As a result, the common law should only be developed in the employment context to the extent that labour legislation fails to give effect to the constitutionally endorsed labour rights.[199] It was held that development of the common law to reflect rights and remedies related to unfair dismissals and unfair labour practices as already protected in the LRA would endorse "attempt[s] to circumvent rights and to obtain, by reference to, but not in reliance upon, the provisions of the LRA an advantage that it does not confer".[200]

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[194] *Murray v Minister of Defence* 2008 (6) BLLR 513 (SCA) at par 11. Footnotes omitted.

[195] *Murray v Minister of Defence* 2008 (6) BLLR 513 (SCA) at par 11. Footnotes omitted.

[196] 2010 (5) BLLR 488 (SCA).

[197] 2009 (4) BLLR 348 (LC).

[198] See *SA Maritime Safety Authority v McKenzie* 2010 (5) BLLR 488 (SCA) at paras 36 and 43. Wallis AJA explained that cases (such as *Boxer Superstores Mthata v Mbenya* 2007 (8) BLLR 693 (SCA) and *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 (8) BLLR 699 (SCA)) in which the development of the common law was considered, merely articulated that "an employee is entitled to a pre-dismissal hearing where the right is conferred by a statute or by an employment contract". In *SA Maritime Safety Authority v McKenzie* 2010 (5) BLLR 488 (SCA) at paras 45 – 48, Wallis AJA also held that any statements made in *Boxer Superstores Mthata v Mbenya* 2007 (8) BLLR 693 (SCA) at par 6, *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 (8) BLLR 699 (SCA) at paras 4 – 7, and *Transman (Pty) Ltd v Dick* 2009 (7) BLLR 629 (SCA) at 13 and 30 that can be read as taking the argument (regarding the impact of the harmonisation of the constitutionally and common law endorsed fair treatment on employment relationships) further than development where necessary in the absence of statutory regulation of the constitutional right to fair labour practice, was clearly obiter.

[199] See *SA Maritime Safety Authority v McKenzie* 2010 (5) BLLR 488 (SCA) at par 36; s 8(3)(a) of the Constitution.

[200] See *SA Maritime Safety Authority v McKenzie* 2010 (5) BLLR 488 (SCA) at par 56. According to Wallis AJA attempts of this nature "occasioned the recent jurisdictional debate in cases such as" *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC), *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA), and

3 LABOUR LAW TODAY

3 1 The Purpose of Labour Law

Labour law seeks to regulate a specific type of relationship to which no other field of law can claim possession: the employment relationship.[201] In seeking to regulate employment relationships, labour law reflects the perspective of Klare that law, as power, "reflects the key underlying relationship of … domination".[202]

Labour law, objectively viewed, is sui generis in nature. The somewhat haphazard development of labour law,[203] a story of action and reaction, supports this perspective.[204] Power imbalances and conflicts of interest were the constant catalysts for legislative attempts to uphold fairness and equality in labour relations. This equity-based progression was a constant response to political, economic and social circumstances and borrowed principles and rules from other areas of the law[205] to create a unique employment-based power balance system.

Gcaba v Minister for Safety and Security 2009 (12) BLLR 1145 (CC). See Chapter Eight and Chapter Nine. Cf Du Toit 2008 (125) *SALJ* 95 AT 96 – 97.

[201] The predetermined employment relationship basis translates into regulation through contextualisation of the relevant principles at de facto level of application. See Chapter Five, part 1.

[202] Klare 1997 (18) *ILJ* 588 at 591.

[203] See part 2.

[204] The realisation that labour law deals with the rights, duties and interests of various role-players and the State's pivotal involvement in the employee-employer relationship gave rise to the development of the concept of tripartism. Within this system, the three role players – the State, the employer and employee (or their respective organisations and representatives) – each have a function and a role to fulfil in the industrial relationship. A tripartite approach is recognised in labour systems throughout the world. The involvement of the State in the employment relationship is aimed at evening out the factual and contextual weaker position of the employee (in contrast to that of the employer), seeing that the philosophy of humanisation, partnership and the industrial relationship doctrine of the 20th century strive for the achievement of greater equality between the tripartite partners (which now includes the State). See Wiehahn *Aantekeninge* par 2.15. For a discussion of the idea of tripartism and its place in the public employment relationship see Chapter Four, part 3 2 3.

[205] Examples of these are the law of contract, administrative law and criminal law.

The borrowing of principles has encouraged some academics to label labour law a mere by-product or specific form of contract law.[206] In truth, labour law overlaps with a range of private and public law considerations.[207] Employment relationships merely commence with the aid of contractual considerations and obtain effect through the acknowledgement of certain (public law) rights[208] and counteracting obligations.[209] Given the vast array of legal influences, South African labour law has a hybrid character. It may place reliance on principles associated with specific rights and other areas of law, but these borrowed principles are informed by the specific employment context in which it finds application.[210] Labour law is an example of the practical success of the idea of hybridity or interdependence as, in essence, it focuses on sui generis labour law, but emphasises the inherent flexibility of its character.[211] Contemporary South African labour law gives expression to this hybrid character in its desire to address power imbalances in a constitutionally coherent manner.[212]

The individual employment relationship is the primary focus of the power struggle labour law seeks to regulate.[213] The acknowledgment of a collective element of labour law is a counteraction to the domination-subordination relationship present in individual

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[206] See Du Plessis *Inleiding tot die Reg* 267. Labour law cannot function as a mere by-product of contract law, as the latter does not possess the ability to adapt the employment relationship to social and political effects in labour relations.

[207] See Hahlo and Kahn *The South African Legal System* 126.

[208] These rights are referred to as the six democratic labour rights: the right to work, the right to associate, the right to bargain collectively, the rights to withhold labour, the right to protection and the right to develop. See Poolman *Principles of Unfair Labour Practice* 11; Van der Merwe 1988 (9) *ILJ* 749; Wiehahn *Aantekeninge* paras 2.1, 2.3 and 4.128.

[209] See Poolman *Principles of Unfair Labour Practice* 2.

[210] See Hepple 1999 (20) *ILJ* 9. See Chapter Five, part 1.

[211] See Cameron 1986 (7) *ILJ* 183 at 185; *NAAWU v Pretoria Precision Castings (Pty) Ltd* 1985 (6) ILJ 396 (IC).

[212] The idea of hybridity resembles the constitutionally endorsed doctrine of interdependence and the international law equivalent of connexity. See Chapters Seven and Nine.

[213] Kahn-Freund *Labour and the Law* 1 recognises that regulatory power of labour law resides mainly in its focus on the individual employment relationships. An unequal power relationship, akin to that of an employer and employee, can be found in administrative law relationships due to the coercive or command element present in both. See Chapter Three.

employment relationships.[214] In short, labour law is the sum of a real or fictitious belief in an equality-based relationship between the individual and collective employment powers at play.[215] In light of this view, Kahn-Freund proclaims that labour law should be seen in this regulatory context, regardless of the label that has been prescribed to it.[216]

In identifying the function of labour law, one should stay true to the power struggle at play.[217] This emphasis is crucial, as power is the "pervasive presence within the employment relationship that ultimately distinguishes employment from … ordinary commercial [contractual relationships] … and explains why the employer has a duty to act fairly"[218] within the scope of contemporary labour law.[219] As such, the individual and collective aim of labour law is to establish and protect the idea of fairness through equalisation of labour power.[220]

3 2 The Relationship

3 2 1 Misunderstood Contractual Perspective

The employment relationship, at its most simplistic, has been described as a contractual relationship.[221] Merely "attaching a label [whether it be contract or administrative, private or public] does not affect the substance of the matter".[222]

Labour law focuses on a specific relationship between people that "arises out of mutual need".[223] An employment relationship continues and is reciprocal in character,

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[214] See Kahn-Freund *Labour and the Law* 1.

[215] See Kahn-Freund *Labour and the Law* 1. Within the context of the employment relationship the presence of equality is mostly fictitious, as such a relationship is mainly characterised by "domination and subordination". See Weddernburn et al *Labour Law and Industrial Relations: Building on Kahn-Freund* 83.

[216] See Kahn-Freund *Labour and the Law* 3. Ganz 1967 (30) *MLR* 288 at 292 explains that "merely attaching a label to the relationship … does not affect the substance of the matter".

[217] See Arthurs 1996 (46) *Univ Toronto LJ* 1 at 44 – 45.

[218] Brassey 1993 (9) *SAJHR* 177 at 195.

[219] See Kahn-Freund *Labour and the Law* 3.

[220] See Kahn-Freund *Labour and the Law* 4. See also Davis, Cheadle and Haysom *Fundamental Rights in the Constitution* 216 – 217.

[221] See Brassey 1993 (9) *SAJHR* 177 at 180.

[222] Ganz 1967 (30) *MLR* 288 at 292.

[223] Bendix *The Basics* 11.

rendering it more than a mere contractual arrangement.[224] It is a status relationship, as it is influenced by imperative norms.[225] Reliance cannot merely be placed on pure contractual principles.[226] The employment context necessitates "an open admission of a status of employment"[227] to allow labour law to evolve in reaction to the practical demands of labour practices.[228] This status lends itself to be governed by principles found in public law.[229]

3 2 2 Conflict Component

Conflict, arising from both substantive[230] and procedural[231] matters, is a constant element in an employment relationship.[232] The conflict element is countered by the mutual need for co-operation.[233] Employment relationships move between these two extremes, constantly adjusting to align with the social, economic and political conditions of the time, in search of balance.[234] The nature of the needs[235] or interests at play in an

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[224] See Basson et al *Essential Labour Law* 32 – 44; Grogan *Workplace Law* 49. This feature is not found in an administrative law relationship. Cf Strydom 1999 (11) *SA Merc LJ* 40 at 50.

[225] Fairness is such a normative imperative. The fact that cases such as *NEHAWU v UCT* 2003 (2) BCLR 154 (CC) and *Transport Fleet Maintenance (Pty) Ltd v NUMSA* 2004 (25) ILJ 104 (LAC) distinguish between rights and obligations arising from an employment contract *or* from an employment relationship is evidence of the fact that the relationship carries a different status than mere contract. See Brassey 1993 (9) *SAJHR* 177 at 180.

[226] See the following discussion on the deficiencies of the principle of freedom of contract in the regulation of labour law.

[227] Rideout 1966 (19) *CLP* 112.

[228] See Brassey 1993 (9) *SAJHR* 177 at 180; Rideout 1966 (19) *CLP* 112.

[229] The power element present in employment relationships places the focus on public law principles rather than principles of contract law. This 'cross-fertilization' again hints at labour law's hybrid character. See Collins 1986 15 *ILJ (UK)* 1 at 10 – 13. See also Brassey 1993 (9) *SAJHR* 177 at 180.

[230] Substantive matters are those dealing with wages and basic conditions of employment. See Bendix *The Basics* 12.

[231] Procedural matters emanate from the employer's approach to decisions, be it disciplinary or other. See Bendix *The Basics* 12.

[232] Bendix *The Basics* 12 explains that these conflict areas influence each other, as "[c]onflict that centres on substantive issues spill over into procedural issues".

[233] See Bendix *The Basics* 18.

[234] See Wiehahn *Aantekeninge* paras 2.2 and 2.4; Wright *Labour Law* 1.

employment relationship determines whether the balance can be best regulated at individual or collective level.

A conceptual distinction between the, albeit overlapping, individual and collective dimensions of the employment relationship has developed.[236] Such a distinction is justified, because the individual dimension raises concerns about workplace justice, while the collective dimension focuses on respect for, and the promotion and protection of, the interest of all concerned groups.[237] However, both focus on the employment relationship and both ultimately have the same goal, namely to balance the unequal power at play in pursuit of fair labour practices.

3 2 3 Dimensions of the Unequal Power Relationship

The status of employment has a personal element, as it focuses on the relationship between employer and employee.[238] This does not imply an equal relationship, as "the relation between an employer and an isolated employee is typically a relation between a bearer of power and one who is not a bearer of power".[239] A more evolved view of the employment relationship also recognises the influence of trade unions, employers' organizations and the State (as regulator) as role players with an interest in the regulation of employment relationships.[240] The employment relationship therefore has an individual[241] and collective[242] dimension.

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[235] If the nature of the 'need' determines the method of regulation, then an employment related need inevitably involves some form of employment regulation.

[236] See Basson et al *Essential Labour Law* 225; Grogan *Workplace Law* 315.

[237] See Grogan *Workplace Law* 315.

[238] See Wright *Labour Law* 1. Brassey 1993 (9) *SAJHR* 177 at 198 notes that "[e]mployment is more than simply an exchange of hard cash for hard work; it is a relationship in which feelings of trust, confidence and good will play an important part". These 'feelings' emphasise the personal dimension to the employment relationship.

[239] Davies and Freedland *Kahn-Freund's Labour and the Law* 18. See also Strydom 1999 (11) *SA Merc LJ* 40 at 50.

[240] According to Wright *Labour Law* 1, labour law consequently "deals with the relationship of employer/employee/collective organisations/State".

[241] Rycroft and Jordaan *A Guide to South African Labour Law* 1 explain that "'individual' labour law is concerned with the relationship between individual employer and individual employee … [and] is founded on the common-law contract of employment, but its content is determined largely by statute and collective

3 2 3 1 Individual Dimension

The common law view that voluntary and consensual parties to a contract bind themselves equally, is a misleading notion.[243] Left unrestrained, the principle of freedom of contract ignores the stronger bargaining power of the employer,[244] and allows for the presence of domination and subordination in the conclusion of the contract of employment.[245] It has to be said, that certain residual terms are found in the common law of contract, namely "the duty to be respectful, to work in a competent manner, and to act in good faith".[246] These terms create the impression that the employee's interests are protected, even though the employer has the power to prescribe the 'consensual' terms of the agreement. In practice, this only strengthens the employer's position, due to the broad phrasing of these residual terms,[247] as the common law preserves the employer's "right to dismiss the employee simply by giving the required notice".[248] This perspective emphasises lawfulness instead of fairness.[249] Legislation as a component of contemporary labour law attempts to restore balance and promote fairness in the

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bargaining". Labour law balances the interests of the concerned parties to achieve industrial justice. See Rycroft and Jordaan *A Guide to South African Labour Law* 1 fn 4.

[242] Rycroft and Jordaan *A Guide to South African Labour Law* 1 note that collective labour law "is applied to the relationship between employer and organized labour [and] … [i]ts content is determined primarily by statute and collective bargaining". In this context, the judiciary aims to protect collective bargaining power as a method of dispute resolution. See Rycroft and Jordaan *A Guide to South African Labour Law* 1 fn 4.

[243] See Cassim 1984 (5) *ILJ* 275 at 276; Grogan *Workplace Law* 10; *Tiopazi v Bulwayo Municipality* 1923 AD 317; *Pretoria City Council v Minister of Labour* 1974 TPD 238.

[244] See Brassey 1993 (9) *SAJHR* 177 at 181; Collins 1986 (15) *ILJ (UK)* 1 at 10; Strydom 1999 (11) *SA Merc LJ* 311.

[245] See Strydom 1999 (11) *SA Merc LJ* 311 at 312.

[246] Strydom 1999 (11) *SA Merc LJ* 311 at 312. See also Brassey 1993 (9) *SAJHR* 177 at 186.

[247] Strydom 1999 (11) *SA Merc LJ* 311 at 312 notes that the residual terms enhance the employer's prerogative, as it allows for a broad interpretation of the duties.

[248] Strydom 1999 (11) *SA Merc LJ* 311 at 312. See also Pretorius and Pitman 1990 *Acta Juridica* 133 at 134; *Kubheka v Imextra (Pty) Ltd* 1975 (4) SA 484 (W) at 488.

[249] See Cassim 1984 (5) *ILJ* 275 at 276; Grogan *Workplace Law* 106.

individual employment relationship through equalisation of power, by limiting the exploitation of employees and to promote job security.[250]

Contemporary labour law's individualistic approach to labour relations forms the basis of the idea(l) of equal partnership between employers and employees.[251] It is an attempt to promote fair employment practices so that the interests of both parties attract equal consideration. In practice, this equalisation is not easily realised, as the employer is the one with the capital and associated power to regulate the employee's employment. Without the regulatory assistance of labour law to restrain common law deficiencies, the employee is exposed to exploitation, abuse and endangerment in the workplace,[252] regardless of society's ideals of equitable uniformity.

3 2 3 2 Collective Dimension

Individual employment, from an unrestrained common law perspective, does not give recognition to the individual employee's existence "alongside many others with the same employer".[253] The common law does not consider the collective dimension of labour relations.[254]

Legislative regulation provides for collective bargaining to balance the unequal power relationship between employer and employee through the joint action of employees as represented by trade unions.[255] This labour law development assists with this task by providing certain facilitating rights, such as freedom of association and the right to strike.[256]

Collective labour law, like individual labour law, focuses on employment relationships. There is an undeniable link (even overlap) between individual and collective labour

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[250] See Grogan *Workplace Law* 5; Strydom 1999 (11) *SA Merc LJ* 311 at 313.

[251] See Wiehahn *Aantekeninge* par 2.14.

[252] All of these aspects contributed to the development of collective labour law, where one voice is multiplied by the many in an effort to be heard. See discussion in part 3 2 3 2.

[253] Pretorius and Pitman 1990 *Acta Juridica* 133 at 135.

[254] See Pretorius and Pitman 1990 *Acta Juridica* 133 at 135.

[255] See Vettori (LLD UP 2005) 25.

[256] See Vettori (LLD UP 2005) 25. These rights were unfortunately not always protected or respected by the State. See Arthurs 1996 (46) *Univ Toronto LJ* 1 at 3; Chapter Four.

law,[257] as collective labour law may be described as an indirect mechanism to ensure a fair(er) outcome at individual level. Collective bargaining forms the functional component of labour law,[258] focussing on matters of mutual interest instead of disputes of right.[259] This collective 'mutual interest' goal is a contemporary labour law method of addressing the deficiencies of individual labour law.[260]

3 3 Managerial Prerogative[261]

Subordinates will question the basis for the authority to which they are subject and the reasonableness of the manner in which it is exercised.[262] Employees therefore question the employer's managerial prerogative, as it "constitutes the most characteristic expression of the employer's power".[263] Employers fervently rely on managerial prerogative when regulating their workplace standards and refusing to bargain with trade unions on work related issues.[264]

In similar fashion to the concept of fairness, the term managerial prerogative evades legislative or common law definition.[265] Strydom explains that the word prerogative in itself "denotes a right or a privilege which belongs to a particular institution, group or

[257] See Grogan *Workplace Law* 315.

[258] Basson et al *Essential Labour Law* 230 elaborate: "A central theme of collective labour law is that collective bargaining is the preferred method of establishing and changing terms and conditions of employment as well as the resolution of interest disputes."

[259] See Basson et al *Essential Labour Law* 228; Grogan *Workplace Law* 339.

[260] See Bendix *The Basics* 16, 27 and 39.

[261] It is necessary to briefly explore the labour law understanding of managerial prerogative, as Chapter Five, parts 2 1 3, 3 1 and 4 (in evaluating the relationship between the substantive understanding of the principles of fairness and reasonableness) explores the argument that there is a link between managerial prerogative (from a labour law perspective) and the idea of deference as respect (as constitutionally embraced from an administrative law perspective).

[262] See Chamberlain 1963 (16) *Indus & Lab R Rev* 184 at 185.

[263] Papadimitriou 2009 (30) *Comp Labour Law & Pol'y Journal* 273.

[264] See Strydom 1999 (11) *SA Merc LJ* 40.

[265] Although employers and trade unions regard the meaning of the term managerial prerogative as obvious in practice, the nature and the scope of the term is at issue when the interests of the parties in the employment relationship are at odds and require legislative regulation and judicial intervention. See Strydom 1999 (11) *SA Merc LJ* 40 – 41.

person".[266] An employment related prerogative "is usually taken to refer to the 'right to manage' an organisation".[267] The employer's decisions can fall into one of two categories: Human resource related organisational decisions and economic or business based decisions.[268]

With regard to economic or business type decisions, for example investment decisions, an employer can act unilaterally in exercising unqualified managerial prerogative.[269] Human resource related decisions (reflecting the manner in which the employer utilises the employees) can therefore be linked to the controversy surrounding the exercise of managerial prerogative. The fact that employees are at the impact centre of the exercise of managerial power (in relation to the first type of decision) calls the manner in which the power is exercised to be scrutinised. It is this type of decision, which makes it difficult to identify the acceptable scope of the employer's managerial prerogative.[270]

It is obvious that agreement on every employment decision by all parties to the employment relationship is improbable, if not impossible.[271] As there is an overlap between employment terms and conditions and work practices, regardless of the theoretical distinction made above, confusion often results in disputes over the scope of managerial prerogative.[272] While the employer can change work practices unilaterally, any changes to employment terms and conditions must be negotiated with employees

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[266] Strydom 1999 (11) *SA Merc LJ* 40 at 41. Strydom (LLD UNISA 1997) 5 explains that the purpose of managerial prerogative is found in the needs of the organisation.

[267] Strydom 1999 (11) *SA Merc LJ* 40 at 42. See also Collins 1986 (15) *ILJ (UK)* 1; Jordaan 1991 (11) *ILJ* 1; Poolman *Principles of Unfair Labour Practices* 91.

[268] See Strydom 1999 (11) *SA Merc LJ* 40 at 42. Cf *George v Liberty Life Association of Africa Ltd* 1996 (8) BLLR 985 (IC).

[269] According to the judgment in *BTR Dunlop Ltd v NUMSA (2)* 1989 (10) ILJ 701 (IC) at 705, "[t]here must be scope for unilateral action consistent with the fundamental nature of the employment relationship". See *UWC and UWCUWU* 1992 (13) ILJ 699 (ARB) at 705 per Bozalek A.

[270] Strydom 1999 (11) *SA Merc LJ* 40 at 42 warns that the theoretical distinction between the two types of decisions is not water tight in practice, as "[t]he objectives of the organisation will, for example, influence decisions as to the number and type of employees to be employed by the organisation as well as the terms and conditions of employment that they are offered".

[271] See *BTR Dunlop Ltd v NUMSA (2)* 1989 (10) ILJ 701 (IC) at 705.

[272] See SACWU obo Mhlongo and Silicon Technology (Pty) Ltd 2002 (23) ILJ 2134 (CCMA) at 2138.

(or their union representatives) and be agreed upon by all parties to the employment relationship.[273]

The employer cannot merely rely on managerial prerogative "to make the employee submissible to instructions of whatever kind management might choose to impose".[274] The employer, while having the right to manage, is confined to exercising that right within the scope of the terms and conditions of the employment contract, whilst observing the general legal rules that govern employment relationships.[275] The scope of managerial prerogative must be determined with consideration of two factors: the right to work[276] and the right to trade.[277] The two factors stand in conflict with one another.[278]

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[273] If this is not done, a protected strike is the next step for employees. See *SACWU obo Mhlongo and Silicon Technology (Pty) Ltd* 2002 (23) ILJ 2134 (CCMA) at 2138.

[274] Checkers SA Ltd (South Hills Warehouse) and SACCAWU 1990 (11) ILJ 1357 (ARB) at 1366.

[275] When an employer appoints an employee, he or she grants that employee a certain status that, once accepted by the employee, cannot be altered without consent. See *Checkers SA Ltd (South Hills Warehouse) and SACCAWU* 1990 (11) ILJ 1357 (ARB) at 1366 per Cameron A; *Groenewald v Cradock Munisipaliteit* 1980 (1) ILJ 269 (E) at 272 per Eksteen J. In *Checkers SA Ltd (South Hills Warehouse) and SACCAWU* 1990 (11) ILJ 1357 (ARB) at 1366, it was noted that if an employer then alters his or her employee's status unilaterally, such an alteration would amount to a "change [in] the essential nature of the employment contract". This by no means implies that an employee can expect his or her working obligations to remain unchanged as from the moment of appointment. The Labour Appeal Court in *A Mauchle (Pty) Ltd t/a Precision Tools v NUMSA* 1995 (16) ILJ 349 (LAC) pointed out that only a dramatic change to the terms of an employee's employment, that in effect amounts to the employee undertaking a different job, will be regarded as a challengeable unilateral change. See *SACWU obo Mhlongo and Silicon Technology (Pty) Ltd* 2002 (23) ILJ 2134 (CCMA) at 2138 – 2139. Cf *Visser and Vodacom* 2003 (24) ILJ 693 (ARB) at 697.

[276] The right to work is regarded as one of the six democratic rights. See Poolman *Principles of Unfair Labour Practice* 11.

[277] In *BTR Dunlop Ltd v NUMSA (2)* 1989 (10) ILJ 701 (IC) at 705, the Industrial Court noted that it is the right to trade that compels the judiciary to show respect for the employer's managerial prerogative, as it "includes the right to manage".

[278] See *Clarke v Ninian and Lester (Pty) Ltd* 1988 (9) ILJ 651 (IC); *BTR Dunlop Ltd v NUMSA (2)* 1989 (10) ILJ 701 (IC) at 705.

It is the task of the judiciary to balance the underlying interests to determine the scope of managerial prerogative.[279]

Initially the employer's managerial prerogative was judicially regarded as fairly wide and unfettered at times, as the common law traditionally favoured the employer.[280] The traditional common law unfettered managerial prerogative of the employer is proof of the unequal power in the employment relationship.[281] Legislative and constitutional recognition of the principle of fairness now limits the employer's common law managerial prerogative.[282] Considerations of fairness and reasonableness restrict managerial prerogative at a substantive level by informing the concept of unfair labour practices, as it is wide enough to embrace issues ranging from promotions, demotions and suspensions to dismissals on the ground of conduct, capacity and operational requirements.[283] The legislative recognition and jurisprudential development of unfair labour practices does not annul the employer's right to discipline and dismiss.[284] It merely restricts managerial prerogative in an attempt to eliminate the arbitrary element in the unequal bargaining relationship.[285]

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[279] See *BTR Dunlop Ltd v NUMSA (2)* 1989 (10) ILJ 701 (IC) at 705. See also *Clarke v Ninian and Lester (Pty) Ltd* 1988 (9) ILJ 651 (IC).

[280] See *George v Liberty Life Association of Africa Ltd* 1996 (8) BLLR 985 (IC) at 997; Strydom 1999 (11) *SA Merc LJ* 311.

[281] See Grogan *Riekert's Basic Employment Law* 88; Strydom (LLD 1997 UNISA) 66. Under the common law, the employer's right to discipline attaches to the employer's right to give instruction. According to Anderman *Labour Law: Management Decisions and Workers' Rights* 62 (as quoted in Strydom (LLD 1997 UNISA) 65), the employer's common law prerogative to discipline "is carefully preserved in the employee's duty to obey as an implied fundamental term of the contract".

[282] See Strydom (LLD 1997 UNISA) 75 and 80. See also *R v Canqan* 1965 (3) SA 360 (E) at 367 – 368. Strydom (LLD 1997 UNISA) 90 notes that the managerial prerogative of the employer is still recognised, but now tempered by the fact that the employer's "instructions must not only be *lawful* but also *fair* or *reasonable*". Emphasis added.

[283] See *George v Liberty Life Association of Africa Ltd 1996* (8) BLLR 985 (IC) at 997 – 998.

[284] See Strydom (LLD 1997 UNISA) 103.

[285] See Strydom (LLD 1997 UNISA) 103 and 108. In *Checkers SA Ltd (South Hills Warehouse) and SACCAWU* 1990 (11) ILJ 1357 at 1365 (ARB), it was recognised that even though an employer "has the prerogative to manage the business … [and] has a decisive say over the conduct of the enterprise" this prerogative is now limited by considerations of lawfulness, fairness and reasonableness, as is evident in

The limitation that the constitutionally entrenched right to fair labour practices places on an employer's managerial prerogative, requires that employers act in a fair manner when taking commercial decisions that potentially affect the rights of employees. Deference for managerial prerogative, viewed through a value-added constitutional prism, has the effect that judicial interference with an employer's decision is warranted if the relevant decision was reached in the absence of fairness.[286] In the past, the judiciary has acknowledged that the employer's employment decisions call for respect unless bad faith or improper motives underlie the decision under review.[287] The fact that the judiciary generally approaches interference with the managerial discretion of employers with an element of respect, by no means implies that the judiciary's default position is one of submission to the view of the employer unless otherwise persuaded.[288]

It does not constitute an undue disregard for an employer's prerogative if the judiciary evaluates the reasons for employment decisions in terms of the idea of rational

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the rationale behind the legislative limitations imposed on the managerial prerogative of employers. See also Brassey et al *The New Labour Law* at 74; Strydom (LLD 1997 UNISA) 111; *Checkers SA Ltd (South Hills Warehouse) and SACCAWU* 1990 (11) ILJ 1357 at 1364 (ARB); *NAWU v Atlantis Diesel Engines (Pty) Ltd* 1992 (13) ILJ 405 (IC) at 408.

[286] See Van Jaarsveld 2006 (18) *SA Merc LJ* 355 at 358. The Labour Appeal Court in *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen* 1996 (8) BLLR 985 (IC) confirmed this approach. See also the discussion of the impact of the Constitutional Court's judgment in *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) in Chapter Five, part 4 3.

[287] In *George v Liberty Life Association of Africa Ltd* 1996 (8) BLLR 985 (IC) at 996 – 997, Landman P explained that as far as it is associated with the commercial activities of the business, managerial prerogative requires judicial recognition of the employer's capacity to recruit, appoint and promote employees in accordance with his or her opinion of the business requirements. Cf *Arries v CCMA* 2006 (11) BLLR 1062 (LC) at par 16; *Administration Western Cape (Department of Health and Social Services) v Bikwani* 2002 (23) ILJ 761 (LC) at paras 29 – 32.

[288] In *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at paras 177 and 178, Ngcobo J stated (albeit it in the context of dismissal) that it is essential to recognise that a discretion lies with the employer. The law requires the employer (in similar fashion as the administrative law decision-maker) to apply his or her mind in formulating an adverse employment decisions. The fact that the employer has a discretion does not obligate the judiciary to surrender to the employer's perspective. An employer's perspective of fairness will unquestionably favour his or her interests primarily.

justifiability.[289] The Labour Appeal Court has looked to administrative law for guidance in determining how the reasons must be ascertained.[290] Simplified, a rational decision is one that passes the test of both factual and legal causation.[291] Consequently, both administrative and labour law approach the idea of deference as respect in a similar way. Both call for the facts of the dispute and the interests that require balancing to dictate the required degree of respect. The test for deference can be summarised as follows: a decision warrants interference as far as the discretion of the decision-maker was not properly and reasonably exercised as required by the circumstances of the case.[292]

3 4 External Influences: Political, Social and Economic

Labour law reflects customs, standards, and norms[293] in the regulation of the employment relationship.[294] These customs, standards, and norms change as society changes.[295] Society's multitude of employment relationships forms the basis of economic activity.[296] The realities that social and economic considerations bring to an employment relationship are further linked to political considerations, as "[s]ociety and politics revolve around the economy".[297] Because of its hybrid nature, labour law is

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[289] See *Shoprite Checkers (Pty) Ltd v Ramdaw NO* 2001 (22) ILJ 1603 (LAC) at 1613 and 1617; *Coca-Cola Bottling East London v CCMA* 2003 (2) BLLR 159 (LC) at 163; *Basson v Provincial Commissioner (Eastern Cape), Department of Correctional Services* 2003 (4) BLLR 341 (LC) at 356; *Benjamin v UCT* 2003 (12) BLLR 1209 (LC) at 1223 – 1224; *Arries v CCMA* 2006 (11) BLLR 1062 (LC) at paras 43 and 44 (with reference to *Carephone (Pty) Ltd v Marcus NO* 1998 (11) BLLR 1093 (LAC)). Cf *Pharmaceutical Manufacturers Association of SA: In re Ex Parte Application of the President of the RSA* 2000 (3) BCLR 241 (CC) at par 90.

[290] See *County Fair Foods (Pty) Ltd v CCMA* 1999 (20) ILJ 1201 (LAC) at 1712.

[291] Reasoning of this nature reminds of administrative law's approach to reasonableness and deference as respect. Cf *Department of Justice v CCMA* 2001 (11) BLLR 1229 (LC) at par 25. See Chapter Three, part 3 6 2 and Chapter Five, part 2 1 3.

[292] See *Arries v CCMA* 2006 (11) BLLR 1062 (LC) at par 16.

[293] As found in the common law, legislation or jurisprudence.

[294] See Bendix *The Basics* 47.

[295] See Bendix *The Basics* 47.

[296] See Bendix *The Basics* 2.

[297] See Bendix *The Basics* 21; Strydom 1999 (11) *SA Merc LJ* 40 at 50; Vettori (LLD UP 2005) 23.

accustomed to function within a polycentric setting and is susceptible to regular and dynamic transformation.[298] Its metamorphic character is comparable to that of a living being adapting to its elements by way of evolution.[299] Its susceptibility to change reveals an element of flexibility that ensures that labour principles do not become archaic or unsuitable because of a change in political, social and economic circumstances.[300]

Due to its regular political, social and economic transformation, contemporary labour law balances the interest of various role players and provides "the normative framework for the existence and operation of all the institutions of the labour market".[301] Labour law therefore has optimal impact when unified and equally applicable to employment disputes in every sphere of business – be it private or public.[302] Equal applicability of labour law and access to its regulatory framework does not automatically imply that there is only one standard mould for a proper employment relationship. Labour law's flexible character is supported by variable core concepts, such as fairness, that ensure its adaptability to the needs of every employment relationship as required by the context of every dispute.

3 5 Contemporary Core Concepts

The flexible essence of contemporary labour law is encapsulated in s 23(1) of the Constitution, the right to fair labour practices. As such, labour law – whether contractual or legislative in nature – is built upon two core concepts – 'labour practices' and 'fairness'.

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[298] See Grogan *Workplace Law* 1.

[299] Due to this character, it functions well within the current South African constitutional dispensation as the Constitution (much like the European Convention on Human Rights 1950) can be regarded as a "living instrument". See Limbach 2001 (64) *MLR* 1.

[300] See Cheadle, Davis and Haysom *South African Constitutional Law* 18-2; Rideout *Rideout's Principles of Labour Law* 6. Bendix *The Basics* 23 – 24 explains that the following variables are ever-present: *politically* dominant party-policies "greatly affect the conduct of the labour relationship"; *economically*, "[w]ithholding labour in the form of strike action can have extremely detrimental effects"; and *socially* it is undeniable that people "bring their social prejudices, customs and mores to the workplace" resulting in "social problems find[ing] their way to the workplace and the bargaining table". Emphasis added.

[301] Deakin and Morris *Labour Law* 1.

[302] See Deakin and Morris *Labour Law* 1.

3 5 1 Labour Practices

The concept 'labour practices' evades precise definition, but is confined to the scope of the employment relationship.[303] The Constitutional Court has frequently emphasised that the law must strive for fair results through the balancing of the interests and rights of the parties involved in a dispute.[304] Recognition of the impact of the employment relationship and the balance of matters of mutual interest brings within the ambit of the constitutional labour practices a wide range of labour issues.[305] The equity jurisprudence of the Industrial Court is of great interpretative assistance in determining the scope and application of the term labour practices within the context of s 23.[306]

It has been argued that s 23(1), in dealing specifically with the right to fair labour practices, should focus exclusively on individual matters, as the remaining subsections of section 23 focus on collective labour rights.[307] Commentators have however emphasised the limitation of such an approach, as it "would exclude from the realm of the fair labour practice right those collective practices which cannot find a home under the collective labour rights".[308]

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[303] See Currie and De Waal *Bill of Rights Handbook* 504.

[304] See *NEHAWU v UCT* 2003 (2) BCLR 154 (CC) at par 40 per Ngcobo J. See also *Avril Elizabeth Home for the Mentally Handicapped v CCMA* 2006 (9) BLLR 833 (LC) where the Labour Court indicated that, in the context of s 23, the judicial protection of the right not to be unfairly dismissed calls for the recognition of the tension between the respective interests of employers and employees.

[305] This approach reminds of the equity jurisprudence of the Industrial Court whereby the balancing of employment interests for the realisation of labour peace brought within the scope of labour practices both individual and collective matters. See Cooper 2005 (26) *Comp Labour Law and Pol'y Journal* 199 at 206 – 208.

[306] See Chaskalson et al *CLOSA* 30–17. The Industrial Court found unfairness to relate to the following labour practices: dismissal in the absence of a fair reason and procedure; selective dismissal; failure to reemploy as per agreement; failure to renew a contract regardless of reasonable expectation; discrimination; dismissal of strikers involved in a lawful strike; refusal to bargain; bargaining in bad faith; unfair bargaining strategies; victimization for trade union involvement. See Cooper 2005 (26) *Comp Labour Law and Pol'y Journal* 199 at 208.

[307] See Chaskalson et al *CLOSA* 30–18.

[308] Chaskalson et al *CLOSA* 30–18 further explain: "If the duty [to bargain] should be found to form part of the right to fair labour practices, this would grant a cause of action to parties wishing to enforce the duty against recalcitrant other parties in the absence of a duty to bargain in the 1995 LRA." See also

3 5 2 Fairness

Jurisprudence pre-dating the Constitution confirmed that lawful conduct does not necessarily amount to fair conduct.[309] Although the Constitutional Court has confirmed that "the inquiry into fairness is not novel",[310] the concept has gained fundamental recognition. Consequently, labour practices can only be regarded as fair, from a s 23 constitutional perspective if both lawful and reasonable.[311]

Fairness is a core element in the employment relationship, as "no meaningful relationship can result from arbitrary, discriminatory or unreasonable applications of statutory authority".[312]

Although it is a relatively uncomplicated exercise to identify (un)fairness after the judicial fact, the general scope of the concept of fairness evades jurists. Fairness is understood in terms of synonyms: "'equitable', 'equity', 'unbiased', 'reasonable', 'impartial', 'balanced', 'just', 'honest, 'free from irregularities', 'according to the rules', 'equality'".[313] From the vast array of synonyms, it is clear that the only thing that is certain is that fairness is a vague and variable concept.

Chaskalson et al *CLOSA* 30–21. Cf *Reference re Public Service Employee Relations Act* (1987) 38 DLR (4th) 161 per Dickson CJ.

[309] See *NEWU v CCMA* 2003 (24) ILJ 2335 (LC); Basson et al *Essential Labour Law* 75.

[310] *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 63 per Navsa AJ. See also Currie and De Waal *Bill of Rights Handbook* 503.

[311] See the discussion to follow with regard to the link between fairness and reasonableness. See also Chapter Three, parts 2 3 2 and 3 6 2.

[312] Sossin 2002 (27) *Queen's LJ* 809 at 827. The same argument holds true in the context of administrative law relationships.

[313] Poolman *Principles of Unfair Labour Practice* 42. The identification of equality as a synonym of fairness is of great importance, as equality is both a right and a value in the Constitution. Equality before the (labour) law is what public employees negotiated for and theoretically obtained with the constitutional inclusion of s 23 (the right to fair labour practices). Poolman's reference to reasonableness as a synonym for fairness reminds of the reasoning of Sachs J in the *Sidumo*-case, namely that a fair decision also qualifies as a reasonable decision and vice versa.

The concept of fairness has revolutionised the modern perspective of labour law with its transformative impact on contemporary labour law,[314] as the Constitution prevents fairness from becoming just a word on paper.[315] Its inherent contextual flexibility has however also attracted criticism as creating uncertainty in a legal system that aims to promote legal certainty.[316] The vagueness associated with the concept of fairness does not automatically translate to judicial uncertainty, as a general duty to act fairly can be deduced and sufficiently identified from the synonyms of 'fairness'.[317] Even though the concept is broad and elastic in nature, it also acknowledges the rules of natural justice.[318]

In *Sidumo v Rustenburg Platinum Mines Ltd*,[319] Navsa AJ confirmed that the concept of fairness is not absolute, as it "affords a range of possible responses".[320] The possibility exists that there can be more than one fair response in any given context.[321] The context in which a decision is made determines the standard of fairness required.[322]

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[314] Modern administrative law has not been left untouched by the concept of fairness. See Mullan 1982 (27) *McGill LJ* 250 at 273; *Ridge v Baldwin* [1963] 2 All ER 66; *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A). See also Chapter Three, parts 2 2 and 3 6.

[315] See Basson et al *Essential Labour Law* 12; Cheadle, Davis and Haysom *South African Constitutional Law* 18-14(2); Currie and De Waal *Bill of Rights Handbook* 502; Grogan 2006 22(6) *Employment LJ*.

[316] Mullan 1982 (27) *McGill LJ* 250 at 274 explains: "It suffices to say that adjudication by reference to such open-ended standards as natural justice and fairness – the judge's 'gut' reaction to the merits of a particular case – is fraught with danger to many of the values that we aspire to in our legal system."

[317] The duty to act fairly relates to both (positive and negative) acts and omissions. See Poolman *Principles of Unfair Labour Practice* 42 – 45. See also *R v Electricity Commission* 1924 (1) KB 171 at 205.

[318] See Mullan 1982 (27) *McGill LJ* 250 at 266.

[319] 2007 (12) BLLR 1097 (CC).

[320] *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 34.

[321] See *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 34 per Navsa AJ. For similar reasoning, see also Hutchinson 2001 (22) *ILJ* 2223 at 2224; Sossin 2002 (27) *Queen's LJ* 809 at 822; *NUMSA v Vetsak Co-operative Ltd* 1996 (6) BLLR 697 (A) at 706; *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA* 2006 (11) BLLR 1021 (SCA) per Cameron JA.

[322] See Poolman *Principles of Unfair Labour Practice* 43; Sossin 2002 (27) *Queen's LJ* 809 at 822.

The concept of fairness, and the duties associated therewith, cannot be described as static.[323]

The constitutional concept of fairness seeks to create equilibrium between employer, employee and the public in the context of labour relations,[324] and incorporates two dimensions: substantive fairness (fairness of impact or goal) and procedural fairness (fairness in action).[325] The assessment of fairness in the constitutionalised labour context calls for the consideration of the circumstances of every case.[326] It is not strictly a question of law, but also calls for a moral or value judgment.[327] This approach "necessarily involves a degree of subjective judgment".[328] It must however not be understood as the unfettered exercise of the adjudicator's personal perspective, as fairness is "a combination of findings of fact and opinions".[329]

It is evident that fairness (in the context of labour practices) is the core concept on which balance in the employment relationship depends.[330] Section 23(1) of the Constitution introduces "an implied duty on both the employer and the employee to act fairly"[331] that tempers the uncompromising terms of employment contracts and

[323] See Sossin 2002 (27) *Queen's LJ* 809 at 824.

[324] See Cheadle, Davis and Haysom *South African Constitutional Law* 18–13, Cohen 2004 (20) *SAJHR* 482.

[325] See *Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State Aided Schools: Eastern Transvaal* 1999 (2) BCLR 151 at par 1. Poolman *Principles of Unfair Labour Practice* 42 – 43 comments that, although distinguishable in focus, substantive and procedural fairness supplements one another to achieve "a reasonable measure of certainty and effective accuracy".

[326] See *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 63 per Navsa AJ.

[327] See *SACCAWU v Irvin & Johnson Ltd* 1999 (8) BLLR 741 (LAC) at 751; *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 63 per Navsa AJ.

[328] Currie and De Waal *Bill of Rights Handbook* 503.

[329] *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 63 per Navsa AJ. See Currie and De Waal *Bill of Rights Handbook* 503; *Council of Mining Unions v Chamber of Mines of SA* 1985 (6) ILJ 293 (IC) at 295.

[330] Poolman *Principles of Unfair Labour Practice* 42 identifies it as more than a mere requirement, but rather an obligation in labour relations.

[331] Basson et al *Essential Labour Law* 57.

supplements employment terms and conditions.[332] The fairness element of s 23(1) is therefore not solely determined from the perspective of the employee.[333]

3 5 3 Fairness and Reasonableness

Fairness is sometimes perceived as a standard that finds expression through considerations of reasonableness in the circumstances of a case.[334] In terms of this view, fairness requires proportionality as associated with the concept of reasonableness in administrative law.[335] In the determination of reasonableness, Poolman has identified three stages:

> (a) whether the [decision-maker] in labour relations, after reasonable careful investigation has adequate factual grounds on which to base his views;
>
> (b) whether [the decision-maker] in labour relations adopted a reasonable procedure in his investigation; and
>
> (c) whether the decision and the consequential conduct was reasonable in the circumstances.[336]

The first aspect shows that an element of rationality is required, as the factual grounds must support the decision emanating from the labour practice. The second consideration encompasses a procedural aspect. The last consideration reveals an element of proportionality, as the decision (and pursuant conduct) must amount to a reasonable response. Poole explains that the principle of proportionality prescribes that there has to be a fair balance between the action taken (the decision) and the right affected in the factual circumstances of the case.[337] In the pursuit of substantial justice, Poolman argues that "[e]quity [or fairness] incorporates those rules of reasonableness

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[332] See Basson et al *Essential Labour Law* 57.

[333] See *NEHAWU v UCT* 2003 (2) BCLR 154 (CC); Basson et al *Essential Labour Law* 94.

[334] See Mullan 1982 (27) *McGill LJ* 250 at 267; *BMD Knitting Mills (Pty) Ltd v SACTWU* 2001 (7) BLLR 705 (LAC) at par 19.

[335] See Hutchinson 2001 (22) *ILJ* 2223 at 2225. As is the case with fairness, reasonableness is a flexible and therefore variable concept within the context of labour law. Poolman *Principles of Unfair Labour Practice* 47 notes that "it is therefore difficult to provide fixed rules against which the conduct is to be measured". See also Chapters Three and Five.

[336] See Poolman *Principles of Unfair Labour Practice* 47.

[337] See Poole 2005 (25) *Oxford J Legal Stud* 697 at 707.

in the particular circumstances to avoid or minimize hardship and injustice … [as the] moral standards of society require the application of equitable principles according to changed societal norms of justice".[338] Sossin therefore explains that the evaluation of a decision's reasonableness calls for consideration whether the decision "can be justified normatively on grounds of fairness, consistency and coherence".[339]

What this illustrates (as will be explored in more detail in subsequent chapters), is that there is a close link between fairness (the core value of labour law) and reasonableness (one of the core values of administrative law). In *Sidumo v Rustenburg Platinum Mine Ltd*,[340] Sachs J was sensitive to this reality in stating that "it is difficult to see how a reasonable commissioner can act unfairly, or a fair commissioner can function unreasonably".[341]

4 FURTHER MANIFESTATIONS OF THE FAIRNESS PRINCIPLE

As has already been illustrated, fairness considerations have influenced the development of the common law and the legislative approach to the regulation of labour practices. Two further examples of the impact of fairness considerations in the regulatory structure of labour law are dispute resolution and remedies.

4 1 Dispute Resolution

The constitutionally informed LRA supports a specialised, labour specific, approach to dispute resolution. Employees who have been unfairly dismissed or subjected to unfair labour practices have access to two specialised forums, namely the CCMA and the Labour Court.[342]

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[338] Poolman *Principles of Unfair Labour Practice* 48. One can simplify this statement by reasoning that fairness gives a de facto contextual content to the de jure reasonableness requirement. See Chapter Five, part 1.

[339] Sossin 2002 (27) *Queen's LJ* 809 at 830.

[340] 2007 (12) BLLR 1097 (CC).

[341] *Sidumo v Rustenburg Platinum Mine Ltd* 2007 (12) BLLR 1097 (CC) at par 145.

[342] Grogan *Dismissal, Discrimination and Unfair Labour Practices* 555 qualifies this position: "If a recognition agreement or contract of employment provides that disputes concerning the termination of employment must be referred for private arbitration, the employee cannot utilize the statutory forums."

Arbitration by the CCMA calls for a re-hearing of a dispute by a commissioner, a neutral third party, who is at liberty to "deal with the substantial merits of the dispute with a minimum of legal formalities".[343] Although the LRA endorses the speedy resolution of disputes, it does not allow commissioners to ignore the principles of natural justice during the arbitration proceedings.[344] In terms of s 138 of the LRA, a commissioner must determine the substantive and procedural fairness of a disputed dismissal or labour practice, by determining whether the reason presented for the action taken against the employee holds true in the facts and circumstances of the specific case.[345] If the decision is fair, with regard to both reason and procedure, interference by the commissioner is unwarranted.[346]

A CCMA arbitration award may only be questioned by means of review on the specific grounds mentioned in s 145. In respect of matters falling within the jurisdiction of the CCMA, the court's involvement is limited to "an exercise of secondary decision-making".[347] The standard of review is that of a reasonable decision-maker.[348] The Labour Court relies on the principle of rationality to review the reasoning and conclusion

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[343] See s 138 of the LRA; Basson et al *Essential Labour Law* 337; Grogan *Dismissal, Discrimination and Unfair Labour Practices* 272, 562 and 563; *County Fair Foods (Pty) Ltd v CCMA* 1999 (11) BLLR 1117 (LAC); *Mkhize v CCMA* 2001 (1) SA 38 (LC); *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC). Cf *Volkswagen SA (Pty) Ltd v Brand NO* 2001 (6) BCLR 615 (LC). See also art 8 of the ILO Convention on Termination of Employment 158 of 1982.

[344] In the execution of his or her responsibilities as stipulated in the LRA, the commissioner must also take note of the relevant Codes of Good Practices. See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 563.

[345] See Grogan 2006 22(6) *Employment LJ* (Electronic Version); *County Fair Foods (Pty) Ltd v CCMA* 1999 (11) BLLR 1117 (LAC) at par 11 per Kroon JA; *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at paras 59 and 79.

[346] *County Fair Foods (Pty) Ltd v CCMA* 1999 (11) BLLR 1117 (LAC) must be considered in light of the discussion on substantive fairness, the outdated reasonable employer test and the influence of the Constitutional Court's decision in *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) on the idea of deference as respect in Chapter Five, part 2 1 3 and 4 2.

[347] Hutchinson 2001 (22) *ILJ* 2223 at 2224.

[348] See *Sidumo v Rustenburg Platinum Mines* 2007 (12) BLLR 1097 (CC). To survive review, a decision must be one that a reasonable decision-maker can reach. Administrative law also looks to the reasonable decision-maker in the review of a decision. See *POPCRU v Minister of Correctional Services* 2006 (8) BCLR 971 (E).

of a commissioner.[349] In essence, the court reviews the commissioner's logic.[350] In addition to this review mandate, ss 191(5)(b) and 191(6) of the LRA also provide for the adjudication of specific types of dismissal disputes by the Labour Court in the first instance as "a court of law and equity established in terms of section 151 of the LRA".[351]

4 2 Remedies

In line with the fairness-perspective of s 23, remedies in the employment context should fit the equitable principles legislatively and judicially developed specifically for the workplace.[352] Ultimately, the aim is to grant speedy and effective relief.[353] Sections 193 and 194 of the LRA, building on the 'justice and equity' discretion of the Industrial Court, guide the Labour Court and the CCMA in identifying possible fair remedies, such as reinstatement, re-employment or compensation, when it fits the circumstances of an unfair dismissal or unfair labour practice.[354]

5 CONCLUSION

The employment relationship, as the regulatory focus of labour law, amounts to a power relationship based on command and subordination. Labour law is aimed at countering "the inequality of bargaining power ... inherent in the employment relationship",[355] a relationship of dependency, mutual need and conflicting interests. Labour law is multi-

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[349] See *De Beers Consolidated Mines Ltd v CCMA* 2000 (21) ILJ 1051 (LAC) at par 27 per Conradie JA.

[350] See Grogan 2006 22(6) *Employment LJ* (Electronic Version). In *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA* 2006 (11) BLLR 1021 (SCA) at par 34, Cameron JA explained that the reasoning of a commissioner would not be logical if he or she relied on a bad reason which "cannot provide a rational connection to a sustainable outcome." In considering the commissioner's logic, it is not the task of the court to weigh good reasons against bad reasons.

[351] Basson et al *Essential Labour Law* 340. In *Gibb v Nedcor Ltd* 1997 (12) BLLR 1580 (LC), Jali AJ argued that reference to the term adjudication in these sections of the LRA calls for a distinction from the review required by s 145, regardless of the fact that adjudication is not defined in the Act.

[352] See Cassim 1984 (5) *ILJ* 275 at 300; Grogan *Workplace Law* 5.

[353] Conciliation and mediation are important concepts in labour law. Adjudication is seen as a last resort. The remedy granted by the court must be effective if previous negotiations between the parties themselves have failed to resolve the employment issue. See Grogan 1992 (109) *SALJ* 186.

[354] See Grogan *Workplace Law* 129 – 134.

[355] See Brassey 1993 (9) *SAJHR* 177 at 201 – 202; Klare 1988 (38) *Cath UL Rev* 28.

faceted and reactive in nature, responding to social, economic and political variables.[356] Labour law is also of public interest, as it has been used, but also abused, as "a principal tool of state policy".[357] Constitutionally informed, labour law has undergone a paradigm shift towards equality for all employees in labour law through the concept of fair labour practices.[358]

In developing its core concept of fairness, labour law has embraced proven principles of law (as developed in other legal branches) to meet the needs of the employment relationship,[359] while avoiding fragmentation. Consequently, labour law allows for overlap with other legal fields, as will be illustrated in the chapters to follow, "[b]ecause the employment relation is central to so many theories of social relations".[360]

Accordingly, calls for the compartmentalisation of labour law requires cautious and critical evaluation,[361] as confirmed by Froneman J in *Nakin v MEC, Department of Education, Eastern Cape Province*,[362] as the values of the Constitution inform all law.[363] To accommodate constitutional harmony (or hybridity) reliance on other rights are called for to inform labour rights when the context of a dispute so requires.[364] The idea of hybridity, so understood, empowers labour law to give expression to its own hybrid character in the regulation of employment relationships.

The unavoidable influence of the Constitution (through its values and rights) on the system of labour law can have progressive effects, as Chapter Ten will ultimately

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[356] This is evident from South Africa's labour history. Arthurs 1996 (46) *Univ Toronto LJ* 1 at 4 emphasises that there is "a close affinity ... between the state and labour law … in the light of the rapid and ramifying social, economic, political … developments [which] are transforming the state, the character of employment, and consequently, labour law".

[357] Takirambudde 1995 (39) *JAL* 39 at 41.

[358] See Takirambudde 1995 (39) *JAL* 39 at 41.

[359] See Brassey 1993 (9) *SAJHR* 177 at 202.

[360] Arthurs 1996 (46) *Univ Toronto LJ* 1 at 32.

[361] For such a critical (but cautious) evaluation, see Chapters Eight and Nine.

[362] 2008 (5) BLLR 489 (Ck).

[363] See *MEC, Department of Road and Transport, Eastern Cape v Giyose* 2008 (5) BLLR 472 (E) at par 17 per Froneman J.

[364] See *MEC, Department of Road and Transport, Eastern Cape v Giyose* 2008 (5) BLLR 472 (E) at par 18 per Froneman J.

illustrate by embracing the idea that the Constitution "may gradually alter the character and behaviour perhaps even the identities, of the actors in the labour law field".[365] This 'alteration' is already evident in the inclusion of public servants in our labour system and the two-fold classification (employer or regulator) of the State in the context of labour law. A discussion of the proper understanding of the public service is therefore called for and is the focus of Chapter Four. Before such a contextual discussion can be attempted, it is necessary to give due consideration to administrative law's development, goal and fundamental tenets in South Africa, as has been attempted from a labour perspective in this chapter. Such an evaluation will allow for a balanced and constitutionally endorsed evaluation of the relationship between labour and administrative law in the regulation of the public employment. The labour law exercise in this chapter will therefore be repeated in Chapter Three from an administrative law perspective.

[365] Arthurs 1996 (46) *Univ Toronto LJ* 1 at 40.

CHAPTER THREE

THE DEVELOPMENT, GOAL AND FUNDAMENTAL TENETS OF ADMINISTRATIVE LAW IN SOUTH AFRICA

1 INTRODUCTION

The focus of this chapter falls on administrative law and the principles associated with it, disconnected from other external legal influences. It is aimed at the identification of the normative characteristics that inform administrative law, as the basis for a comparison with the normative basis of labour law. Along with Chapter Two, this chapter provides the yardstick against which to measure the compatibility of labour and administrative law in the context of public employment.

This chapter will show that the key developments in administrative law culminated in s 33(1) of the Constitution.[366] Section 33(1) advances administrative law[367] in its

[366] In the constitutional milieu, the concept administrative action (in its widest meaning) refers to conduct of the administration when public power is exercised. The term administrative action has obtained a complex meaning, as the right to just administrative action and the applicability of PAJA is confined by the ambit of such action. The categorisation of action as administrative action is a threshold requirement. Section 33 illustrates a move away from the categorisation of types of administrative action, but not from the required presence of administrative action. Under PAJA, that determination has a narrower focus, as s 1 describes administrative action as any decision taken, or any failure to take a decision, by an organ of state, when exercising a power in terms of the Constitution or a provincial constitution, or exercising a public power or performing a public function in terms of any legislation. The enactment of PAJA has not inspired the legal community to great praise for its potential. The basis for this attitude lies in the wording of the definition of administrative action in s 1 of PAJA, which has been criticised as producing "a misguided idea of deference" due to the narrow description of the concept. In establishing the ambit of public power (and therefore also administrative action), the court in *President of the RSA v SARFU* 2000 (1) SA 1 (CC) at par 143 stated that the determination of whether action taken amounts to the implementation of legislative or the formulation of policy primarily requires consideration of the nature of the power. See Burns and Beukes *Administrative Law* 111; Hoexter *Administrative Law* 6; Hoexter in Corder and Van der Vijver *Realising Administrative Justice* 29; Klaaren 2006 *Acta Juridica* 370 at 378; *Gamevest (Pty) Ltd v Regional Land Claims Commissioner, Northern Province and Mpumalanga* 2002 (12) BCLR 1260 (SCA) at par 12 per Olivier JA; *Fetsha v Member of the Executive Council responsible*

promotion of administrative justice, to the extent that the latter is not protected elsewhere in the Constitution,[368] and gives expression to the basic principles or conceptual trilogy of administrative justice: lawfulness, reasonableness and fairness.[369] Section 33 must not be restrictively construed as a mere codification of common law rules that inform it,[370] as the Constitution may call for the development of these principles.[371]

As part of an array of specialised rights in the Bill of Rights, s 33 "has far less work to do than … if it were the only right in Chapter 2 of the Constitution".[372] The fact that s 33 is one of a collection of rights,[373] supports the Constitutional Court's perspective that all fundamental human rights entrenched in the Bill of Rights are mutually supportive and

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for Education (Eastern Cape) [2006] 3 All SA 542 (Ck) at par 10. Cf *Cape Metropolitan Council v Metro Inspection Services CC (Western Cape)* 2001 (10) BCLR 1026 (SCA) at par 16 per Streicher JA.

[367] See Devenish, Govender and Hulme *Administrative Law and Justice* 128; Govender in Corder and Van der Vijver *Realising Administrative Justice* 47.

[368] See Rautenbach General Provisions of the South African Bill of Rights 63. See also Devenish, Govender and Hulme Administrative Law and Justice 128.

[369] See Govender in Corder and Van der Vijver *Realising Administrative Justice* 47.

[370] See Burns and Beukes *Administrative Law* 203. Cf *President of the RSA v SARFU* 2000 (1) SA 1 (CC) at par 136; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (7) BCLR 687 (CC) at par 22; *Fetsha v Member of the Executive Council responsible for Education (Eastern Cape)* [2006] 3 All SA 542 (Ck) at par 9.

[371] See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC) at paras 28 – 42; Burns and Beukes *Administrative Law* 202.

[372] Hoexter in Corder and Van der Vijver *Realising Administrative Justice* 28. This statement calls for reflection on the pre-constitutional (uncharacteristic) role of administrative law in the protection of human rights in a repressive legal milieu. See Govender in Corder and Van der Vijver *Realising Administrative Justice* 49; *Rikhoto v East Rand Administration Board* 1983 (3) SA 595 (A); *Hurley v Minister of Law and Order* 1985 (4) SA 709 (D); *Mathebe v Regering van die RSA* 1988 (3) SA 667 (A); *Hira v Booysen* 1992 (4) SA 69 (A).

[373] Govender in Corder and Van der Vijver *Realising Administrative Justice* 48 explains that s 33 forms "part of a cluster of rights that include those stipulated in ss 32 and 34". See also Burns and Beukes *Administrative Law* 201. Cf Devenish, Govender and Hulme *Administrative Law and Justice* 16; Hoexter *Administrative Law* 138; Govender in Corder and Van der Vijver *Realising Administrative Justice* 45.

interdependent.[374] Section 33 must be viewed within the holistic context of the Constitution and its underlying values.[375] The constitutionalisation of specific fundamental rights creates a broader scale of judicial review than previously allowed.[376] The goal of this chapter is to trace the development of administrative law, albeit somewhat in isolation. It serves as a basis for the analysis of the conceptual trilogy that allows for the contextual co-operation between the rights to fair labour practices and just administrative action. To enable a proper understanding of the scope of these concepts, their relation to the principles of natural justice and initial development will first be traced (part 2). The identification of the key developmental moments will be followed by a discussion of the purpose of administrative law (part 3 1) and the type of relationship it seeks to regulate (part 3 2). This opens the door to a proper understanding of the contextual considerations (parts 3 3 and 3 4) that influence the functioning of the conceptual trilogy, namely, procedural fairness (part 3 5 1), reasonableness (part 3 5 2) and lawfulness (part 3 5 3). Finally, it will be considered how the proposed promotion and protection of the trilogy in terms of the right to just administrative action translates into remedies in practice.

[374] See *Government of the RSA v Grootboom* 2000 (11) BCLR 1169 (CC) at par 23. See also *NCGLE v Minister of Justice* 1998 (12) BCLR 1517 (CC) at paras 15 – 32 (per Ackerman J) and par 112 (per O'Regan J); *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) BCLR 569 (CC) at paras 41 and 102 – 104; *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 153.

[375] The interpretation of s 33 must take account of its relationship with other provisions entrenched in the Bill of Rights, as well as s 1 and the general provisions in Chapter 10 of the Constitution, with due regard to the principles of accountability, responsiveness and transparency. See Burns 2002 (17) *SAPL* 279 at 286, 289 and 290; Craig *Administrative Law* 3.

[376] See Hoexter in Corder and Van der Vijver *Realising Administrative Justice* 28. Hoexter comments that the categorisation of review as either constitutional or administrative is not of great importance, as the Constitutional Court in *Pharmaceutical Manufacturers Association of SA: In re Ex parte application of the President of the RSA* 2000 (3) BCLR 241 (CC) at par 30 held that "[t]here is only one system of law … shaped by the Constitution which is the supreme law".

2 KEY MOMENTS IN THE DEVELOPMENT OF ADMINISTRATIVE LAW

Early administrative law was not well recognised as a field of law in South Africa.[377] Its narrowly construed traditional pillars were the ultra vires rule and the principles of natural justice. It was later recognised that a restrictive perspective does not serve the ends of justice, resulting in the development of the broader concepts of lawfulness, reasonableness and procedural fairness.

2 1 The Traditional Pillars of Administrative Law

2 1 1 Ultra Vires

The English doctrine of ultra vires has a limited meaning:[378] no administrative body, organ or authority may exceed its objective powers.[379] This understanding allowed the judiciary to overlook considerations of procedural fairness and reasonableness.[380] As a result, the doctrine allowed formalism to creep into the judicial review of administrative action and gave a narrow meaning to the principle of legality.[381]

As a component of the rule of law (s 1 of the Constitution), the principle of legality has a broader meaning, requiring that public power must be exercised in good faith.[382] The Constitutional Court has embraced the broader principle of legality as the grundnorm of

[377] The fact that only a few descriptive pages in the 1935 comprehensive constitutional law contribution of Kennedy and Schlosberg, *The Law and Custom of the South African Constitution*, focuses on administrative law is evidence of this. The reason for administrative law's slow development is historically rooted. See Beinart 1948 (11) *THRHR* 204 – 205; Davis 2006 *Acta Juridica* 23 at 24 – 25.

[378] See Burns and Beukes *Administrative Law* 204.

[379] See Burns and Beukes *Administrative Law* 204.

[380] Burns and Beukes *Administrative Law* 205 explain that South African judiciary followed the English "with the result that the requirement of lawfulness or legality was often confined to compliance with provisions of the enabling or empowering statute".

[381] See Burns and Beukes *Administrative Law* 205; Hoexter *Administrative Law* 110, 116 and 117 with reference to Baxter *Administrative Law* 301. Cf Devenish, Govender and Hulme *Administrative Law and Justice* 219.

[382] See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC) at par 56; Hoexter *Administrative Law* 117.

administrative law, as it is enshrined in the supreme Constitution, and has distanced itself from the doctrine of ultra vires.[383]

2 1 2 Natural Justice

The idea of procedural fairness was introduced through the narrow scope of the principles of natural justice,[384] as a minimum standard of fairness[385] by means of two general rules:[386] audi alteram partem[387] and nemo iudex in sua causa.[388] The judiciary jealously guarded this approach and stifled the development of a general duty to act fairly, as it was reasoned that the value of procedural fairness "would be lessened rather than increased if it were applied outside its proper limits",[389] as associated with the rules of natural justice.

2 2 Procedural Fairness

The development of the principle of fairness, following the trend set by the groundbreaking English decision of *Ridge v Baldwin*,[390] was a triumph for law generally

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[383] See Burns and Beukes *Administrative Law* 198; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (7) BCLR 687 (CC) at par 22.

[384] See Hoexter 2004 (4) *Macquarie LJ* 165 at 169. See also De Ville *Judicial Review* 218; Devenish, Govender and Hulme *Administrative Law and Justice* 129; Hoexter *Administrative Law* 351. Cf *Sachs v Minister of Justice* 1934 AD 11 at 38 per Stratford JA; *R v Nqwevela* 1954 (1) SA 123 (A) at 131 per Centlivres CJ; *Attorney-General, Eastern Cape v Blom* 1988 (4) SA 645 (A) at 662 per Corbett JA.

[385] See Burns and Beukes *Administrative Law* 51.

[386] In giving content to these rules, courts considered the presence or absence of fair play. See Currie and Klaaren *Benchbook* 89.

[387] A person affected by a decision should be granted the opportunity to state his/her side, preferably before any decision is taken. See Currie and Klaaren *Benchbook* 89.

[388] The person making a decision affecting another person must be, and be perceived to be, impartial. See Currie and Klaaren *Benchbook* 89.

[389] *Laubscher v Native Commissioner, Piet Retief* [1958] 2 All SA 58 (A) at 59. See Hoexter 2004 (4) *Macquarie LJ* 165 at 169; Hoexter *Administrative Law* 352. See also Wiechers as referred to in Burns and Beukes *Administrative Law* 51.

[390] [1964] AC 40. Grey 1982 (27) *McGill LJ* 360 at 364 fn 40 notes that *Ridge v Baldwin* [1964] AC 40 brought about the "rebirth" of the principle of fairness.

and administrative law specifically.[391] With the judicial acceptance of the general principle of fairness, minimum standards were identified to guide decision-makers.[392]

2 2 1 The Duty to Act Fairly

The creation of the duty to act fairly is attributed to English law, and viewed as an elaboration of the rules of natural justice.[393] In *In re HK (An Infant*),[394] Lord Parker declared the rules of natural justice to fall within the ambit of the collective duty to act fairly.[395] This general approach to fairness brought about a judicial understanding that the duty to act fairly requires case-by-case contextualisation of the already recognised principles of natural justice.[396] The seminal South African decision of *Administrator,*

[391] See Grey 1982 (27) *McGill LJ* 360.

[392] See Grey 1982 (27) *McGill LJ* 360. Asimow 1996 (44) *American J Comp L* 393 at 398 explains that procedural fairness "safeguards an individual's dignitary interests" in that decision-makers are compelled to consider the side of the affected individual. In the current context, fairness allows for the review of the legality and not the merits of a decision. Within the ambit of administrative law, fairness is therefore primarily viewed as a procedural framework. It must however be noted that Wade *Administrative Law* 340 regards no decision as ever being completely unreviewable. See also *Roncarelli v Duplessis* [1958] SCR 121 at 142 and Grey 1982 (27) *McGill LJ* 360 at 361.

[393] The acknowledgment of the right to be heard has led to courts inferring a variety of procedural rights, for example the right to be informed of an impending (potentially adverse) decision. See Sossin 2002 (27) *Queen's LJ* 809 at 824. In *Walele v City of Cape Town* 2008 (11) BCLR 1067 (CC) at par 27, Jafta AJ explained that it is the negative impact of decisions affecting the rights and legitimate interests of individuals that form the basis of such rights. The evolvement of the general duty to act fairly is also evident in the development of labour law. It formed the basis of the acknowledgment of the concept of fair labour practices by the Wiehahn Commission. See Chapter Two, part 2 2.

[394] [1967] 2 QB 617.

[395] Apart from the fact that the person presiding over a procedure must be uninvolved and that all affected individuals must be granted an opportunity to state their side of the case (as per the rules of natural justice), the basic requirements of fairness also call for the affected person to be informed of the reasons on which the decision is based. As a procedural concept, the right to reasons is traditionally part of the concept of fairness as emphasised by Grey 1982 (27) *McGill LJ* 360 at 364 – 365.

[396] See *R v Liverpool Corporation, Ex Parte Liverpool Taxi Fleet Operators' Association* [1972] 2 All ER 589; Baxter *Administrative Law* 538 – 540; Burns and Beukes *Administrative Law* 51; Evans 1973 (36) *MLR* 93 at 94; Hawke and Parpworth *Introduction to Administrative Law* 164; Sossin 2002 (27) *Queen's LJ* 809 at 824. Baxter *Administrative Law* 538 – 540 prefers to view the general duty to act fairly within a procedural sense. See Corder 1998 (14) *SAJHR* 38 at 48. Cf *Van Huyssteen v Minister for Environmental Affair* 1995 (9) BCLR 1191 (C) in which the court followed this approach.

Transvaal v Traub[397] embraced this general idea of fairness in calling for the application of administrative law principles of justice in the public employment context. The developmental importance of the recognition of the duty to act fairly lies in the fact that it offers "an escape from the conceptual mess",[398] which initially limited the fairness requirement to only certain kinds of administrative actions.[399]

In short, the duty to act fairly is flexible rather than static.[400] Its general content is dependent "on the importance of the interest affected by the decision and not on whether that interest belongs to some list on the 'rights' side of a rights/privilege distinction".[401] So viewed, this general duty calls for decisions made in good faith.[402]

2 2 2 Legitimate Expectation[403]

Traditionally an affected person with an expectation short of a right could not call on the protection of natural justice.[404] The concept of legitimate expectation first appeared on

[397] 1989 (4) SA 731 (A). This case concerned the denied appointment of hospital residents.

[398] Hoexter 2004 (4) *Macquarie LJ* 165 at 171.

[399] See Hoexter 2004 (4) *Macquarie LJ* 165 at 171.

[400] For example, a written hearing may be sufficient in one set of circumstances, while the variable concept of fairness may require an oral hearing in another context. See Sossin 2002 (27) *Queen's LJ* 809 at 824.

[401] Dyzenhaus and Fox-Decent 2001 (51) *Univ Toronto LJ* 193 at 194. See the discussion on the doctrine of legitimate expectation at part 2 2 2.

[402] See Grey 1982 (27) *McGill LJ* 360 at 366.

[403] It is acknowledged that there is an ongoing academic debate with regard to the recognition and development of the principle of substantive legitimate expectation in South African jurisprudence. However, O'Regan J in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 (9) BCLR 846 (CC) at par 306 explained that "[o]ur courts have expressly refrained from determining the question whether a legitimate expectation might give rise to a substantive benefit, although English courts have developed a doctrine of substantive legitimate expectation". Brand JA also recently in *Duncan v Minister of Environmental Affairs and Tourism* [2010] 2 All SA 472 (SCA) at par 14 pronounced (with reference to Campbell 2003 (120) *SALJ* 292 and Quinot 2004 (19) *SAPL* 543) that the time has not yet come for South African "courts to cut the Gordian knot" as far as the issue surrounding substantive legitimate expectation is concerned. For this reason, the discussion of legitimate expectation within the ambit of this study will be confined to the traditional procedural perspective.

[404] In *Walele v City of Cape Town* 2008 (11) BCLR 1067 (CC) at par 34, Jafta AJ explained that prior to the acceptance of the doctrine of legitimate expectation the common law confined the application of audi alteram partem "to cases where an administrative decision affected pre-existing rights of the party

the legal scene in *Schmidt v Secretary of State for Home Affairs*,[405] where Lord Denning MR reasoned that the focus should fall on whether it would be *fair* to deprive a person who has a right, interest or legitimate expectation from the opportunity to be heard.[406] In the South African context, a paradigm shift came with the *Traub*-judgment, when the Appellate Division introduced the doctrine of legitimate expectation.[407] The introduction of the doctrine, because of the recognition of the duty to act fairly, brought about a less rigid judicial approach,[408] 20 years after the English decision of *Ridge v Baldwin*[409] rejected the sterile distinction between rights and privileges.[410] The importance of this development lies in the recognition of legality as the overreaching principle that brings together the two paradigms of rights and interest or expectations.[411]

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challenging the validity of the decision on the basis that it was denied a hearing". The result being that applicants that wished to acquire rights, but did not yet possess existing rights, were not entitled to procedural fairness. This approach went hand in hand with the administrative law associated deprivation theory, in terms of which the courts reasoned that the benefit of fairness only befell people whose rights were eradicated or surrendered because of an official action. See Hoexter 2004 (4) *Macquarie LJ* 165 at 169 – 170; *Laubscher v Native Commissioner, Piet Retief* [1958] 2 All SA 58 (A).

[405] 1969 (2) Ch 149 (CA).

[406] See *Schmidt v Secretary of State for Home Affairs* 1969 (2) Ch 149 (CA) at 170.

[407] See *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A) at 761. Cf *Walele v City of Cape Town* 2008 (11) BCLR 1067 (CC) at par 27. The doctrine of legitimate expectation (as linked to procedural fairness) strikes a reasonable equilibrium between the need to safeguard individuals against unfair decisions and the promotion of judicial deference for administrative decisions. See *SA Veterinary Council v Szymanski* 2003 (4) BCLR 378 (SCA) for the legitimate expectation requirements. See also *Hauptfleisch v Caledon Divisional Council* 1963 (4) SA 53 (C) at 59; *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 All ER 346; *Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State Aided Schools: Eastern Transvaal* 1999 (2) BCLR 151 (CC) at par 34; *NDPP v Phillips* 2002 (4) SA 60 (W) at par 28.

[408] See Hoexter 2004 (4) *Macquarie LJ* 165 at 171.

[409] [1964] AC 40.

[410] See Evans 1973 (36) *MLR* 93 at 97.

[411] See Dyzenhaus and Fox-Decent 2001 (51) *Univ Toronto LJ* 193 at 194.

2 2 3 Broadening the Scope of Procedural Fairness

The concept of fairness is now a constitutional principle. No matter how it is clothed,[412] the principle of fairness remains omnipresent. In the context of s 33, fairness has a procedural rather than a substantive character.[413] It aims to grant people who stand to be adversely affected by an administrative action the opportunity to state their case before the action or decision is taken.[414] This gives the administrator the advantage of having all the relevant facts upon which to base his or her decisions.[415] Within the ambit of s 33, the concept of procedural fairness forms an important "component of the rights-based approach to administrative law".[416]

The right to procedurally fair administrative action not only involves the application of the rules of natural justice, but also includes principles and procedures that are right, just and fair, as dictated by every individual case.[417] It amounts to more than an interpretative presumption.[418] Although no fixed content can be prescribed to the principle of procedural fairness, the importance of adherence to it and its promotion is irrefutable.[419]

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[412] It could be within the scope of s 23 (fair labour practices) or s 33 (procedurally fair administrative action).

[413] See Burns and Beukes *Administrative Law* 52.

[414] See Burns and Beukes *Administrative Law* 52.

[415] In *Janse van Rensburg NO v Minister of Trade and Industry NO* 2000 (11) BCLR 1235 (CC) at par 24, Goldstone J elaborated as to the constitutional rationale of fairness. See Chapter Six, part 2 for a discussion of the foundational design of procedural fairness.

[416] Burns and Beukes *Administrative Law* 69. The same understanding holds true for ss 3 and 4 of PAJA. Section 3 of PAJA deals with individual procedural fairness, while s 4 gives effect to s 33 of the Constitution by means of collective procedural fairness.

[417] See *Jenkins v Government of the RSA* [1996] 1 All SA 659 (Tk); *Maharaj v Chairman of the Liquor Board* [1996] 2 All SA 185 (N); Cheadle, Davis and Haysom *South African Constitutional Law* 27–4.

[418] In terms of s 36 of the Constitution (the general limitation clause) the rights in s 33 can only be limited if reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

[419] In *Fetsha v MEC for Education (Eastern Cape)* [2006] 3 All SA 542 (Ck) at par 30, the court stated that s 33 "does not limit the application of procedural fairness only to administrative action that affects rights or legitimate expectations [as] … [i]t rather appears to include the broader notion of a duty to act fairly without laying down rigid rules as to the range of situations to which procedural fairness would apply".

2 3 Reasonableness

Reasonableness, as a requirement for just administrative action, has a turbulent past and a controversial interpretative present, because it has a reputation for being difficult to prove.[420]

2 3 1 Common Law

Traditionally, reasonableness falls within the broader scope of the principle of legality.[421] Initially it was not well received due to judicial fears that it would blur the lines between review and appeal.[422] This resulted in an incoherent common law approach to and a narrow judicial perspective of the concept of reasonableness.[423]

Not merely any degree of unreasonableness was regarded as solely sufficient to render a decision deficient.[424] Only unreasonableness of a gross nature was considered reviewable.[425] This narrow perspective was referred to as 'symptomatic

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The court qualified that s 3 of "PAJA reintroduces the limitation of the right to procedural fairness to administrative action that affects rights or legitimate expectations". Hoexter *Administrative Law* 358 described the formulation of procedural fairness in s 3(1) as noteworthy for two reasons: "On the one hand, it is more generous than s 1 of the Act in that it recognises legitimate expectations as a trigger in addition to rights. On the other, it is less generous in requiring that rights or legitimate expectations be affected *materially* as well as adversely." Section 1 of PAJA qualifies the concept of administrative action as referred to in s 33. Section 3 refers to that same concept in a different context, which controversially includes legitimate expectations. In *Walele v City of Cape Town* 2008 (11) BCLR 1067 (CC) at par 30, Jafta AJ argued that Parliament "must have been aware of the judicial decisions applied to the *audi* principle in its original and expanded forms, incorporating the doctrine of legitimate expectation" when it enacted PAJA. In *Walele v City of Cape Town* 2008 (11) BCLR 1067 (CC) at par 35, Jafta AJ therefore noted that the application of the definition in s 1 to the interpretation of s 3 "will lead to absurdity". Jafta AJ was willing to read s 3 as excluding the s 1 definition.

[420] See Grey 1982 (27) *McGill LJ* 360 at 366.

[421] See Wiechers *Administratiefreg* 178.

[422] See Hoexter 2004 (4) *Macquarie LJ* 160 at 170.

[423] See Burns and Beukes *Administrative Law* 210.

[424] See Devenish, Govender and Hulme *Administrative Law and Justice* 130.

[425] For example, gross unreasonableness was reviewable if it related to mala fides or ulterior motive, as something besides standard unreasonableness could also be inferred from it. See Burns and Beukes *Administrative Law* 210 and 485; Devenish, Govender and Hulme *Administrative Law and Justice* 121;

unreasonableness', as associated with the English law *Wednesbury*-principle.[426] In terms of this principle, the required reviewable standard of unreasonableness must be "[s]o outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it".[427] This traditional approach has been labelled to stringent.[428] This perspective is reflected in the court's rejection of the symptomatic approach in *Standard Bank of Bophuthatswana Ltd v Reynolds NO*,[429] moving it closer to the constitutional perspective of reasonableness.[430]

2 3 2 The Constitutional Extension of Reasonableness

In the constitutional context, reasonableness has been transformed into a primary adjudicative tool, in answer to the desire for simplicity following the common law confusion.[431] The inclusion of reasonableness as a requirement for just administrative

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Administrator, Transvaal and the First Investment (Pty) Ltd v Johannesburg City Council 1971 (1) SA 56 (A) at 80; *Maharaj v Chairman of the Liquor Board* [1996] 2 All SA 185 (N) at 189 and 193.

[426] See *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 as referred to in *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935. The 'symptomatic unreasonableness' approach was evident in South African cases, such as *Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Limited* 1928 AD 220 at 237. See Devenish, Govender and Hulme *Administrative Law and Justice* 130; Hoexter 2004 (4) *Macquarie LJ* 160 at 170.

Cf De Ville *Judicial Review* 13, 196 and 209.

[427] *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 at 951. For criticism of the Wednesbury-approach see De Ville Judicial Review 211. See also *Brind v Secretary of State for the Home Department* [1991] 1 All ER 720 at 738; *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd* [1999] 1 All ER 129 at 157.

[428] See the critical perspectives of Baxter *Administrative Law* 458, 489 – 490 and Wiechers *Administratiefreg* 237 – 254. See also Burns and Beukes *Administrative Law* 211 and 392; Hoexter *Administrative Law* 302. Cf *Union Government v Union Steel* 1928 AD 220.

[429] 1995 (3) SA 74 (B) at 96. See Burns and Beukes *Administrative Law* 395.

[430] Case specific considerations are noticeable in the proportionality approach as a means of evaluating reasonable administrative action. As such, the social, economic, historical and political aspects of every case come into consideration. Cf De Ville *Judicial Review* 211 – 212. See part 2 3 2 2.

[431] See Fredman 2006 *Publ Law* 498 at 514; Hoexter *Administrative Law* 303.

action in s 33(1) alters the narrow common law approach.[432] As a result, two elements of reasonableness (rationality and proportionality) have evolved.

2 3 2 1 Rationality

The requirement that decisions must be rational is rooted in the rule of law, which dictates that the exercise of public power must not be arbitrary in nature.[433] Rationality forms the minimum requirement for the exercise of all public power,[434] even where the nature of the decision taken by an organ of state falls outside the ambit of an administrative action.[435] Rationality in this context is informed by the principle of legality;[436] it requires a rational connection between the designed purpose of the power and the exercise of that power.[437]

The s 24(d) interim Constitution reference to justifiability in relation to reasons given was interpreted as rationality,[438] "which is the first element of reasonableness".[439]

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[432] This new perspective is reflected in ss 6(2)(f)(ii) and 6(2)(h) of PAJA.

[433] For such arbitrary decisions to be avoided, Burns and Beukes *Administrative Law* 383 note the necessity of a rational link in a decision between the power and the purpose for which it is exercised. For reference to the link between rationality and the rule of law, see *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the RSA* 2000 (3) BCLR 241 (CC) at par 90 and *Dawood v Minster of Home Affairs* 2000 (8) BCLR 837 (CC) at par 47.

[434] See Burns and Beukes *Administrative Law* 383; *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the RSA* 2000 (3) BCLR 241 (CC) at par 85. Cf De Ville *Judicial Review* 200.

[435] See Burns and Beukes *Administrative Law* 383.

[436] See Hoexter *Administrative Law* 323.

[437] See Hoexter *Administrative Law* 323. As stated, rationality is not solely a test for reasonable administrative action. Reasonableness is not only exclusively a concept calling for consideration in administrative law, but is also an important consideration in other provisions of the Bill of Rights. Within a culture of justification, rationality retains its position as a principle of the rule of law. See *S v Makwanyane* 1995 (6) BCLR 665 (CC) at par 156 per Ackerman J; *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the RSA* 2000 (3) BCLR 241 (CC) at par 85; De Ville *Judicial Review* 200.

[438] Hoexter *Administrative Law* 303 – 304 explains that the wording of s 24(d) rendered the doctrine of symptomatic unreasonableness redundant. See Asimow 1996 (44) *American J Comp L* 393 at 396 fn 15; Burns and Beukes *Administrative Law* 211, 384 and 396; De Waal, Currie and Erasmus *Bill of Rights Handbook* 473; Hoexter 2004 (4) *Macquarie LJ* 160 at 172; Mureinik 1994 (10) *SAJHR* 31 at 40; *Roman v Williams NO* 1997 (9) BCLR 1267 (C); *Carephone (Pty) Ltd v Marcus NO* 1998 (11) BLLR 1093 (LAC);

During this interim period, reasonableness was read into the requirement of just administrative action through the general limitation clause,[440] requiring that any limitation of a right in the Bill of Rights be reasonable and justifiable in an open and democratic society. Within the context of s 33, rationality has also been judicially identified as a standard of review.[441]

A decision is generally viewed as rational if supported by the evidence and information available to the administrator, along with the reasons provided for it.[442] In addition, a rational decision objectively furthers the purpose for which the power (in terms of which it was taken) was granted.[443]

Rationality, although not specifically defined,[444] has also been included in the content of PAJA.[445] In terms of s 6(2)(f)(ii) administrative action is reviewable if it is not rationally connected to the purpose for which it was taken, the purpose of the empowering provision, the information before the administrator, or the reasons given for it by the

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Mafongosi v United Democratic Movement [2003] 1 All SA 441 (Tk). Cf *Carephone (Pty) Ltd v Marcus NO* 1998 (11) BLLR 1093 (LAC) at par 32 per Froneman DJP.

[439] Hoexter *Administrative Law* 303. Consequently, even though reasonableness was not expressly referred to in the interim Constitution, its effects were still profound.

[440] See Burns and Beukes *Administrative Law* 212.

[441] See *Minister of Health v New Clicks SA (Pty) Ltd* 2006 (1) BCLR 1 (CC) at par 108. Cf Hoexter *Administrative Law* 304. It has also been argued that reasonable administrative action requires a functionary to make rationally justifiable decisions. See *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the RSA* 2000 (3) BCLR 241 (CC) at par 85. Cf *Ampofo v Member of the Executive Council for Education, Arts, Culture, Sports and Recreation, Northern Province* [2002] 1 All SA 226 (T) at par 55.

[442] See Hoexter *Administrative Law* 307.

[443] This approach was adopted by the Labour Appeal Court in *Carephone (Pty) Ltd v Marcus NO* 1998 (11) BLLR 1093 (LAC) at par 37. See Hoexter *Administrative Law* 307.

[444] See Burns and Beukes *Administrative Law* 387.

[445] In the application of s 6(2)(f)(ii), the Supreme Court of Appeal has referred to the *Carephone*-approach with approval. See Hoexter *Administrative Law* 308; *Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa* 2004 (3) SA 346 (SCA) at par 21; *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA* 2006 (11) BLLR 1021 (SCA) at par 25.

administrator.[446] These considerations have been described as a four-pronged rationality test.[447]

Regardless of its express legislative recognition, rationality as a standard against which to evaluate the reasonableness of an administrative action is but one consideration. While rationality is the minimum requirement for reasonableness, s 33(1) calls for something more in a reasonableness analysis. If rationality is to be regarded as a threshold consideration for reasonableness, then other considerations naturally follow.

2 3 2 2 Proportionality

Although the majority in *Bel Porto School Governing Body v Premier, Western Cape*[448] read s 24(1) of the interim Constitution as merely requiring rationality,[449] the minority reasoned that "[j]ustifiability … must demand something more substantial and persuasive than mere rational connection" as the principle of legality requires that "[a]ll exercises of public power have to have a rational basis".[450] Subsequent cases point to the fact that rationality is merely the first aspect of reasonable administrative action.[451] In addition to rationality, proportionality has been identified as the second component to reasonableness in terms of s 33(1).[452]

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[446] Although s 6(2)(f)(ii) is describable as "a thorough and searching ground of review", Hoexter *Administrative Law* 308 – 309 explains that this is not particularly alarming as it honours the identified common law grounds of review: ulterior purpose, failure to apply the mind and arbitrariness.

[447] See Burns and Beukes *Administrative Law* 387; De Ville *Judicial Review* 200. Cf *Harksen v Lane NO* 1997 (11) BCLR 1489 (CC) at paras 43 – 54; *S v Lawrence* 1997 (10) BCLR 1348 (CC) at par 19.

[448] 2002 (9) BCLR 891 (CC).

[449] See *Bel Porto School Governing Body v Premier, Western Cape* 2002 (9) BCLR 891 (CC) at paras 41 – 46.

[450] *Bel Porto School Governing Body v Premier, Western Cape* 2002 (9) BCLR 891 (CC) at par 164.

[451] See Hoexter *Administrative Law* 307. In *Khosa and Mahlaule v Minister for Social Development* 2004 (6) BCLR 569 (CC) at par 67, the Constitutional Court clearly stated that constitutional reasonableness stretched further than rational review. See Fredman 2006 *Public Law* 498 at 514; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (7) BCLR 687 (CC) at par 43 per O'Regan J; *Minister of Health v New Clicks SA (Pty) Ltd* 2006 (1) BCLR 1 (CC) at par 108 per Chaskalson CJ.

[452] The fact that it is referred to as a second element by no means implies that it is to be regarded as a lesser element than rationality. See Hoexter *Administrative Law* 309.

In *Council of Civil Service Unions v Minister for the Civil Service*,[453] Lord Diplock predicted that proportionality, as a basis for administrative review, would develop in English law and other jurisdictions.[454] True to this prediction, elements of the principle of proportionality now form part of South African administrative law.[455] Due to uncertainty about the limits of the principle of proportionality, its status, in contrast to rationality, remains contentious.[456]

The proportionality analysis reveals a bolder character than the traditional reasonableness test.[457] Hoexter (with reference to *S v Manamela*)[458] defines proportionality as "the notion that one ought not to use a sledgehammer to crack a nut".[459] It maintains equilibrium between the unfavourable and favourable impact of an action with the aim of encouraging administrators "to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end".[460] Proportionality allows for a balance that is realistically maintainable by

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[453] [1984] 3 All ER 935.

[454] See *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 at 950.

[455] *Roman v Williams NO* 1997 (9) BCLR 1267 (C) at 1276 was the first case in which administrative law was held to require reasonable administrative action of a proportional nature. Cf *Ngqumba v Staatspresident* 1988 (4) SA 224 (A) at 252 and 256. In *Minister of Health and Another v New Clicks SA (Pty) Ltd* 2006 (1) BCLR 1 (CC) at par 637, Sachs J confirmed the significance of proportionality within the reasonableness enquiry. See De Ville *Judicial Review* 207; Hoexter *Administrative Law* 309.

[456] See De Ville *Judicial Review* 203; Hoexter *Administrative Law* 309 – 310.

[457] See Jowell 2006 *Acta Juridica* 13 at 18. Mureinik 1994 (10) *SAJHR* 31 argues that the increase of judicial support for the principle of proportionality indicates the "move from a 'culture of authority' to a 'culture of justification'". For examples of similar judicial reasoning see *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* 2001 (4) SA 661 (W) at par 36; *Bel Porto v Premier, Western Cape* 2002 (3) SA 265 (CC) at par 166; *Schoonbee v MEC for Education, Mpumalanga* 2002 (4) SA 877 (T) at 885; *Mafongosi v United Democratic Movement* 2002 (5) SA 567 (Tk) at paras 14 – 15; *Minister of Health v New Clicks SA (Pty) Ltd* 2006 (1) BCLR 1 (CC) at par 637.

[458] 2000 (3) SA 1 (CC) at par 34.

[459] Hoexter *Administrative Law* 309. Cf *R v Goldsmith* [1983] 1 WLR 151 at 155; Burns and Beukes *Administrative Law* 408. De Ville *Judicial Review* 203 and Plasket (PhD 2002 Rhodes) are fervent supporters of proportionality. See Hoexter *Administrative Law* 311.

[460] Hoexter *Administrative Law* 309 with reference to Hoexter in Klaaren *A Delicate Balance: The Place of the Judiciary in a Constitutional Democracy* 61 at 64.

the reasonable decision-maker. In short, a proportionality analysis balances constitutional interests.[461]

The proportionality of an administrative action is evaluated with due regard to considerations of balance,[462] necessity[463] and suitability.[464] This formula is not specifically identifiable in PAJA,[465] but it has been argued that s 6(2)(h)[466] indirectly includes proportionality considerations,[467] as it calls for something more than mere rationality.[468] Burns and Beukes explain that "the requirement of proportionality between

[461] See Du Plessis and Penfold 2005 *ASSAL* 27 at 69.

[462] De Ville *Judicial Review* 203 determines the balance consideration by enquiring whether "the measures (even though it may be suitable and necessary) [do] not place an excessive burden on the individual which is disproportionate in relation to the public interest at stake?" In *S v Makwanyane* 1995 (6) BCLR 665 (CC) the Constitutional Court referred to the principle of proportionality as "the balancing of different interests". Cf Burns and Beukes *Administrative Law* 416.

[463] With regard to necessity, De Ville *Judicial Review* 203 evaluates the necessity of a measure by asking whether "no lesser form of interference with the rights of a person was possible in order to achieve the desired aim (such alternative measures being equally effective to the measure taken)". Cf Jowell 2006 *Acta Juridica* 13 at 18.

[464] According to De Ville *Judicial Review* 310 one must consider whether "the measure in question [was] suitable or effective to achieve the desired aim". Cf Hoexter *Administrative Law* 310.

[465] The Act does not make express mention of proportionality within the context of reasonableness review. See Burns and Beukes *Administrative Law* 416; Hoexter *Administrative Law* 311.

[466] The section allows for a court or tribunal to judicially review administrative action if "the exercise of the power or the performance of the function authorised by the empowering provisions, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function".

[467] Section 6(2)(h) allows for review of unreasonableness as a separate ground of review from that of rationality found in s 6(2)(f)(ii). See Currie and De Waal *Bill of Rights Handbook* 675; Hoexter *Administrative Law* 312 considers the possibility of such an interpretation. De Ville *Judicial Review* 209 points out that s 6(2)(i) possibly serves a similar purpose, as the section refers to the review of "otherwise unconstitutional or unlawful" administrative action.

[468] The wording of the section unfortunately reminds of the traditional *Wednesbury*–approach. See part 2 3 1; Currie and De Waal *Bill of RIghts Handbook* 675. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (7) BCLR 687 (CC) at par 44, O'Regan J criticised the *Wednedsbury*-test for unreasonableness. Hoexter *Administrative Law* 312 explains that s 33(1) "killed the doctrine of symptomatic unreasonableness stone dead" by allowing direct reliance on lawful, reasonable and procedurally fair administrative action. See also Burns and Beukes *Administrative Law* 403.

the means and the ends should include an examination of the reasonableness of the decision itself and it is in this regard that the two principles overlap".[469] The legislative omission of express mention of the proportionality principle by no means denies the crucial role of the proportionality enquiry, as "its role in controlling the exercise of administrative action cannot be understated".[470] This is evident from the judgment in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*,[471] where O'Regan J reasoned that a reasonableness evaluation calls for consideration of the nature of competing interests in an unequal power relationship, as well as the impact that a decision of the power bearer may have on the interests of a vulnerable individual or group.[472]

2 4 Lawfulness

As a common law principle, lawfulness is traditionally associated with the doctrine of ultra vires.[473] This English law doctrine requires that organs of state not exceed their objective power.[474] Unlawful administrative action occurs when an administrator acts beyond the framework of his or her empowering provision.[475] As such, lawfulness is a formal test that does not necessitate the consideration of reasonableness or procedural fairness. In the past, this common law approach was applied inconsistently throughout

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[469] Burns and Beukes *Administrative Law* 416. See also Burns and Beukes *Administrative Law* 408; Hoexter *Administrative Law* 411. Cf Baxter *Administrative Law* 528.

[470] Burns and Beukes *Administrative Law* 416.

[471] 2004 (7) BCLR 678 (CC).

[472] See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (7) BCLR 678 (CC) at par 45. The inclusion of considerations of this nature in the reasonableness evaluation clearly requires a balance of interests that is in conformity with the proportionality perspective of De Ville *Judicial Review* 203 – 310.

[473] See part 2 1 1; Burns and Beukes *Administrative Law* 50; Devenish, Govender and Hulme *Administrative Law and Justice* 129.

[474] Lawful administrative action must conform to the provisions of empowering statutes and all common law rules. See Wiechers and Baxter as referred to in Burns and Beukes *Administrative Law* 205. Burns and Beukes *Administrative Law* 205 fn 30 hold that this approach to lawfulness reminds of the narrow approach of ultra vires, also termed procedural ultra vires. Corder 1998 (14) *SAJHR* 38 at 48 supports the narrow perspective, while De Ville 1995 (11) *SAJHR* 264 prefers the broader approach.

[475] See Burns and Beukes *Administrative Law* 205.

South African jurisprudence, to the exclusion of the other trilogy principles.[476] This makes the constitutional protection of the principles all the more significant.[477]

2 5 Legality

The Constitutional Court has placed reliance on the constitutionally endorsed rule of law to curtail the abuse of power.[478] Generally, the scope of the rule of law is considered to be broad.[479] At a minimum, it requires adherence to the principle of legality.[480]

Constitutional Court decisions reveal a fondness for the principle of legality.[481] In recent decisions, where administrative actions were found to be absent, but public power was nevertheless at play, the court looked to the principle of legality for guidance.[482]

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[476] See Burns and Beukes *Administrative Law* 50.

[477] See Burns and Beukes *Administrative Law* 50. The inclusion of lawfulness in the Constitution has brought forth various opinions as to its interpretation. Hoexter *Administrative Law* 225 declares that "the requirement of lawfulness in relation to administrative action … seem to coincide completely with the content of the constitutional principle of legality". Considering the relationship between lawfulness and legality in the control of public power Hoexter *Administrative Law* 251 explains that, regardless of whether reliance is placed on the principle of legality or the ordinary administrative law rules, an administrator is not allowed to act outside the scope of his or her power or misconstrue that power. Cf *President of the RSA v SARFU* 2000 (1) SA 1 (CC) at par 148. In the context of lawfulness, Hoexter *Administrative Law* 226 explains that "it seems there is nothing to choose between the grounds in the PAJA and those implied by the principle of legality … [but] constitutional logic dictates that where possible, resort should be had to a detailed statute such as the PAJA before relying on a broad constitutional principle".

[478] See *Pharmaceutical Manufacturers Association of SA: In re Ex parte application of the President of the RSA* 2000 (3) BCLR 241 (CC) at par 85. Mureinik 1994 (10) *SAJHR* 31 at 32 describes this as an incident of the "culture of justification". Cf Burns 2002 (17) *SAPL* 279 at 285.

[479] See De Smith, Woolf and Jowell *Judicial Review* 14.

[480] See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC) at paras 56 – 59; Currie and De Waal *The New Constitutional and Administrative Law: Volume One* 77; Hoexter *Administrative Law* 13.

[481] Hoexter *Administrative Law* 321 explains that the appeal of legality is "the great contrast between it and the PAJA ... Where the Act applies only to 'administrative action', a concept it defines very narrowly, the principle of legality applies to every exercise of public power; and where the PAJA contains specific, detailed rules, the beauty of the principle of legality is its generality".

[482] See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC); *President of the RSA v SARFU* 2000 (1) SA 1 (CC); *Pharmaceutical Manufacturers*

Consequently, if s 33 cannot find direct application, the exercise of public power does not stand free from lawfulness and reasonableness review,[483] because the principle of legality has been developed as a constitutional conceptual safety net.[484] As such, it falls within the broader scope of the rule of law, but should be regarded as a principle separate from the administrative justice clause.[485]

As part of the rule of law, the principle of legality conveys the notion that "the exercise of public power is only legitimate where it is lawful".[486] Furthermore, the ideas underlying legality gain legitimacy as products "of an interplay of purposive orientation between the citizens"[487] and the state.[488] Two elements support the implicit constitutional principle of legality:[489] public power must be exercised in good faith, and an organ of state must not misconstrue its power.[490] These constraints have been found to be implicitly present throughout the Constitution, and not limited to the administrative justice clause.[491] Legality, as a constitutional constraint on the exercise of public power, incorporates "objective rationality" as a "minimum threshold requirement applicable to the exercise of all public power",[492] so incorporating an element of reasonableness.[493]

Association of SA: In re Ex Parte President of the RSA 2000 (3) BCLR 241 (CC); Hoexter 2004 (4) *Macquarie LJ* 165 at 181.

[483] See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC) at par 58.

[484] In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC) at par 59, it was found that the principle of legality is "implicit in the constitution".

[485] See Hoexter 2004 (4) *Macquarie LJ* 165 at 181.

[486] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC) at par 56. Cf Hoexter 2004 (4) *Macquarie LJ* 165 at 181. This idea is shared by Dyzenhaus and Fox-Decent 2001 (51) *Univ Toronto LJ* 193 at 196.

[487] Fuller *The Morality of Law* 204.

[488] See Dyzenhaus *Hard Cases* 262.

[489] See Hoexter 2004 (4) *Macquarie LJ* 165 at 181.

[490] See *President of the RSA v SARFU* 2000 (1) SA 1 (CC) at par 148.

[491] See *President of the RSA v SARFU* 2000 (1) SA 1 (CC) at par 148.

[492] *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the RSA* 2000 (3) BCLR 241 (CC) at par 90. See also Hoexter 2004 (4) *Macquarie LJ* 165 at 182.

[493] See Hoexter *Administrative Law* 321 and 323.

The Constitutional Court has been quick to rely on the specific content or "rich possibilities of the Rule of Law as a foundational value of our constitutional order".[494] Consequently, the principle of legality "may be used to inform and supplement the written law and the written Constitution itself".[495] As such, the flexible constitutional principle of legality has the potential of acting "as a residual repository of fundamental norms about how public power ought to be used".[496]

Reliance on the broader constitutional principle of legality requires the judicial evaluation of conflicting interests in "a creative and innovative capacity to craft new remedies and to contribute to the evolution"[497] of rights based jurisprudence.[498] This constitutional function of legality provides "a way of overcoming the all-or-nothing results that are dictated by the use of threshold concepts".[499]

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[494] Hoexter 2004 (4) *Macquarie LJ* 165 at 182. Footnotes omitted.

[495] Hoexter 2004 (4) *Macquarie LJ* 165 at 183.

[496] Hoexter 2004 (4) *Macquarie LJ* 165 at 183. It is undeniable that lawfulness can be brought within the scope of legality. See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC) at par 59. The Constitutional Court has however refrained from interpreting the principle of legality to cover procedural fairness or proportionality. See *Masetlha v President of the RSA* 2008 (1) BCLR 1 (CC) at par 78. Cf the minority judgment of Sachs J in *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (1) BCLR 1 (CC) at par 637. Plasket (PhD Rhodes 2002) 164 however argues that the s 33 requirement of a right to reasons is the only element still separating the principle of legality from just administrative action. Hoexter 2004 (4) *Macquarie LJ* 165 at 183 – 184 points out that full reasonableness can be included within the principle of legality if the exercise of public power "can be said to be irrational or a misconstruction of one's power not to give due regard to proportionality". See also Hoexter 2006 *Acta Juridica* 303 at 321; Hoexter *Administrative Law* 323. With regard to procedural fairness, Hoexter 2004 (4) *Macquarie LJ* 165 at 184 declares, with reference to Raz 1977 (93) *LQR* 195 at 201, that the rule of law "lists the observance of natural justice as one of the most important principles implied in the doctrine".

[497] Devenish, Govender and Hulme *Administrative Law and Justice* 17.

[498] It is also an indirect manner by which the Constitutional Court recognises the trap of conceptualism in the threshold requirement of administrative action in the broad s 33 of the Constitution and the more stringent PAJA.

[499] Hoexter 2004 (4) *Macqaurie LJ* 165 at 184.

3 ADMINISTRATIVE LAW TODAY

3 1 The Purpose

Administrative law has an active component in its definition, namely law in motion,[500] which results in two dimensions: empower and constrain.[501] These dimensions translate into the primary and secondary purposes of administrative law: the first attempts to legally limit power in an attempt to protect citizens from the State, while the second aims to compel public authorities to perform their duties.[502] In short, the focus falls on both power and duty as "the negative as well as the positive side of maladministration".[503] This focus gives administrative law a relative autonomous identity[504] as a "body of general principles which govern the exercise of powers and duties by public authorities".[505]

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[500] Maitland *Constitutional History of England* 533 (while regarding administrative law as generically part of constitutional law) draws a distinction between structure and function (within the constitutional context). Holland *Jurisprudence* 374 works with a similar distinction of constitutional law "at rest" and "in motion". Both authors place the major part of administrative law within the latter of their two dividing principles, i.e. as the law relating to function. Maitland and Holland proclaim these limiting distinctions necessary for reasons of convenience.

[501] See Currie and Klaaren *Benchbook* 3. Wade and Forsyth *Administrative Law* 4 – 5 affirms Currie and Klaaren's dual perspective.

[502] See Jayakumar *Administrative Law* 1; Plasket *Administrative Action: The Constitution and the Promotion of Administrative Justice Act 3 of 2000* par 2, Paper delivered at the Legal Resource Centre seminar on the Promotion of Administrative Justice Act 3 of 2000, 23 October 2001; Wiechers *Administratiefreg* 1.

[503] Wade and Forsyth *Administrative Law* 5. Jowell 2006 *Acta Juridica* 13 comments that the positive duty aspect of administrative law's definition "shifted the perspective of administrative law in the direction of the consumer – those persons affected by official decisions". See also Devenish, Govender and Hulme *Administrative Law and Justice* 12.

[504] Grant *Administrative Law Through the Cases* 1 correctly qualifies this general statement by adding that constitutional law plays an important role in developing the principles of this unique administrative law. See *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the RSA* 2000 (3) BCLR 241 (CC) at par 45. Cf *Transnet Ltd v Goodman Bros (Pty) Ltd* 2001 (2) BCLR 176 (SCA) at par 34; *Fetsha v Member of the Executive Council responsible for Education (Eastern Cape)* [2006] 3 All SA 542 (Ck) at par 12.

[505] Jayakumar *Administrative Law* 1. Cf Beinart 1948 (11) *THRHR* 204 at 207.

Public interest promotes the aim of administrative justice and informs this two-pronged approach.[506] General public functions are regarded "as those functions aimed at the public interest".[507] It is the public interest element that gives the power exercised by public functionaries a public character.[508] The weight ascribed to the public interest in any given situation must be evaluated.[509] In *Chirwa v Transnet Ltd*,[510] Langa CJ stated that the facts of every case must be scrutinised for the presence or absence of strengthening factors within such an evaluation.[511] Strengthening factors are "intimately linked to the impact a decision has on the public".[512]

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[506] See Devenish, Govender and Hulme *Administrative Law and Justice* 84. Devenish, Govender and Hulme *Administrative Law and Justice* 82 note that "[p]olitically it is necessary to distinguish between the state interest and public interest. It is submitted that the latter has a wider impact than the former". See also Devenish, Govender and Hulme *Administrative Law and Justice* 10; Quinot (LLD US 2007) 207 – 208.

[507] Quinot (LLD US 2007) 207. See Baxter *Administrative Law* 90; Burns and Beukes *Administrative Law* 191; Devenish, Govender and Hulme *Administrative Law and Justice* 74 fn 64. In *POPCRU v Minister of Correctional Services* 2006 (4) BLLR 385 (E) at par 56, Plasket J explained that every action of an organ of state must be exercised in the public interest. See Quinot (LLD 2007 US) 203.

[508] See *POPCRU v Minister of Correctional Services* 2006 (4) BLLR 385 (E) at par 53. In *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 191, Langa CJ commented that the *POPCRU*-facts pointed to the "'pre-eminence of the public interest' in the proper administration of prisons". See also *Bullock NO v Provincial Govt, North West Province* [2004] 2 All SA 249 (SCA).

[509] This fact was illustrated by the minority judgment of Langa CJ in *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at paras 186 – 194.

[510] 2008 (2) BLLR 97 (CC).

[511] See *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 191.

[512] *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 193. The absence of strengthening factors cannot be guaranteed in public employment disputes. In *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 194, Langa CJ emphasised that his "reasoning does not entail that dismissals of public employees will never constitute 'administrative action' under PAJA". The requirements for an administrative action may for example be present where "the person in question is dismissed in terms of a specific legislative provision, or where the dismissal is likely to impact seriously and directly on the public by virtue of the manner in which it is carried out or by virtue of the class of public employee dismissed".

Public function[513] and public interest are not mere synonyms, as "[t]he most fundamental difference lies in the fact that under the criterion of public interest the focus is more on the (abstract) interest the public has in the action, whereas under public function the focus is rather on the object or subject matter of such action".[514] The distinction is however not absolute.[515] Public power is at play where the public interest is paramount.[516] A unified understanding of and approach to public power however eludes the judiciary.[517]

[513] De Smith, Woolf and Jowell *Judicial Review* 167 – 168 explain that a body or organ of state performs a public function when "it seeks [with the necessary authority] to achieve some collective benefit for the public or a section of the public … [when it] intervene[s] or participate[s] in social or economic affairs in the public interest … [and when it] regulate[s] commercial and professional activities to ensure compliance with proper standards". See Hoexter *Administrative Law* 3.

[514] Quinot (LLD US 2007) 207.

[515] See Baxter *Administrative Law* 100. Public function can translate into public interest, as the State is called upon to always act in the public interest. Quinot (LLD US 2007) 207 therefore concludes that "these two ideas may simply be two different ways of looking at the same criterion". See also Boulle, Harris and Hoexter *Constitutional and Administrative Law* 300; Quinot (LLD US 2007) 203.

[516] See *Dawnlaan Beleggings (Edms) Bpk v JSE* 1983 (3) SA 344 (W) at 364 – 365 per Goldstone J.

[517] In *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services* 2006 (10) BLLR 960 (LC) at par 59, Freund AJ found that when the "respondent exercised his power to transfer, he exercised a public power or performed a public function … conferred by statute on a public official which is required to be exercised in the public interest … [and is] manifestly a 'public power'". However, in *Hlope v Minister of Safety and Security* 2006 (3) BLLR 297 (LC) at par 12, Van Niekerk AJ (in agreement with Murphy AJ in *SAPU v National Commissioner of the Police Service* 2006 (1) BLLR 42 (LC)) held that it "does not necessarily follow that because the power to suspend or transfer is sourced in legislation, it axiomatically follows that the power or function concerned is a public one … [as] disciplinary or operational transfers and suspensions are employment or labour-related matters, not administrative acts". In dealing with a labour dispute regarding correctional officers, Plasket J in *POPCRU v Minister of Correctional Services* 2006 (4) BLLR 385 (E) at par 53 argued that it is not through the vastness of the public interest group that public power is brought into play, but rather the fact that in such "instances … public power … has been vested in a public functionary who is required to exercise it in the public interest, and not in his or her own private interest or at his or her own whim".

3 2 The Relationship

The essence of administrative law is one of relationship, albeit a limited one,[518] as it "includes the entire range of actions by government with respect to the citizen or by the citizen with respect to the government, except those matters dealt with by the criminal law and those left to private civil litigation".[519] In determining the scope and nature of this legal relationship,[520] it is important to identify the (sometimes combined) rules and principles regulating this complex relationship.[521]

A specific relationship to which the State finds itself party may involve both administrative action and labour practices due to the procedural and substantive

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[518] In giving effect to its purpose, administrative law is designed to regulate the relationship between society and the State. See Chongwe 1989 (15) *Commw L Bull* 623; Haysom and Plasket 1988 (4) *SAJHR* 303 at 307; McAuslan 1978 (9) *Cambrian LR* 40; *Makhasa v Minister of Law and Order, Lebowa Government* 1988 (3) SA 701 (A) at 723.

[519] Friendly 1974 (3) *Md Bar J* 6. See also Devenish, Govender and Hulme *Administrative Law and Justice* 7. Cf Beinart 1948 (11) *THRHR* 231.

[520] A legal relationship implies the participation of two legal subjects (whose relationship originates from agreement or some other legal consequence) and is regulated by law. See Devenish, Govender and Hulme *Administrative Law and Justice* 65. General administrative law recognises this relationship at de jure level, without linking it to a specific predetermined de facto type of relationship/context.

[521] The complexity flows from the fact that the State can find itself party to more than one type of relationship simultaneously. See De Smith, Woolf and Jowell *Judicial Review* 173; Devenish, Govender and Hulme *Administrative Law and Justice* 66; Wade and Forsyth *Administrative Law* 9, 20 and 13. Burns and Beukes *Administrative Law* 16 – 17 point out that administrative law was traditionally identified as public in nature and contrasted to private action associated with contractual agreements, while the employment relationship (due to contractual creation) was regarded as private in nature. The Constitution has watered down the public/private divide. Legal purists/traditionalists justify separate regulation on the hypothesis that a private law relationship is equal in nature, while a public law relationship is in essence unequal. This hypothesis has been disproved in practice. Few relationships exist that are truly equal, as is evident in the private law relationship between parent and child. Baxter *Administrative Law* 62 predicted this development as a result of the public regulation of private activities and privatisation of public services. Cf *John Wilkinson and Partners (Pty) Ltd v Berea Nursing Home (Pty) Ltd* 1966 (1) SA 791 (N); *Basson t/a Repcomm Community Repeater Services v Post Master-General* 1994 (3) SA 224 (SE); Devenish, Govender and Hulme *Administrative Law and Justice* 65; Wiechers *Administratiefreg* 47 and 48.

characteristics within the multi-faceted relationship.[522] Baxter mentions three prerequisites for determining the presence of administrative law characteristics in the relationship:

(1) the organ of state acts from a position of authority;[523]

(2) the organ of state exercises its power in advancement of public interest;[524] and

(3) the organ of state gives expression to an empowering act.[525]

Wiechers regards the requirement of "owerheidsgesag"[526] as the decisive factor. This factor cannot be regarded as decisive, as every relationship has its own specific context in which it stands to be considered.[527] Authority however remains an important indicator due to a power hierarchy being a typical feature of an administrative relationship,[528] as "the administrative organ takes the greater or stronger position, in relation to either a subject or another administrative organ, as a result of its state power".[529] It is the norm that an organ of state finds itself party to a power relationship, because it is clothed with

[522] Quinot (LLD US 2007) 123 fn 2 explains that "[t]o classify the state action as administrative action does not mean that it is not also contractual in nature, it is simply not purely contractual, ie purely private law regulated".

[523] See Baxter *Administrative Law* 351. An organ of state, as party to an administrative relationship, is not "simply free to employ its powers as it pleases". Wiechers *Administratiefreg* 48 describes it as follows: "The ... decisive characteristic of an administrative law relationship is that the organ of state that stands in the relationship is clothed with public power and has made use of this authority or has the capacity to make use of this authority." (Own translation) Cf Burns and Beukes *Administrative Law* 100; Devenish, Govender and Hulme *Administrative Law and Justice* 66.

[524] See Baxter *Administrative Law* 351. Cf Devenish, Govender and Hulme *Administrative Law and Justice* 66.

[525] See Baxter *Administrative Law* 351. Cf Devenish, Govender and Hulme *Administrative Law and Justice* 66.

[526] The term "owerheidsgesag" translates to state authority or public power. See Wiechers *Administratiefreg* 51 – 52.

[527] See Burns and Beukes *Administrative Law* 100.

[528] See Wiechers *Administratiefreg* 58.

[529] Wiechers *Administratiefreg* 3. (Own translation) See Burns and Beukes *Administrative Law* 100. Cf Hoexter *The New Constitutional and Administrative Law: Volume Two* 2.

public power[530] to be exercised in the public interest.[531] The subordinate position of the citizen does however not imply that "the individual is totally stripped of rights, privileges and freedoms when entering into an administrative-law relationship, or that the administrator may infringe upon these rights, unless specifically empowered to do so".[532]

It is the interaction between the authority exercising public power and the subordinate that administrative law seeks to regulate in an attempt to prevent an insidious impact on the lives of individuals.[533] Administrative law attempts to achieve this through a set of (court developed) common law principles.[534] These common law principles[535] have a

[530] It is important to note that an administrative action is a specific form of public power and not merely equitable thereto. In *President of the RSA v SARFU* 2000 (1) SA 1 (CC) at par 143, the Constitutional Court explained that a series of considerations determine under which public form the nature of the power should fall: "The source of the power, though not necessarily decisive, is a relevant factor. So too is the nature of the power, its subject matter, whether it involves the exercise of a public duty, and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is." Accordingly, when determining whether a specific exercise of public power qualifies as an administrative action, "the subject matter of a power is … relevant to determine whether the exercise of the power constitutes administrative action for the purposes of section 33". The court warned that this exercise would require the drawing of difficult boundaries, in determining which form of public power should fall within the constitutional purpose of s 33. Due to the inherent uncertainty accompanying such an evaluation, this must "be done on a case by case basis". Cases such as *President of the RSA v SARFU* 2000 (1) SA 1 (CC), while acknowledging the existence of different forms of public power, also emphasise that a definition of public power remains elusive. It has however been noted that public power is not equatable to the political power of government. See Beinart 1948 (11) *THRHR* 208; Wiechers *Administratiefreg* 3. Cf *Simelela v MEC for Education, Province of the Eastern Cape* 2001 (9) BLLR 1085 (LC) at par 39. A consideration as to the meaning of public power remains unavoidable, as Beinart 1948 (11) *THRHR* 208 at 215 points out that "[t]he nature of the issue will often depend on the nature of the power granted to the administrator".

[531] See Burns and Beukes *Administrative Law* 100; Hawke *Introduction to Administrative Law* 103; Wiechers *Administratiefreg* 47 and 67.

[532] Burns and Beukes *Administrative Law* 102.

[533] See Devenish, Govender and Hulme *Administrative Law and Justice* 7; Kennedy and Schlosberg *of the South African Constitution* 407.

[534] Chongwe 1989 (15) *Commw L Bull* 620 at 623 explains that "[a]dministrative law is … largely a judge-made response to the evolution of a state bureaucracy". See Devenish, Govender and Hulme *Administrative Law and Justice* 8.

quadruple aim, in seeking "to promote the effective use of administrative power, to protect individuals and organizations from its misuse, to preserve a balance of fairness between public authorities and those with whom they interact, and to ensure the maintenance of the public interest".[536] In fulfilling its aim to protect citizens against the abuse of public power, administrative law both empowers and constrains, thereby balancing the rights and interests of individuals against the public interest.[537] The ultimate objective of this equalisation is the promotion and protection of constitutional justice to preserve a balance of fairness.[538]

3 3 The Context in which the Relationship is Regulated

In giving effect to its regulatory aim, administrative law has a general and specific or particular approach.[539] Particular "administrative law deals with the rules and principles that have developed in specific and specialised areas of administration, such as social welfare",[540] while "[g]eneral administrative law ... expounds the rules and principles common to all or most kinds of administrative action".[541] General and specific

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[535] The Constitution usurps the common law principles reconcilable with the spirit, values and rights enshrined therein. See s 39 of the Constitution; *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the RSA* 2000 (3) BCLR 241 (CC).

[536] Baxter *Administrative Law* 3. See Devenish, Govender and Hulme *Administrative Law and Justice* 9.

[537] See Wade and Forsyth *Administrative Law* 5. According to Hoexter *Administrative Law* 42 this focus of administrative law is a necessary component as the presence of power implies "a measure of discretion or choice", which can potentially be abused if left unrestrained. Cf Harlow and Rawlings *Law and Administration.*

[538] See Hoexter in Corder and Van der Vijver *Realising Administrative Justice* 27. Cf Baxter *Administrative Law* 3.

[539] See Hoexter *Administrative Law* 7.

[540] Hoexter *Administrative Law* 7. Cf Baxter *Administrative Law* 2; Devenish, Govender and Hulme *Administrative Law and Justice* 8. Particular/specific administrative law contextualises rules and principles at de facto level.

[541] Hoexter *Administrative Law* 7. Cf Baxter *Administrative Law* 2; Devenish, Govender and Hulme *Administrative Law and Justice* 8. General administrative law contextualises rules and principles at de jure level.

administrative law are symbiotic in nature, as the former creates the framework that facilitates the latter.[542]

General administrative law "describes the powers … of the administration and the way in which those powers may be exercised and are controlled".[543] It acts as a safety net where there are gaps in the specific regulation. This is possible as the inherent ideas and principles of general administrative law are ever-present in the specific realm.[544] However, it is a well-accepted rule of interpretation that, in the case of conflict, the specific should trump the general. In the case of general and specific administrative law instruments, this is true in theory. In practice, such conflict is avoided by the fact that general administrative law provides the "underlying principles and jurisprudence"[545] and "permeates virtually every facet of the legal system".[546]

In giving effect to s 33, PAJA (as an example of general administrative law) prescribes a framework of general principles and rules applicable to all administrative action, as well as the remedies available when these are disregarded.[547] All administrative decision-making must occur within this framework, which "prescribes *how* the administrative powers … must be applied within a specific sphere of administrative law".[548] In turn, labour law has been identified as an example of such a specific sphere of administrative law connected to this general framework, if the circumstances so justify.[549]

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[542] See Chapter Five, part 1; Devenish, Govender and Hulme *Administrative Law* 9; Hoexter *Administrative Law* 7. Cf Cane *Administrative Law* 18.

[543] Hoexter *Administrative Law* 8 with reference to Baxter *Administrative Law* 5. Farina 2004 (19) *SAPL* 489 at 490 explains that general administrative law is "the regulation of regulation". Cf Hoexter *Administrative Law* 8. Cf Burns and Beukes *Administrative Law* 4.

[544] See Devenish, Govender and Hulme *Administrative Law and Justice* 9.

[545] Devenish, Govender and Hulme *Administrative Law and Justice* 8.

[546] Baxter *Administrative Law* 2. Cf Devenish, Govender and Hulme *Administrative Law and Justice* 8.

[547] See Burns and Beukes *Administrative Law* 4.

[548] Burns and Beukes *Administrative Law* 4. Emphasis added.

[549] Burns and Beukes *Administrative Law* 5 elucidates: "This branch of law regulates the organisational rights of employees and trade unions and also makes provision for the resolution of labour disputes through statutory conciliation, mediation and arbitration. The basic principles of administrative law and just administrative action apply to this field of law, albeit in a less formal manner. Specific administrative-

Within the context of the values and rights of the Constitution, it must be understood that specific developments (with regard to fairness) function within the broader general principles of administrative law in a manner that is reconcilable with both s 23 (fair labour practices) and s 33 (fair administrative action). Consequently, a general administrative law relationship can stand in (constitutional) relation to a specific employment relationship.

3 4 External Influences: From Political to Moral

In unison with labour law, administrative law is susceptible to change as its development speaks of external influences.[550] Administrative law is influenced by political ideas of the State.[551] The basic principles of administrative law evolve in accordance with the idea of democracy embraced by the system that dominates it.[552] Every shift in the South African concept of government and democracy (initially characterised by ideas of parliamentary sovereignty, segregation and apartheid, now influenced by the Constitution)[553] is reflected in the development of administrative law.[554] In reaction to external influences, administrative law has "not only become increasingly sophisticated but has more specifically seen an expansion of judicial control over the administrative process".[555] The paradigm shift from parliamentary sovereignty (along with the associated formalistic conceptualism)[556] to constitutional

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law principles, such as the principle of fairness, have acquired their own content and meaning in the sphere of labour law."

[550] See Chapter Two, part 3 4. De Smith, Woolf and Jowell *Judicial Review* 12 point out that this characteristic of administrative law is evident in the fact that administrative common law folded under parliamentary pressure and failed to protect individuals and groups from governmental assault. See Burns 2002 (17) *SAPL* 279.

[551] See Devenish, Govender and Hulme *Administrative Law and Justice* 8.

[552] See Corder 1998 (12) *SAJHR* 38 at 40.

[553] Mureinik 1994 (10) *SAJHR* 31 at 32 associates such vigorous state control of administrative law with a culture of authority created by the state's apartheid doctrine. See also Burns 2002 (17) *SAPL* 279 at 280.

[554] See Corder 1998 (12) *SAJHR* 38 at 40.

[555] Barrie 1991 (1) *TSAR* 169.

[556] Cf Hoexter 2004 (4) *Macqaurie LJ* 165 at 167. English administrative law, from which the formalistic conceptual perspective originated, adopted a flexible approach to administrative law in *Ridge v Baldwin* [1964] AC 40 (CA), while South African administrative law long still ignored this altered perspective.

democracy reflects "a right-based conception of public law, which is openly and unashamedly concerned with the imposition of certain standards of legality".[557] This rights-based approach is generally associated with Dworkin's concept of law as integrity,[558] which attempts to accommodate the problematic moral dimension of the law by holding that "propositions of law are true if they figure in or follow from principles of justice, fairness and procedural due process that provide the best constructive interpretation of the community's legal practice".[559] A certain legal notion is viewed as the best approach if it can be justified by the community's concept of justice, fairness and procedural due process as now informed by the Constitution and (more specifically) the Bill of Rights. In South Africa's democracy, the Constitution is a bridge from a culture of authority to a culture of justification with this rights oriented approach.[560] In a culture of justification, it is of immense importance "that the Constitution is founded on

[557] Craig as quoted in Corder 1998 (14) *SAJHR* 38 at 41. The core rights of this type of democracy (that inform the effective functioning of the State) are openness of action, involvement in decision-making, validation for decisions made and accountable administrative action. Plasket *Administrative Action: The Constitution and the Promotion of Administrative Justice Act 3 of 2000* par 12 holds that the main aim of a rights-based approach of public law is to circumvent the abuse of power. See s 1(d) of the Constitution; Corder 1998 (14) *SAJHR* 38 at 42 – 43; Davis 2006 *Acta Juridica* 23; De Ville *Judicial Review of Administrative Action* 10; Devenish, Govender and Hulme *Administrative Law and Justice* 6.

[558] In Dworkin's own words, "law as integrity accepts law and legal rights wholeheartedly … [as] [i]t supposes that law's constraints benefit society not just by providing predictability or procedural fairness, or in some other instrumental way, but by securing a kind of equality among citizens that makes their community more genuine and improves its moral justification for exercising the political power it does". See Dworkin *Law's Empire* 95 – 96; Devenish, Govender and Hulme *Administrative Law and Justice* 6.

[559] Dworkin *Law's Empire* 225. Dworkin's theory distinguishes principles from legal rules, as he holds the former to have a moral content, as moral considerations determine the existence of a legal principle. See *The Nature of Law* http://plato.stanford.edu/entries/laphil-nature/ (11/07/2006). Cf Devenish, Govender and Hulme *Administrative Law and Justice* 6.

[560] This metaphor is best associated with Mureinik 1994 (10) *SAJHR* 31 at 32, as the author refers to this "culture of justification" as "a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command". Cf Burns 2002 (17) *SAPL* 279 at 283; *Shabalala v Attorney-General, Transvaal* 1996 (1) SA 725 (CC) at 740. According to Stacey 2007 (22) *SAPL* 79 at 87 the "basic principle of Mureinik's 'culture of justification' is that all decisions claiming the backing of democratic authority are legitimate only if they have been shown to be justifiable". See Davis 2006 *Acta Juridica* 23 at 30; Hoexter 2006 *Acta Juridica* 303 at 304.

the rule of law and directly enforceable values of constitutional supremacy".[561] In the event of inconsistency, constitutional supremacy entails that the constitutional provisions trump government action of any legal or political nature.[562] Within this framework, the rule of law is of utmost importance as it acts as a check[563] on the exercise of all power.[564] Over the years, the rule of law evolved into elements of efficacy of the law,[565] stability,[566] supremacy of legal authority[567] and impartial justice.[568] The evolved rule of law is incorporated into the s 1(d) value of the Constitution.[569]

3 5 The Current Conceptual Trilogy Underlying Administrative Law

3 5 1 Procedural Fairness

3 5 1 1 Variable Nature

Throughout the development of the concept of fairness, society's focus shifted away from historic exclusion, differentiation, indignity and stereotypes.[570] The duty of fairness, within the context of constitutional values, cannot simply be equated to the rules of

[561] Plasket Administrative Action: The Constitution and the Promotion of Administrative Justice Act 3 of 2000 at par 5.

[562] See Currie and De Waal *The New Constitutional and Administrative Law: Volume One* 21.

[563] The term is here used in the context of checks and balances.

[564] See De Smith, Woolf and Jowell *Judicial Review* 14; Hoexter 2006 *Acta Juridica* 303 at 320 – 321.

[565] Devenish, Govender and Hulme *Administrative Law and Justice* 14 note that an effective administrative law system exhibits "fair dealing and good administration".

[566] Vague laws have been held to be inconsistent with the constitutional understanding of the rule of law. See *SA Liquor Traders Association v Chairperson Gauteng Liquor Board* 2006 (8) BCLR 901 (CC).

[567] Constitutionally understood, the rule of law requires every decision to be taken in accordance with the law, of which the Constitution is supreme. See Devenish, Govender and Hulme *Administrative Law and Justice* 14.

[568] See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC) at par 56 fn 52; *Magidimisi NO v The Premier of the Eastern Cape* Case Number 2180/04 (unreported) at par 18 per Froneman J.

[569] See Fallon 1997 (97) *Colum LR* 1 at 8 – 9. The s 33 constitutional right to just administrative action breaths fresh air into the development of administrative law. See Hoexter 2004 (4) *Macqaurie LJ* 165 at 172.

[570] See *Minister of Finance v Van Heerden* 2004 (12) BLLR 1181 (CC) at paras 26 and 27.

natural justice.[571] No precise description can be ascribed to fairness, due to its flexible nature.[572] This variable character allows specific situations to dictate the content of the norm.[573] It calls for what is "essentially an intuitive judgment".[574] Ultimately, the question comes down to what procedural fairness requires in the circumstances of every specific case.[575] Constitutionally informed, its adaptable nature has earned fairness "a comprehensive, principled, operational and elegant new legal figure".[576]

A context-sensitive approach will call upon courts to balance relevant considerations[577] in the interest of fairness and ultimately justice.[578] Furthermore, the "flexibility of the duty to act fairly and the requirement of procedural fairness as protected in the Constitution … have made it possible to impose this obligation in a wider range of cases"[579] than traditionally brought within the ambit of administrative review.

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[571] This does not imply that natural justice does not form part of constitutional fairness. See Corder 1998 (14) *SAJHR* 38 at 48; Currie and Klaaren *Benchbook* 88 fn 1. Cf De Ville *Judicial Review* 24.

[572] Fairness is but one flexible principles of the administrative justice trilogy; reasonableness also has a variable character. See Hoexter *Administrative Law* 328.

[573] See *Doody v Secretary of State for the Home Department and Other Appeals* [1993] 3 All ER 92, referred to with approval by the Supreme Court of Appeal in *Chairman: Board On Tariffs And Trade v Brenco Incorporated* 2001 (4) SA 511 (SCA) at par 13. See *NCGLE v Minister of Justice* 1998 (12) BCLR 1517 (CC) at par 126; *Minister of Finance v Van Heerden* 2004 (12) BLLR 1181 (CC) at par 27. De Ville *Judicial Review* 221 and 249 holds that the application and content of the principle of procedural fairness are interlinked in its evaluation.

[574] *Doody v Secretary of State for the Home Department* [1993] 3 All ER 92 at 106. See Currie and Klaaren *Benchbook* 89.

[575] See De Ville *Judicial Review* 247.

[576] *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (1) BCLR 1 (CC) at par 640 per Sachs J. See also *Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State Aided Schools: Eastern Transvaal* 1999 (2) BCLR 151 at par 39.

[577] See De Ville *Judicial Review* 247.

[578] See De Ville *Judicial Review* 249.

[579] De Ville *Judicial Review* 224.

3 5 1 2 The Substantive Dimension of Fairness

The developed general duty to act fairly and consequential constitutional fairness standard embrace more substance than mere procedural rules.[580] The recognition of a general standard of fairness appears to blur the traditional distinction between substantive and procedural fairness.[581] This perspective is linked to the argument that procedural fairness (along with reasonableness) calls for a degree of contextual variability when considering what is required of administrative authorities.[582]

The idea of substance incorporates a degree of ambiguity.[583] Courts are functionally hesitant to intervene in issues that can be labelled substantive in nature.[584] In the context of administrative law, courts rather view procedure as their sphere of

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[580] Natural justice is not the sum total of its primary traditional rules. See Wiechers as referred to in Burns and Beukes *Administrative Law* 51.

[581] Burns and Beukes *Administrative Law* 214 elaborate as to the underlying purpose of the distinction: "The importance of the distinction between procedural and substantive fairness is that where administrative action is challenged on the basis of procedural unfairness or irregularity, a reviewing court examines procedural issues only … Where substantive unfairness is alleged, the reviewing court must determine whether the decision was substantively fair or reasonable, in the light of issues such as general interest, government policy, the effect on the individual …"

[582] See Corder 1998 (14) *SAJHR* 38 at 48; Grey 1982 (27) *McGill LJ* 360 at 368 – 369; Malan 2007 (22) *SALJ* 61 at 73; s 3(2) of PAJA. Cf *Ridge v Baldwin* [1964] AC 60; Cf *Wiseman v Borneman* [1969] 3 All ER 275 at 277.

[583] See Dyzenhaus and Fox-Decent 2001 (51) *Univ of Toronto LJ* 193 at 195. It also has to be said that the term 'substantive' may have different meanings: outcome of a decision; who defines procedural fairness; form and content of procedural fairness; justification requirement of procedural fairness; political justification for procedural fairness. Dyzenhaus and Fox-Decent 2001 (51) *Univ of Toronto LJ* 193 at 195 – 196 explains that several of these meanings "pertain to process, [therefore] it might seem that the distinction between process and substance is illusory; what we have is substance all the way down". The authors however hold "that the distinction is not likely to disappear, since ... it does at least have the function of demarcating domains". Still, the use of the distinction must be "sensitive to the demands of the principle of legality" as it is the "basis of the appropriate [constitutional] conception of judicial review".

[584] See Dyzenhaus and Fox-Decent 2001 (51) *Univ of Toronto LJ* 193 at 195.

influence.[585] The judiciary must however guard against the identification of a formalistic set list of procedural rules required in every set of circumstances.[586]

The flexible nature of fairness may be seen as the catalyst for the argument that administrative law should consider fairness in general (and not just procedural fairness) in the promotion of administrative justice.[587] An unrestrained understanding of the logical link between administrative action and traditional procedural fairness justifies the recognition of the substantive dimension of fairness.[588] A distinction is not denied, but the weight the distinction carries in developed administrative law is questioned.[589]

Read in line with the perspective of Chaskalson CJ in *Bel Porto School Governing Body v Premier of the Province, Western Cape*,[590] s 33(1) of the Constitution clearly maintains a substantive/procedural distinction.[591] If this were not so, s 33(1) would have referred to fair administrative action without a procedural qualification.[592] Chaskalson CJ pointed out that a judicial disregard of the distinction would amount to a disregard of the doctrine of separation of powers.[593]

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[585] See Dyzenhaus and Fox-Decent 2001 (51) *Univ of Toronto LJ* 193 at 195 – 196.

[586] This would restrict the value of fairness and allow courts to assume that fairness is only procedural in nature. The pre-constitutional formalistic conceptual approach in the sphere of administrative law created such an approach. The courts considered procedural fairness as contextually removed from substantive fairness, creating the idea that substantive questions could not arise legitimately in an administrative law relationship. See Grey 1982 (27) *McGill LJ* 360 at 364.

[587] See Burns and Beukes *Administrative Law* 343.

[588] See Burns and Beukes *Administrative Law* 343; Grey 1982 (27) *McGill LJ* 360 at 369.

[589] According to Grey 1982 (27) *McGill LJ* 360 at 369 – 379 the argument is supported by the fact that the administrative law distinction between rights and interests have retained analytical appeal, while losing its practical significance after *Ridge v Baldwin* [1964] AC 60.

[590] 2002 (9) BCLR 891 (CC).

[591] See Burns and Beukes *Administrative Law* 343.

[592] See *Bel Porto School Governing Body v Premier of the Province, Western Cape* 2002 (9) BCLR 891 (CC) at par 84. The court based its reasoning on that of Corbett CJ in *Du Preez v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) at 231, namely that it is the manner and not the merit of a decision that must be considered within the administrative law duty to act fairly.

[593] See *Bel Porto School Governing Body v Premier of the Province, Western Cape* 2002 (9) BCLR 891 (CC) at par 88. Burns and Beukes *Administrative Law* 344, however still suggest that the constitutional requirement of reasonableness, now explicitly referred to in s 33(1), "if given a broad interpretation, could

Although s 33(1) clearly emphasises the procedural element of fairness, the Constitution is not confined to s 33 in determining the scope of a fairness evaluation. The minority (Sachs and Mokgoro JJ) in *Bel Porto School Governing Body v Premier, Western Cape*[594] argued that the constitutional perspective of fairness is broader than traditional common law rules associated with natural justice.[595] Constitutional fairness incorporates two dimensions:[596] substantive fairness[597] and procedural fairness.[598] The distinction is however not clear-cut.[599] The minority acknowledged the traditional separation of substantive and procedural fairness, but viewed such compartmentalisation as a complex process.[600] It was argued that this separation might be difficult to maintain, as the two dimensions "may to some extent become intertwined".[601] With due regard to the constitutional milieu, the minority noted that "[i]t is necessary to determine the circumstances in which a court, looking at a scheme that as *a whole passes the test of constitutional fairness*, can and should detach a detail which,

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still constitute authority for the premise that all administrative action must be procedurally and substantively fair and just". Cf *Re Scott and Rent Review Commission* (1977) 81 DLR (3rd) 530 (NSCA) at 533 – 535 per MacKeigan CJNS; Grey 1982 (27) *McGill LJ* 360 at 368.

[594] 2002 (9) BCLR 891 (CC).

[595] See *Bel Porto School Governing Body v Premier, Western Cape* 2002 (9) BCLR 891 (CC) at par 153. It must be noted, as stated by Corder in Cheadle, Davis and Haysom *South African Constitutional Law* 27–15, that "[t]he difference in approach taken in the *Bel Porto* case may well turn less on the principle and rather more on the facts of the case as presented to the court".

[596] Sachs and Mokgoro JJ drew this distinction in *Bel Porto School Governing Body v Premier, Western Cape* 2002 (9) BCLR 891 (CC) at par 153.

[597] Substantive fairness focuses on the effect or impact of an action or decision.

[598] Procedural fairness is concerned with the manner in which a decision is taken.

[599] See *Bel Porto School Governing Body v Premier, Western Cape* 2002 (9) BCLR 891 (CC) at par 153.

[600] See *Bel Porto School Governing Body v Premier, Western Cape* 2002 (9) BCLR 891 (CC) at par 153.

[601] *Bel Porto School Governing Body v Premier, Western Cape* 2002 (9) BCLR 891 (CC) at par 153. The interdependent relationship between substantive and procedural fairness may be another consequence of the interdependence of fundamental rights and values. Some rights, such as labour and socio-economic rights, clearly have a substantive element, while due process rights such as just administrative action are procedural in nature. It is more than probable that one set of circumstances can infringe constitutional fairness on both a substantive and procedural level.

viewed on its own would be constitutionally unfair".[602] This approach prevents a fairness enquiry from becoming a sham in which formal procedure is painstakingly observed, while substantive questions are cunningly evaded.[603] Dyzenhaus therefore argues that "the value of fairness is not purely formal",[604] as was the perception under a culture of authority.[605] Within a culture of justification, the value of fairness is of a substantive nature.[606]

3 5 2 Reasonableness

3 5 2 1 Substantive Proportionality

Judicial caution in the evaluation of proportionality is based on the possible overreach it could bring to a reasonableness enquiry. The idea that proportionality brings a substantive element to reasonableness resides in the fact that rationality review does not link reasonableness to the merits of the action.[607] Opposition to the recognition of a substantive element of reasonableness is primarily based on two arguments.[608] The one being the fear that the judiciary may regard themselves as super-administrators entitled to impose "their own ideas on the administration",[609] the other that the boundaries between appeal and review may become uncertain.[610]

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[602] *Bel Porto School Governing Body v Premier, Western Cape* 2002 (9) BCLR 891 (CC) at par 153. Emphasis added.

[603] See Grey 1982 (27) *McGill LJ* 360 at 365.

[604] Dyzenhaus *Hard Cases* 262.

[605] See Dyzenhaus *Hard Cases* 262.

[606] See Dyzenhaus *Hard Cases* 262.

[607] In *Minister of Health v New Clicks SA (Pty) Ltd* 2006 (1) BCLR 1 (CC) at par 661, Sachs J explained that proportionality "will always be a matter of context, impact and degree and ultimately a question of balance". As such, it incorporates within its range the substantive perspective of judicial review. See Corder 1998 (14) *SAJHR* 38 at 48 – 49; *Radio Pretoria (geregistreer ooreenkomstig artikel 21 van die Maatskappywet van SA van 1973 soos gewysig) v Voorsitter van die Onafhanklike Kommunikasie-owerheid van SA* [2006] 1 All SA 143 (T). Cf *De Lange v Smuts NO* 1998 (7) BCLR 779 at par 130 per Mokgoro J.

[608] See Burns *LAWSA* Vol 1 at par 142.

[609] Burns *LAWSA* Vol 1 at par 142.

[610] Hoexter *Administrative Law* 106 notes that in some cases it may be impossible "to separate the merits from the rest of the matter, since a court cannot effectively judge the legality of the decision without

In *Bel Porto School Governing Body v Premier, Western Cape*,[611] the minority of the court (in the context of interim Constitution's s 24 justifiability) declared an element of substantive review to be present, as it "requires more than a mere rational connection between the reasons and the decision".[612] Mokgoro and Sachs JJ reasoned that rationality alone is insufficient, as public power generally must be exercised in a rational manner, as it is required by the principle of legality generally and lawfulness specifically.[613] In the majority judgment, Chaskalson CJ held that justifiability merely requires a rational decision.[614] This view must be checked with the evaluation of reasonableness (as a concept encompassing more than mere justifiability) within the scope of s 33 by the same judge. In *Minister of Health v New Clicks SA (Pty) Ltd*,[615] Chaskalson CJ stated that the express s 33 inclusion of reasonableness allows "for a more intensive scrutiny of administrative decisions".[616]

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considering its merits as well". See *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA* 2006 (11) BLLR 1021 (SCA) at par 31 per Cameron JA.

[611] 2002 (9) BCLR 891 (CC).

[612] *Bel Porto School Governing Body v Premier, Western Cape* 2002 (9) BCLR 891 (CC) at par 164. See Burns and Beukes *Administrative Law* 384.

[613] See *Bel Porto School Governing Body v Premier, Western Cape* 2002 (9) BCLR 891 (CC) at par 164. In the context of labour law, the substantive element of review (due to the requirement of both substantive and procedural fairness) was never denied as in the administrative law context. Froneman J's understanding of justifiability in *Carephone (Pty) Ltd v Marcus* 1998 (11) BLLR 1093 (LAC) (as required in the interim Constitution provision for just administrative action) as something calling for a value judgment is proof that the Constitution and the relation between different rights crossing the private/public divide has brought about development in the area of judicial review.

[614] See *Bel Porto School Governing Body v Premier, Western Cape* 2002 (9) BCLR 891 (CC) at par 89. See Currie and De Waal *Bill of Rights Handbook* 675; Pillay 2005 (122) *SALJ* 419 at 427. Cf *Bel Porto School Governing Body v Premier, Western Cape* 2002 (9) BCLR 891 (CC) at par 128.

[615] 2006 (1) BCLR 1 (CC).

[616] This argument is based on the fact that s 33 of the Constitution no longer necessitates jurists to validate justifiability as importing reasonableness. See *Minister of Health v New Clicks SA (Pty) Ltd* 2006 (1) BCLR 1 (CC) at par 108. Cf Hoexter *Administrative Law* 306; *Bel Porto School Governing Body v Premier, Western Cape* 2002 (9) BCLR 891 (CC) at par 46; *Khosa v Minister of Social Development* 2004 (6) BCLR 569 (CC) at par 67. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at paras 45 and 49, O'Regan J acknowledged that reasonableness review incorporates a substantive element. In casu, O'Regan J considered the reasonable equilibrium approach. This approach

The recognition of reasonableness, if properly construed, does not carry administrative law judicial scrutiny over to the area of appeal.[617] In *Sidumo v Rustenburg Platinum Mines*,[618] Navsa AJ stated that substantive rationality as applied by the Labour Appeal Court has been likened "to administrative law concepts such as reasonableness".[619] In respecting the distinction between appeal and review, the subjective element of reasonableness calls for recognition of the fact that review has two sides: substantive and procedural.[620] Although substantive review "is review on the ground of the substantive content of the decision",[621] it does not allow a court to abuse the limits of such review to substitute a reasonable decision of a public body with its own substantive decision.[622] This development is acceptable as the justification for substantive review is not merely based on the pragmatic application of the principle of fairness[623] (as relating to reasonableness), but rooted in constitutional values and

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requires an acceptable decision to strike an equilibrium "between a range of competing interests or considerations". Proportionality requires the means to meet the ends. It entails that the administrative action must be the least intrusive means to realise the ends sought to be achieved by the action. Cf Asimow 1996 (44) *American J Comp L* 393 at 408 – 409; Jowell 2006 *Acta Juridica* 13 at 17 – 18; Mureinik 1994 (10) *SAJHR* 31. The development of different tests illustrate that the courts' attitude towards reasonableness review has moved from strict to flexible. It cannot be denied that, although courts generally withhold interference in decisions under review, some room for intervention has emerged. See *Carephone (Pty) Ltd v Marcus* 1998 (11) BLLR 1093 (LAC) at par 36; Hoexter *Administrative Law* 107 and 318.

[617] Reasonableness and fairness stand in close conceptual proximity. See Grey 1982 (27) *McGill LJ* 360 at 367 – 368; *Minister of Immigration and Ethnic Affairs v Pochi* (1980) 44 FLR 41 at 67; *CUPE Local 963 v New Brunswick Liquor Employees* (1979) 26 NR 341 at 351 per Diplock J.

[618] 2007 (12) BLLR 1097 (CC).

[619] 2007 (12) BLLR 1097 (CC) at par 39.

[620] Forsyth *Judicial Review and the Constitution* 332 describes judicial review as a spectrum with both a procedural and substantive end.

[621] Forsyth *Judicial Review and the Constitution* 332.

[622] See Forsyth *Judicial Review and the Constitution* 332.

[623] Corder in Cheadle, Davis and Haysom *South African Constitutional Law* 27–18 takes the position that the requirement of reasonable administrative action illustrates a constitutional demand for "a degree of review of the substance of the decision, as the requirement of lawfulness and procedural fairness must surely cover all the formal and procedural aspects of the matter".

principles.[624] Thomas emphasises that a Bill of Rights is "first and foremost an effects-oriented document".[625] Recognition of substantive judicial review is not irreconcilable with transformative constitutionalism.[626] The starting point of an analysis should be "the *consequence* of the practices, not simply the motivation".[627] A denial of reasonableness as more than mere rationality and something different from lawfulness and procedural fairness, will rekindle the pre-constitutional formalistic administrative law review perspective, "leaving the individual helpless and unprotected in the face of sweeping administrative powers".[628]

3 5 2 2 Variable Nature

The variable nature of reasonableness has contributed to it being described as an elusive concept.[629] The mere fact that various tests for reasonableness have developed is evidence of its variable nature, a characteristic it shares with the concept of fairness.[630]

In *Olitzky Property Holdings v State Tender Board*,[631] Cameron JA admitted general considerations of reasonableness to be a value-judgment "based on considerations of morality and policy, and taking into account its assessment of the legal convictions of the community and now also taking account of the norms, values and principles

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[624] See Forsyth *Judicial Review and the Constitution* 335; *Minister of Health v New Clicks SA (Pty) Ltd* 2006 (1) BCLR 1 (CC) at par 616 per Sachs J. Cf Thomas *Canada and the United States: Differences that Count* 309.

[625] Thomas *Canada and the United States: Differences that Count* 309.

[626] See Chapter One for a reference to the theoretical meaning of this phrase, as developed by Klare 1998 (14) *SAJHR* 146.

[627] Thomas *Canada and the United States: Differences that Count* 309. Emphasis added. Footnotes omitted.

[628] Burns *LAWSA* Vol 1 at par 142.

[629] Although a positive transformative tool, not all academics and jurists are equally excited by the variable nature of reasonableness residing in the proportionality test as discussed. Corder and Van der Vijver *Realising Administrative Justice* 47; See Grey 1982 (27) *McGill LJ* 360 at 366.

[630] See Corder and Van der Vijver *Realising Administrative Justice* 47. The connection between fairness and reasonableness is not limited to their variable nature. Both demand something more than lawfulness, as a decision that appears lawful may not necessarily be fair or reasonable.

[631] 2001 (8) BCLR 779 (SCA).

contained in the Constitution".[632] The context in which reasonableness is evaluated determines the method of consideration.[633] As guidance to the contextual application of the principle, O'Regan J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*[634] identified certain factors, namely, "[t]he nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected".[635] This flexible test for reasonableness calls for a balance between rationality and proportionality.[636] One can describe the consideration of these factors (and their relation to the tests) as functioning on a judicially adjustable curve.[637] This allows for reasonableness to be applied in a flexible manner (which allows for expression of the public interest)[638] as dictated by the circumstances or context of the case.[639] This perspective undeniably renders reasonableness review contextual in application.[640] The variability of reasonableness review is found in its reliance on degrees of rationality and proportionality as prescribed

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[632] *Olitzky Property Holdings v State Tender Board* 2001 (8) BCLR 779 (SCA) at par 11. This perspective of reasonableness has its roots in the landmark case of *S v Makwanyane* 1995 (6) BCLR 655 (CC), where the Constitutional Court made it clear that there is no fixed yardstick for the determination of reasonableness in every situation.

[633] See *Minister of Health v New Clicks SA (Pty) Ltd* 2006 (1) BCLR 1 (CC) par 145. Cf Hoexter *Administrative Law* 201.

[634] 2004 (7) BCLR 687 (CC).

[635] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (7) BCLR 687 (CC) at par 45. See also Burns and Beukes *Administrative Law* 212.

[636] This reasonableness equilibrium is referred to by Jowell 2006 *Acta Juridica* 13 at 18 in his evaluation of O'Regan J's judgment in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (7) BCLR 687 (CC). It takes into consideration the crucial requirements and positive contributions of both these tests.

[637] Craig *Administrative Law* 552 understands the reasonableness perspective to call for "irrationality *and* proportionality … [to] be applied with differing degrees of rigour or intensity". See Hoexter *Administrative Law* 315 fn 137.

[638] See De Ville *Judicial Review* 130.

[639] See Hoexter *Administrative Action* 315. The factors do however assist in offering "some frame of reference for reasonableness, which is otherwise a rather colourless concept" as they "confirm the inherent variability of reasonableness and offer a new basis for its operation".

[640] See De Ville *Judicial Review* 130.

by the circumstance, be it purely administrative or a combination of labour and administrative considerations.[641] The intensity and degree of the principles of rationality and proportionality as applied, differs depending on the circumstances of the case.[642] Such a case-by-case analysis undeniably calls for value judgments at some level, and as incorporated into (substantive) judicial review, allows some deliberation of the merits.[643]

3 5 3 Lawfulness

The principle of lawfulness has the potential to "be interpreted widely to include compliance with the Constitution, with enabling legislation and with the rules of the common law".[644] Viewed broadly, lawfulness can be seen as "an umbrella concept",[645] incorporating the concepts of procedural fairness and reasonableness within its general ambit.[646] So viewed, s 33 lawfulness is equated to the broader constitutional value of legality. This understanding of lawfulness is not supported by the Constitution.[647] PAJA also reveals the trilogy as separate but supporting principles.[648] Lawfulness must rather

[641] See Craig *Administrative Law* 552. Cf Hoexter *Administrative Law* 315 fn 137.

[642] See Hoexter *Administrative Law* 315 fn 137.

[643] *Carephone (Pty) Ltd v Marcus* 1998 (11) BLLR 1093 (LAC) par 36.

[644] Burns and Beukes *Administrative Law* 51.

[645] Burns and Beukes *Administrative Law* 51.

[646] Burns and Beukes *Administrative Law* 204 note that it is a reoccurring argument that lawfulness functions as an umbrella concept that includes the requirements of reasonableness and procedural fairness within its ambit. Burns and Beukes *Administrative Law* 51 explain that such reasoning would render the inclusion of procedural fairness and reasonableness in s 33 unnecessary.

[647] The position lawfulness holds within the scope of s 33 is of great importance. It is worded as a principle collaborating with the principles of procedural fairness and reasonableness to ensure the promotion of just administrative action. These concepts were regarded important enough to necessitate separate protection in the context of s 33. See Burns and Beukes *Administrative Law* 51. Cf *TWK Agriculture Ltd v Competition Commission* [2007] JOL 20764 (CAC) at par 21.

[648] This reasoning is supported by s 6 of PAJA that articulates separate grounds of review by means of subsections. Specific parts of s 6 grant courts the power to review administrative action where an administrator acts unlawfully: ss (6)(2)(a)(i), (6)(2)(a)(ii), (6)(2)(f)(i) and (6)(2)(i). These sections grant legislative recognition to lawfulness as a form of narrow ultra vires. Cf Burns and Beukes *Administrative Law* 205; *TWK Agriculture Ltd v Competition Commission* [2007] JOL 20764 (CAC) at par 21. Unlike the concept of procedural fairness, PAJA does not contain a section specifically titled 'lawfulness'. However, s 6 of PAJA includes the common law principles of administrative legality and therefore lawfulness as

be viewed as the persona legality takes on when it finds contextual application, as the source of the exercise of lawful administrative action is rooted in the principle of legality.[649] The fact that lawfulness must be viewed as context specific also gives it a variable character, albeit to a lesser extent than that associated with fairness and reasonableness.[650] One is rather dealing with lawfulness as administrative legality in contrast to constitutional legality.[651] As administrative legality, lawfulness forms an important part of the rights-based philosophy of administrate law.[652]

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grounds for judicial review. See Burns and Beukes *Administrative Law* 51 and 89; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (7) BCLR 687 (CC) at par 30.

[649] See Burns and Beukes *Administrative Law* 50. This argument reminds of the comments made by Wiechers with regard to the relationship between legality and the doctrine of ultra vires. Wiechers *Administrative Law* 178 declares the doctrine of ultra vires to fall within the broader ambit of the principle of legality. Cf De Ville *Judicial Review* 8 fn 67.

[650] Hoexter *Administrative Law* 201 explains that the variability of lawfulness resides in the fact that "courts apply different degrees of rigour in different circumstances to the question whether a statutory formality has been complied with".

[651] See Burns and Beukes *Administrative Law* 51. The courts have used the terms lawfulness and legality interchangeably. Cf *Vorster v Department of Economical Development, Environment & Tourism: Limpopo Provincial Government* [2006] JOL 17461 (T) at par 17 per Fabricius AJ. The trick is in determining the contextually prescribed considerations, which will point to either administrative legality or constitutional legality. The fact that context can assist in the distinction is clearly identifiable in the judgment of Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 at 951.

[652] In administrative law, lawfulness forms an important component of the rule of law. See Burns and Beukes *Administrative Law* 69.

4 REMEDIES[653]

Remedies available under common law review of administrative action were mainly limited to interdicts and declaratory orders. These remedies were generally all subject to the discretion of the court.[654]

In the constitutional milieu, South Africa embraces "a broad approach to justiciability [as] … [o]ur courts consider every exercise of public power that infringes or threatens fundamental rights to be justiciable".[655] This constitutional spirit places an indispensable duty on the courts to afford appropriate relief, meeting the requirements of both justice and equity.[656] This remedial approach is found in s 8 of PAJA. Plasket credits it with the positive result of freeing the court from conservative constraints.[657] Courts are now empowered to grant remedies that are just and equitable in the context of PAJA. The fact that courts are authorised to grant remedies that are just and equitable are of great importance. It is a principle of law that every remedy must carry the potential of effectiveness.[658] PAJA therefore prevents review from being potentially toothless.[659]

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[653] In terms of the principle of avoidance (as confirmed with specific reference to PAJA by Chaskalson CJ in *Minister of Health v New Clicks SA (Pty)* 2006 (1) BCLR 1 (CC) at par 437 and reiterated by Van der Walt 2008 (1) *CCR* 77 at 99) reliance should not be placed directly on a constitutional right if there is legislation in place giving effect to that right. The same argument holds true for constutitutional remedies in general and specialised remedies contained in legislation enacted to promote and protect a specific constitutionally entrenched right. For this reason, the discussion in part 4 of Chapter Three will only focus on remedies within the ambit of PAJA. A similar argument can be made in the case of labour legislation based remedies (see Chapter Two, part 4 2) in light of the Constitutional Court's reasoning in *SANDU v Minister of Defence* 2007 (8) BCLR 863 (CC) at par 52.

[654] See Baxter *Administrative Law* 678; Burns and Beukes *Administrative Law* 505.

[655] Plasket *Administrative Action: The Constitution and the Promotion of Administrative Justice Act 3 of 2000* at par 29.1.

[656] See Plasket *Administrative Action: The Constitution and the Promotion of Administrative Justice Act 3 of 2000* at par 29.3.

[657] See *Plasket Administrative Action: The Constitution and the Promotion of Administrative Justice Act 3 of 2000* at par 29.3.

[658] See Grey 1982 (27) *McGill LJ* 360 at 365.

[659] De Ville *Judicial Review* 135 explains the scope of this remedial power: "Section 8 of Paja ... gives the court a wide discretion in granting relief. Whereas in some instances it would be appropriate to declare invalid (or set aside) a decision where effect was not given to a legitimate expectation, in others it would

The objective of just administrative action (understood as a component of the constitutional task to promote and protect fundamental rights interdependently) justifies such discretionary contextual remedies.[660] The combination of the infringed fundamental rights and the case-specific circumstances in which such infringement occurs guide the judiciary in determining the appropriate remedy.[661]

5 CONCLUSION

Chapter Three (although isolated within the theme of the study) serves to illustrate that administrative law relies on a system of rules and variable principles to effectively control the exercise of public power and balance the interplay between empowerment and accountability within administrative law relationships.[662] Within this purpose, three facets can be identified. Firstly, administrative law recognises the disparity in the relationship between the State and citizens.[663] Secondly, its regulatory rationale calls for the application of both substantive and procedural rules to address this disparity, which can be present in both public and private law contexts.[664] Thirdly, these rules must be

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indeed be appropriate to issue a declaratory order or *mandamus* to the effect that a certain decision has to be taken. These are not ... the only possible remedies. Compensation might sometimes be an appropriate remedy, or an order that the public authority take account of the legitimate expectation of the party affected in taking a decision." Cf Grey 1982 (27) *McGill LJ* 360 at 365 for a discussion as to the general relation between review and remedy.

[660] See *McKinney v University of Guelph* (1990) 76 DLR (4th) 545 (SCC).

[661] Cf *Fose v Minister of Safety and Security* 1997 (7) BCLR 851 (CC) per Ackermann J; De Ville *Judicial Review* 356 – 357.

[662] See Plasket (PhD Rhodes 2002) 2. Cf Chaskalson 1989 (5) *SAJHR* 293 at 298; De Smith, Woolf and Jowell *Judicial Review* 5.

[663] See De Smith, Woolf and Jowell *Judicial Review* 5.

[664] See De Smith, Woolf and Jowell *Judicial Review* 5. Viewed in isolation, the set of rules administrative law contributes to the equalisation of the relationship between the State and citizen (whether it be purely administrative or also of an employment nature) are mainly procedural in nature. Although basically procedural in nature, the constitutionally informed application of its conceptual basis has brought administrative law closer to substantive considerations.

justified in terms of the constitutional principles that regulate the exercise of public power.[665]

These facets crystallised throughout the development of administrative law, following a different developmental path to that of labour law. As evident from a reading of Chapter Two and Three, the dogmatic development of administrative law was influenced by the judiciary's pre-constitutional attempts to restrain the abuse of public power,[666] while the flexible development of labour law was pragmatically brought about through legislative intervention.[667] The method of development may be different, but the underlying conceptual norms are complementary, as Chapters Five and Six will illustrate. The perspective is supported by the fact that in no area of law the objective of justice is more evident than in the constitutional relationship between administrative and labour law: Both aim to establish a just society and attempt to bridge the gap between law and justice in a broader political, social and economic milieu.[668] The interrelated objectives embrace the concept of fairness (the basis of social justice) as the underlying principle of both the ss 23 and 33 idea of constitutional justice.

Building on this understanding, Chapters Five and Six will consider the co-operative character of administrative law, as procedural rules function in conjunction with substantive rules supplied by other areas of law, such as labour law.[669] The variable trilogy (lawfulness, reasonableness and procedural fairness) acts as the legal means by

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[665] See De Smith, Woolf and Jowell *Judicial Review* 14. Administrative law, as informed by the Constitution, now has a transformative character. See Chaskalson 1989 (5) *SAJHR* 293 at 295 and 299.

[666] The historic development of administrative law carries the fingerprints of formalistic conceptualism. It placed an all-or-nothing condition on the protection of justice and constrained the variable nature of the trilogy of principles. See Hoexter 2004 (2) *Macquarie LJ* 165 at 168.

[667] See Chapter Two, parts 2 2 and 2 4,

[668] These interrelated objectives align with the preamble of the Constitution. See Chaskalson 1989 (5) *SAJHR* 293 at 298.

[669] The substantive rules trigger the context in which the power-imbalance relationship functions. This disparity arises because all administrative actions of the State at some level interfere with property, trade or labour, at least to some extent. See Beinart 1948 (11) *THRHR* 214 at 223. Evans 1973 (36) *MLR* 93 explains that administrative law inspires a judicial "willingness to extend … [its] principles … in novel ways in order to remedy an injustice". See for example *R v Liverpool Corporation, Ex Parte Liverpool Taxi Fleet Operators' Association* [1972] 2 All ER 589 per Lord Denning.

which unjust formalistic results are opposed.[670] The variable nature of these concepts empowers the judiciary to take context-informed constitutional value judgments.[671] When the variable nature of the basic principles (uncontroversial in isolation) find contextual expression, the 'contamination' of these principles through labour law considerations, causes judicial confusion and enhances formalistic reasoning as Chapters Eight and Nine reveals.[672] Judicial recognition and application of the doctrine of interdependence (the description of which is found in Chapter Seven) reveals the potential to resolve formalistic thinking, as it recognises the normative interrelation between fundamental rights, such as the rights to fair labour practices and just administrative action.

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[670] The administrative justice clause and PAJA rely strongly on conceptualism, which can undermine variability if formalistically construed. Section 33 and PAJA place no inherent restriction on the flexible nature of the principles of justice, but introduces administrative action as a threshold requirement: s 33 broadly regards it as the operational link, while PAJA provides a checklist approach to the identification of the presence or absence of administrative action. Hoexter 2004 (4) *Macquarie LJ* 165 at 168, 172 and 184 explains that the threshold approach unfortunately allows courts to write in formalistic code or "legalistic shorthand".

[671] This perspective addresses traditional formalistic symptoms. See Hoexter *The New Constitutional and Administrative Law: Volume Two* 112. Cf De Ville *Judicial Review* 67; Evans 1973 (36) *MLR* 93 at 99; *R v Liverpool Corporation, Ex Parte Liverpool Taxi Fleet Operators' Association* [1972] 2 All ER 589 per Lord Denning. The judiciary must view the following question as primarily calling for its attention: What does constitutional justice call for in the specific circumstances? Answering this question is not an option, but a legal directive. Merely limiting the question to administrative or labour justice would be an incorrect assumption that constitutional justice can be compartmentalised into the different fundamental rights.

[672] Jurisprudence unfortunately fails to clearly illustrate that the s 33 of the Constitution and PAJA related requirement of administrative action should be read as an impact threshold. This is in conformity with the variable principles of fairness (both substantive and procedural) and reasonableness as impact emerges as an important consideration in determining infringement of constitutional rights. This shift in perspective is necessary, as the requirement of an administrative action threshold is undeniably a requirement for a specific form of public power. The exercise of any specific public power is subject to all the contextually relevant provisions of the Constitution, as well as all the general constitutional values, principles and requirements. See De Ville *Judicial Review* 25, 67 and 68.

CHAPTER FOUR

PUBLIC EMPLOYMENT

1 INTRODUCTION

Following the consideration of the fundamental principles of labour and administrative law in Chapters Two and Three, this chapter introduces the public employment relationship as a relationship that has revealed itself as the prime catalyst for the fundamental (re)consideration of the relationship between administrative and labour law.

The point of departure of this chapter is twofold. First, one has to recognise that there are different approaches to the regulation of public sector employment.[673] For example, some fifty years ago, Plewman declared that "the true legal relationship between the Crown, as employer, and the statutory servant, is one which is *sui generis*, and is comparable only in very general terms to the common law relationship of master and servant".[674] More recently, in his minority judgment in *Chirwa v Transnet Ltd*,[675] Langa CJ (in summarising the view of majority) stated that "there is no reason to afford public employees greater protection than private employees".[676] In at least one instance, the suggestion has even been made that public employment operates in a sphere of law of its own, as evidenced by the development of a distinctive doctrine applicable to public employment.[677]

Secondly, despite the express legislative choice to regulate public employment in labour relations terms similar to private employment, a general (and somewhat controversial) presumption seems to persist: public and private employment relationships remain fundamentally different, must be distinguished in principle and, accordingly, must be

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[673] The existence of the debate is already proof of the importance of the legal regulation of public employment relationships. See Anon 1984 (97) *HLR* 1611 at 1614.

[674] Plewman 1955 (72) *SALJ* 70 at 85.

[675] 2008 (2) BLLR 97 (CC).

[676] *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 171.

[677] See Dotson 1956 (16) *Publ Admin Rev* 197 refers to the "[e]merging doctrine".

regulated separately.[678] The counterargument is that there is no fundamental difference between private and public employment relationships.[679] This is not to deny that differences may exist, but rather to illustrate that the identifiable differences that do exist do not originate from the nature of the public or private employment relationships. The differences that do exist are of a job- or sector-specific character. The hypothesis of this chapter is that there is no substantial difference between the nature of the employment relationship found in either the private or public sector. The differences that do exist are contextual, as the differences are linked to either the nature of the job or sector, and not the relationship. These contextual differences alone are not substantial enough to support a presumption of difference and compartmentalised legal regulation of private or public sector employment relationships.

The main purpose of this chapter is to evaluate the presumption of a fundamental difference between private and public employment and, in the bigger picture, to set the scene for a proper evaluation of the interaction between labour and administrative law in regulating public employment in the chapters to follow.[680] The evaluation of this presumption of difference will be done in two ways. Firstly, part 2 will focus on the way in which public employment - and the legal regulation thereof – developed. Accordingly, consideration will be given to the early development of public employment and its regulation in England, the reception and development of these principles in early South African jurisprudence and its ultimate translation into legislation. Secondly, part 3 will

[678] Dotson 1956 (16) *Publ Admin Rev* 197 at 200 fn 4 provides an early example of this approach by stating that "public employment cannot be compared in any fundamental way to private employment" and by pointing out that "it becomes clear that the employment relationship must be rationalized in a context of public, not private, law". More recently, it has been declared that "[t]he complexity of the *interrelationship* among … [the] sources of law underscores the importance of a unified treatment of the law of public employment as a distinct body of doctrine". See Anon 1984 (97) *HLR* 1611 at 1617. Emphasis added.

[679] See Dotson 1956 (16) *Publ Admin Rev* 197 at 200 fn 4.

[680] While it is true that in jurisdictions throughout the world, public employment is regulated separately in addition to generally applicable labour laws regulating the private sector, the aim of this chapter is to compare (at a conceptual level rather than a positivistic level) the nature of the employment relationships found in either the public or private sector. It is therefore not denied, from a positivistic perspective, that South African legislation (for example the Public Service Act 103(P) of 1994) indeed creates a regulatory distinction.

consider the extent to which public sector employment remains unique in modern society in general and the current South African dispensation in particular. Consideration will be given to contemporary arguments relied upon in attempts to justify a distinction between the regulation of public and private employment. These arguments will be divided into three groups – those based on the supposed nature of the relationship in question (part 3 1), and those based on the sector-specific contextual differences between private and public employment (part 3 2), and also with specific consideration of those based on the apparent necessity to differentiate between the collective labour rights granted to public and private employees respectively (part 3 3).

In anticipation of the discussion to follow, this chapter will show that neither a historical perspective on the development of the regulation of public employment, nor any of the arguments still used today, justify a fundamental differentiation in the regulation of private and public employment. In fact, the fundamental similarity of the two types of employment already justifies uniform regulation of employment (whether public or private) by means of labour legislation such as the LRA. However, this chapter will also show that there are contextual differences between private and public employment. These differences at least call for flexibility in the application of norms in such a way that contextual differences are properly reflected in the regulation of the substantially similar public and private employment relationships.[681]

2 DEVELOPMENT OF THE PUBLIC EMPLOYMENT RELATIONSHIP

2 1 English Law Influence

The English common law has had an immense influence on the development and the regulation of the (statutory) employment relationship between the Crown (or State) and

[681] Looking ahead to the discussion in Chapter Five and further, it may already be stated that it is in a combination of the existence of contextual differences between private and public employment and the requirement of flexibility that administrative law becomes important and where the answer to the proper interaction between labour and administrative law in the regulation of the public employment relationship is to be found.

its public servants.[682] As far as South Africa is concerned, "English law was incorporated and viewed as applicable to the relationship between the Crown and its servants, in so far as that law was part of the rights of sovereignty or government".[683]

Originally, public employees were seen as servants of the highest authority in all affairs and the source of all law and justice, namely the Crown.[684] It fell within the ambit of the Crown's ancient right and privilege to appoint public servants, stipulate their employment conditions and decide on their remuneration.[685] This was a form of at will employment, as public servants held office purely at the pleasure of the Crown.[686] As a result, the Crown had the absolute discretion to dismiss a servant when it so wished.[687] This traditional approach to the public service reveals that the relationship between the Crown and its public servants was not intended to be contractual in form or statutorily regulated. Blackstone conveys this message by dealing with the public service as part of the law of property.[688] In fact, public offices were considered a form of property and

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[682] Beinart 1955 *BSALR* 21 at 47 notes: "The Roman-Dutch law authorities do not give much assistance on the question of legal relationship between the government and members of the armed forces."

[683] Beinart 1955 *BSALR* 21 at 51. See also *Union Government v Whittaker* 1916 AD 194 per Innes CJ; *Binda v Colonial Government* 1950 (3) SA 151 (A) per De Villiers CJ.

[684] See Plewman 1955 (72) *SALJ* 70.

[685] See Plewman 1955 (72) *SALJ* 70.

[686] See Plewman 1955 (72) *SALJ* 70. Mandelbrote 1936 (53) *SALJ* 426 at 428 explains that this prerogative of the Crown is linked to the aphorism that "the King can do no wrong".

[687] See Plewman 1955 (72) *SALJ* 70; *Fletcher v Nott* (1938) 60 CLR 55 at 77 per Dixon J. In *Council of Civil Service Unions v Minister of the Civil Services* [1984] All ER 935 at 950, Lord Diplock identified the rationale underlying this common law prerogative: "[T]he theory [is] that those by whom the administration of the realm is carried on do so as personal servants of the monarch who can dismiss them at will, because the King can do no wrong". In a contemporary context, Gleeson J in *Jarratt v Commissioner of Police for New South Wales* (2006) 225 CLR 130 at paras 7 and 10, held that the application of the common law service at pleasure rule to public employment "is difficult to reconcile with modern conceptions of government and accountability", as the rules were "established long before modern developments in the law relating to natural justice". The United Kingdom discredited the rule in *Council of Civil Service Unions v Minister for the Civil Service* [1984] All ER 935 and *M v Home Office* [1994] 1 AC 377.

[688] The idea of public offices as the property of public servants is based on a 19th century United Kingdom practice. In *Marks v The Commonwealth* (1964) 111 CLR 549, it was explained: "The notion of an office as a form of property in which a man can have an estate is foreign to present-day ideas. But it is ... the

therefore hereditable.[689] As property, offices were also purchasable "unless the grant from the Crown specified otherwise, or unless the office was a position of trust, or one calling for services of a personal nature or was granted to an individual because of the confidence reposed in him, in which case the office was usually for life".[690] Historically, commissions in the armed forces were commonly bartered as commodities.[691] Crown-favourites were also rewarded with public offices as gifts.[692] Personal work performance was seldom regarded a requirement, as public servants employed their own personal servants[693] (with no connection to the Crown)[694] to perform the necessary public office tasks in return for a small portion of the office holder's remuneration.[695] The result was a "system of holding offices, based as it was on property, far from making tenure of office precarious, made most officials virtually irremovable".[696] The early English public service can be illustrated as follows:

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key to an understanding of the legal meanings of resigning an office and of holding an office at pleasure." See *Jarratt v Commissioner of Police for New South Wales* (2006) 225 CLR 130 at par 64 per McHugh J, Gummow J and Hayne J; Beinart 1955 *BSALR* 21.

[689] See *Marks v The Commonwealth* (1964) 111 CLR 549 at 586 per Windeyer J; *Coutts v The Commonwealth* (1985) 157 CLR 91 at 99 and 120; *Jarratt v Commissioner of Police for New South Wales* (2006) 225 CLR 130 at par 65 per McHugh J, Gummow J and Hayne J; Beinart 1955 *BSALR* 21 at 23.

[690] Beinart 1955 *BSALR* 21 at 23.

[691] Beinart 1955 *BSALR* 21 at 23 fn 18, in quoting Logan, elaborates: "The reports of the seventeenth and eighteenth centuries abound in cases dealing with the sale of offices and the traffic in the emoluments attached thereto, cases which involve offices ranging from the captaincy of an East Indiaman to the post of surveyor of the baggage of the port of London. The diarist, Samuel Pepys, had to buy off a competitor who made a claim for his post in the Admiralty."

[692] See Beinart 1955 *BSALR* 21 at 23.

[693] They were the responsibility of the person who employed them. This was a typical master-servant relationship, with no responsibility accruing to the government (Crown). See Beinart 1955 *BSALR* 21 at 23.

[694] This reminds of the current day trend of privatisation and outsourcing of State functions.

[695] See Beinart 1955 *BSALR* 21 at 23.

[696] Beinart 1955 *BSALR* 21 at 23.

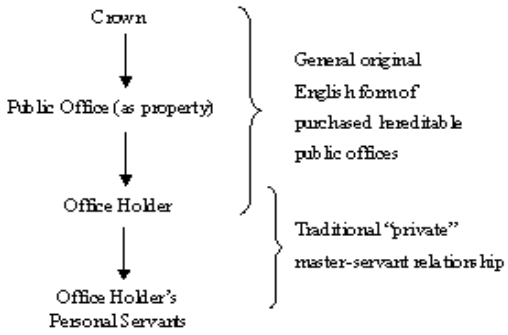

Illustration 2: Early English Public Service

A speech on economic reform delivered by Burke (a British statesman and political writer) in 1780, as well as the recommendations of several commissions, altered the earlier property perspective.[697] This shift eventually led "to the prohibition of the sale of offices, the abolition of fees and perquisites attaching to offices and of sinecures, and the substitution therefore of salaries voted by Parliament".[698] Although these changes moved public offices out of the realm of property and into that of contract,[699] this step was not well received by all.[700] The English judiciary took an extreme route and labelled

[697] Collins *Justice in Dismissal* 11 explains: "The underlying reason for the rejection of ownership of jobs by all types of economic systems consists in an appeal to general welfare considerations … [which] include reference to the wealth, happiness, and satisfaction of preferences of all the members of a society … [In addition to the fact that it would harm] productive efficiency, ownership of jobs would create friction in the labour market, by preventing reductions in the workforce to meet declining demands and by discouraging workers from seeking new jobs …"

[698] Beinart 1955 *BSALR* 21 at 24.

[699] See Beinart 1955 *BSALR* 21 at 24.

[700] Freedland 2005 *Publ Law* 224 at 226 – 227 identifies the rationale for the introduction of public employment contracts as being twofold. First, it removes the lack of clarity regarding terms and conditions of employment. Secondly, it places the public servants more or less on par with their private sector counterparts. With regard to this attempt at equalisation Freedland explains that the "latter notion of 'putting them more on a par with their counterparts in other walks of life' has to do with identifying the employment relationship as a commercial armslength market relationship, importing no special privileges or 'jobs for life'". In a somewhat ironic fashion, and with regard to the administrative law arguments of the 'purists', Freedland emphasises that these equalisation notions are regarded as "contributing to the broad goals of promoting greater 'transparency, accountability and openness'". This merger of "general law and practice of contracts of employment on the one hand and, on the other hand, the traditional particularities of the civil service employment relationship" is not without its obscurities. These obscurities are however

the relationship between the Crown and its servants as a legal category incomparable with any known enforceable legal relationship.[701] Nonetheless, it was identified as a relationship.

Beinart refers to this approach as a "levelling-out process", whereby everyone, from the public officials' servants to the highest servants (i.e. Ministers) was subject to the rules applicable to all Crown servants.[702] With this step, public office gained its appropriate meaning as "service to the public", seeing that it was no longer seen as something to be acquired for private gain.[703] In the context of this evolvement of the English public office, Beinart identifies two main judicial trends of 19th century jurisprudence:

> *One*, which became generally accepted, was to regard all government offices to be at the pleasure of the Crown, only its basis being disputed; in how far could it be said to be founded on public policy and according to what extent could this rule be varied? *The other* far more contentious, was to the effect that there were no legally enforceable rights as between the subject and the Crown in matters of service.[704]

Beinart describes these trends as "products of the transitional stages, and not the final stages of the evolution"[705] as the "effects of social change on the law is always gradual;

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mainly rooted in "an unresolved set of issues about the prerogative nature of Crown employment" which has not survived constitutionalisation in South Africa.

[701] Beinart 1955 *BSALR* 21 at 24 elucidates: "The effect that these vast reforms in the nature of public office had on the common law is nowhere specifically indicated. It is clear that the movement was away from property – indeed this notion was soon discarded – but the exact direction of the movement is not clear. It was heading towards contract, no doubt, but there is a period of wavering, noticeable in judicial decisions starting with the latter half of the nineteenth century. Many judges, finding themselves free from the trammels of property, went, it seems, over to the other extreme, to a sort of legal Alsatia in which the relation between the Crown and its servants could not be fitted into any legal category or, at least, into no enforceable legal relationship."

[702] See Beinart 1955 *BSALR* 21 at 24.

[703] See Beinart 1955 *BSALR* 21 at 25.

[704] Beinart 1955 *BSALR* 21 at 25. Emphasis added.

[705] Beinart 1955 *BSALR* 21 at 25.

indeed the law usually lags behind the actual facts".[706] The pursuit of "a stable public service, free of political manoeuvring"[707] is a product of social variables.

Initially there was a distinction between supreme political[708] and subordinate non-political[709] servants of the Crown,[710] with only the latter technically and legally holding office at the pleasure of the Crown.[711] This position was altered when all public servants where subjected to the same rules and regulations.[712]

2 2 The Initial South African Response

In cases such as *Malcolm v Commissioner of Railways*,[713] *Sheard v Attorney-General*,[714] *Marshall v Union Government*,[715] and *Sachs v Dönges, NO*,[716] the South

[706] Beinart 1955 *BSALR* 21 at 25.

[707] Beinart 1955 *BSALR* 21 at 25.

[708] Referring to cabinet ministers.

[709] Referring to the permanent members of the public service.

[710] See Plewman 1955 (72) *SALJ* 70.

[711] In practice, the permanent members of the public service were considered to have a right to remain in undisturbed 'possession' of their positions, as they discharged their functions in a proper manner. See Plewman 1955 (72) *SALJ* 70 at 71.

[712] Beinart 1955 *BSALR* 21 at 22 states that "all persons from the Prime Minister down to the casual sweeper of government offices are more or less on the same legal footing … [as the] legal relationship that results is always between the employee and the Crown and not between the employee and the person who appointed him – they are all alike public servants of the Crown".

[713] 1904 TS 947. The court relied on the rule that the Crown can dismiss a servant at pleasure. See Beinart 1955 *BSALR* 21 at 54.

[714] 1908 TS 1077. Beinart 1955 *BSALR* 21 at 54 fn 61 explains that Wessels J reasoned that "in terms of his commission the Governor had no authority to bind his successors not to dismiss Crown servants. This implied that express authority from the Crown to appoint on terms other than pleasure would have been binding, as decided in [the English case of *Terrell v Secretary of State the Colonies* [1953] 2 All ER 490]".

[715] 1917 TPD 371. De Villiers JP relied on the English case of *Dunn v The Queen* [1896] 1 QB 116 (controversial in itself) to hold that a civil servant only had a moral, and not a legal, right to an increase in pay. Beinart 1955 *BSALR* 21 at 55 explains that "[i]n effect, this [was]… a decision that a Crown servant's pay [could] … be reduced at pleasure, and no contrary agreement by the Crown would avail him".

[716] 1950 (2) SA 265 (A). Beinart 1955 *BSALR* 21 at 55 – 56 explains that the judges of the Appellate Division, in casu, were divided as to the scope of the English rule of dismissibility at pleasure: "Van den Heever, J.A. took the extreme view that the rule … is an attribute of the Prerogative … [and] Centlivres,

African judiciary showed preference for English precedent.[717] Consequently, a great deal of public employment law "has its origin in the patronage of the Crown".[718] However, legal roots grow along with society. In South Africa, this brought about a contractual and a statutory element to public employment.

Ever since the recognition of public sector employment as an area in need of regulation, South African courts have been at odds as to the role of the contractual element in that employment relationship. What is clear is that the idea that public employment should predominantly be regarded as statutorily regulated dominated pre-constitutional South African jurisprudence.[719]

Plewman explains that the traditional public employment relationship appears to mirror the contractual relationship of master and servant, but the rights and obligations of the parties are governed primarily by statute.[720] In contrasting this perspective with early

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J.A. … was of the opinion that the rule to dismiss at pleasure was part of the wider principle that the Crown cannot fetter its future executive action and, therefore, an express contractual term to the contrary cannot oust the Crown's right to terminate at pleasure." They based their judgments on the doctrine of executive necessity, which originated from an once-off (widely criticised) judicial comment in *Rederiaktiekbolaget "Amphirite" v King* [1921] 3 KB 500 per Rowlatt J, "to the effect that the employment of public servants is an illustration on a lesser scale of the principle that the government cannot by contract hamper its freedom of action in matters which concern the welfare of the state". See Beinart 1955 *BSALR* 21 at 39. Hahlo and Kahn *The Union of South Africa* 185 also comment, with reference to *Union Government v Schierhout* 1922 AD 179 and *Nicol NO v Lawrie* 1950 (3) SA 151 (A): "If there were (as is now doubted by many), an inability of the Crown in England by contract to fetter this right [to dismiss at will], will that rule abstain in South Africa? Certainly if a statute so authorises, dismissibility at pleasure can be contractually excluded. Otherwise, if the rule is really a governmental prerogative matter, the English law should apply, but if merely a question of public policy, the Roman-Dutch law, favouring enforceability of the contract (except with military servants). The trend is favouring the second view, which it is believed is the correct one."

[717] Beinart 1955 *BSALR* 21 at 55 explains that the English precedent was followed by South African courts in cases regarding non-military servants of the Crown.

[718] Plewman 1955 (72) *SALJ* 70.

[719] In *Lavoipierre v Union Government* 1925 TPD 47 at 59, Stratford J stated (albeit obiter) that, "[u]nder the Public Service Act, 1912, the Minister does not make contracts; he makes appointments and promotions; and until the public servant actually assumes the duties of the office he is directed to fill, there seems nothing to prevent the Minister from changing his mind with impunity".

[720] See Plewman 1955 (72) *SALJ* 70.

private sector master and servant law, the dissimilarity between the two spheres of employment becomes evident, as the State traditionally avoided interference in the private employment relationship, while it regulated public employment with intricate and numerous statutes.[721] This is evident from the development of South African labour law in accordance with the political, social and economic variables of the time.[722] As social demand shifted in response to the political and economic atmosphere in South Africa, so too did the labour focus of the State. As a result, the State opted to regulate the rights and obligations of the parties to the employment relationship by means of legislation (in contrast to the idea of relying on contractual freedom).[723] Early comparison reveals legislation outweighing contract in the public sector with the opposite position prevailing in the private sector.[724]

In *Evans v Public Service Commission and Minister of Justice*,[725] Bristowe J stated that a "public servant is bound solely by statutes".[726] According to the court, public employees only possessed rights statutorily bestowed upon them.[727] However, in

[721] The State relied on legislation to address public employment issues every time a new problem or situation had to be regulated or suppressed.

[722] See Chapter Two, part 3 4.

[723] One of the justifications advanced for the increase in legislative intervention was the struggle for procedural rights: "[T]he procedural rights afforded public employees turn largely on the legislature's willingness to grant civil servants the protection of tenure." The idea of protection of tenure implied a system that protected "public employees against dismissals without cause". See Anon 1984 (97) *HLR* 1611 at 1616 – 1617.

[724] This early comparison created the impression that public servants were better protected than private employees were, as the latter were left to the mercy of the employer in the absence of statutory protection. However, this initial position changed when the principle of fairness, the equity jurisdiction of the Industrial Court, and the principles of collective labour law were recognised. Public sector employees were denied this protection from abuse of power by the State as employer, until the advent of a constitutional democracy.

[725] 1920 TPD 118.

[726] *Evans v Public Service Commission and Minister of Justice* 1920 TPD 118 at 125.

[727] Public servants were denied any rights not found to exist on the proper interpretation of the statutes. See *Evans v Public Service Commission and Minister of Justice* 1920 TPD 118 at 125.

Schierhout v Minister of Justice[728] Innes CJ did not view the distinction between public and private sector employment as clear-cut:

> Broadly speaking … [the public servant] contracts at his appointment that he will serve the state in accordance with the statutes and the statutory regulations from time to time operative. These laws regulate in great detail the conditions and terms of his service. Once upon the fixed establishment he retains his position until he is duly removed or superannuated. He occupies his position midway between that of a Crown employee subjected to dismissal at pleasure and that of an ordinary servant whose period of service depends upon the terms of his contract.[729]

In *Bramdaw v Union Government*,[730] Matthews J further held that the "Crown *contracts* that it will perform its statutory obligations, i.e. that it will pay a servant his statutory emoluments for the services he renders, will not withhold those emoluments except so far as the statute permits and will not remove him from office except as provided by statute".[731] In supporting the views of Innes CJ and Matthews J, Beinart puts forward the perspective that "the legal relationship between the Crown and the employees is … a contract and where the Act is silent on a particular point, the common law applies … [as all] the statutes do is to exclude certain common law terms either expressly or by necessary implication".[732]

Plewman, however, emphasises the ever-present element of public power and explains that people are "generally appointed to the public service by virtue of powers conferred by statute on the [State], in its executive capacity".[733] Although this may be true, statutory regulation present in the exercise of public power has whittled down the principle of dismissal at pleasure.[734]

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[728] 1926 AD 99 at 108.

[729] *Schierhout v Minister of Justice* 1926 AD 99 at 108.

[730] 1913 NPD 57.

[731] *Bramdaw v Union Government* 1913 NPD 57 at 73.

[732] Beinart 1955 *BSALR* 21 at 63.

[733] Plewman 1955 (72) *SALJ* 70 at 71. See also Stewart 1995 (16) *ILJ* 15 at 23.

[734] As a result, certain grounds of dismissal have developed through legislation. See Plewman 1955 (72) *SALJ* 70 at 71.

This analysis shows that the early South African approach to public employment reached the stage where it was accepted that public employment has both a statutory and contractual element.[735]

2 3 Legislative Intervention

Modern day public servants find their employment regulated by means of detailed legislation providing, for example, grounds for their dismissal, as well as the procedures to be followed for fair implementation of decisions by the State (or organs of state) as employer.[736] Such a legislative framework is a necessity for the balancing of employment interests.[737] However, a labour relations framework was not always provided for public employees. South Africa's apartheid legacy is the primary reason for this neglect, especially in the context of collective bargaining.[738]

Traditionally, the regulatory legislative framework, functioning to the exclusion of public employees, supported the presumption of substantial difference between private and public employment. Prior to 1993, the South African legal system did not provide a labour relations framework for the public service with the result that public servants "had no labour rights, no right to organise into trade unions or to bargain collectively".[739]

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[735] The development in the private employment relationship also reached the stage where the contractual element was supplemented with statutory regulation. See Chapter Two, parts 2 1 and 2 2.

[736] In the past, there has been uncertainty as to whom the actual "employer" in the public service is when it comes to employment disputes, seeing as government is divided into many institutions and organs. In analogy to the view that the Crown is the employer of its servants, the State is in reality the employer of those people working in the public service. In *MEC for Transport: KwaZulu- Natal v Jele* 2004 (12) BLLR 1238 (LAC), it was held that the State and not a specific government department should be seen as the employer in cases where disputes arise between public servants and their departments. See Grogan *Workplace Law* 28; Grogan 1990 (11) *ILJ* 655.

[737] See Chapter Two, part 2 4 2 for a discussion of the role of legislation in addressing the deficiencies of the traditional common law approach to the employment relationship.

[738] Huluman *The Practice of Social Dialogue in the South African Public Service* 2 http://www.pscbc.org.za (2008/07/09) explains that the previous administration fragmented the public service.

[739] Huluman *The Practice of Social Dialogue in the South African Public Service* 2.

The 1956 LRA, which governed the private sector, specifically excluded the public service from the restricted rights contained therein.[740] The effect of this was that public servants could not complain of their working conditions or unfair and unreasonable treatment using the 1956 LRA created mechanisms or even rely on collective bargaining techniques.[741] Public employment relationships were therefore restricted at both an individual and collective level.[742] The legal consequence of such restrictions

[740] The exclusion was contained in s 2(2) of the 1956 LRA. See Ngcukaitobi *The Right to Collective Bargaining in the Public Service* 3 http://www.lexisnexis.co.za/ServicesProducts/presentations/17th/TembekaNgcukaitobi.doc (2008/06/13). The labour rights found in the 1956 LRA were of a restricted nature, as the State initially saw the employment relationship as a matter to be primarily regulated by the parties involved, and later saw labour legislation as a manner of restraining economic pressure threatening the State. See the discussion in Chapter Two, part 2 1. A vast array of statutes regulating public employment were put in place during the time of the Union: the Public Service Act 27 of 1923 (it established the Public Service Commission that acted as an advisory board in all matters relating to the public service, but its decisions could be overruled by the Governor-General), the Government Service Pension Act 32 of 1936 and the Railways and Harbours Service Act 28 of 1912. Although public servants were not granted the labour rights extended to their private sector counterparts, s 14 of the 1923 Public Service Act provided that their salaries could not be reduced, while s 17 regulated transfer and s 18 retirement. Furthermore, s 20 of the 1923 Public Servants Act listed seventeen types of misconduct and provided that public servants be duly charged, granted the right to be heard by a person appointed by the Public Service Commission, allowed an appeal to the Commission and if found guilty either be discharged from service, have his salary reduced or subjected to a lesser penalty legislatively prescribed. Section 96 did imply that the Crown could be sued in a court of law if it did not observe the provisions and procedures of the 1923 Public Servants Act. There was nevertheless a limitation, as the Act restricted public servants to the remedies therein provided. The State for example legislatively determined the tribunal of its choice. The public service was later regulated in terms of the Public Service Act 111 of 1984, along with the Public Service Staff Code. See Beinart 1955 *BSALR* 21 at 59 – 61; Plewman 1955 (72) *SALJ* 70 at 73; Stewart 1995 (16) *ILJ* 15. Grogan *Workplace Law* 9 comments that, in terms of these regulations, "[e]mployment disputes in the public sector were therefore dealt with by the civil courts as issues of contract or administrative law".

[741] See Ngcukaitobi *The Right to Collective Bargaining in the Public Service* 3.

[742] Emery and Giauque 2005 (71) *Int Rev Admin Sc* 639 at 640 explain that it is a historical tendency in most jurisdictions to distinguish the public sector from the private by means of legislative exclusion. The authors however note that, apart from the legislative exclusion, the courts "contributed to the creation of a specific regime for the civil service". See also Emery and Giauque 2005 (71) *Int Rev Admin Sc* 639 at 643. In South Africa's pre-constitutional era, both these legislative and judicial limitations where present in the regulation of disputes relating to public employment.

was that "[e]mployment disputes in the public sector were ... dealt with … according to the principles of the law of contract or administrative law".[743] Emery and Giauque describes this legislative and judicial position as a form of negative differentiation, as it resembles characteristics of a "situation essentially marked by a type of confusion of references and developing paradoxes".[744]

A legislative attempt was made to bridge the regulatory gap with the promulgation of the 1993 PSLRA. With this step, the regulation of public and private employment relationships was rendered "broadly similar".[745] The result was a substantially similar but still separate system of employment regulation.[746] This step brought into question the relevance of the presumption of substantial difference.[747] Although the 1993 PSLRA

[743] Grogan *Workplace Law* 10. Harlow 2005 (71) *Int Rev Admin Sc* 279 at 280 comments that the "common law world used the dominant 'control' theory of law to add a substantial legal dimension to public administration's traditional managerial basis". Harlow explains that the theory in "administrative law that best represents this ideal-type is a 'command-and-control' theory which … is usually highly procedural in character". In the American context it is referred to as 'due process', the English system knows it as 'natural justice', while the French refer to the 'rights of defence'". See also Harlow 2005 (71) *Int Rev Admin Sc* 279 at 281 – 282.

[744] Emery and Giauque 2005 (71) *Int Rev Admin Sc* 639 at 640.

[745] Stewart 1995 (16) *ILJ* 15.

[746] Stewart 1995 (16) *ILJ* 15 also emphasises that the Act enforced legislative distinction. It created "an entirely different system of regulation than that for the private sector". This Act functioned against an administrative law background. Stewart 1995 (16) *ILJ* 15 at 24 further explains that the difference between the former LRA and public service legislation arose out of different processes and negotiations, rather than employment characteristics and arguments based on efficiency and expediency.

[747] The 1993 PSLRA not only granted labour rights and protection against unfair labour practices in the public sector, but also established the Public Service Bargaining Council (Central Chamber) at national level and Departmental and Provincial Bargaining Councils. A similar system was contained in legislation regulating the education and police services. The Education Labour Relations Act 146 of 1993 established the Education Labour Relations Council, while the South African Police Labour Regulations passed in 1995 (after labour unrest in the police and prison departments) led to the establishment of the National Negotiating Forum. Both these Acts have been repealed by the LRA. Bargaining forums of this nature focussed on dispute prevention and resolution, as well as the "[r]egulation of settlement of matters of mutual interest through negotiations". In terms of s 35 of the LRA, the establishment of the Public Service Co-ordinating Bargaining Council serves as a compulsory framework for social dialogue, at central level, in the Public Service. The objectives of the Council falls mainly on the enhancement of labour peace, promotion of sound employment relationships, negotiation of agreements to balance

maintained sectoral separation, it did specifically provide labour rights to public employees for the first time.[748] In doing so, the 1993 PSLRA also defined what constituted unfair labour practices in a public employment relationship. This was the first legislative step in granting public employees access to the equity jurisprudence developed in the private sector in response to the Wiehahn recommendations.[749]

The 1994 PSLRA replaced the 1993 Act[750] and brought public employment within the context of the LRA.[751] The 1994 Act was repealed by the LRA.[752] The LRA (along with the BCEA) now grants recognition and protection to public servants through the inclusion of the State in the definition of 'employer'.[753] Dispute resolution mechanisms

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mutual interest, dispute resolution and conclusion, supervision and enforcement of collective agreements. It is important to note that these objectives are reconcilable with the broad aim of the LRA. The LRA therefore draws a contextually informed distinction between private and public sector bargaining councils. Bargaining councils in the private sector are the product of a voluntary process, while the creation of public sector bargaining councils is mandatory. See Huluman *The Practice of Social Dialogue in the South African Public Service* 2 – 6. See part 3 for a discussion of contextual considerations.

[748] See Huluman The Practice of Social Dialogue in the South African Public Service 2.

[749] This also indicated a paradigm shift in the application of administrative law in the public employment context. Grogan *Workplace Law* 10 explains that, in extending the unfair labour practice jurisdiction, this Act and the Education Labour Relations Act 146 of 1993 gave public servants "access to the Industrial and Labour Appeal Court, as well as the freedom to strike".

[750] The 1994 PSLRA also replaced the Education Labour Relations Act 146 of 1993.

[751] See Gorgan *Workplace Law* 10. Stewart 1995 (16) *ILJ* 15 at 23 comments on the position prior to the LRA: "Whether one's view of administrative law is that it should control government power and protect individual rights, or that it should ensure accountability and foster participation, the power that the state exerts in the relationship with its employees, at times as an instrument of public policy and with potentially devastating effects on their lives, is an appropriate subject for administrative law control". Consequently, any labour relations framework should have regard of this reality in regulating public employment relationships. See also Stewart 1995 (16) *ILJ* 15 at 22.

[752] The LRA also repealed the Education Labour Relations Act 146 of 1993 and the South African Police Service Labour Relations Regulations of 1995.

[753] See Basson et al *Essential Labour Law* 119. In giving effect to the constitutional right to fair labour practices, the labour legislation drafters recognised that the previous sectoral separation was not conducive to constitutional transformation and social justice. Recognition is therefore given to the fact that certain considerations within the context of public employment require specific consideration. See part 3.

created by the LRA are now extended to the public service.[754] The LRA created a new labour relations framework for the public sector that substantially associates it with the private sector.

The LRA provides for the current unified system of labour relations as a response to the constitutional imperative that labour rights are applicable to all sectors, without unjustified distinction.[755] If not supporting, unification at least shows acceptance of the argument that there are more substantial similarities that underlie public and private employment relationships in the modern day understanding of labour law, than there are differences.[756]

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[754] Additional sources of protection, namely the Public Service Act 103(P) of 1994, the Employment of Educators Act 76 of 1998 and the South African Police Service Act 68 of 1995 were introduced. These enactments, along with specific regulations and collective agreements functioning within the general context of the labour relations framework, also regulate public employment relationships and are responses to the Constitution. However, as is evident from a reading of supplementary legislation, the LRA remains the primary piece of labour legislation. Although the long title of the Employment of Educator's Act 76 of 1998 proclaims that it provides for the employment of educators by the State and regulates the conditions of service, discipline, retirement and discharge of educators, its provisions are generally subject to the LRA, as section 11(1) of the Educator's Act states: "The employer may, having due regard to the applicable provisions of the Labour Relations Act, discharge the educator". The Public Service Act 103(P) of 1994 similarly states (in s 17(1)(a)) that the power to discharge "shall be exercised with due observance of the applicable provisions of the Labour Relations Act". The Public Service Amendment Act 30 of 2007 (operational with the exception of certain sections) identifies as one of its aims the alignment of the grounds of dismissal found in the Public Service Act 103(P) of 1994 "with the grounds of dismissal recognised by the Labour Relations Act". Furthermore, the South African Police Service Act 68 of 1995 (in s 1) stipulates that a strike by the police force "means a strike within the meaning of the Labour Relations Act".

[755] Any limitation of a constitutional right, labour or other, must be legally reasonable and justifiable in terms of s 36 of the Constitution to be acceptable within the context of an open and democratic society.

[756] In terms of s 197(1) of the Constitution, the public service "must function, and be structured in terms of national legislation". The LRA qualifies as national legislation. Nothing in s 197(1) therefore points to a constitutional imperative to differentiate between the labour regulation of public and private employment based on the nature of the respective employment relationships. The Constitution merely recognises that a framework is necessary to recognise and regulate public service practices. With s 197, the Constitution acknowledges the need for a structure in which the required values and principles can take sector-specific contextual form.

It has to be said that academic and judicial attempts to cling to the presumption of difference has allowed some technical difficulties to emerge as obstacles to the transformation of constitutionally informed labour law. Huluman, with reference to Adair and Albertyn, explain that "the extension of modern labour legislation to the public service caused tension between the archaic, prescriptive and inflexible labour legislative framework and the LRA's emphasis on equity and self-regulation".[757]

In summary, it can be said that the nature of public employment and its concomitant regulation initially showed marked differences to private employment. However, public employment and its regulation evolved through the stage of being seen as a combination of contract and statute to the point of express legislative recognition of the similarity between private and public employment.

3 THE PRESUMPTION OF DIFFERENCE

Given the development of the public employment relationship and its regulation as described in part 2, it is not surprising that it has been said that public employment "has not been the subject of unifying treatment".[758] The traditional approach, which relies on the public/private divide, "rests on historical accident rather than any point of principle".[759] As such, historical developments in this area have left no "systematic approach"[760] for the proper understanding and interpretation of the rights now guaranteed in ss 23 and 33 of the Constitution, nor of subordinate legislation applicable to public employment.

Some commentators accept that contracts form the basis of the creation of employment relationships in general, but only play a limited role due to the nature of the relationship, and generally accept that there is "no general distinction between State and private employment".[761] This perspective, which is in favour of a unified approach, is based on

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[757] Huluman *The Practice of Social Dialogue in the South African Public Service* 4. See also Adair and Albertyn 1999 (24) *ILJ* 813.

[758] Anon 1984 (97) *HLR* 1611 at 1614.

[759] Fredman and Morris *State as Employer* 268.

[760] Anon 1984 (97) *HLR* 1611 at 1614.

[761] Fredman and Morris 1990 (19) *ILJ (UK)* 142. See Blair 1958 (21) *MLR* 265; Chapter Two, part 3 2. Carty 1991 *Publ Law* 145 similarly notes that "[l]abour lawyers … have not traditionally drawn any

the argument that the nature of public and private employment relationships is substantially similar. However, the traditional presumption of difference (supported with arguments of the substantially different job- or sector-specific contextual realities) continues to find juristic favour.

The discussion to follow is based on the understanding that the general nature of an employment relationship is common to both the private and public sector and forms the basis of the similarity that justifies the constitutionally informed unified labour law approach.[762] In contrast, the job- or sector-specific considerations create the context in which an employment relationship functions. It is not the nature of the employment relationship, but the nature of the job or sector that is different. In general, the Constitution and labour legislation has identified the need to protect the parties to an employment relationship generally characterised by unequal power. To do so, reliance is placed on equity-based principles to balance the interests of the parties to an employment relationship. This understanding is common to all sectors and jobs. This is the basis on which s 23 of the Constitution and the LRA find application and forms the basis of the contemporary declaration of substantial similarity. The difference-element comes into play when considering the interests that require balancing. The job- or sector-specific context of a specific employment relationship under scrutiny will determine the content of those interests, as well as the degree to which the equity-based principles will find application. The context in which an employment relationship functions cannot be predetermined with precise certainty, as it would lead to over-

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distinction between state and private employers". According to Leigh and Lustigarten 1991 (54) *MLR* 613 at 636 the earlier English perspective unfortunately primarily influenced the South African approach, as the public service is regarded as "serving a Parliamentary executive". This approach brought about great injustice and led to the idea that the public service is in need of more regulation than their private sector counter parts in order to prevent abuse. With regard to the modern day English approach, Fredman and Morris 1990 (19) *ILJ (UK)* 142 at 152 – 153 argue that there are certain characteristics relating to the State as employer that cannot be ignored "despite the rhetoric of 'value for money', 'efficiency' and 'market discipline', as the State functions differently than "its private sector counterparts".

[762] See Chapter Two, part 3 2 for a discussion of the nature of an employment relationship.

regulation and absolute formalism that undermines the flexible character of the constitutionally recognised principle of fair labour practices.[763]

It is therefore necessary to scrutinise the arguments on which the separatistic views are based. For purposes of the discussion, these arguments will be divided into three groups. In the first instance (part 3 1), those arguments based on the supposed unique nature of the public employment relationship will be evaluated. Particular consideration will be given to whether public employment qualifies as a special status relationship (part 3 1 1), as well as the question whether the power struggle inherent in employment relationships justifies a different approach to public employment (part 3 1 2). In the second instance, those arguments based on the supposed job- or sector-specific contextual differences between private and public employment will be evaluated (part 3 2). In evaluating the substantial weight to be granted to contextual differences, specific attention will be paid to the difference in resources (as it relates to profit aspirations and public interest), public perception and tripartism. Thirdly, in the absence of substantial difference of the public and private employment relationship, the argument that collective labour law does not find equal application in public and private sector employment will be questioned (part 3 3).

In summary, this exercise will ultimately illustrate that, although contextual differences between employment relationships are present, all employment relationships (whether public or private) are substantially similar in nature. No employment-based dispute (even if restricted to the private sector) is exactly the same and differing job- or sector-specific contexts prevent the precise replication of the protection and promotion of individual and collective labour rights.[764]

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[763] To say that the unique context or circumstances in which public or private employment relationships respectively function justifies separate and distinctive legislative regulation is akin to arguing that the unique circumstances in which the employment relationship of a waiter or a bricklayer and their respective employers function justifies distinct legislative regulation, because the waiter deals directly with the public, while the bricklayer works in an environment with a higher risk of job-related injury.

[764] This does not undermine the idea of equality, as equality (as constitutionally endorsed) does not require absolute sameness in treatment.

3 1 Nature of the Employment Relationship

3 1 1 Status Relationship

An argument that has featured strongly in support of the presumed difference between public and private employment is that public employment carries a special legal status, which, in turn, calls for a separate theory of law and regulation.[765] Blair, based on the labour relations reality of the 1950s, declares that public employment qualifies for such a distinction as it meets the three essential legal conditions for a special legal status relationship.[766] Viewed against the contemporary understanding of South African labour law, Blair's findings can be challenged through a re-evaluation of these conditions.

The first of Blair's requirements for a special status legal relationship is a "significant degree of public or social interest in the existence of the condition".[767] It is undeniable that there is public interest in public employment - the general public has an interest in effective public services and the public has a special concern when labour related problems in public employment have the potential to affect their daily lives.[768] Nevertheless, is the presence of such interest substantial or fundamental enough in itself to counter the substantive similarities between public and private sector employment relationships? It is doubtful whether this argument in the current day justifies an approach that endorses the presumption of difference between public and private employment. To focus solely on the public element is to sever the head from the body. Public employment undoubtedly is a public relationship,[769] but it is nevertheless

[765] See Blair 1958 (21) *MLR* 265.

[766] See Blair 1958 (21) *MLR* 265. In the 1950s context in which Blair argues for distinct regulation to grant private and public sector employees similar protection, public servants were prevented from striking, exercising their political rights and could be dismissed without notice or just cause. In contrast, private sector employees' liberties were protected in that they had to be given due notice prior to dismissal and just cause had to be shown. Cf Emery and Giauque 2005 (71) *Int Rev Admin Sc* 639 at 645.

[767] Blair 1958 (21) *MLR* 265 at 266.

[768] See Smith and McLaughlin 1962 (16) *Indus & Lab R Rev* 30. It must be noted that employment problems, regardless of sector, remain labour related problems. The context of the problem is merely different and must be evaluated by means of an application of flexible labour principles within the context at hand.

[769] See Dotson 1956 (16) *Publ Admin Rev* 197 at 201.

an employment relationship.[770] The general essence of the employment component cannot be ignored simply because it coexists with the public component in one singular legal relationship. As already stated, the general employment relationship itself has been identified as a status relationship.[771] Furthermore, general employment relationships arguably also fall within this social condition, as employment itself is of immense social significance.[772]

Blair declares the second requirement for a special status legal relationship to be legal relevance in a substantial and general manner, in contrast to "restrictions of a specific nature" that "affect legal conditions only in a limited manner".[773] To bestow on public employees a legal status that justifies distinction from general employment, the restrictions placed on public employees by the State as employer must be materially different from that found in private employment.[774] At present, it cannot be said that the general legal capacity of public employees is sufficiently restricted or elevated to meet this requirement, as the power associated with the prerogative to employ/dismiss at will no longer clings to the State as it traditionally did to the Crown.[775] Absent this prerogative, this argument cannot sufficiently support a presumption of difference.

The third (and most significant) condition Blair holds forth as granting a unique legal status to public employment lies in its nature, as the status of public employees is conferred and withdrawn by means of State intervention.[776] Uncertainty as to the role of contract and statute in the stipulation of the terms of public employment has contributed

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[770] As Harlow 2005 (71) *Int Rev Admin Sc* 279 at 291 comments, the "law is not, as public administrators often see it, a static phenomenon nor is it necessarily an instrument for status".

[771] See Chapter Two, part 3 2.

[772] Cf *NEHAWU v UCT* 2003 (2) BCLR 154 (CC); *Transport Fleet Maintenance (Pty) Ltd v NUMSA* 2004 (25) ILJ 104 (LAC).

[773] An example of such a substantial legal restriction is found in the limited legal capacity of mentally impaired persons. Another example is the limited economic/legal capacity of a person who is declared bankrupt. See Blair 1958 (21) *MLR* 265 at 266 and 268.

[774] See Brassey 1993 (9) *SAJHR* 177 at 180.

[775] If this question were discussed 50 years ago, the answer would have been different, because substantial legal limitations were put on public servants. See the discussion in part 2. Cf Blair 1958 (21) *MLR* 265 at 266.

[776] See Blair 1958 (21) *MLR* 265 at 266.

to contemporary support for Blair's third condition. However, this argument is superficial, as it does not consider the function performed by the State within the public employment relationship. The State acts as employer, albeit with public power. Arbitrary conduct is no longer the norm in public employment.[777] In reality, the public employment relationship is as voluntary in nature as that of the private sector: legislation prescribes the terms of public employment contracts, while the terms of private employment, although in theory open to negotiation, is prescribed by the employer in a take-it-or-leave-it fashion.[778] From a contemporary perspective, this third condition is as unconvincing as the first two presented in support of the special legal relationship in support of the fundamental difference contention.

If the traditional conditions identified by Blair are accepted without regard to the transformative nature of the South African legal system, public employment may artificially be declared a legal relationship calling for specific regulation of its own. Ironically, Blair, while supporting the recognition of public employment as a unique legal status, simultaneously propagates that public servants must be granted "the same rights *vis-à-vis* the State employer as are available to"[779] private employees against their employers. Viewed against the current legal landscape, Blair's reliance on the three conditions to support his unique status argument is inherently contradictory[780] and

[777] The traditional position that public servants held office at pleasure changed substantially when the traditional Crown-servant relationship was 'legalised' with legislative limitations placed on prerogative powers. Blair 1958 (21) *MLR* 265 at 268 argues that the fact that legislative prescriptions are consequently involved in the creation and conclusion of public employment relationships brings with it a legal nature that implies State intervention to some degree. This argument loses sight of the fact that any employment relationship has a legal nature to it.

[778] In the private sector, it is the private employer that prescribes the terms and conditions open for the employee's acceptance per his or her choice, while in the public sector it is state-intervention of a particular kind, that of the legislature, that dictates the terms on which an employee can accept or reject the offer of employment. Although a non-party prescribes the terms and conditions in the public sector, the employee remains in a similar position as his private sector counterpart who only in theory has individual negotiation power. Both public and private sector employees are at an equal power disadvantage.

[779] Blair 1958 (21) *MLR* 265 at 275.

[780] If a unique status is identified, that requires acknowledgment of unique interests that cannot be linked to rights and obligations identified within the context of the private sector, it would not be a legally 'just' fit.

refutes the presumption of difference. The traditional declaration[781] that there is nothing essentially illogical in claiming a separate status[782] for public employees may still ring true to some, but is out of step with the contemporary nature of employment in general. It is not surprising that Emery and Giauque, for example, regard the proclaimed difference between public and private employment as a myth that "emerged from the administrative apparatus itself, rather than from the status of civil servant[s]".[783]

3 1 2 Power Struggle and Employment Needs

In *McAuliffe v Mayor of New Bedford*,[784] Holmes J stated that a public servant accepts employment on the terms offered to him or her.[785] The unequal power inherent in employment implies that both the private and public employee have only their services to offer, in contrast to the vast and intimidating resources of the private or public employer.[786] The individual employee stands alone, with the only alternative being the refusal of employment.[787]

In reality, this power differential and the needs of the parties to both private and public employment relationships are substantially comparable. The State as employer requires faithful performance,[788] managerial freedom[789] and continuity of service.[790] In turn,

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[781] As based on the principles identified by Blair 1958 (21) *MLR* 265 at 268.

[782] See Blair 1958 (21) *MLR* 265 at 268.

[783] Emery and Giauque 2005 (71) *Int Rev Admin Sc* 639 at 645. Within the context of "administrative apparatus" reasoning, the difference in status is based on the negative thoughts associated with a bureaucratic system. See Emery and Giauque 2005 (71) *Int Rev Admin Sc* 639 at 643.

[784] 1892 (155) Mass 216.

[785] See *McAuliffe v Mayor of New Bedford* 1892 (155) Mass 216 at 221.

[786] See Dotson 1956 (16) *Publ Admin Rev* 197 at 199.

[787] See Dotson 1956 (16) *Publ Admin Rev* 197 at 199. Stewart 1995 (16) *ILJ* 15 at 16 explains: "In this regard the public employee is in a similar (un)equal negotiating position as the private employee. An employment relationship, regardless of its public or private sector backdrop, remains one of subordination. This is evident when considering the needs and resources of both parties to the public employment relationship." The differing needs and resources give rise to the subordinate element of public employment similar to that of private employment.

[788] The State requires of its employees to fulfil their tasks in "a trustworthy and honest" manner. See Dotson 1956 (16) *Publ Admin Rev* 197 at 198.

[789] This allows the State to determine "what positions are needed, how many are wanted, and what their" duties entail. See Dotson 1956 (16) *Publ Admin Rev* 197 at 198.

public employees require reasonable working conditions and minimum levels of security.[791] The needs of public sector parties to the employment relationship are not fundamentally irreconcilable with their private sector counterparts.[792] These needs in fact illustrate that the power struggle in the public sector resembles that referred to by Kahn-Freund in the context of private employment.[793] Dotson therefore holds that a review of the needs of the State or private employers and the public or private employees are comparable in "that each has serious and pressing requirements ... [and] their respective resources in relation to their needs are vastly unequal".[794] The reality of a comparable unequal position illustrates that both private and public employees are limited (in the context of their individual employment relationships) to negotiate the terms and conditions of their employment.[795]

3 2 Contextual Reality

Throughout the years, several differences have been identified between the private and public employment sectors,[796] some of which have been classified as substantial with reference to considerations such as resources, profit aspirations, the public interest,

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[790] Continuity of service is an important need of the State as employer as "it must be able to maintain certain functions without interruption" as is required by the public interest it serves. See Dotson 1956 (16) *Publ Admin Rev* 197 at 198.

[791] Examples of such minimum security would be medical aid and pension fund contributions. See Dotson 1956 (16) *Publ Admin Rev* 197 at 199.

[792] This is emphasised by Dotson 1956 (16) *Publ Admin Rev* 197 at 199: "In short, the freedoms of enterprise which we have found essential to employee welfare in private endeavour are no less a necessity in public employment, and for equally cogent reasons." Dotson 1956 (16) *Publ Admin Rev* 197 at 200 fn 4 further explains that the identification of similar employee concerns is a necessary exercise "relevant to the rationalisation of public employment at a certain stage", but this does not imply that the characteristics of all employment relationships (whether private or public) are similar. For instance, public employment has an additional public character. See Dotson 1956 (16) *Publ Admin Rev* 197 at 201.

[793] The inherent (subordinate) character of an employment relationship is emphasised in the academic work of Kahn-Freund. See Chapter Two, part 3 2.

[794] Dotson 1956 (16) *Publ Admin Rev* 197 at 200.

[795] Dotson 1956 (16) *Publ Admin Rev* 197 at 200 holds that the State's great economic capacity allows it to stipulate the terms and conditions of employment due to its comprehensive and flexible resources. See part 3 2 1 for a consideration of the contextual impact of resources.

[796] See Smith and McLaughlin 1962 (16) *Indus & Lab R Rev* 30 at 32.

tripartism and collective bargaining. These differences are contextual variables at best, as they are linked to the character of the sector or job and not the nature of the employment relationship. These differences merely inform the application of the equity-based principles and rules regulating employment relationships, while the existence of the employment relationship triggers the application of these principles and rules. The mere existence of a sector or job character difference is not enough to justify a fundamentally different regulatory approach. Mere sector-specific contextual differences cannot function as catalyst for the implementation of a different labour regulatory system in the public and private sector. To illustrate this point, it is necessary to evaluate the public sector-specific arguments that are presented as apparent justification for separate regulation based on a presumption of difference between public and private employment.

3 2 1 Resources, Profit Aspirations and the Public Interest

Resources[797] are a recurring theme in the difference-debate. In reality, there are differences in employer-resources. Those endorsing the presumption of difference in favour of a separate legal theory for public employment, identify the disparity between the resources available to the State as employer and private employers as a key factor.[798]

It is generally acknowledged that the private sector has a profit aspiration.[799] This aim ultimately plays a role in employment decisions. If profit is the aim, then the market is the ultimate determinant in business-based employment decisions.[800] Supply and demand within the market determines the profit margin, which, in turn, determines the

[797] The fairly broad term 'resources' is used in legal literature as relating to public employment, but can also be understood in a more restrictive sense as bargaining power.

[798] See Fredman and Morris 1990 (19) *ILJ (UK)* 142 at 152.

[799] See Smith and McLaughlin 1962 (16) *Indus & Lab R Rev* 30 at 32.

[800] Heintzman and Marson 2005 (71) *Int Rev Admin Sc* 549 at 551 explain the link between society and the market: "Both theory and practice in the private sector have already identified a link between employee satisfaction and customer satisfaction, on the one hand, and between customer satisfaction and the bottom line, on the other. The combination of these two relationships yield a causal chain in which an improvement in employee attitudes and behaviours leads to an improvement in customer attitudes and behaviours, which leads in turn to an increase in growth and profit."

number of employees appointed and maintained by a private employer.[801] Wages for private employees are privately funded.[802] In contrast, profit is not the motive for decisions relating to the provision of services by organs of state.[803]

Following this reasoning, the argument has developed that "the attitude of the employee vis-à-vis the employer"[804] is different between the two spheres. Smith and McLaughlin explain:

> The private employee is conscious of the profit motive underlying his employer's activities, and of the fact that this affects the process of decision making concerning employee wages and other emoluments. The employee tends to think he is competing with the management and the owners of the enterprise in the division of its fruits. The public employee, on the other hand, enters this type of employment realizing that he serves the public interest, not a profit motive.[805]

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[801] Competition within the industry has an influence on such business decisions. While business considerations may be the reason for appointments, those considerations do not in itself characterise the nature of the employment relationship. Although Smith and McLaughlin 1962 (16) *Indus & Lab R Rev* 30 at 32 point out that the services provided by the public sector (in contrast to that found in the private sector) have little or no competition, the position is not as clear-cut in the contemporary context. The State, for instance, has competitors in more than one area of service to the public, for example in transport and medical services.

[802] Smith and McLaughlin 1962 (16) *Indus & Lab R Rev* 30 at 32 – 33 identify that decisions of this nature in the private industry "are based upon the financial positions of the employer".

[803] Heintzman and Marson 2005 (71) *Int Rev Admin Sc* 549 at 552 explain that, in contrast to a profit based bottom line in the private sector, "citizen trust and confidence is, in many ways, the bottom line for the public sector, or as reasonable proxy for it". The public sector bottom line is however not "easily measurable, because it involves competing and even contradictory notions of the public good". Heintzman and Marson 2005 (71) *Int Rev Admin Sc* 549 at 552 elaborate: "Like everything else in the public domain, the bottom line for government is contestable, and involves conflict, contradictions, paradoxes and trade-offs between competing public goods. That is what democratic governance and policies are all about."

[804] Smith and McLaughlin 1962 (16) *Indus & Lab R Rev* 30 at 33.

[805] Smith and McLaughlin 1962 (16) *Indus & Lab R Rev* 30 at 33.

The authors elaborate on this reasoning, by stating that the sense of obligation of public employees makes them "less 'competitive' than private employees".[806] Smith and McLaughlin however recognise that this (wage informed) argument identifies at best a theoretical difference in that it is "more hypothetical than real".[807]

It cannot be denied that the State has "unique resources".[808] The State's predominant source of revenue is taxes[809] and its predominant focus is on service to the public (and not profit and production). Due to the State's unique resources, budget considerations come into play when employment decisions regarding available positions and salaries are made.[810] Stewart accordingly argues that the "traditional relationship between capital and labour is absent in the public sector".[811] The argument follows that, unlike private employers, the State as employer does not feel the burden of market constraints.[812] This argument points to the fact that the State does not function as "just another industry".[813]

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[806] Smith and McLaughlin 1962 (16) *Indus & Lab R Rev* 30 at 33.

[807] Smith and McLaughlin 1962 (16) *Indus & Lab R Rev* 30 at 33 – 34. What remains real is the shared reality of an unequal power relationship in both the private and public employment sector.

[808] Fredman and Morris 1990 (19) *ILJ (UK)* 142 at 152. In addition to financial resources, Frant 1993 (37) *American J Pol Sc* 990 at 995 points out that the State, in "[c]ontrol over hiring and firing … officials [has] access to a large pool of labor … and public funds with which to reward supporters". Dotson 1956 (16) *Publ Admin Rev* 197 at 199 confirms that the State has unique resources at its disposal.

[809] Stewart 1995 (16) *ILJ* 15 at 17 explains that "this prescribes a minimal role for the profit motive". Although there has emerged a trend to privatise public services, it "has not substantially altered the source of revenue".

[810] Smith and McLaughlin 1962 (16) *Indus & Lab R Rev* 30 at 33 emphasise that the use of public funds inevitably render the State answerable to the public. In contrast, "private enterprise … derives its funds from private sources" which renders its managers answerable primarily to its owners. See Smith and McLaughlin 1962 (16) *Indus & Lab R Rev* 30 at 32.

[811] Stewart 1995 (16) *ILJ* 15 at 16 links this argument to the reasoning that managerial power in the public service is found within a hierarchy of power and not in the ownership of capital.

[812] See Fredman and Morris 1990 (19) *ILJ (UK)* 142 at 152.

[813] Stewart 1995 (16) *ILJ* 15 at 17. Frant 1993 (37) *American J Pol Sc* 990 points out that "[m]ost people believe that the public sector is more 'bureaucratic' than the private sector, meaning that there are more internal rules constraining employees' behaviour".

Although the State may not feel the burden of market constraints, this does not imply the absence of constraints on the State as party to an employment relationship.[814] In contrast to market constraints, the State is subject to political and macro-economic constraints.[815] The potential residing in the State to "override commercial considerations in favour of political goals"[816] within the framework of industrial relations[817] has caused some concern.[818] Frant further endorses the presumption of difference in holding that the structure of the public service is different, in that it "creates unique incentives for executives to abuse their appointing authority".[819] The incentives and abuse however do not translate to a substantial difference, as private sector employers also tempt captains of industry with large monetary incentives that bring with it power. With power comes

[814] See Fredman and Morris 1990 (19) *ILJ (UK)* 142 at 152.

[815] See Fredman and Morris 1990 (19) *ILJ (UK)* 142 at 152. The fact that the modern State has exclusive power to decide issues of national security (as Stewart 1995 (16) *ILJ* 15 at 20 emphasises) is hardly constraint enough to render it protected from comprehensive and uniform labour regulation, which primarily focuses on the balancing of interests and power in an employment relationship. Labour law requires balancing of interests and power, but does not define those interests and power. Labour law rather leaves it to the contextual (job- or sector-specific) considerations of every case to determine the content of the relevant interests and power.

[816] Fredman and Morris 1990 (19) *ILJ (UK)* 142 at 152. Stewart 1995 (16) *ILJ* 15 at 20 points out that the State has the power to call on the military "to quell industrial action, remove strikers from state premises and to take over the functions and duties of the strikers". An example of such action can be found in the 1990 and 2007 strikes at public hospitals. In 1990, the hospital workers at ten day-clinics and fifteen provincial hospitals in the Cape Peninsula partook in a strike. The State called upon the military to assist with the crisis this caused for the functioning of the hospitals. See Anon, Die Burger 10 March 1990 and Anon, Die Burger 2 May 1990. During the 2007 strike at public hospitals, the State called on 2600 military members to assist with the crisis at hospitals with the provision of medical care, the cooking of meals for patients as well as cleaning. The State also called upon the military to protect the public against the striking hospital workers. See Keppler, Die Burger 9 June 2007 and Merton, Die Burger 11 June 2007.

[817] This bureaucratic character of the State as employer is not restricted to the public sector, as the effect thereof is also felt in the private sector. See Stewart 1995 (16) *ILJ* 15 at 16.

[818] Stewart 1995 (16) *ILJ* 15 at 21 points out that courts are reluctant to interfere in revenue decisions, as "it is their role to intervene to control the use or abuse of public power". The author identifies this as an area in which administrative law controls and remedies can assist in the regulation of the public employment relationship, if the abuse of resources unknown to the private sector affects employment rights.

[819] Frant 1993 (37) *American J Pol Sc* 990 at 995.

the potential for abuse, regardless of whether that power is exercised in the public or private domain. Arguably, only the degree of potential abuse differs. Abuse in the public service has a potentially greater (public) impact than the purely internal business impact in the case of a private organisation. Although abuse of power, resources and structure may be valid concerns, its job- or sector-specific character is inappropriate as basis for the separate legal regulation of public and private employment.[820]

Although the State functions as an employer, it must be admitted that the contrasting "milieux in which employee relations problems arise"[821] inevitably find expression in the rationale for employment decisions in different sectors. The rationale for employment decisions by the State as employer to a certain degree differs from that found in the private sector.[822] Stewart explains that "[p]ublic sector employment decisions are subject to social, political and ideological factors, not purely the market, and the public interest should be at the centre of the decision makers' considerations".[823] It can also be said that the "criteria for determination of wages and working conditions and the limitations upon these determinations, as between private and public employment, obviously differ at least in [some] instances".[824] In the private sector, the "area within

[820] Stewart 1995 (16) *ILJ* 15 at 16 correctly observes that a public employment "relationship is far too complex to be able to rely simply on the capital-labour dichotomy to explain it".

[821] Smith and McLaughlin 1962 (16) *Indus & Lab R Rev* 30 at 33.

[822] See Stewart 1995 (16) *ILJ* 15 at 17.

[823] Stewart 1995 (16) *ILJ* 15 at 17. Although public employment decisions are subject to such variables as social and political factors, the private sector is not unaffected by these variables. See Chapter Two, part 3 4. With regard to the political element present in private employment Du Toit 2007 (28) *ILJ* 1405 explains that "power built up in the bargaining arena enables trade unions also to engage with broader issues and exert political pressure". However, it is only the impact or influence of these factors that differs. Substantial similarity cannot be denied based on the different contextual degrees of the identified factors. In the context of private employment, social and political factors influence the economic or market related rationale underlying employment decisions. In the context of public employment, the influence of social and political factors (both to an extent linked to economic variables) find expression in the public interest rationale, which, in turn, influence public (power) based employment decisions. See further the perspectives of Stewart 1995 (16) *ILJ* 15 at 17.

[824] Smith and McLaughlin 1962 (16) *Indus & Lab R Rev* 30 at 33. Smith and McLaughlin 1962 (16) *Indus & Lab R Rev* 30 at 32 also emphasise that private employer wages are sourced from private funds.

which decisions are made is bounded by overriding economic realities".[825] The fact that the State acts according to budget rather than market interest is linked to the rationale for employment decisions taken in the public sector.[826] However, while profit and economic considerations are not the primary rationale for decisions relating to the servants that perform public services,[827] the modern democratic State "include[s] a more market-driven public service"[828] that supports the lack of fundamental difference. Considerations of a resource-nature therefore fail to pass as substantial enough to override the substantial similarities between public and private employment relationships.

In attempts to magnify the perception of profit aspiration difference between public and private employment, the interests vested in the provision of public and private sector services have been identified as a key distinction. Interests differ from person to person, workplace to workplace and sector to sector. Due to the profit incentive found in private employment, the interests of the employees are clearly economic in nature. In contrast, legal writings regarding public employment (limited as it may be) have identified public policy as a vital interest in that sphere.[829] As such, public employment requires a special virtue in its vocation[830] founded on an apparently special moral level.[831] However, this is nothing more than a sector-specific contextual consideration, as it cannot be ignored that public employees are also citizens affected by the conduct of the State.[832] Although public servants act with the public interest in mind, they are also citizens with an interest in exercising their legally recognised rights.[833]

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[825] Smith and McLaughlin 1962 (16) *Indus & Lab R Rev* 30 at 33. However, the State as employer is not left unaffected by economic realities, as these realities affect social and political considerations that ultimately affect decisions relating to the public interest.

[826] Stewart 1995 (16) *ILJ* 15 at 17.

[827] See Smith and McLaughlin 1962 (16) *Indus & Lab R Rev* 30 at 32.

[828] Burns and Beukes *Administrative Law* 168.

[829] See Dotson 1956 (16) *Publ Admin Rev* 197 at 199.

[830] See Dotson 1956 (16) *Publ Admin Rev* 197 at 199.

[831] See Anon 1984 (97) *HLR* 1611 at 1628.

[832] See Dotson 1956 (16) *Publ Admin Rev* 197 at 199.

[833] See Anon 1974 (122) *Univ Penn LR* 1647.

As such, a balance must be struck between the interests of the public and that of the individual public employee as citizen.[834] The employment relationship in the public sector functions in an undeniably complex sector-specific context due to conflicting interests, as "the public has an interest in better services and lower taxes, whereas the public employee has an interest in higher wages and less work".[835] However, public employees have an equal stake in the public interest they serve[836] and similarly seek employment (although it is of a public nature) for personal economic benefit. They are not mere volunteers who perform their services free of charge.

It is illogical to reason that public servants must be denied their identity as 'normal' employees because the public holds them responsible and accountable for their universal interest. Reasoning of this nature places a heavy burden on public employees. Public interest cannot generally be regarded as the definable character of a public employment relationship.[837] Fredman and Morris argue that it is the nature of the public job that indicates the regulatory significance of public interest in the exercise of public power in the public employment relationship[838] and not whether it qualifies as an employment relationship in nature.[839] The sector-specific context within which the

[834] See Anon 1974 (122) *Univ Penn LR* 1647 at 1684.

[835] Stewart 1995 (16) *ILJ* 15 at 19.

[836] See Dotson 1956 (16) *Publ Admin Rev* 197 at 199.

[837] Public interest is however one of the defining characters of an administrative action as a form of public power.

[838] See Fredman and Morris 1990 (19) *ILJ (UK)* 142 at 152.

[839] The public degree of a job is of value to the contextual interests/needs to be considered. This can however be viewed as a requirement of the job and not necessarily as a defining character of the job. See Anon 1974 (122) *Univ Penn LR* 1647 at 1657. The following reasoning has developed: "A greater degree of exposure to the public ... may sustain a more stringent general 'good character' requirement – a high school principal might … be subject to dismissal for behaviour that is acceptable from someone such as the school's janitor, whose job has less visibility. A job conferred on an individual of state may also carry with it a sensitivity to public opinion based upon its symbolic status. Teachers and policemen, who fill roles viewed by the community as models for good behavior, might thus be subject to greater state-imposed restraints than people whose jobs are less highly regarded … The same behavior by public employees with different jobs might also lead to different … [contextual] results on the basis of permissible inferences regarding effects on government service. For example, a custodian's or social worker's inability to handle his or her personal financial affairs properly might not be grave enough to

employment relationship is situated should be the primary and defining determinant of the requirements of the specific job, but not of the nature of the relationship as employment.[840] A nexus between the context of employment and the public interest is required in assessing which interests call for specific protection, as well as the extent of that protection, in an employment dispute on a case-by-case basis.[841]

3 2 2 Public Perception

Public employees have been referred to as the "universal class",[842] because they are servants acting in the "universal interests of the community."[843] Some commentators have even described the public service as a "moral crusade".[844] Descriptions of this nature reflect the public's perception of what they think the public service should be or ought to represent.

Prior to the democratic transition, the South African public service formed part of the bureaucratic system that was mistrusted by the majority of the population. Marx appropriately states: "Anybody we like is efficient. Anybody we do not like is a bureaucrat."[845] However, pre-democratic perceptions of this nature cannot be allowed to justify negative differentiation in the form of separate labour regulation.

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warrant discharge where no direct job performance was affected; but the same conduct by an agent with fiscal responsibility could lead to a substantial loss of public confidence and to a judicial determination that a discharge for this reason was justified." See Anon 1974 (122) *Univ Penn LR* 1647 at 1654.

[840] With regard to good character, it is for example of no interest to the public or the State, whether the public employee "goes to church, mows his lawn seasonably … or gives to the United Fund". These are characteristics of a good or nice person, neighbour or citizen, but are removed from employment considerations. See Anon 1974 (122) *Univ Penn LR* 1647 at 1658.

[841] See Anon 1974 (122) *Univ Penn LR* 1647 at 1660.

[842] Hegel *Philosophy of Right* 132. See also Anon 1984 (97) *HLR* 1611.

[843] Hegel *Philosophy of Right* 132. See also Anon 1984 (97) *HLR* 1611.

[844] Anon 1984 (97) *HLR* 1611 at 1628.

[845] Marx 1949 (43) *American Pol Sc Rev* 1119. Because a bureaucrat is viewed as domineering and interfering, it can be argued that public servants carried a negative bureaucratic label because of the system, which in the past not only authorised but also insisted that they act in a domineering and interfering manner as a response to the government's fear of revolt. As a result, the public service historically carried the burden of being regulated and governed by such a system and this at first sight superficially separates public servants from their private sector counterparts.

The public administration of the pre-democratic State "embraced 'values and structural arrangements … at odds with those [now] embedded in the Constitution'".[846] In acknowledging this truth, the South African administration (following the developing trend of administrative law) moved from the bureaucratic side of Marx's spectrum to the efficient side.[847] This paradigm shift represents an attempt to address negative public perception. It does not affect the nature or essence of the employment relationship that the LRA seeks to regulate.

Chapter 10 of the Constitution deals with the basic values and principles that govern the public administration and attempts to transform the public service into a trusted functioning component of government.[848] The law generally recognises that the context of a case informs the applicable values and principles. This is no different when linked to public service considerations reflected in s 195 of the Constitution.[849]

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[846] Harlow 2005 (71) *Int Rev Admin Sc* 279 at 280.

[847] This shift in focus is not unique to South Africa. In an American context, the court in *Thompson v Gallagher* 1973 (489) F 2d 443 (5th Cir) "set the stage for judicial articulation of how the balance of the state interest in efficiency is to be struck against the need to protect the public employee against … arbitrariness". See Anon 1974 (122) *Univ Penn LR* 1647 at 1653.

[848] See Devenish, Govender and Hulme *Administrative Law and Justice* 10.

[849] Section 195 reads as follows:

"(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(*a*) A high standard of professional ethics must be promoted and maintained.

(*b*) Efficient, economic and effective use of resources must be promoted.

(*c*) Public administration must be development-oriented.

(*d*) Services must be provided impartially, fairly, equitably and without bias.

(*e*) People's needs must be responded to, and the public must be encouraged to participate in policy making.

(*f*) Public administration must be accountable.

(*g*) Transparency must be fostered by providing the public with timely, accessible and accurate information.

(*h*) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.

(*i*) Public administration must be broadly representative of the South African people, 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.

Public interest and inevitably public perception allows for sector-specific contextualisation of the public service in s 195.[850] Principles found in s 195 are generally associated with a reformed approach to public administration and the public service.[851] In this regard, the principles of accountability,[852] responsiveness[853] and transparency[854] are of great importance to a government based on democracy.[855]

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(2) The above principles apply to—

(*a*) administration in every sphere of government;

(*b*) organs of state; and

(*c*) public enterprises.

(3) National legislation must ensure the promotion of the values and principles listed in subsection (1).

(4) The appointment in public administration of a number of persons on policy considerations is not precluded, but national legislation must regulate these appointments in the public service.

(5) Legislation regulating public administration may differentiate between different sectors, administrations or institutions.

(6) The nature and functions of different sectors, administrations or institutions of public administration are relevant factors to be taken into account in legislation regulating public administration."

[850] Section 195 of the Constitution endorses the ideal of an efficient public administration. See Burns 2002 (17) *SAPL* 279 at 286. The constitutional interpretation of ss 23 and 33 must take account of the relationship between these sections and other provisions in the Bill of Rights, as well as the general provisions in Chapter 10 of the Constitution that deals with the basic values and principles that govern the public administration.

[851] See Burns 2002 (17) *SAPL* 279 at 287.

[852] See Burns 2002 (17) *SAPL* 279 at 286. Cf Leyland and Woods *Administrative Law* 36. The Constitution sets the standard for administrative accountability. Section 92(2) of the Constitution provides that "Members of the Cabinet are *accountable* collectively and individually to Parliament for the exercise of their powers and the performance of their functions". Emphasis added. In terms of s 133(2), the same holds true of the Members of the Executive Council of a province. Section 55(2) also states that the "National Assembly must provide for mechanisms ... to ensure that all executive organs of state in the national sphere of government are accountable to it ... [and] to maintain oversight of ... any organ of state".

[853] Burns 2002 (17) *SAPL* 279 at 289 states that "[a] responsive government is one which is alert to the needs of its people and addresses these needs". In this regard, s 4 of PAJA is important as it emphasises that the public administration must be responsive to and address the "needs of the people".

[854] Transparency as a value of a democratic government is important when trying to change a society's opinion that government decisions are shrouded in suspicion and mistrust. See Burns 2002 (17) *SAPL* 279 at 290.

These principles contain the values directing the conduct of public employees. In effect, these principles reflect the public sector's version of "management doctrines".[856] Management is the prerogative of an employer and is influenced by the needs of the specific workplace and associated workforce. Management in practice is a contextual exercise.[857]

Section 195 aligns South Africa's public service with the international trend[858] to restore public trust in the public service.[859] Section 195 has interpretative value when the application of the norms underlying s 23 is called for in a public employment context.[860] The interpretative character of s 195 cannot be read as a limitation on the granting of labour rights to public servants, or as an endorsement of the presumption of difference.

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[855] Burns 2002 (17) *SAPL* 279 at 286 and 292 states that the effectiveness of the rights-based approach in the facilitation of respect, protection, promotion and fulfilment of the rights entrenched in the Bill of Rights is intrinsically linked to the constitutional duty placed on the public administration to carry out their functions in an accountable, responsive and transparent manner. The rights must therefore be viewed within the holistic context of the Constitution (all relevant provisions included) and its underlying values.

[856] Argyriades 2003 (69) *Int Rev Admin Sc* 521.

[857] Hughes *Public Management and Administration* 242 describes this reform: "[T]he traditional model of administration is obsolete and has been effectively replaced by a new model of public management. This change represents a paradigm shift from a bureaucratic model of administration to a market model of management closely related to that of the private sector. Managerial reform implies a transformation, not only of public management, but of the relationship between market and government, government and the bureaucracy, and bureaucracy and the citizenry." See also Argyriades 2003 (69) *Int Rev Admin Sc* 521 at 522.

[858] Argyriades 2003 (69) *Int Rev Admin Sc* 521 at 527 describes this international trend: "On the national, sub-national and international levels, we need to reaffirm the true *values of citizenship*, which match and complement those of the *public service*."

[859] See Argyriades 2003 (69) *Int Rev Admin Sc* 521 at 526. In the South African context, mistrust is rooted in the suppressive pre-constitutional history.

[860] See *Chirwa v Transnet Limited* 2008 (2) BLLR 97 (CC) par 76. The fact that ss 33, 195 and 197 of the Constitution can have interpretative value in understanding of the public employment relationship and the applicability of the s 23 right to fair labour practices, endorses the idea that the rights that are traditionally associated with the apparently different employment sectors are interdependent. Interdependence implies substantial similarity as it would otherwise be meaningless. See the discussion of the doctrine of interdependence in Chapter One, part 5 2 and Chapter Seven, part 2 2.

This constitutionally endorsed shift in focus embraced by the public service strives to alter public perception in favour of an 'effective' public administration "that can deliver services 'efficiently' and 'economically' but without violating individual human rights".[861] The s 195 constitutional considerations are job- or sector-specific and therefore contextual in nature, but do not inform the nature of the employment relationship.

3 2 3 Tripartism

A tripartite approach to the promotion of co-operation in labour relations is recognised in labour systems throughout the world.[862] It has similarly gained currency in South Africa.[863] It must accordingly be considered whether the idea of tripartism supports or refutes the presumption of difference.

Within a tripartite system, the three role players – the State, the employer and the employee (or their respective organisations and representatives) – each have a function and a role to fulfil in the industrial relationship.[864] The State's role in this system is aimed at evening out the factually weaker position of the (private) employee in contrast to that of the (private) employer. This approach is based on the philosophy of humanisation, partnership and the industrial relationship doctrine of the 20th century, which strives to achieve greater equality between the partners (which includes the State).[865] Poolman describes the characteristics associated with this approach as open negotiations, decision-making of a democratic nature, as well as the support of collective interests.[866] Within this structure, employers are clothed with certain duties,[867]

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[861] Harlow 2005 (71) *Int Rev Admin Sc* 279 at 287. Transparency is a key element for an efficient public administration.

[862] See Wiehahn *Verslag Aantekeninge* par 2.15.

[863] See Wiehahn *Verslag Aantekeninge* par 2.15. Poolman *Principles of Unfair Labour Practice* 17 emphasises that the Wiehahn Commission considered the idea of tripartism as fulfilling the equalisation function. It regarded tripartism as allowing the role-players to discuss problems and injustices and so to strive towards the formation of a labour system, which represents "all interests for the advancement of social justice".

[864] See Wiehahn *Verslag Aantekeninge* par 2.15. Stewart 1995 (16) *ILJ* 15 at 18 points out that industrial relations *generally* involve the three identified actors, but, as will be explained, exceptions are possible.

[865] See Wiehahn *Verslag Aantekeninge* par 2.15.

[866] See Poolman *Principles of Unfair Labour Practice* 17. In other words, trilateral relations between the three role-players imply "collaborative relations between the social partners in sharing the broad objective

balanced by the duties of the employees[868] that come into play within the labour system. It is the role of the State (specifically its legislative arm) to formulate the structure for such a system.[869] In theory, tripartism transforms the actors in the unequal employment relationship into equal social partners and empowers them to address important policy issues.[870]

An artificial argument can be made that public employees cannot participate in this equalisation process as the State simultaneously fulfils two of the three roles of the parties to tripartism.[871] Reasoning of this nature supports the presumption of difference. However, this argument is flawed.

Tripartism, as viewed by the ILO,[872] is a concept that requires an equal amount of representation in the negotiation of interests, necessitates the protection of mutual and respective interests, and prevents role-players from neglecting their obligation to social justice[873] in favour of their own interests.[874] As such, tripartism does not inform the

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of promoting and preserving harmonious relations in the work environment and the country as a whole". See Poolman *Principles of Unfair Labour Practice* 18.

[867] These duties of employers included the creation of job opportunities, granting employees the opportunity to complete the available work, not obstructing freedom of association, bargaining in good faith, providing a working environment that is mentally and physically safe for employees and developing skills of employees. See Wiehahn *Verslag Deel 5* par 4.41.1.

[868] The Commission stated that employees had the duty to perform adequately in terms of their employment agreements, to act in good faith when bargaining with employers and to respect and promote the property and interests of employers. See Wiehahn *Verslag Deel 5* par 4.41.1.

[869] See Wiehahn *Verslag Deel 5* par 4.41.2.

[870] See Mandela 1994 (15) *ILJ* 732.

[871] Stewart 1995 (16) *ILJ* 15 at 18 – 19 notes that it is a "distinctive feature of public sector employment … that the employer and the state are one and the same". A conflict of interest and an abuse of power can potentially occur when the State as employer's position is not explicitly regulated by one sphere of the law, to protect the rights of all parties involved.

[872] According to the standards set for tripartism by the ILO, effective consultation should be the outcome, and for this to become reality the envisioned representation for and negotiation of employers and employees should take place on an equal footing.

[873] Social justice, as interpreted with the values of the Constitution and the aim of labour law as expressed in the LRA, once again plays a key role in balancing the interests present in employment relationships.

[874] See Poolman *Principles of Unfair Labour Practice* 18.

nature of the employment relationship, but rather aims to promote the job- or sector-specific contextual interests emanating from the employment relationship.[875] The substantial similarity of the nature of public and private employment emphasises that the idea of equality (between employer and employee) underlies the labour rights of all employees - regardless of sector. In pursuit of equality in the public sector, two forms of state intervention are present: legislative determination of the labour structure and executive fulfilment of the role of manager or agent of the State as employer.[876] What is somewhat misleading is that the executive largely determines the agenda (and mostly the content) of legislative involvement.[877] Consequently, where the State's interests as employer are present, the balance is fragile.

Despite this fragility, an interest-based understanding of tripartism (which is the ILO's approach) shows a tripartite system as only one method of promoting the idea of social dialogue (negotiations, consultations, exchange of information and collective bargaining).[878] Put differently, a tripartite process is the ILO default for advancing social

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[875] In fact, recognition of tripartism illustrates that the interests calling for consideration allow for interdependent considerations endorsed by both administrative and labour law as the respective traditional protectors of public and private employees.

[876] Harlow 2005 (71) *Int Rev Admin Sc* 279 at 281 refers to "the 'balanced constitution' model, in which government is subject in all its undertakings to a dual 'control' of law – on one side, by the legislator, on the other by the judiciary".

[877] Furthermore, since most of the labour law rules are negotiated between various stakeholders, including the executive branch of the State, before it is converted into binding rules by the legislature, the legislature does not play an active role in that pre-legislative stage and therefore the creation of the labour structure (apart from formally adopting the legislation).

[878] Huluman *The Practice of Social Dialogue in the South African Public Service* 1. The ILO defines 'social dialogue' as follows: "Social dialogue is defined by the ILO to include all types of negotiation, consultation or simply exchange of information between, or among, representatives of governments, employers and workers, on issues of common interest relating to economic and social policy. It can exist as a tripartite process, with the government as an official party to the dialogue or it may consist of bipartite relations only between labour and management (or trade unions and employers' organizations), with or without indirect government involvement. Social dialogue processes can be informal or institutionalised, and often it is a combination of the two. It can take place at the national, regional or at enterprise level. It can be inter-professional, sectoral or a combination of these. The main goal of social dialogue itself is to promote consensus building and democratic involvement among the main stakeholders in the world of work. Successful social dialogue structures and processes have the potential

dialogue, but it is not the only recognised form. Tripartism is merely one form, which is implemented if it is the best contextual option, as "[s]ocial dialogue can take a variety of forms, ranging from the act of tripartite process, with the Government as an official party to dialogue, or it may consist of *bipartite* relations only between labour and management, with or without indirect government involvement".[879]

Phrased differently, tripartism is merely a contextually informed method of endorsing social dialogue. It is equally consistent with the ideals of tripartite relations to recognise the possibility of public employees as role-players in a bipartite system.[880] By allowing bipartite relations (through which it is acknowledged that State interest is an unavoidable element in public employment relationships),[881] social dialogue is still maintained.[882] However, the form of social dialogue remains a question of contextual

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to resolve important economic and social issues, encourage good governance, advance social and industrial peace and stability and boost economic progress." See *Social Dialogue, Labour Law and Labour Administration* 1 http://www.ilo.org/public/english/dialogue/ifpdial/areas/social.htm (2008/07/11).

[879] Huluman *The Practice of Social Dialogue in the South African Public Service* 2. Emphasis added. The ILO identifies enabling conditions for social dialogue: "In order for social dialogue to take place, the following must exist: Strong, independent workers' and employers' organizations with the technical capacity and the access to relevant information to participate in social dialogue; Political will and commitment to engage in social dialogue on the part of all the parties; Respect for the fundamental rights of freedom of association and collective bargaining; and Appropriate institutional support." See *Social Dialogue, Labour Law and Labour Administration* 1.

[880] The bipartite system regards the State, as regulator, as taking an indirect or invisible position in the social dialogue. The main actors in a bipartite system are employers (in the public service this includes the State acting in this capacity) and employees.

[881] Apart from its position as employer, the role of the State in social dialogue is described as follows by the ILO: "For social dialogue to work, the State cannot be passive even if it is not a direct actor in the process. It is responsible for creating a stable political and civil climate which enables autonomous employers' and workers' organizations to operate freely, without fear of reprisal. Even when the dominant relationships are formally bipartite, the State has a role in providing essential support for the process through the establishment of the legal, institutional and other frameworks which enable the parties to engage effectively." See *Social Dialogue, Labour Law and Labour Administration* 1.

[882] The compulsory establishment of the PSCBS is an important safety net in the bipartite relationship resulting from the fact that the State as regulator overlaps with the State as employer in the public sector. Among other things, the PSCBC has the objective to promote a sound employer-employee relationship in

interest and not of the nature or status of the relationship that underpins it.[883] Social dialogue is the goal. Tripartism is just one way through which social dialogue can be promoted. As such, tripartism cannot be viewed as the ultimate (difference enhancing and defining) pursuit, the structure of which makes the balance between the State as employer and the State as legislator fragile and possibly unstable.

What is important and substantially similar in both public and private employment is the promotion of social dialogue.[884] Social dialogue is the common denominator. Social dialogue, the promotion of which is the aim of tripartite *or* bipartite systems, does not prescribe a one-size-fits-all system.[885] Whether tripartite or bipartite, the goal and product remains effective social dialogue, regardless of the sector-specific context. In turn, social dialogue allows for the collective element in employment relationships, which in turn facilitates the pursuit of consensus in the employment relationship.[886]

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the public sector and conclude, supervise and enforce collective agreements. See Huluman *The Practice of Social Dialogue in the South African Public Service* 5 - 6.

[883] See Chapter Two, part 3 2 for a discussion of the nature and extent of the substantial elements that underlie an employment relationship.

[884] Recognition of the shared ideal of social dialogue keeps the State's unemployer-like characteristics (as a contextual reality) in control, and allows the substantial similarities between public and private employment relationships to surface. In a tripartite system, it would be the role of the State as regulator to ensure that there is no abuse of power between the employer and the employees. The presence of the PSCBC and its role in the negotiation of collective agreements in the public sector checks the State's role as regulator and constrains the abuse of power between the parties to a public employment relationship. Due to the fact that the State as regulator takes a backseat in a bipartite system, the PSCBC has the potential to regulate equal negotiations between the State as employer and public employees.

[885] The ILO gives the following description: "Social dialogue takes into account each country's cultural, historical, economic and political context. There is no 'one size fits all' model of social dialogue that can be readily exported from one country to another. Social dialogue differs from country to country, though the overriding principles of freedom of association and the right to collective bargaining remain the same." See *Social Dialogue* 2 http://www-ilo-mirror.cornell.edu/public/english/dialogue (2008/10/31).

[886] The ILO identifies the main goal of social dialogue as the promotion of "consensus building and democratic involvement among the main stakeholders in the world of work". See *Social Dialogue* 2.

3 3 Collective Bargaining

In the absence of substantial difference of the public and private employment relationship, the argument that collective labour law does not find equal application in the public and private sectors can also be questioned.

While private employers have always been encouraged, if not compelled, to bargain, allow for the negotiation of collective agreements and make use of grievance and arbitration procedures,[887] the State as employer is traditionally regarded as immune from such persuasion. Originally, the absence of a collective element in public employment therefore supported the presumption of a fundamental difference with private employment.[888] From a contemporary perspective, it becomes apparent that the presumed difference based on the collective is no more than a historical remnant.

The traditional position was that the "resort to strike action or other forms of economic force by unions which … organized public employees ... [was] almost universally considered to be illegal, and this kind of limitation on unionism ... [was] solidly entrenched".[889] The traditional restrictions placed on public employment have undergone some liberating transformation.[890] Various arguments have been presented as explanation for the fact that collective bargaining "came to the public sector much later than to the private workplace".[891] What is important is that collective bargaining nevertheless came to the public sector, creating yet another similarity through the transformation of labour law.

The traditional view holds that limitation of collective labour law in public employment "stem[s] from the notion that the [State] … as sovereign stands in a different relation to

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[887] See Smith and McLaughlin 1962 (16) *Indus & Lab R Rev* 30 at 34.

[888] Cf the reasoning of Blair 1958 (21) *MLR* 265.

[889] Smith and McLaughlin 1962 (16) *Indus & Lab R Rev* 30 at 35.

[890] See Smith and McLaughlin 1962 (16) *Indus & Lab R Rev* 30 at 36.

[891] Anon 1984 (97) *HLR* 1611 at 1616. Smith and McLaughlin 1962 (16) *Indus & Lab R Rev* 30 at 30 – 31 ascribe the lack of concern and development of labour regulation in the public sector to the development of unionism: "[T]he primary impact of aggressive trade unionism has been in the area of private employment, and there is no doubt that the growth of trade unionism has been a major factor contributing to the tremendously increased interest in and emphasis upon labor relations research ..." This is no more evident than in the development of labour law in South Africa. See Chapter Two, part 2.

civil servants than does the private sector employer to its employees".[892] This perspective regards public sector industrial action as "an attack on the authority of the state".[893] Stewart argues that, "[a]lthough this argument possibly has consequences for whether or not public employees can be publicly involved in political activity, and for the applicability of administrative law, it can have little impact on the right to resort to industrial action".[894] The mere "fact of the state being sovereign cannot give it carte blanche in its relationship with its employees".[895]

Contemporary adherence to the sovereign perspective in denying collective labour rights to the public service would allow the law to regress to the traditional idea of prerogative and offices held at pleasure.[896] Stewart affirms this view to be "long since outdated in industrial relations thinking".[897]

This argument was heavily relied upon pre-democratically, as the "policy of the apartheid government was strongly opposed to extending labour rights including rights to collective bargaining to state employees."[898] The political influence of public employees were seen as a great threat to the State, a sentiment already expressed in *Abood v Detroit Board of Education*.[899] Ngcukaitobi summarises this argument by stating that "the officials representing public employees in collective bargaining are, unlike their private counterparts, subject to a range of political influences [as] … 'public employee unions attempt to influence governmental policy making'".[900]

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[892] Anon 1984 (97) *HLR* 1611 at 1616. Smith and McLaughlin 1962 (16) *Indus & Lab R Rev* 30 at 35 also acknowledge the fact that the State's status as sovereign has been identified by some as the "rationale for existing legal limitations on the right of public employees to organize, or to bargain collectively, or to engage in strike or other forms of concerted 'economic' action".

[893] Stewart 1995 (16) *ILJ* 15 at 27.

[894] Stewart 1995 (16) *ILJ* 15 at 27.

[895] Stewart 1995 (16) *ILJ* 15 at 27.

[896] See Ngcukaitobi *The Right to Collective Bargaining in the Public Service* 3.

[897] Stewart 1995 (16) *ILJ* 15 at 27–28.

[898] Ngcukaitobi *The Right to Collective Bargaining in the Public Service* 3.

[899] 1995 (4) LCD 183 (USA). Note that even in the traditional argument, political influences merely amount to job- or sector-specific contextual influences.

[900] Ngcukaitobi *The Right to Collective Bargaining in the Public Service* 4.

In *Abood v Detroit Board of Education*,[901] the court was of the opinion that public employees were denied the advantage of collective bargaining as their activities "raise[d] the ideals and beliefs of public employees onto a higher plane than the ideas and beliefs of private employees".[902] Ngcukaitobi also links this argument to reasoning that "the right to collective bargaining invariably limits the exercise of managerial discretion, the very basis of the laws created under apartheid".[903] This yet again brings a political element to the argument against collective labour law in the public sector.[904] It must, however, be kept in mind that parliamentary power (culture of authority), associated with the apartheid government, has now been replaced with a supreme Constitution and a culture of justification.[905]

Another closely related argument is based on the function and purpose of collective action. In the private sector, collective bargaining power is found in the economic pressure on profit margins.[906] When viewing collective action in the public sector, the weapon apparently takes on a political instead of an economic character.[907] Unlike private employers, the State can withstand collective action, as profit motives are irrelevant.[908]

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[901] 1995 (4) LCD 183 (USA).

[902] *Abood v Detroit Board of Education* 1995 (4) LCD 183 (USA) at 281.

[903] Ngcukaitobi *The Right to Collective Bargaining in the Public Service* 4 – 5.

[904] Stewart 1995 (16) *ILJ* 15 at 19, relying on the 1985 academic work of Golding, draws the political link: "Since the civil service is the political structure through which state power is exerted, worker struggles in the civil service have a political and ideological impact way beyond those in the private sector, where, in contrast, the impact is primarily on productivity and profitability. The public employer has a weapon at its disposal which the private employer lacks, and that is that the state has legislative power: employment decisions can be given the force of law."

[905] The idea of a culture of authority versus a culture of justification was first used by Mureinik 1994 (10) *SAJHR* 31.

[906] See Stewart 1995 (16) *ILJ* 15 at 27.

[907] See Stewart 1995 (16) *ILJ* 15 at 27. Although political and not economical, it is nevertheless a contextually informed character.

[908] Stewart 1995 (16) *ILJ* 15 at 27 explains the basis of this argument: "The argument is that this form of political pressure puts public employees at an advantageous position relative to other pressure groups seeking an influence on the allocation of public resources. Although this may be true, it does not seem to be a compelling argument."

Dotson extends the political-imbalance in this argument to a capacity-imbalance argument. Dotson states that collective bargaining is traditionally regarded as an ineffective way to grant public employees stronger negotiation power, as the strength of the State "with which to achieve and protect its interests in public employment ... are unmatched by the employee's relative capacity".[909] Although the employees' resources or capacity might differ from that of the State, Dotson does acknowledge that "duties are the correlatives of rights, [and that] the position of each party would merely be the product of the other's rights … the duties of the … [State] are fixed by the employee's claims".[910]

The fact that the public and private sector differs with regard to political and economic power does not justify the granting of collective rights to the latter, while denying the former the same rights.[911] There exists no substantial basis for the presumption of difference based on collective bargaining considerations, regardless of the fact that the leverage relied upon by private and public employees may be different, as the difference in leverage flows from the position of the employers whose power the employees attempt to equalise through collective action.[912] Interconnected reasoning is found in the public interest consideration (which Dotson proclaims to be the determining factor in the collective labour rights debate in the public sector)[913] which has already been identified as an essentially contextual consideration.[914]

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[909] Dotson 1956 (16) *Publ Admin Rev* 197 at 200.

[910] Dotson 1956 (16) *Publ Admin Rev* 197 at 203.

[911] Another political argument is found in the fact that public servants have access to sensitive State information. However, Stewart 1995 (16) *ILJ* 15 at 25 correctly states that "[i]n both private and public sectors there may be certain information which is sensitive and necessarily kept confidential and arrangements can be made for the protection of such information in both cases". The argument therefore does not carry enough weight to justify the limitation of collective labour rights in the public service.

[912] See Stewart 1995 (16) *ILJ* 15 at 27. See part 3 2 1 for a discussion of the link between employer power and employer resources.

[913] See Dotson 1956 (16) *Publ Admin Rev* 197 at 199. Stewart 1995 (16) *ILJ* 15 at 19 argues that public opinion can be a powerful weapon in the hand of public employees: "Public sector employees and their unions can lobby public opinion and have an impact in the political process and thereby put a form of pressure on the public employer from which the private employer is relatively immune. 'Relatively' … because public opinion certainly can have an impact on a private employer in the context of a labour dispute; consumer boycotts in South Africa over the last decade are evidence of this." However, public

Dotson also reasons that carefully timed public sector strikes can inconvenience or even endanger the public.[915] In *SALGA v SAMWU*,[916] Van Niekerk AJ, however, explained that the public is generally and inevitably inconvenienced by strikes,[917] as service delivery is affected. Regardless of the sector in which the strike takes place, third parties (namely the public) are indirectly affected by the consequences of a strike. For example, a strike by private airline security staff or private airline maintenance staff directly endangers the safety of the public.

In addition to the consideration of the public interest, Stewart argues that public opinion can be a powerful weapon in the hand of public employees, as "[p]ublic sector employees and their unions can lobby public opinion and have an impact in the political process and thereby put a form of pressure on the public employer from which the private employer is relatively immune".[918] Stewart emphasises the fact that such immunity is relative and not substantial enough to deny collective labour rights in the public sector, "because public opinion certainly can have an impact on a private employer in the context of a labour dispute; consumer boycotts in South Africa over the last decade are evidence of this".[919]

Based on the public interest reasoning, some academics nevertheless hold "that public employees should be restricted in their ability to resort to industrial action compared to their private sector counterparts … based on the essentiality of public services to the community".[920] Labour development however reveals that the "argument can apply only to essential or emergency services and not all public services".[921]

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employees have the potential to "harness public sympathy in support of strike action and against the government".

[914] See part 3.

[915] Dotson 1956 (16) *Publ Admin Rev* 197 at 199. Stewart 1995 (16) *ILJ* 15 at 26 points out that a "defining character of most government activity and services is that they are the only ones available to the public". As such, "industrial action which disrupts such services has a very significant impact on the public which serves as substantial leverage in collective bargaining".

[916] 2008 (1) BLLR 66 (LC).

[917] Regardless of whether the strike is linked to the private or public sector.

[918] Stewart 1995 (16) *ILJ* 15 at 19.

[919] Stewart 1995 (16) *ILJ* 15 at 19.

[920] Stewart 1995 (16) *ILJ* 15 at 26.

Stewart correctly concludes that "it is quite appropriate for public and private sector employees to be governed by the same collective bargaining and dispute resolution framework, with the exception of essential service workers".[922] This perspective echoes that of Wellington and Winter, that "the changing nature of … [public] employment and the ever visible example of collective bargaining in the private sector, has led to a liberalized common law and a growing body of enactment and has reduced to a whisper"[923] the arguments presented against the introduction of collective labour rights into the public sector.

As history has shown, "collective bargaining will remain central to South African industrial relations".[924] The purpose of collective bargaining is to equalise negotiation power.[925] Its effectiveness is rooted in "the leverage that either side of industry can wield on the other".[926] Although it is generally assumed that the State holds "a stronger position than its private sector counterpart, the public employee is potentially also in a stronger position than its private sector counterpart."[927] Consequently, arguments in favour of distinct treatment of the two sectors, as far as collective labour rights are concerned, are misplaced.[928] The Fact Finding and Conciliation Commission of the ILO, sent to investigate the previous labour system of South Africa shared this view,[929]

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[921] Stewart 1995 (16) *ILJ* 15 at 26. Stewart 1995 (16) *ILJ* 15 at 28 states that "it is quite appropriate for public and private employees to be governed by the same collective bargaining and dispute resolution framework, with the exception of essential service workers".

[922] Stewart 1995 (16) *ILJ* 15 at 28.

[923] Wellington and Winter 1969 (78) *Yale LJ* 1107 at 1108

[924] Stewart 1995 (16) *ILJ* 15 at 26.

[925] Stewart 1995 (16) *ILJ* 15 at 24 explains: "Neither the different sources of authority, nor the different rationales for decision making that are characteristic of the public and private sectors, nor the various differences that flow from these, have much implication for the appropriate collective bargaining and dispute resolution procedures. In collective bargaining, each side of the industry is seeking to maximize its position. The balance of power between the two sides is the incentive to settle."

[926] Stewart 1995 (16) *ILJ* 15 at 26.

[927] Stewart 1995 (16) *ILJ* 15 at 26.

[928] See Ngcukaitobi *The Right to Collective Bargaining in the Public Service* 4.

[929] Ngcukaitobi *The Right to Collective Bargaining in the Public Service* 5.

emphasising the significant disadvantage for employees in the public sector should they be excluded.[930]

4 CONCLUSION

Although the primary rationale for employment decisions in the public and private sectors may differ, the variables influencing public or private employment decisions nonetheless intersect,[931] endorsing the idea of substantial similarity. The intersection causes the traditional private/public distinction to blur in reality. Hutchinson, although radically rejecting the idea of judicial review, also rejects the traditional separation between State and private sector along the public/private distinction on which the presumption of difference is based.[932] The intersection of variables is possible, as there is no practical distinction between public and private power. Both the State and private industry "is implicated in all activity that takes place within … [either] boundaries".[933]

Fredman and Morris hold "that the State as employer has *special contextual characteristics* which mean that it can never conduct itself entirely according to the private sector model".[934] The focus should fall on the nature of the employment relationship and not on the superficial existential variable differences when considering whether the presumption is based on truth or myth. The private/public sector distinction identified in academic writings is contextually well reasoned, but, at the same time, recognises that the State "with its system of checks and balances, often blur lines of

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[930] In the recognition of such disadvantage, the ILO recommended the development of a negotiation system for the determination of terms and conditions applicable to public employment relationships. See Ngcukaitobi *The Right to Collective Bargaining in the Public Service* 5.

[931] See Stewart 1995 (16) *ILJ* 15 at 17.

[932] Hutchinson 1990 (40) *Univ Toronto LJ* 374 at 380 elaborates: "There is no choice in dealing with corporations, for their activities pervade the lives of every citizen. How we put food on the table, what food we put on the table, what we pay to put food on the table, and what food we think we should put on the table are all questions that are deeply shaped by the actions of corporations and the life-images that they project. Corporate managers are leading public policy-makers."

[933] Hutchinson 1990 (40) *Univ Toronto LJ* 374 at 392.

[934] Fredman and Morris 1990 (19) *ILJ (UK)* 142 at 143. Emphasis added. However, the authors do not deny that there are instances in which the State acts in a manner similar to that of private employers.

authority, with resulting confusion and overlap as compared with decision making in private employment".[935] As indicated, the overlap points to substantial similarity rather than difference.

Accepting the idea that employment relationships can be divided between the purely private or the purely public "implies, somewhat misleadingly, that there is a simple answer to a simple question when in reality a more elaborately reasoned argument is required".[936] Woodruff emphasises that "[t]here are many popular assumptions that will not bear the best of analysis [of which one] is that the methods and conditions of private employment are vastly superior to those of public employment".[937] Reasoning of this nature is at the root of the unjustified presumption of difference between public and private employment relationships.

With regard to the substantial element, namely the nature of the employment relationship, the public and private sector have similar characteristics and require similar labour regulation:

- All employment relationships are equally describable as special legal relationships. Any argument to the contrary must fail, because social interests inform both public and private employment relationships. The legislator gave specific expression to this reality in setting out the objectives of the LRA.
- The restrictions placed on the employment of public servants by the State are not sufficiently different to the restrictions experienced by private sector employees. In the absence of sufficient restrictive difference, a regulatory distinction is irreconcilable with the unifying spirit of the Constitution. All employment relationships, whether public or private, are reactive in nature. When the nature of the employment relationship is considered, it is irrelevant whether the terms and conditions are regulated by legislation or contract as both legal forms see the individual employee standing helpless against the public or economic take-it-or-leave-it power of the employer.

[935] Smith and McLaughlin 1962 (16) *Indus & Lab R Rev* 30 at 34.

[936] Freedland 2005 *Publ Law* 224 at 227.

[937] Woodruff 1923 (29) *Am J Soc* 208.

It must however be acknowledged that uniform labour relations rules, justified by the substantial similarities in the nature of employment relationships, do not find application in isolation. As has been illustrated by the discussion of the development of labour law in Chapter Two, labour law and the regulatory rules associated with it are flexible in nature to allow for maximum effectiveness, with due regard to contextual variables. Contextual variables (such as resources, market influences and tripartite negotiations) influence the manner and extent to which uniform labour relations rules are implemented. It is therefore true that private and public employment appear to be different when viewed contextually. The differences are however not substantial enough to justify a regulatory difference:

- The difference in resources available to the public and private sector employee do not justify the presumption of difference, as a multi-million dollar South African based international company's employees are not viewed as employees of different status than those of a nationally owned franchise. They are all employees, they are all vulnerable and in a weaker bargaining position to that of their employers. The interests of the parties to the employment relationship remain substantially the same regardless of the sector.
- Public perception also fuels the erroneous idea that public and private sector employment is different in nature. In a South African context, the presumption of difference is rooted in the outdated perspective that the public service forms part of the bureaucratic system mistrusted by the majority of the population. The Constitution informs a contemporary understanding (ss 195 and 197) that sees the public service as the transparent and trustworthy cogs of the executive engine of the country. Absent the job- or sector-specific contextual constraints of the public service, endorsed by mistrust, the presumption of difference cannot stand when viewed against the substantial similarities residing in the essence of all employment relationships.
- With regard to the international endorsement of tripartism, it has also been stated that this concept, contextually endorsed, does not inform the nature of an employment relationship, whether public or private. It calls for proper recognition and negotiation of the interests of the parties to an employment relationship. The

interests at play in any given employment relationship are influenced by the contextual realities of the specific workplace and not the specific sector. Tripartism does not set out to define the character or status of those parties and cannot serve as endorsement for the idea that public and private employment is substantially different.

With regard to collective labour law, it is not denied that traditionally collective bargaining was only applicable to private employment relationships. This traditional perception is also relied upon to justify the apparent differences. From a contemporary perspective the argument cannot stand. Public servants now also make use of collective bargaining to negate the unequal bargaining power of the State, possibly with more effect than in the private sector in which the idea developed. Although the impact of the collective action may differ in the public and private sector, it is a shared instrument endorsing the idea of substantial similarity.[938]

Ultimately, all employees, whether public or private, inevitably find themselves regulated by both legislative provisions and contractual terms and conditions. No one legal form is reserved for the primary regulation of either public or private employment relationships.

The endorsement of a presumption based on a continued job- or sector-specific contextual distinction between public and private employment creates an awkward legal picture. Frant argues that the complete legal isolation of public employment brings with it a problem, namely the attempt at the creation of a prototypical relationship.[939] In doing so, inflexible rules are created in an attempt to control certain types of behaviour. Any employment relationship behaviourally reacts to job- or sector-specific contextual variables, without altering the substantial nature of the employment relationship.[940]

Public employees or 'servants' are the "people inside the state, taking the day-to-day decisions that make it function".[941] The public service is recognised as a chosen career

[938] Note that the impact here concerned is yet another mere contextual difference.

[939] See Frant 1993 (37) *American J Pol Sc* 990 at 992.

[940] See Frant 1993 (37) *American J Pol Sc* 990 at 992. As Dotson 1956 (16) *Publ Admin Rev* 197 at 198 states, "[i]t is elementary that the theory of public employment is … [influenced] by the social and political *context* in which it must function". Emphasis added.

[941] Farina 2004 (19) *SAPL* 489 at 508.

in which the employees are "citizens in lieu of the rest of us".[942] Nevertheless, it is still a career and public employees are still employees. In identifying a constitutionally justified approach to public employment one "must take into account … [all the] inherent conditions" of the public law labour connection, with regard to practical need and the balancing of interests and unequal power.[943]

An open-ended reading of the constitutionally endorsed right to fair labour practices allows for the accommodation of contextual considerations, without forfeiting the nature of the underlying relationship, which imply that fair labour practice considerations should be evaluated within the factual circumstances of the public employment context. It is constitutionally permissible to balance the public interest (s 195) with the just administrative right of public employees as a citizen (s 33), all within the contextually influenced functioning of the right of every individual to fair labour practices (s 23). This is by no means an easy task, but "[t]he Constitution itself makes provision for the complex issues involved in bringing together again in one country areas which had been separated under apartheid".[944]

This means that any distinction between private and public employment should fall on the contextual focus of the profession, rather than the placement of the nature of the employment relationship in law:

> What distinguished the members of the *public service profession*, in its strict sense of the term … is their total dedication to the general as opposed to particularistic interests. Public servants are employed to help articulate, represent, defend, explain and give concrete expression to this public or general interest.[945]

As such, the public interest is part of the job description of public employment. Doctors act in accordance with the Hippocratic Oath and therefore in the best interest of their patients. That does not make them any less employees in status when employed by a

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[942] Farina 2004 (19) *SAPL* 489 at 510.

[943] See Dotson 1956 (16) *Publ Admin Rev* 197 at 200.

[944] *Executive Council, Western Cape Legislature v President of the RSA* 1995 (10) BCLR 1289 (CC) at par 7.

[945] Argyriades 2003 (69) *Int Rev Admin Sc* 521 at 527. Emphasis added.

hospital. A vast array of professions exists, each with their own contextually influenced functions and job-specific rules to regulate those functions. All of these employees still fall within the uniform regulatory framework applicable to the relationship existent between employers and employees.[946] This perspective of public employment leaves room for sufficient contextual recognition of the public (interest) element.[947] This approach also recognises the fact that "there is an essential unity in all state-citizen relationships",[948] with public employment as "a specific aspect of the totality".[949] It does not require continued and unjustified adherence to any notion that a completely separate doctrine is called for in the regulation of public employment.

With due regard to the protective unifying objective of labour law, in light of the values endorsed by the Constitution, the presumption should be rephrased in favour of the recognition of substantial similarity between public and employment relationships.

At no time should the endorsement of regulatory equality, based on substantial similarity, be viewed as propagating absolute sameness in treatment. The constitutionally endorsed understanding of equality allows for different treatment of individuals in the promotion of substantive equality. Similar logic must be present when proclaiming that the absence of substantial difference in the character, nature and status of public and private employment relationships calls for equal labour rights. Equality in this sense merely endorses equal access to the protective rights and regulatory framework that has developed within the scope of the LRA. It does not imply absolute similarity in the scope of application and protection of the right to fair labour practices in every employment context.

The fact that the presumption of a fundamentally different public employment relationship cannot stand, as is the case with the controversial and unconvincing arguments associated with it, causes one to view the jurisprudence that developed because of this presumption with suspicion. It appears that the judiciary has to some

[946] All employment relationships must function within a legal framework and it would be impractical to draft and enact labour legislation stipulating the ethical and institutional parameters of every recognised career choice. See the discussion of Argyriades 2003 (69) *Int Rev Admin Sc* 521 at 527 in this regard.

[947] See Dotson 1956 (16) *Publ Admin Rev* 197 at 201.

[948] Dotson 1956 (16) *Publ Admin Rev* 197 at 201.

[949] Dotson 1956 (16) *Publ Admin Rev* 197 at 201.

degree failed to appreciate that the nature of public employment is similar to that found in the private sector and brings with it considerations of labour equity, which, in itself, allows for different forms and contexts, one of which (public employment) is influenced by particular public elements. In one sense, public employment combines specialised substance (labour law) and general form (administrative law). [950]

Furthermore, the fact that public and private employment relationships are substantially similar allows for proper consideration of the interaction and interdependence of the core concepts of administrative and labour law that respectively informed the development of both branches of law during the period of superficial suppression. Chapters Five, Six and Seven will focus on an analysis of these core concepts against the background of the doctrine of interdependence as endorsed by the Constitution. Chapters Eight and Nine will thereafter illustrate the judicial (mis)understanding of the interaction between these norms informing the rights to fair labour practices and just administrative action.

[950] The LRA now directly regulates the employment relationship between the State and its employees. Similarly, State action always has a public element, which potentially involves PAJA, if the public power is exercised in the form of administrative action. Both the LRA and PAJA have undeniable constitutional roots in ss 33 and 23 respectively. These fundamental rights inform the specific employment relationship within a general administrative law relationship. See De Ville *Judicial Review* 237. The specific/general analysis will be further evaluated in Chapters Five and Six.

CHAPTER FIVE
THE SUBSTANTIVE DIMENSION: THE RELATIONSHIP BETWEEN (ADMINISTRATIVE LAW) REASONABLENESS AND (LABOUR LAW) SUBSTANTIVE FAIRNESS

1 INTRODUCTION

While Chapter Four illustrates that there is no substantive reason to differentiate between public and private employment relationships, it also reveals that the factual context in which a dispute between the parties to an employment relationship arises, influences the scope and application of the relevant regulatory concepts. Chapters Two and Three, dealing with the essence of labour and administrative law, set the scene for an evaluation of the pragmatic and reactive cross-fertilization of the relevant de jure and de facto level regulatory concepts that underlie administrative and labour law respectively, both of which can potentially find application in public employment disputes.

The focus of this chapter is confined to the comparison between the administrative law concept of reasonableness and the labour law understanding of substantive fairness, in an attempt to evaluate the potential cross-fertilization at a substantive level. Chapter Five therefore draws a comparison between substantive fairness and reasonableness, as the latter concept is the general administrative law counterpart to the specialised labour law evaluation of a valid reason.[951]

On its own, as unconnected abstract concepts, fairness and reasonableness are devoid of true regulatory meaning in practice.[952] The practical application of these concepts calls for a pragmatic shift from formalism to functionalism. Only when the general

[951] In moving away from the orthodox perspective of natural justice, both administrative and labour law in its development gave recognition to the duty to act fairly. This duty underlies both the constitutional rights to just administrative action and fair labour practices. Consequently, this duty underlies the development of both the concepts of reasonableness and substantive fairness. The conceptual reality, (as outlined in Chapter Two, part 3 5 and Three, part 3 5) allows for the in-depth evaluation of these normative considerations.

[952] See Baxter 1979 (96) *SALJ* 607 at 633.

reasonableness framework finds application in a specific situation, does it become a standard with the potential to structure the practical application of substantive fairness considerations.[953] Allowing the flexibility of the doctrine of fairness within the framework of reasonableness considerations empowers the judiciary to avoid legalistic reasoning.[954] In so doing, the spirit and purport of the Constitution gains recognition, as it calls on the judiciary to reject formalistic logic.

Although Chapter Five, in exploring this functional understanding, expands on the conceptual discussions in Chapters Two and Three, it is nevertheless necessary to recap the main developmental administrative and labour law moments. Building on this summary, the chapter attempts to illustrate that the development of reasonableness, as an administrative law concept, is based on general (one might even say universally acknowledged) guidelines as identified by the judiciary. In contrast, labour law for the most part (as initially based on the work of the Industrial Court) codifies the specialised development of the concept of fair labour practices.[955]

The hypothesis for the discussion in Chapter Five is that that the equity guidelines associated with labour law, in contrast to administrative law, is more defined and specialised. As a result, more contextualisation takes place within the employment relationship when assessing what constitutes a fair and valid reason.

Within the scope of this chapter (and the study in general) conceptual contextualisation should be understood as it relates to the character of labour and administrative law respectively, the one being specialised and the other general. When the term contextualised is merely interpreted as the application of concepts within a specific set of facts, then administrative and labour law can both be viewed as applying general principles within a specific context. So viewed, a comparison is meaningless. However, when the term contextualised is viewed within the assessment of the relation between specific and general law, then it has comparative value. As Chapter Two emphasises,

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[953] Cf Baxter 1979 (96) *SALJ* 607 at 633.

[954] See Baxter 1979 (96) *SALJ* 607 at 626 – 267.

[955] Although labour law has continually attempted to codify the basic core guidelines for the concept of fairness, these guidelines are not formalistic rules to be slavishly endorsed by the judiciary irrespective of the circumstances of every individual case.

labour law focuses on and regulates a specific legal relationship.[956] Through a period of intensive activity, labour law early on recognised the concept of substantive fairness, resulting in the development of detailed trends, perhaps more so than is the case with administrative law.[957] So understood, contextualisation describes the process of adjustment of the content or meaning of the variable concepts within the employment relationship. Labour law contextualises the principles underlying justice at two levels: de jure (the applicable legal relationship) and the de facto (acknowledging that the legal relationship is always between the employer and employee). In contrast, administrative law can link the principles to the de jure level, but lacks a predefined understanding of the specific relationship (and the associated capacity in which the parties to that relationship act) to which the de jure level principles find application. It is this specific-general distinction that allows for compatibility (and even interdependence) of conceptual contextualisation of both labour and administrative law. Phrased differently, administrative and labour law remain reconcilable in the respective approaches to reasonableness and substantive fairness evaluations.

Ultimately, the goal of this chapter is to illustrate that general reasonableness guidelines originating in administrative law inform the labour law understanding of specific contextualised substantive fairness. It will be shown that the forced separation of labour and administrative law after the constitutional entrenchment of the rights to fair labour practices and just administrative action, both revolutionary and unconventional inclusions in a Bill of Rights, is baseless in the absence of any substantive conceptual conflict.

To assist this evaluation, the administrative law perspective of the substantive dimension of justice will be recapped in part 2. The specific focus in part 2 will fall on the meaning of reasonableness (part 2 1) and the concepts of rationality (part 2 1 1), proportionality (part 2 1 2) and judicial deference (part 2 1 3) associated with it. The (substantive) understanding of reasonableness will be supplemented with a discussion

[956] See Chapter Two, part 3 1.

[957] Although the concept of fairness retains its variable character in labour law (reconcilable with variable reasonableness) certain practices have developed in specific contexts (such as for example the suspension or dismissal of an employee for misconduct) that act as indicators for when an employment decision is substantively fair.

of the administrative law understanding of adequate reasons (part 2 2). Consequently, part 2 will reveal that administrative law, absent pre-determined de facto guidelines, embraces general core concepts at a macro level. Phrased differently, it will be illustrated that administrative law, in the absence of specific contextual considerations, relies on the general abstract meaning of reasonableness (and its varying degrees), with the result that the judiciary must determine the required degree of reasonableness on a case-by-case basis.

This process of contextualisation within the context of the employment relationship, which is the focus of part 3, already started with the Wiehahn Commission's recognition of the principle of fair labour practices as the core labour law concept.[958] Against this background and the discussion in part 2 of this chapter, part 3 will focus on the meaning of fairness (part 3 1) and how it impacts on the idea of managerial prerogative, specifically with consideration of the Constitutional Court's rejection of the reasonable employer test in *Sidumo v Rustenburg Platinum Mines Ltd*[959] (part 3 1 1). Following this discussion, the meaning of adequate reasons (part 3 2) will be considered from a specialised labour law perspective with reference to contextual examples of unfair labour practices (part 3 2 1) and unfair dismissals (part 3 2 2), both areas where fairness guidelines have been developed at a de facto level.

In turn, the discussion of the administrative law perspective of reasonableness and the labour law perspective of (substantive) fairness (in parts 2 and 3 respectively), will allow for a consideration of the possible reconciliation of these two concepts in the context of public employment. It is at this crossroads between contextualisation and codification that the mutual normative interdependence of administrative and labour law become important in an attempt to avert conceptual formalism. In part 4, normative reconciliation will be evaluated with due regard to the shared administrative and labour law duty to act fairly (part 4 1), the evaluation of fairness within the framework of reasonableness (part 4 2) and the reconciliation of the Constitutional Court's perspective in *Bato Star Fishing*

[958] See Chapter Two, part 2 2.

[959] 2007 (12) BLLR 1097 (CC).

(Pty) Ltd v Minister of Environmental Affairs and Tourism[960] and *Sidumo v Rustenburg Platinum Mines Ltd*[961] (part 4 3).

2 ADMINISTRATIVE LAW PERSPECTIVE

2 1 The Meaning of Reasonableness

Under the influence of the Constitution, the concept of reasonableness has evolved into the substantive administrative law counterpart of substantive fairness in labour law. As an abstract concept, reasonableness shies away from formalistic isolation.[962] No absolute standard for the determination of reasonableness is identifiable.[963] The evaluation of reasonableness is a value-oriented test.[964] The mere fact that administrative law generally recognises the necessity of a balance between the interests of parties in an unequal power relationship implies that reliance on the concept

[960] 2004 (7) BCLR 687 (CC). From an administrative law perspective it is important to consider the impact of the seminal *Bato Star*-judgment, as it is to the development of reasonableness review what *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A) pre-constitutionally was to the doctrine of legitimate expectations.

[961] 2007 (12) BLLR 1097 (CC). Although the Constitutional Court grappled with reasonableness review in the context of an alleged unfair dismissal in casu, the comparison between the reasoning of the court in its earlier *Bato Star*-judgment and its recent *Sidumo*-judgment offers great insight in so far as the interdependent understanding of the idea of deference as respect (see part 2 1 3) in relation to the equity-based approach that underlies the right to fair labour practices (as far as it relates to both fair dismissals and fair labour practices as envisaged in the LRA).

[962] In *Stanfield v Minister of Correctional Services* 2003 (12) BCLR 1384 (C) at par 10, Van Zyl J (although referring to rationality as a synonym for reasonableness instead of acknowledging it as a mere component thereof) commented on the scope of a reasonableness evaluation: "It requires a proper consideration and assessment of *all the relevant facts and circumstances*. If such facts are ignored or misconstrued, the discretion cannot be properly exercised ..." Emphasis added. See also Steinberg 2006 (123) *SALJ* 264 at 265.

[963] See the judgment of Chaskalson P in *S v Makwanyane* 1995 (6) BCLR 665 (CC) as referred to in *Larbi-Odam v Member of the Executive Council for Education* [1996] 4 All SA 185 (B) at 205.

[964] See De Ville *Judicial Review* 213 for a discussion of the value-oriented approach. For a discussion of fairness as a value-based test, see also Woolman and Bishop *Constitutional Conversations* 231.

of reasonableness calls for the evaluation of a decision's justifiability.[965] To perform this function, varying degrees of reasonableness have been identified.[966]

The concept of reasonableness can find expression as either rationality (part 2 1 1) or proportionality (part 2 1 2). This standard-based perspective allows the concept to adapt to various circumstances.[967] The applicability of the varying degree of reasonableness is determined with due regard to the idea of judicial deference (part 2 1 3).[968]

2 1 1 Rationality[969]

At its most basic, reasonableness requires an administrative decision to be explicable and rational.[970] Phrased differently, reasonableness equates to a justifiable reason. A justifiable reason will be absent if the decision-maker fails to apply his or her mind[971] or acts mala fide.[972] In merely requiring a justifiable reason, reasonableness allows for "an area of 'legitimate diversity', [as] a space within which various reasonable choices may be made".[973]

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[965] Cf Currie and De Waal *Bill of Rights Handbook* 676.

[966] The broad and flexible de jure (macro) level concept of reasonableness, adjusts its content in relation to the facts in which it finds application. Cf Currie and De Waal *Bill of Rights Handbook* 676.

[967] See Steinberg 2006 (123) *SALJ* 264 at 273.

[968] In the evaluation of reasonableness, administrative law allows for a margin of appreciation. See Règimbald 2005 (31) *Man LJ* 239 at 267. In line with this understanding, Malan 2007 (1) *SAPL* 61 at 92 explains that "[a]s long as a discretionary decision strikes a *reasonable equilibrium in the circumstances*, and is capable of being shown to be a justifiable decision in all the circumstances, it will fall into the unreviewable field of legitimate diversity". Emphasis added.

[969] See Chapter Three, part 2 3 2 1.

[970] See *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the RSA* 2000 (3) BCLR 118 (CC) at par 90*; Foodcorp (Pty) Ltd v Deputy Director General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management* 2006 (2) SA 191 (SCA) at par 18. See also Felix 2006 *Acta Juridica* 95 at 97; Galligan *Discretionary Powers* 5.

[971] A decision-maker will fail to apply his or her mind if the decision is arbitrary, based on irrelevant considerations, or not supported by substantial evidence.

[972] See *WC Greyling & Erasmus (Pty) Ltd v Johannesburg Local Transport Board* 1982 (4) SA 427 (A); *Maharaj v Liquor Board* [1996] 2 All SA 185 (N); *SA Connexion CC v Chairman, Publications Appeals Board* 1996 (4) SA 108 (T).

[973] Hoexter 2000 (117) *SALJ* 484 at 510 refers to "legitimate diversity" as the "limits of reason".

2 1 2 Proportionality[974]

Reasonableness can also call for "an appropriate balance between the need to ensure that constitutional obligations are met ... and recognition for the fact that the bearers of those obligations should be given appropriate leeway to determine the best way to meet the obligations in all the circumstances".[975] This renders the concept of reasonableness a relational standard and a proportionality consideration.[976]

Proportionality is central to the duty to act fairly, as that duty calls for consideration of the interests of all involved in or affected by the decision.[977] The proportionality test aims to give substance and meaning to fundamental rights:[978] In judging a decision unreasonable, judgment falls not on the correctness of the decision, but rather on the lack of a plausible justification.[979] A value judgment will have to be made, which in turn

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[974] See Chapter Three, parts 2 3 3 2 and 3 5 2.

[975] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) at par 87. This perspective is reflected by the Constitutional Court in *Minister of Health v New Clicks SA (Pty) Ltd* 2006 (1) BCLR 1 (CC) and *Government of the RSA v Grootboom* 2000 (11) BCLR 1169 (CC). Viewed as such, Steinberg 2006 (123) *SALJ* 264 at 273 describes the reasonableness paradigm as being "standard-based rather than rule-based". Sullivan 1992 (106) *Harv LR* 22 at 57 – 59 explains that legal directives translate into either rules or standards "to signify where they fall on the continuum of discretion". Rules allow less discretion to the decision-maker, while standards allow for an element of deference. See McCrudden 2000 (20) *Oxford J Legal Stud* 499 at 515. Recognition of reasonableness as a standard endorses a contextual rather than formalistic judicial approach, as the "distinction in constitutional law between 'categorization' and 'balancing' is a version of the rules/standards distinction". It is informative that Sullivan 1992 (106) *Harv LR* 22 at 59 – 60 regards categorization to correspond to rules, while balancing relates to standards. Cf *RAV v City of St Paul* 112 S Ct 2538 (1992) at 2567 – 2569.

[976] See Currie and De Waal *Bill of Rights Handbook* 577 fn 46. De Ville *Judicial Review* 213 comments that the test for reasonableness, so understood, "appears to be similar to the test of fairness" as constitutionally understood. Hoexter 2000 (117) *SALJ* 484 at 510 comments that a reasonable decision (falling within the scope of this constitutional standard) will amount to one that falls within the "limits of reason". See also Steinberg 2006 (123) *SALJ* 264 at 266.

[977] See Chapter Three, part 2 2 1.

[978] The effect of a decision or action will be unreasonable, if the individual's adverse and the State's beneficial consequences are disproportionate. See De Ville *Judicial Review* 205 fn 90 and 207; Schwarze *European Administrative Law* 679.

[979] See Mureinik 1993 *Acta Juridica* 35 at 40. See also Pillay 2005 (122) *SALJ* 419 at 425.

requires a justifiable decision to be both "legally and morally defensible".[980] Reasonableness, as proportionality, brings a higher standard to the evaluation than is the case with reasonableness as rationality.[981] Règimbald elucidates that "[v]arying levels of the intensity of review will be appropriate in different categories of cases and this will ... correspond to the different formulations of the test (balancing, necessity, suitability)".[982]

When evaluating the justifiability of an administrative action, a holistic approach to the decision is required,[983] which takes into consideration the factors identified by O'Regan J in the *Bato Star*-judgment that have been elevated to a broad test for proportionality.[984] The required equilibrium is determined through the application of these guidelines to the facts of every case.[985] This process determines whether rationality will be sufficient to balance the range of competing interests or whether a higher degree of reasonableness in the form of a full-scale proportionality analysis is required.[986]

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[980] Pillay 2005 (122) *SALJ* 419 at 425.

[981] See Wakwa-Mandlana and Plasket 2005 *ASSAL* 104 at 117.

[982] Règimbald 2005 (31) *Man LJ* 239 at 267. Footnotes omitted. See also Règimbald 2005 (31) *Man LJ* 239 at 262; Chapter Three, part 2 3 2 2.

[983] See Driver and Plasket 2003 *ASSAL* 69 at 89; *Hayes v Minister of Finance and Development Planning, Western Cape* 2003 (4) SA 598 (C).

[984] These factors have been set out in Chapter Three, part 3 5 2 2. See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (7) BCLR 687 (CC) at par 45 per O'Regan J. These factors serve as a condensed general version of the reasoning of South African jurisprudence regarding the substantive nature of reasonableness. In response to the guidelines identified by O'Regan J, Currie and De Waal *Bill of Rights Handbook* 676 fn 120 comment that "'[r]easonableness means, in other words, what is reasonable". The authors reason that this perspective "is not quite as pointlessly circular as it might look" if one takes into consideration that s 6(2)(h) of PAJA refers to "no more than the unqualified standard of reasonableness".

[985] Cf *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (7) BCLR 687 (CC) at par 48.

[986] See De Ville *Judicial Review* 215. See also Currie and De Waal *Bill of Rights Handbook* 677.

2 1 3 Judicial Deference

The courts have taken to exercising a degree of deference when evaluating the reasonableness of administrative decisions taken by the executive.[987] Deference as respect sees judicial intervention as an appropriate recourse when a decision is unreasonable.[988] This perspective of deference embraces the idea that the required degree of reasonableness is dependent of the facts of every case.[989] The judgment of the Constitutional Court in the *Bato Star*-judgment reflects this understanding of deference as respect.[990]

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[987] In administrative law, this implies deference for the executive, while in labour law deference is owed to the employer. In the public sector, the executive and the employer overlap. Fairness (whether it be called substantive or reasonable) nevertheless allows for interference with the power of the executive-employer when public power infused employment decisions are not justifiable on the facts or not justifiable on the reasons proffered for that decision. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (7) BCLR 687 at par 48, O'Regan J emphasised that judicial interference with executive decisions are allowed (regardless of the idea of deference) when "the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it". See also Règimald 2005 (31) *Man LJ* 239 at 256.

[988] See De Ville 2006 (2) *PER* 11/48; *Canadian Union of Public Employees Local 963 v New Brunswick Liquor Corporation* [1979] 2 SCR 227. The idea of deference in administrative law is rooted in the constitutional principle of separation of power, which prevents the judiciary from taking over the executive's policy-making function. See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (7) BCLR 678 (CC) at par 46 per O'Regan J. It is possible to draw a comparison between non-intervention in policy-decisions where the executive has the advantage of the business of government when making such policies and non-intervention in business-related decisions of the employer when making work place policies where he or she has the advantage of expert knowledge of his or her business requirements.

[989] Interference on the ground of unreasonableness is justified only when the required standard is absent, rendering the decision unjustifiable. See De Ville 2006 (2) *PER* 12/48; Hoexter *Administrative Law* 138; *Nicholson v Haldimand-Norfolk Regional Board of Commissioners of Police* [1979] 1 SCR 311. It is by no means implied that a court cannot interfere with an administrative decision on grounds of unlawfulness or procedural unfairness. The focus in this deference discussion is however intentionally confined to deference as it relates to unreasonableness, to allow for a comparison between reasonableness and the judicial approach to labour law's perspective of substantive fairness, as per the focus outlined in part 1 of this chapter.

[990] See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (7) BCLR 678 (CC) at par 46 per O'Regan J. For a discussion on the development of the idea of deference, see Dyzenhaus 1996 (16)

Deference understood as respect "is tied to the notion of variability",[991] in that the judiciary need not approach review "in an all-or-nothing fashion, and that the intensity of judicial scrutiny may vary according to the context".[992] O'Regan J declared that acceptance of the idea of deference as respect does not equate to judicial rubber-stamping of unreasonable decisions "simply because of the complexity of the decision or the identity of the decision-maker."[993] Deference, so understood, does not exude a submissive character.

The idea of deference as respect calls on the judiciary to consider the reason(s) for a decision, and not merely the decision itself, to determine whether the decision warrants interference.[994] If the reasoning of the decision is defective, then the judiciary is at liberty to interfere with the decision and grant the appropriate remedy to cure the injustice.[995] It calls on the judiciary to refrain from becoming a player in the game and rather to embrace the role of referee in striking a balance between competing interests.[996] Deference as respect does not preclude the judiciary from deciding questions of law.[997]

Oxford J Legal Stud 641; Dyzenhaus 1998 (14) *SAJHR* 11; Dyzenhaus 2000 (20) *Oxford J Legal Stud* 703; Dyzenhaus 2002 (27) *Queen's LJ* 445; Dyzenhaus 2005 (55) *Univ Toronto LJ* 691; Dyzenhaus and Fox-Decent 2001 (51) *Univ Toronto LJ* 193; Dyzenhaus, Hunt and Taggart 2001 (1) *OUCLJ* 5.

[991] Hoexter *Administrative Law* 143.

[992] Hoexter *Administrative Law* 143. This judicial respect in the approach to review goes hand in hand with conceptual variability.

[993] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (7) BCLR 678 (CC) at par 48. See Hoexter *Administrative Law* 145. Cf *Associated Institutions Pension Fund v Van Zyl* 2005 (2) SA 302 (SCA); *Kaunda v President of the RSA* 2005 (4) SA 235 (CC).

[994] See De Ville 2006 (2) *PER* 1 at 14/48.

[995] See De Ville 2006 (2) *PER* 1 at 15/48 and 16/48. The idea of deference as respect gives expression to the idea of interpretative charity. See Dyzenhaus, Hunt and Taggart 2001 (1) *OUCLJ* 5 at 29; De Ville *Judicial Review* 23.

[996] See Burns and Beukes *Administrative Law* 32; Du Plessis *Bill of Rights Compendium* 2C–46; Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* 67 – 72.

[997] The judiciary is not deferring their justice driven and legally informed decision-making power. See *R (on the application of ProLife Alliance) v British Broadcasting Corporation* [2003] 2 All ER 977 (HL), referred to with approval by O'Regan J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (7) BCLR 678 (CC) at par 75 – 76.

2 2 Adequate Reasons

The right to reasons generally functions as an adjunctive to procedural fairness.[998] The requirement that a decision-maker must supply reasons for a decision, in adherence to the s 33(2) constitutional right to reasons, highlights the presence of a substantive dimension that "call[s] for the articulation of sometimes inexpressible value judgments".[999] Section 5(2) of PAJA further endorses the idea that administrative law requires adequate reasons.[1000] The adequacy requirement qualifies the right to reasons.[1001] With regard to s 5(2), it can be deduced that the mere production of reasons, regardless of its adequacy, is insufficient for constitutional compliance with s 33 and its promise of just administrative action.[1002]

The reasons provided must offer the affected individual sufficient information to understand the basis of the decision.[1003] Justification emerges as the crucial

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[998] See Chapter Six for an in depth discussion of procedural fairness, from both an administrative and labour law perspective.

[999] *R v Higher Education Funding Council, ex parte Institute of Dental Surgery* [1994] 1 All ER 651 at 665 per Sedley J. See also Hoexter *Administrative Law* 417.

[1000] See Hoexter *Administrative Law* 428. Although s 5 is the principal PAJA provision pertaining to the right to reasons, this right also features in the procedural fairness provisions in ss 3 and 4. See Hoexter *Administrative Law* 433.

[1001] See Hoexter *Administrative Law* 428. In *Sidorov v Minister of Home Affairs* 2001 (4) SA 202 (T) at 209, the court, in considering the content and scope of s 33(2) of the Constitution, commented as to the underlying rationale: "Succumbing to the temptation of absolving the administration, functionary or organ from providing *proper reasons* for their actions would be to deny the very foundation of our Constitution ..." Emphasis added. In the minority judgment in *Bel Porto School Governing Body v Premier, Western Cape* 2002 (9) BCLR 891 (CC) at par 159, Mokgoro and Sachs JJ noted: "The giving of reasons satisfies the individual that his or her matter has been considered and also promotes good administrative functioning because the decision-makers know that they can be called upon to explain their decisions and thus be forced to evaluate all the relevant considerations correctly and carefully."

[1002] See Burns and Beukes *Administrative Law* 254. See also *Rèan International Supply Company (Pty) Ltd v Mpumalanga Gaming Board* 1999 (8) BCLR 918 (T) at 926 per Kirk-Cohen ADJP.

[1003] Burns and Beukes *Administrative Law* 257 explain that adequate reasons ultimately require that the decision maker provide "sufficient detail to justify the administrative action taken". Cf *Nomala v Permanent Secretary, Department of Welfare* 2001 (8) BCLR 844 (E).

substantive element, as the adequacy of the reasons for the decision must be proportional to the severity or impact of thereof.[1004]

Hoexter identifies two requirements for adequate reasons. First, reasons must be specific, written in clear language and contain appropriate detail and be of a suitable length.[1005] Secondly, a decision-maker must not merely proffer the "standard-form reasons"[1006] that offer "no hint of the facts and reasoning process leading to those conclusions".[1007] Ultimately, the factual context of a decision determines the appropriate degree of detail required for an adequate reason.[1008] Certain factors have emerged to assist in the de jure contextualisation of the variable nature of the 'adequate' qualification to the right to reasons:

> [T]he adequacy of reasons will depend on a variety of factors such as the factual context of the administrative action, the nature and complexity of the action, the nature of the proceedings leading up to the action and the nature of the functionary taking the action.[1009]

[1004] This is apparent from *Moletsane v Premier of the Free State* 1995 (9) BCLR 1285 (E) at 1288, where the High Court reasoned that "[t]he more drastic the action taken, the more detailed the reasons which are advanced should be." Consequently, the court held that "[t]he degree of seriousness of the administrative act should therefore determine the particularity of the reasons furnished". See Currie and De Waal *Bill of Rights Handbook* 681; De Ville *Judicial Review* 294 – 295; *Nomala v Permanent Secretary, Department of Welfare* 2001 (8) BCLR 844 (E); *Commissioner for the SAPS v Maimela* 2004 (1) BCLR 47 (T).

[1005] See Hoexter *Administrative Law* 429.

[1006] Hoexter *Administrative Law* 430.

[1007] Hoexter *Administrative Law* 430. Cf *Nomala v Permanent Secretary, Department of Welfare* 2001 (8) BCLR 844 (E) at 856.

[1008] See *Moletsane v Premier of the Free State* 1995 (9) BCLR 1285 (E).

[1009] *Commissioner of the SAPS v Maimela* 2004 (1) BCLR 47 (T) at 51. Consequently, the circumstances that inform a decision will influence the degree of adequacy required of the reasons proffered. Burns and Beukes *Administrative Law* 258 (with reference to De Ville) identify additional factors to assist in the determination of the adequacy of reasons: whether the issue involves an application for a benefit or a deprivation of a right; the nature of the right that is adversely affected; the nature of the proceedings preceding the action that is taken; the nature and complexity of the decision (including whether it is mainly based on questions of fact or interpretation of law); the nature of the authority to take the decision;

When considering these factors, it becomes apparent that they mimic the elements of the *Bato Star* proportionality test.[1010] Although the idea of an adequate reason is contextually adaptable, Hoexter holds that "some of its ingredients at least must be common to all cases".[1011] According to the author, one such an ingredient is the requirement of "an inevitable connection between the adequacy of reasons and their explanatory power".[1012] Consequently, logic is a common denominator in all adequate reasons, as an adequate reason is explanatory in nature.[1013]

3 LABOUR LAW PERSPECTIVE

3 1 The Meaning of Fairness

The word 'unfair', as part of the concept of the unfair labour practice, does not merely act as an adjective, but "introduces an equitable component into the area of law covered by the definition".[1014] It touches on more than one social value, a reality that renders it complex in nature and rejects its rigid regulation.[1015] In acknowledging this

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the time available to formulate the reasons; and the manner in which an administrative authority has chosen to give effect to this duty to furnish reasons.

[1010] In similar fashion as the factors set out by O'Regan J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (7) BCLR 687 (CC), the adequate reasons factors require de jure contextual justification of the reason provided.

[1011] Hoexter *Administrative Law* 428. Cf Currie and De Waal *Bill of Rights Handbook* 679.

[1012] Hoexter *Administrative Law* 428.

[1013] See Hoexter *Administrative Law* 429. This is evident from the assertions of Schutz JA in the Supreme Court of Appeal judgment in *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd* 2003 (6) SA 407 (SCA) at par 40. Cf *Canada (Director of Investigation and Research, Competition Act) v Southam Inc* [1997] 1 SCR 748 at par 57 per Iacobucci J; Règimbald 2005 (31) *Man LJ* 239 at 255.

[1014] Grogan *Dismissal, Discrimination and Unfair Labour Practices* 45.

[1015] Poolman *Principles of Unfair Labour Practices* 11 describes the concept of the unfair labour practice eloquently, by stating that it "is an expression of the consciousness of modern society of the value for the rights, welfare, security and dignity of the individual and groups of individuals in labour practices". Cf *NEWU v CCMA* 2003 (24) ILJ 2335 (LC) at 2339.

nature, the Industrial Court determined the focus of the fairness element of the concept of unfair labour practices with regard to the context of an employment dispute.[1016]

Unfairness in the context of employment involves a "failure to meet an objective standard".[1017] This will be the case if the employer acts in an arbitrary, capricious or inconsistent manner.[1018] This is the standard, regardless of whether the employer acts intentionally or negligently.[1019] Unfairness can stem from a variety of labour practices, because it "arises from the lack of consideration implicit in all forms of behaviour".[1020] In developing the concept, the Industrial Court considered the different employment contexts in which this evaluation was generally relied upon in practice (at de facto level) and developed guidelines to assist in the determination of fair labour practices and dismissals.[1021] The LRA now gives statutory recognition to these guidelines.[1022]

[1016] See Marais *Onbillike Arbeidspraktyke* 15. Poolman *Principles of Unfair Labour Practice* 16 explains that, "[i]n the process of determining the 'fairness' or 'unfairness' of a 'labour practice', the *relativeness* of the particular allegedly unfair conduct must be understood *in relation to* its merits and all the relevant circumstances surrounding that conduct". Emphasis added. Cf *MAWU v BTR Sarmcol* 1987 (8) ILJ 815 (IC) at 830 – 831. Although labour law incorporated the idea of fairness in the specialised contextual evaluation of employment decisions, it also traditionally recognised that the presence or absence of a fair standard must be determined with due regard to the managerial prerogative of the employer. See Chapter Two, part 3 3.

[1017] *SACCAWU v Garden Route Chalets (Pty) Ltd* 1997 (3) BLLR 325 (CCMA) at 332.

[1018] See *SACCAWU v Garden Route Chalets (Pty) Ltd* 1997 (3) BLLR 325 (CCMA) at 332. This is in line with the administrative law perspective that a decision–maker acts arbitrarily if a decision, absent an adequate reason or discretion (see part 3 2), is exercised without consideration of the relevant merits. See De Ville *Judicial Review* 198.

[1019] An employer or employee's subjective perception of fairness does not dictate the standard required for a fair labour practice. See Basson et al *Essential Labour Law* 189. This is in essence the basis of the reasoning of the Constitutional Court in *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC).

[1020] Poolman Principles of Unfair Labour Practices 16.

[1021] See Strydom (LLD UNISA 1997) 104 – 105. Cf Le Roux and Van *Niekerk The South African Law of Unfair Dismissal*; Rycroft and Jordaan *A Guide to South African Labour Law*. Cf *NAAWU v Pretoria Precision Castings (Pty) Ltd* 1985 (6) ILJ 369 (IC).

[1022] See Strydom (LLD UNISA 1997) 106. Acceptance of the concept of fairness within the realm of labour relations has informed the LRA recognition that decisions relating to for instance promotions,

The requirement of substantive fairness is recognised as a component of s 23 of the Constitution, and accordingly promoted in the LRA as part of the right not to be unfairly dismissed or subjected to unfair labour practices (other than dismissal).[1023] The rationale for substantive fairness, now embedded in the constitutional concept of fair labour practices, seeks to ensure that employment decisions are not taken arbitrarily.[1024] Substantive unfairness points to a failure of justice.[1025]

3 1 1 *Sidumo* Misunderstood

The Constitutional Court with the *Sidumo*-judgment[1026] has created the impression that managerial prerogative is no longer to be regarded with any measure of judicial deference in an unfair dismissal context.[1027] The judgment revealed that commissioners (in acting in an administrative nature), as impartial adjudicators, must balance the interests of the parties without undue preference for the employer's perceptions. The

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demotions, suspensions and other disciplinary measures short of dismissal can amount to unfair labour practices.

[1023] See Basson et al *Essential Labour Law* 94.

[1024] See Strydom (LLD UNISA 1997) 118. De Ville *Judicial Review* 199 explains that an arbitrary decision is one that is "regarded as being irrational, unreasonable, and leading to unequal treatment". See also *Pharmaceutical Manufacturers Association of SA v President of the RSA* 2000 (3) BCLR 241 (CC) at par 85. Cf Cassim 1984 (5) *ILJ* 275 at 276; *Northwest Township (Pty) Ltd v The Administrator, Transvaal* 1976 (4) SA 1 (T) at 10; *NEHAWU v UCT* 2003 (2) BCLR 154 (CC) at par 38.

[1025] In *Pep Stores v Laka* 1998 (9) BLLR 952 (LC), the Labour Court explained that a failure of justice is present where a decision-maker ignores evidence presented to him or her, or commits "a serious error of law". Cf *Department of Justice v CCMA* 2001 (11) BLLR 1229 (LC) at par 7 per Waglay J.

[1026] 2007 (12) BLLR 1097 (CC). The instant case concerned the dismissal of a security guard with a clean fifteen-year service record. He was responsible for access control and was dismissed for his negligence in the implementation of detailed search procedures. The dismissal was the result of an internal disciplinary inquiry, an internal appeal and failed conciliation. The applicant successfully challenged his dismissal in the CCMA. The respondent approached the Labour Court for a review of the commissioner's decision. The Labour Court found no reviewable irregularities. On appeal, the Labour Appeal Court reasoned that dismissal as sanction was not justified in the circumstances of the case. The Supreme Court of Appeal overturned the Labour Appeal Court's decision on appeal and held the dismissal to be a fair sanction. The case ended with the Constitutional Court finding that a reasonable decision-maker could reach the same conclusion as the commissioner.

[1027] For a discussion of the idea of managerial prerogative, see Chapter Two, part 3 3.

court rejected the idea of deference as far as it translates to the traditional reasonable employer test.[1028] This test is based on the English law understanding that reasonableness must be determined from the perspective of the employer.[1029] This perspective of reasonableness is irreconcilable with the equity-based approach on which South African labour law is based.[1030] Within this understanding of the reasonable employer test, deference attracts a subservient element. One is here dealing with deference as submission and not deference as respect.[1031] The Constitutional Court correctly criticised the element of the reasonable employer test to the extent that it hinders impartiality, encourages bias and facilitates prejudice. However, a reading of the Constitutional Court's judgment as a rejection of the idea that a band of reasonableness can exist would be unfortunate. Although the *Sidumo*-judgment was one dealing specifically with the fairness evaluation of a dismissal, the broader meaning that underlies the court's reasoning (as here reflected) adds value to the proper approach to employment related fairness evaluations.

[1028] See *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 70 per Navsa AJ.

[1029] The reasonable employer test has its roots in the reasoning of Lord Denning in *British Leyland UK Ltd v Swift* [1981] IRLR 91 at par 11: "[T]here is a band of reasonableness, within which one employer might reasonably take one view; another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair; even though some other employers may not have dismissed him." In *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 70, Navsa AJ rejected this test on the basis that this English law doctrine does not find application in South African law, as the English statute that regulates the review of a dismissal for fairness is differently worded than its LRA counterpart. See *Engen Petroleum Ltd v CCMA* 2007 (8) BLLR 705 (LAC) at par 19 per Zondo JP.

[1030] In *BMD Knitting Mills (Pty) Ltd v SACTWU* 2001 (7) BLLR 705 (LAC) at par 19, Davis AJA explained that fairness is regarded as a comparator, to ensure that reasons which inform employment decisions are fair to both parties in the employment relationship. This understanding of the spirit of the concept of fairness informs the aim of the Constitution and the LRA "to redress the power imbalances between employees and employers", as was confirmed in *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 74 per Navsa AJ. See also the discussion of the development of labour law in Chapter Two, part 2.

[1031] See part 2 1 3.

The Constitutional Court has referred to deference as respect with approval in administrative law related constitutional jurisprudence.[1032] Deference must amount to respectful interference, not unquestionable submission.[1033] So understood, deference is reconcilable with the objective assessment of fairness as associated with the right to fair labour practices.[1034]

It is submitted, that it is illogical to rely on the rejection of the reasonable employer test to support the conceptual separation of reasonableness and substantive fairness.[1035] At no level does this exercise amount to deference as submission, as the taking into consideration of the factors that influenced the employers decision to, for example, dismiss the employee does not automatically require an analysis of these factors with the employer's state of mind. It merely requires the circumstances to be considered, to adequately balance the interests, to ultimately evaluate whether interference is warranted based on the decision being tainted by general unreasonableness and specific unfairness.[1036] What is required is a value judgment.[1037] The discontent articulated by Parington and Van der Walt is therefore well founded:

[1032] An understanding of deference as respect is required against the background of administrative law's purpose to constrain the abuse of power. In terms of administrative law, the constitutional principle of separation of powers informs this perspective. See part 2 1 3; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (7) BCLR 678 (CC).

[1033] As such, one cannot regard deference as implying submission to the more powerful against the vulnerable in an unequal power relationship, if not justifiable by means of the fairness-comparator.

[1034] Deference as respect, within the reasonableness evaluation, requires a balancing of interests in a manner comparable to labour related fairness.

[1035] Both concepts require consideration of the relevant circumstances that inform an adverse decision, and both concepts require the interests at play to determine the degree of judicial interference, albeit at a de jure and de facto level respectively. According to Partington and Van der Walt 2008 *Obiter* 209 at 223 – 224, this merely entails taking into "consideration the totality of relevant circumstances informing the employer's decision to dismiss".

[1036] If unfairness is present, interference is warranted. If the employer cannot be said to have acted unreasonably in reaching the decision then, deference as respect for the employer's managerial prerogative dictates against interference. Deference as respect for the executive's policy prerogative similarly dictates against interference in the absence of unreasonableness. This is true of employment decision in general and not merely limited to dismissals.

> The use of the word 'deference' in the context of the 'reasonable employer' approach is therefore, it is submitted, really an unfortunate misnomer, the rationale behind which, though not always properly applied or understood, is a safeguard ensuring commissioners do not interfere with the sanction of dismissal simply because it is not the sanction the commissioner would have favoured in the circumstances.[1038]

If the evaluation of fairness from the perspective of the employer is constitutionally questionable, then fairness from the perspective of the commissioner is similarly questionable.[1039] The value judgment that informs the exercise of deference as respect requires the commissioner's objective assessment of the interests of both parties to the dispute.[1040] An equitable objective assessment is required to determine whether the decision, which aggrieves the employee, is justifiable by fair reasons.[1041]

[1037] See *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 179 per Ngcobo J. The judgment of Nasva AJ in *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 79 reflects this sentiment: "In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision, a commissioner is not required to defer to the decision of the employer. *What is required is that he or she must consider all relevant circumstances*." Emphasis added. The reasoning of Navsa AJ is equally true when viewed in the context of unfair labour practices.

[1038] Partington and Van der Walt 2008 *Obiter* 209 at 224 – 225. Footnotes omitted. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (7) BCLR 678 (CC) at par 46, O'Regan J did warn that "[t]he use of the word 'deference' may give rise to misunderstanding as to the true function of a review court".

[1039] The reason for this being, as explained in *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 180, that "a commissioner with an employer background could give a decision that is biased in favour of the employer, while a commissioner with a worker background would give a decision that is biased in favour of a worker".

[1040] See *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 179.

[1041] See *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 180. As explained in *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 181, the reasonable decision-maker has a specific function to fulfil: "[W]hat is required of a commissioner is to take seriously the reasons for the employer establishing the rule and prescribing the penalty of dismissal for breach of it. Where an employer has developed and implemented a disciplinary system, it is not for the commissioner to set aside the system merely because the commissioner prefers different standards. The commission

From a labour law perspective, it is because of the employer's managerial prerogative to develop and implement a disciplinary system that complements the business demands that deference as respect is owed. Ngcobo J therefore held that judicial acknowledgment of deference as respect within the process of formulating a value judgment "is not a reason for the commissioner to defer to the employer."[1042] It is however necessary for the reasonable decision-maker to ascertain the reasons for the employer implementing a particular rule and the importance of the rule in the operation of the employer's business" to enable him or her to "weigh these factors in the overall determination of fairness".[1043]

The general *Bato Star*-statement of O'Regan J that "an administrative decision will be reviewable if ... it is one that a reasonable decision-maker could not reach",[1044] is reconcilable with the current specialised labour law outlook (minus the reasonable employer test) as will be elaborated upon in part 4 2.[1045] Navsa AJ admitted as much in the *Sidumo*-judgment, by stating that the application of the *Bato Star*-standard "will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair".[1046] In the

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should *respect* the fact that the employer is likely to have greater knowledge of the demands of the business than the commission."

[1042] *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 182. Closer consideration of the *Sidumo*-judgment of Ngcobo J in fact lends support to the idea of deference as respect in rejection of deference as submission. It is interesting to note that Ngcobo J also wrote the concurring judgment in the controversial *Country Fair Foods (Pty) Ltd v CCMA* 1999 (11) BLLR 1117 (LAC). In that judgment, Ngcobo J expressed support for the idea that a measure of deference is owed to the discretion the employer exercises in the choice of sanction as a disciplinary measure. See *Country Fair Foods (Pty) Ltd v CCMA* 1999 (11) BLLR 1117 (LAC) at par 29. In the *Sidumo*-case, Ngcobo J was presented with an opportunity to clarifying his interpretation of deference in an employment context.

[1043] *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 182.

[1044] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (7) BCLR 678 (CC) at par 50.

[1045] Cf Partington and Van der Walt 2008 *Obiter* 209 at 228.

[1046] *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 110 Navsa AJ. A nexus between the respective administrative and labour law infused reasoning that underlies the *Bato Star*-judgment and the *Sidumo*-judgment is identifiable in the judgment of Willis JA in *Palaborwa Mining Company Limited v Cheetham* 2008 (6) BLLR 553 (LAC) at par 4. Myburgh 2009 (30) *ILJ* 1 at 17 reveals similar insight.

aftermath of the *Sidumo*-ruling, labour law specific fairness perspective aligns with the general approach of administrative reasonableness: An employer's decision for example to dismiss an employee will be reviewable if a commissioner (in analysing the decision in an impartial, unbiased and unprejudiced manner) cannot foresee the possibility of himself or herself reasonably reaching a similar decision. Although the *Sidumo*-judgment was one dealing with the fairness evaluation of a dismissal, it has the potential to add a further dimension to the proper approach to fairness evaluations of labour practices, as the judgment is rooted in the broader fairness understanding of the constitutional right to fair labour practices.

3 2 Adequate Reasons

The concept of fairness requires judicial deference to be dependent on the specialised legal context that calls for the evaluation of justifiability. A substantively fair reason also requires an evaluation of the adequacy of the reason,[1047] as influenced by the nature and impact of the employment decision, with due regard to competing rights and interests. Indicators as to what constitute adequate reasons in dismissal and other labour practice contexts have been identified in employment jurisprudence and subsequently codified in labour legislation.

3 2 1 Unfair Labour Practices

The broad concept of the unfair labour practice requires that the relationship between employers and employees be informed by considerations of fairness.[1048] Although the LRA seeks to give effect to the right to fair labour practices, it does not embrace an open-textured definition of unfair labour practices, but instead codifies certain equity-inspired practices.

In affording employees protection against unfair labour practices, the LRA qualifies labour practices with the requirement of equitable considerations in a variety of de facto employment contexts. This legislative qualification emphasises the fact that labour law

[1047] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 217.

[1048] See Chapter Two, part 2 2 for a discussion of the initial recognition and development of the concept of (un)fair labour practices. See also Basson et al *Essential Labour Law* 184; Grogan *Dismissal, Discrimination and Unfair Labour Practices* 41.

inherently acknowledges the presence of competing rights in the fairness analysis.[1049] In essence, the right of every employee is protected in so far as it is unfairly limited by the employer's decisions relating to promotions, demotions, probation, training, provisions of benefits, suspension etc. In order to determine whether the interests of the employee justifies judicial infringement on the interests of the employer, the impact of the decision on those affected by it must be brought into consideration, along with consideration of the justifiability of the employer's decision through the evaluation of the reasons proffered.

In identifying a range of possible unfair labour practices in s 186(2) of the LRA, the legislature acknowledges that the nature of the decision that constitutes unfair conduct is central to the substantive fairness evaluation. Among the specific forms of labour practices the LRA seeks to keep within the bounds of fairness are promotion, demotion and suspension decisions. There are, of course, other forms of labour practices that can attract judicial interference, namely employment decisions relating to probation, training or any decision constituting disciplinary action short of dismissal. However, unfair conduct relating to promotions, demotions and suspensions (as examples of labour practices with which employers deal on a regular basis) provide, for purposes of the current discussion, good and representative examples of the specific substantive and procedural fairness requirements in labour law that relate to the general factors underlying considerations of reasonableness and procedural fairness in administrative law.

3 2 1 1 Promotion

As unfair conduct relating to promotions can constitute an unfair labour practice,[1050] s 186(2)(a) of the LRA seeks to protect employees against the unfair (non)promotion[1051]

[1049] It acknowledges the right of every employee to fair treatment, along with the right of every employer to manage his or her business.

[1050] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 52.

[1051] Reference to a promotion constituting an unfair labour practice in terms of the LRA is misleading. It is in fact the decision not to promote (the non-promotion) that amounts to the required conduct in such a challenge. See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 53.

decisions of employers in the context of promotions.[1052] The nature of the non-promotion decision as it relates to unfair labour practices is key to the substantive fairness evaluation.[1053] The decision must amount to the employee not being allocated "a position that is of higher status with more responsibility"[1054] than the position previously held by him or her.[1055]

In evaluating the fairness of the reason for the non-promotion decision, labour law requires consideration of the identity of the decision-maker, with due regard to the fact that competition is an undeniable element of the process.[1056] An employee's unhappiness at being passed over for promotion does not create a protectable interest.[1057] Only in the presence of a reasonable expectation of promotion, can an

[1052] See Basson et al *Essential Labour Law* 187. The idea of a non-promotion decision constituting an unfair labour practice, pre-supposes at de facto level an existing employment relationship between the parties to the dispute. The same holds true for a demotion. See part 3 2 1 2. Cf *Bench v Phalaborwa Transitional Local Council* 1997 (9) BLLR 1163 (LC); *Vereeniging van Staatsamptenare obo Badenhorst v Department of Justice* 1999 (20) ILJ 253 (CCMA).

[1053] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 55.

[1054] *Mashegoane v University of the North* 1998 (1) BLLR 73 (LC) at 77.

[1055] Grogan *Dismissal, Discrimination and Unfair Labour Practices* 52 explains that an increase in salary is not an essential element for a promotion, although it is normally part thereof. Unfair labour practices relating to promotions in the public service attracted attention in the *Jele*-saga, about the unsuccessful promotion application of a public servant from the Department of Health to the Department of Transport. In both the Labour Court and the Labour Appeal Court, it was reasoned that a public servant falls within one general public service (regardless of the different departments). This conclusion allows public servants to bring an unfair labour practice case to the appropriate bargaining council in the event of an unsuccessful promotion application, unless the regulating statute stipulates otherwise. See *Jele v Premier of the Province of KwaZulu-Natal* 2003 (24) ILJ 1392 (LC); *MEC for Transport: KwaZulu-Natal v Jele* 2004 (12) BLLR 1238 (LAC); Grogan *Dismissal, Discrimination and Unfair Labour Practices* 54 – 55. See also Du Toit et al *Labour Law through the Cases* LRA 8–19.

[1056] Within this process, the decision not to promote an employee ultimately lies with the employer as the decision-maker. See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 55; *SAMWU obo Damon v Cape Metropolitan Council* 1999 (20) ILJ 714 (CCMA). Cf *Cullen/Distell (Pty) Ltd* 2001 (8) BALR 834 (CCMA). See also Basson et al *Essential Labour Law* 189.

[1057] An employee is generally not entitled to a promotion in light of the workplace reality of competition between employees. Grogan *Dismissal, Discrimination and Unfair Labour Practices* 55 explains that this is the case even if an employee has acted in that higher position, which "does not in itself [create] an entitlement to be appointed on a permanent basis".

entitlement be created.[1058] If this is the case, the employer's unfair conduct unjustly affects the employee's interests.[1059]

Although the impact of the decision ultimately comes into play when the presence of unfairness is determined, no requirement can be set for an employer to promote the best or most commendable candidate for a promotion.[1060] As a result, arbitrators illustrate a fair degree of respect for the decision of the employer, as "[i]nevitably, a measure of subjectivity enters the selection process at some stage".[1061] The fact that the judiciary has shown deference, does not imply that employers have unlimited power. It merely implies that "[u]nless the appointing authority were shown to have not applied its mind in the selection of the successful candidate, the CCMA may not interfere with the prerogative of the employer to appoint whom it considers the best candidate".[1062] Consideration of the reasons given for the decision therefore requires consideration as to whether the decision-maker applied his or her mind.[1063] The employer's decision to promote the one employee above another must be capable of justification in terms of fair reasons, regardless of provision for an element of

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[1058] It is possible for the words or actions of an employer to create a legitimate expectation of promotion with a specific employee. See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 55. Cf the administrative law perspective in Chapter Three, part 2 2 2.

[1059] Cf Grogan *Dismissal, Discrimination and Unfair Labour Practices* 57.

[1060] See *Cullen/Distell (Pty) Ltd* 2001 (8) BALR 834 (CCMA); Du Toit et al *Labour Law through the Cases* LRA 8–19. Bad faith on the side of an employer has however been inferred "from the patent superiority of the unsuccessful candidate" in exceptional cases. See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 55.

[1061] Grogan *Dismissal, Discrimination and Unfair Labour Practices* 55. See Du Toit et al *Labour Law through the Cases* LRA 8–18; *PSA obo Dalton v Department of Public Works* 1998 (9) BALR 1177 (CCMA). See also Basson et al *Essential Labour Law* 189.

[1062] *SAMWU obo Damon v Cape Metropolitan Council* 1999 (20) ILJ 714 (CCMA) at 718, read with due consideration of the Constitutional Court's *Sidumo*-reasoning. See Du Toit et al *Labour Law through the Cases* LRA 8–17. Cf *Van Rensburg v Northern Cape Provincial Administration* 1997 (18) ILJ 1421 (CCMA); *Communication Workers Union obo Starck and Telkom SA Ltd* 2005 (26) ILJ 353 (CCMA).

[1063] Evaluating the substantive fairness of an employer's decision to promote an employee is not an easy undertaking. See Basson et al *Essential Labour Law* 189; See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 58. See also Du Toit et al *Labour Law through the Cases LRA* 8–18. Cf *PSA obo Badenhorst v Department of Justice* 1999 (20) ILJ 253 (CCMA).

subjectivity in the employer's choice.[1064] An objective standard is required in determining whether a promotion amounts to an unfair labour practice, and allows for determination of the real reasons for the decision in contrast to the reason proffered by the employer.[1065] An objective standard will be absent if an employer acted inconsistently or in an arbitrary or capricious manner.[1066]

In evaluating the reasons given for the non-promotion decision, the relevant factors surrounding the decision call for reflection. Consideration of all the relevant factors enables one to determine whether "the employer's 'standard of industrial justice' falls short"[1067] of the promotion standard required in the circumstances.[1068] The employer, regardless of his or her prerogative to appoint employees of his or her choice, is not at liberty to rely on irrelevant criteria when identifying employees for promotion.[1069] It

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[1064] See Basson et al *Essential Labour Law* 189; Grogan *Dismissal, Discrimination and Unfair Labour Practices* 58.

[1065] See Basson et al *Essential Labour Law* 189. The CCMA has illustrated a willingness to undertake such an exercise in scrutinising the real reasons behind the employer's decision. Scrutiny of this nature allows for the identification of a logical connection (if any) between the real reason and the ultimate non-promotion decision. See Du Toit et al *Labour Law through the Cases* LRA 8–18. Cf *PSA obo Badenhorst v Department of Justice* 1999 (20) ILJ 253 (CCMA). General reasonableness is here also present as guideline to the substantive fairness analysis in the form of basic rationality considerations.

[1066] See *SACCAWU v Garden Route Chalets (Pty) Ltd* 1997 (3) BLLR 325 (CCMA) at 332. See also Du Toit et al *Labour Law through the Cases* LRA 8–19; *PSA obo Van Zyl v Department of Correctional Service*s 2008 (29) ILJ 215 (BCA).

[1067] Strydom (LLD UNISA 1997) 109. See also *Sweet Food & Allied Workers Union v Delmas Kuikens* 1986 (7) ILJ 628 (IC) at 635.

[1068] Jurisprudence has identified the criteria applied for promotion selection as a relevant factor in the fairness enquiry. Consequently, an approach that calls on employers to adopt disciplinary codes has been incorporated in the Code of Good Practice: Dismissal. The reasons for the employer's actions call for review, to assist the evaluation of the presence or absence of such criteria. See *PSA obo Botes v Department of Justic*e 2000 (21) ILJ 690 (CCMA) at 698 as referred to in *Arries v CCMA* 2006 (11) BLLR 1062 (LC) at par 19.

[1069] Although the employer is empowered to determine the criteria for promotion, the criteria so determined must stand in reasonable relation to the requirements of the promotion position. See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 57. Cf *Rafferty/Department of the Premier* 1998 (8) BALR 1017 (CCMA).

constitutes an unfair labour practice if the employer basis his decision on invidious, unacceptable or irrelevant criteria.[1070]

In relation to the criteria consideration, the presence or absence of discrimination is another relevant factor. The criteria found in s 6(1) of the EEA operate as a yardstick for the determination of the fairness of a non-promotion decision.[1071] The presence of discrimination as defined in the EEA can signify the presence of bad faith on the side of the employer. Bad faith in turn translates into an unfair non-promotion based on inadequate reasons.[1072] In the absence of sufficient reasons, a decision lacks a rational connection between the information and the ultimate non-promotion.[1073] A rational connection must be present for a fair non-promotion decision.[1074]

3 2 1 2 Demotion

The decision to demote an employee must be justifiable in terms of the reasons provided by the employer. The effecting decision will be fair if it is justifiable. In evaluating the fairness of a decision to demote an employee, similar considerations are present as in the case of a non-promotion decision.

[1070] See *Arries v CCMA* 2006 (11) BLLR 1062 (LC) at par 17.

[1071] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 55 and 59. Seeing as the LRA does not identify any defences for the employer against an unfair labour practice claim, the employer can rely on the specific defences in s 6 of the EEA (such as affirmative action) that are available to counter allegations of unfair discrimination. Cf *Department of Justice v CCMA* 2004 (4) BLLR 297 (LAC).

[1072] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 56; *Portnet v SALTAFF obo Lagrange* 1998 (7) BALR 963 (IMSSA); *IMATU/Greater Pretoria Metropolitan Council* 1999 (12) BALR 1459 (IMSSA); *Du Plooy and National Prosecuting Authority* 2006 (27) ILJ 409 (BCA).

[1073] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 57. Cf *Mashegoane v University of the North* 1998 (1) BLLR 73 (LC); *PSA obo Petzer v Department of Home Affairs* 1998 (19) ILJ 412 (CCMA)

[1074] See Du Toit et al *Labour Law through the Cases* LRA 8–18; *PSA obo Badenhorst v Department of Justice* 1999 (20) ILJ 253 (CCMA).

Although a demotion amounts to a degradation of the employee's status,[1075] the fairness evaluation is similar to that associated with non-promotion decisions. Yet, a few differences between promotions and demotions are identifiable, the most important being that a demotion often has a disciplinary element.[1076] For such a decision to be substantively fair, the reason therefore must be reasonably justifiable in the circumstances, as a demotion affects the employee's interests.[1077] This calls for the evaluation of the adequacy of the employer's reasons for demotion. To echo the *Bato Star*-test, the evaluation calls for consideration of all the relevant factors to the decision and the nature of, and impact on, the interests of the parties to the de facto employment relationship.

A decision to demote an employee can only have the potential to amount to an unfair labour practice in terms of the LRA if it amounts to an actual demotion.[1078] Only if the decision deprives the employee of a contractually entitled rank, status or benefit will it amount to an actual demotion.[1079] In the absence of rank, status or benefit deprivation, the employee will not experience the required impact. Not every demotion amounts to an unfair labour practice.

[1075] This is the case even if the decision leaves the employee's salary and benefits unchanged. See *Visser v Vodacom (Pty) Ltd* 2002 (10) BALR 1031 (AMSSA); *Van Wyk v Albany Bakeries Ltd* 2003 (12) BLLR 1274 (LC); *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services* 2008 (12) BLLR 1179 (LAC). See also Du Toit et al *Labour Law through the Cases* LRA 8–20; Grogan *Dismissal, Discrimination and Unfair Labour Practices* 60; *Ndlela v SA Stevedores Ltd* 1992 (13) ILJ 663 (IC); *Solidarity obo Kern v Mudau* 2007 (6) BLLR 566 (LC). Cf *SALSTAFF obo Vrey v Datavia* 1999 (6) BALR 757 (IMSSA).

[1076] See Du Toit et al *Labour Law through the Cases* LRA 8–20. A decision to demote is not limited to a disciplinary context. A decision to demote an employee can also arise from an employer's operational requirements. See *Plaatjies v RK Agencies* 2005 (1) BALR 77 (CCMA).

[1077] See Du Toit et al *Labour Law through the Cases* LRA 8–20.

[1078] For example, if an employer instructs an employee to move from an acting position back to his original position, the decision does not constitute a demotion. See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 59.

[1079] See Du Toit et al *Labour Law through the Cases* LRA 8–20; Grogan *Dismissal, Discrimination and Unfair Labour Practices* 60. See also *Ndlela v SA Stevedores Ltd* 1992 (13) ILJ 663 (IC); *Van Wyk v Albany Bakeries Ltd* 2003 (12) BLLR 1274 (LC); *Minister of Justice v Bosch NO* 2006 (27) ILJ 166 (LC); *Solidarity obo Kern v Muau* 2007 (6) BLLR 566 (LC); *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services* 2008 (12) BLLR 1179 (LAC).

In considering the interests of employees, along with consideration of the impact of the decision, sight must not be lost of the interest of the employer. If a decision to demote (as a penalty) is based on a valid reason and imposed in terms of a fair procedure, an employer cannot be denied the right to discipline employees that neglect to adhere to the set standards in the workplace.[1080] However, the operational interests of the business also attaches to the consideration of the interests of the employer.[1081] A demotion as an alternative to dismissal or retrenchment must merely be justifiable in terms of the circumstances of the case.

3 2 1 3 Suspension

The legislature's choice to include unfair suspension within the scope of s 186(2)(b) indicates that a decision to suspend may in certain circumstances be described as fair.[1082] Depending on the nature of a decision to suspend, it can be either a disciplinary or a preventative measure.[1083] The possibility of a fair suspension entitles an arbitrator

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[1080] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 60 – 61.

[1081] Grogan *Dismissal, Discrimination and Unfair Labour Practices* 60 explains: "Demotions may be deemed fair if they are aimed at avoiding retrenchment or dismissal for incapacity".

[1082] Grogan *Dismissal, Discrimination and Unfair Labour Practices* 73 holds that consideration is owed to the period of the suspension, as well as whether the employer followed "the provisions of the applicable disciplinary code or regulation". When the fairness of the suspension of an employee is evaluated, the latter consideration is very important. The reasonableness of the suspension period is dependent on whether the suspension is preventative or punitive in nature. Another relevant consideration is whether the employer may withhold pay during the period of preventative suspension. Generally, it is unfair to withhold pay from a suspended employee, unless it is statutorily authorised or the relevant employee delayed the disciplinary hearing to which the suspension is a preventative measure. If the circumstances justify it, pay can be withheld where an employee is suspended as a punitive measure. Where the facts would justify dismissal, punitive suspension with no pay will be justifiable. See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 74; *Wahl v AECI Ltd* 1983 (4) ILJ 298 (IC). Cf *Rikhotso v Transvaal Alloys (Pty) Ltd* 1984 (5) ILJ 228 (IC); *Marcus v Minister of Correctional Services* 2005 (26) ILJ 75 (SE).

[1083] The nature of the decision, in terms of the grammatical interpretation of s 186 of the LRA, comes across as suspension with a disciplinary dimension. Section 186 of the LRA groups a suspension with "other disciplinary action". In *Koka v Director-General Provincial Administration North West Government* 1997 (7) BLLR 874 (LC), the Labour Court extended the interpretation of suspension within the scope of unfair labour practices to include preventative suspension pending disciplinary action. See *Ndlovu v Transnet Ltd t/a Portnet* 1997 (7) BLLR 887 (LC). See also Basson et al *Essential Labour Law* 194; Du

to evaluate the substantive justifiability of the decision.[1084] Substantive fairness is required for a suspension to qualify as a fair labour practice, as it affects the interest of the relevant employee. Balance is required between the interests of the parties to the employment relationship to enable the employer to maintain discipline within his or her business in accordance with the standards set out in the relevant disciplinary code.[1085] This balancing exercise assists in determining whether the impact of the decision on the affected person is unreasonable. The degree of respect owed to the employer's decision is determined with due regard to the consideration of this impact.[1086] In short, the reasons given must justify the suspension as a necessary measure.[1087]

Toit et al *Labour Law through the Cases* LRA 8–24; Grogan *Dismissal, Discrimination and Unfair Labour Practices* 72. In *Ortlieb/Khulani Springbok Patrols* 1999 (4) BALR 423 (CCMA) at 425, a preventative suspension was described as "[a] practice, universally followed by employers … until serious charges against [employees] are properly investigated and, if they are found to have substance permitting the employee to answer to them".

[1084] In *Sajid v Mohammed NO* 2000 (21) ILJ 1204 (LC), the suspension of an employee was ruled unfair due to the absence of a reason substantiating the employer's conduct. Although the employee was preventatively suspended, the employer did nothing to initiate an inquiry. Grogan *Dismissal, Discrimination and Unfair Labour Practices* 72 – 73 comments that preventative suspension will be fair if there is a prima facie case of misconduct against the employee and there exists sound reasons for denying him access to the workplace.

[1085] If undue emphasis falls on employee interests, the employer will not be able to exercise the required degree of managerial control.

[1086] Closely associated with this consideration is the identity of the decision-maker.

[1087] Although respect is owed to the employer's managerial decisions, the Labour Court in *SAPO Ltd v Jansen van Vuuren NO* 2008 (8) BLLR 798 (LC) at par 39 emphasised that an employer should not too hastily resort to suspension in the absence of a valid reason. See Basson et al *Essential Labour Law* 194; Du Toit et al *Labour Law through the Cases* LRA 8–25. Albeit in the context of a preventative suspension, the statement of Van Niekerk J in *Mogothle v Premier of the North West Province and Another* 2009 (4) BLLR 331 (LC) at par 39 holds equally true for suspensions in general. The judge reasoned that, as a minimum it is firstly required "that the employer has a justifiable reason to believe, *prima facie* at least, that the employee has engaged in serious misconduct; secondly, that there is some objectively justifiable reason to deny the employee access to the workplace based on the integrity of any pending investigation into the alleged misconduct or some other relevant factor that would place the investigation or the interests of affected parties in jeopardy; and, thirdly, that the employee is given the opportunity to state a case before the employer makes any final decision to suspend the employee". The third requirement

3 2 2 Unfair Dismissal

At its most simplistic, an unfair dismissal is a dismissal without any adequately justifiable reason.[1088] This understanding acknowledges the requirement of the substantive fairness for dismissal as a sanction, because dismissal is not merely an expression of retribution or reprisal.[1089] Section 188(1) of the LRA stipulates that the employer can dismiss for misconduct, incapacity or operational requirements if a fair reason exists.[1090] A contextualised understanding of fairness as it relates to the de facto level employment relationship is necessary, as each specific area dictates the range of possibly fair reasons.

A fair reason requires an evaluation of the adequacy of the reason.[1091] The evaluation of the adequacy of the reasons for dismissal requires a balance between the interests of both parties to the employment relationship within the specific context of the dispute.[1092] This balance is found in labour law's perspective of substantive fairness by

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identified by Van Niekerk J relates to the procedural dimension of fairness and is elaborated on in Chapter Six, parts 4 1 1 3 and 4 2 1 1 2.

[1088] See Cassim 1984 (5) *ILJ* 275 at 294.

[1089] See *De Beers Consolidated Mines Ltd v CCMA* 2000 (21) ILJ 1051 (LAC) at 1058.

[1090] See *Mzeku v Volkswagen SA (Pty) Ltd* 2001 (8) BLLR 857 (LAC) at par 14.

[1091] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 217.

[1092] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 217. Certain categories of unfair reasons have crystallised in practice that can be linked to the victimisation of employees. Grogan *Dismissal, Discrimination and Unfair Labour Practices* 225 explains that s 187 of the LRA recognise these categories as automatically unfair, as "it will not generally avail the employer to argue that it was seeking to protect other, more urgent interests, or that it followed a fair procedure, or that for any other reason the dismissal should be considered fair". The focus of the fairness enquiry in automatically unfair dismissal enquiries is the determination of "the true reason for the dismissal". See Basson et al *Essential Labour Law* 95 – 97. Section 187 of the LRA reads as follows:

"(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is—

(a) that the employee participated in or supported, or indicated an intention to participate in or support, a strike or protest action that complies with the provisions of Chapter IV;

(b) that the employee refused, or indicated an intention to refuse, to do any work normally done by an employee who at the time was taking part in a strike that complies with the provisions of Chapter IV or was locked out, unless that work is necessary to prevent an actual danger to life, personal safety or health;

means of s 23 of the Constitution.[1093] Section 188 of the LRA upholds the required constitutional balance, by recognising "an employer's right to fairly dismiss an employee ... as well as an employee's right to be protected against unfair"[1094] dismissal.[1095] This once again emphasises that it is possible to view the fairness focus of labour law not as

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(c) to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee;

(d) that the employee took action, or indicated an intention to take action, against the employer by—

(i) exercising any right conferred by this Act; or

(ii) participating in any proceedings in terms of this Act;

(e) the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy;

(f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;

(g) a transfer, or a reason related to a transfer, contemplated in section 197 or 197A; or

(h) a contravention of the Protected Disclosures Act, 2000, by the employer, on account of an employee having made a protected disclosure defined in that Act.

(2) Despite subsection (1)(f)—

(a) a dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job;

(b) a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity."

For purposes of drawing a comparison between labour law substantive fairness and administrative law reasonableness, only the unfair dismissal approach as reflected in s 188 of the LRA will form the focus of the discussion in this chapter.

[1093] See *NEHAWU v UCT* 2003 (2) BCLR 154 (CC) at par 40. In response, the LRA circumscribes the traditional managerial prerogative of employers in that employers cannot lawfully contract out of their statutory obligations. Limitations placed on the managerial prerogative of the employer in the context of the promotion of fair labour practices have both a procedural and substantive dimension. See Cohen 2007 (19) *SA Merc LJ* 26 at 32. See *George v Liberty Life Association of Africa Ltd* 1996 (8) BLLR 985 (IC) at 997 per Landman P for a discussion of the labour law evolution of the idea of managerial prerogative. See also Chapter Two, part 3 3.

[1094] Cohen 2007 (19) *SA Merc LJ* 26 at 28.

[1095] Grogan *Dismissal, Discrimination and Unfair Labour Practices* 216 reasons that the LRA, in incorporating fairness as the yardstick for a just dismissal, "extends the common-law concept of dismissal".

a limitation, but as a value-added dimension of the multi-faceted legal riddle, that is the employment relationship.

3 2 2 1 Conduct

As is the case with all other employment decisions, a substantively fair misconduct dismissal, objectively evaluated,[1096] requires a defensible and adequately reasonable reason.[1097] In *Malan v Bulbring NO*,[1098] the Labour Court explained that the "issue of whether conduct justified termination of an employment contract requires an analysis of the conduct and its effect on the employment relationship".[1099] The evaluation of the circumstances and relevant factors of the case therefore assists the evaluation of the reasons for, as well as the impact of, the decision to dismiss.[1100]

Fairness decrees that the employer should be empowered to take disciplinary action when the employee is guilty of misconduct,[1101] as "[t]rust is obviously an operational requirement of any business".[1102] The employer has an interest in promoting and

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[1096] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 219. In *SACWU v Afrox Ltd* 1999 (10) BLLR 1005 (LAC) at par 32, the Labour Appeal Court noted: "The enquiry into the reason for the dismissal is an objective one, where the employer's motive for the dismissal will be merely one of a number of factors to be considered. This issue (the reason for the dismissal) is essentially one of [factual and legal] causation".

[1097] See *Oliver v Foschini Group Ltd* 1995 (8) BLLR 102 (IC) at 110; *GIWUSU v VM Construction* 1995 (9) BLLR 99 (IC) at 106. The fairness of the reason and the sanction must "be decided in accordance with the guidelines" identified by the Industrial Court and incorporated in the Code of Good Practice: Dismissal.

[1098] 2004 (10) BLLR 1010 (LC).

[1099] *Malan v Bulbring NO* 2004 (10) BLLR 1010 (LC) at 1017. See Du Toit et al *Labour Law through the Cases* LRA 8–31.

[1100] According to Strydom (LLD UNISA 1997) 123, these elements are not to be considered in isolation. A value judgment, based on a holistic view of the facts and circumstances and with due regard to the interests of both parties to the employment relationship, is called for. See *NEHAWU v Medicor (Pty) Ltd t/a Vergelegen Medi-Clinic* 2005 (1) BLLR 10 (LC) at par 42 per Potgieter AJ.

[1101] See Dekker 2007 (19) *SA Merc LJ* 372 at 377.

[1102] Dekker 2007 (19) *SA Merc LJ* 372 at 377. The following specific forms of misconduct have been identified: absence from work, abusive language and racist comments, assault, competing with the employer/conflict of interest, damage to the employer's property, disclosing confidential information, dishonesty, drug use, drinking on duty, falsification of records, fraud, bringing the employer's name into

protecting this trust element in the workplace.[1103] The workplace rules put in place to maintain the trustworthy standard of employees must also be reasonable to not infringe unduly on the rights and interests of employees.[1104]

Holistically viewed, the decision to dismiss will only be reasonable and based on a fair reason if the following can be shown: the misconduct was actually committed by the employee,[1105] the employee was aware of the fact that his or her conduct was in contravention of a reasonable rule that amounts to misconduct,[1106] and the employer's decision to dismiss corresponds to past action taken against similar acts of misconduct by employees.[1107] For the decision to be substantively fair, a finding of guilt (in

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disrepute, insubordination or insolence, negligence, sexual harassment, sleeping on duty, theft or unauthorised possession and unauthorised use of the employer's property. See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 291 – 322 for a detailed discussion of these specific forms of misconduct.

[1103] See Basson et al *Essential Labour Law* 119 – 120.

[1104] See Item 7 of the Code of Good Practice: Dismissal; s 188(2) of the LRA; Basson et al *Essential Labour Law* 118 – 119; Du Toit et al *Labour Law through the Cases* LRA 8–32.

[1105] Once the reasonableness of the relevant rule is established, the contravention of the reasonable rule calls for consideration. Determining the justifiability of the reasons to dismiss based on the employee's conduct also requires an evaluation of guilt and innocence. Grogan 2008 24(6) *Employment LJ* (Electronic Version) explains that the idea of deference as respect does not influence the judicial review discretion with regard to the guilt or innocence of an employee. See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 219 – 220.

[1106] For the requirement that a reasonable rule must be in place, see Basson et al *Essential Labour Law* 116 – 118; *NUM v East Rand Gold and Uranium Co Ltd* 1986 (7) ILJ 739 (IC); *Van Zyl v Duvha Opencast Services (Edms) Bpk* 1988 (9) ILJ 905 (IC); *Hoechst (Pty) Ltd v CWIU* 1993 (14) ILJ 1449 (LAC); *Louw v Delta Motor Corporation* 1996 (17) ILJ 958 (IC).

[1107] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 219 – 220. Even though the employer has the discretion to dismiss for misconduct, fairness implies that similar cases receive similar treatment. In *NUMSA v Henred Fruehauf Trailers (Pty) Ltd* 1994 (15) ILJ 1257 (A) at 1264, Van der Heever JA stated: "Equity requires that the Courts should have regard to the so-called 'parity principle'." See Du Toit et al *Labour Law through the Cases* LRA 8–32; *Coca-Cola Bottling East London v CCMA* 2003 (2) BLLR 159 (LC) at par 27. Cf *SACCAWU v Irvin & Johnson Ltd* 1999 (8) BLLR 741 (LAC) at 751; *Cape Town City Council v Masitho* 2000 (21) ILJ 1957 (LAC); *CEPPWAWU v Metrofile (Pty) Ltd* 2004 (2) BLLR 103 (LAC); *SRV Mill Services (Pty) Ltd v CCMA* 2004 (2) BLLR 184 (LC); *Minister of Correctional Service v Mthembu NO* 2006 (27) ILJ 2115 (LC).

contravention of a reasonable rule) must be supplemented by an appropriate sanction.[1108]

As is the case with the qualification of an appropriate reason as a component of the s 33(2) right to reasons for a just administrative action, the qualification of an appropriate sanction undeniably reveals a substantive reasonableness standard. In evaluating the justifiability of the sanction, the idea that some respect is owed to an employer's managerial prerogative dictates that an appropriate sanction is not necessarily the best sanction, but merely an acceptable sanction.[1109] Deference as respect (in light of the *Sidumo*-judgment)[1110] requires acknowledgment of the fact that "[t]he determination of an appropriate sanction is ... largely within the discretion of the employer".[1111] If the employer exercises his or her discretion unfairly, interference is justified.[1112]

The courts have fleshed out certain relevant factors to the appropriateness of a sanction for misconduct. Item 3 of the Code of Good Practice: Dismissal incorporates these factors in determining the required parameters of the range of acceptability. These factors underlying de facto level contextualised labour law specific substantive fairness resemble the de jure level *Bato Star*-factors relied upon for a general reasonableness evaluation.[1113] Within this range of factors one finds the following: the gravity of the misconduct,[1114] the circumstances surrounding the misconduct,[1115] the nature of the

[1108] See Grogan 2008 24(6) *Employment LJ* (Electronic Version).

[1109] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 277.

[1110] See part 3 1 1.

[1111] *Nampak Corrugated Wadeville v Khoza* 1999 (2) BLLR 1117 (LAC) at par 33. The word 'appropriate', points to a range of acceptable sanctions in any given set of circumstances. See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 281.

[1112] See *Nampak Corrugated Wadeville v Khoza* 1999 (2) BLLR 1117 (LAC) at par 33. Judicial interference, in terms of the right to fair labour practices and the LRA, will only be justifiable if the employer's chosen sanction is unreasonable and unfair. Judicial interference with regard to the sanction is logically justifiable in a similar manner as interference with the decision to dismiss will be justifiable if the applicable rule allegedly contravened is found to be unreasonable. The employer's discretion with regard to the rule and sanction is not untouchable if it is exercised unreasonably.

[1113] In echoing the reasonableness considerations, the fairness evaluation also has due regard to the idea of deference as respect, albeit respect for managerial instead of executive discretion.

[1114] This begs the question whether the misconduct amounted to a serious breach of the trust relationship. Cf *Oliver v Foschini Group Ltd* 1995 (8) BLLR 102 (IC) at 110; *FAWU obo Sjade v Premier*

work performed by the employee,[1116] the nature of the work and services rendered by the employer,[1117] the circumstances of the infringement itself (as there may be mitigating circumstances),[1118] and the nature of the employee's job.[1119] These factors in essence call for consideration of the relationship between the employee (as the individual that stands to lose his or her source of income) and the employer (as the 'victim' of the misconduct).[1120] The factors considered in the substantive fairness evaluation of a misconduct dismissal are reconcilable with the *Bato Star*-guidelines at all three evaluation levels, namely reasonable rule, contravention of the reasonable rule, and appropriate sanction. The specific misconduct context enables the fairness enquiry to ascribe weight to the general reasonableness factors that act as framework for the evaluation of the decision.

Milling 1997 (18) ILJ 1134 (CCMA); *National Council of Food and Artificial Workers Union obo Roberts v Ons Handelshuis Koop* 1997 (18) ILJ 1176 (CCMA). In *NUM v Free State Consolidated Gold Mines (Operations) Ltd – President Steyn Mines; President Brand Mine; Freddies Mine* 1992 (13) ILJ 366 (IC) at 368, Dannhauser SM stated: "Considering that dismissal should be the sanction of last resort and that it is especially serious for mineworkers because of the limited scope for re-employment, I am not persuaded that dismissal was an unfair sanction." See also *Changula v Bell Equipment* 1992 (13) ILJ 101 (LAC) at 111.

[1115] Cf *Boardman Brother (Natal) (Pty) Ltd v CWIU* 1998 (19) ILJ 517 (SCA).

[1116] Cf the discussion of *Maphatane v Shoprite Checkers (Pty) Ltd* 1996 (17) ILJ 964 (IC) in Basson et al *Essential Labour Law* 121.

[1117] Cf *Standard Bank of South Africa v CCMA* 1998 (19) ILJ 903 (LC). Accompanying this consideration is factors such as the nature and size of the employer's workforce and the position of the employer and its profile in the market place.

[1118] Basson et al *Essential Labour Law* 122 point out that an employee found guilty of assault may have been provoked or even have acted in self-defence. If such circumstances exist, dismissal will not be warranted. Cf *Nkomo v Pick 'n Pay Retailers* 1989 (10) ILJ 937 (IC); *JD Group Ltd v De Beer* 1996 (17) ILJ 1103 (LAC).

[1119] See Basson et al *Essential Labour Law* 120 – 125.

[1120] The nature of these competing interests along with the impact of the decision on the lives and well-being of those affected, fall within the scope of this consideration. Basson et al *Essential Labour Law* 123 – 124 explain that this exercise calls for consideration of "the employee's length of service, status within the undertaking, previous disciplinary record and personal circumstances", which can also include "marital status, the number of dependants and the employee's age".

3 2 2 2 Capacity

In its broadest sense, incapacity refers to an employee's inability to perform his or her work to the standard required by the employer.[1121] Incapacity can arise from an employee's "lack of skill or from physical or mental deficiency".[1122] Although both misconduct and incapacity dismissals are in essence dismissals for conduct by the employee, the employee is not 'at fault' when dismissed for incapacity.[1123] Regardless of the absence of fault, a dismissal for incapacity is legally permissible when the employee's inability to perform the work contractually agreed upon grants the employer an adequate reason for the termination of the employment contract.[1124] The Code of Good Practice: Dismissal identifies two broad categories of no-fault incapacity dismissals: poor work performance and ill health or injury.

3 2 2 2 1 Poor Work Performance

Legislative and judicial acceptance of poor work performance as a fair reason for dismissal demonstrates respect for the managerial discretion of employers to establish "reasonable performance standards"[1125] for the workplace. The object of (substantive) fairness in dismissals of this nature is "to ensure that employers do not abuse the right to dismiss employees for incapacity".[1126] A dismissal for poor work performance will be defensible, in the absence of a reasonable alternative, if the employee failed to meet an attainable performance standard.[1127] The recognition of deference as respect in this context obliges the employer to avoid abuse of discretion in coming to such a decision.[1128]

[1121] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 405.

[1122] Grogan *Dismissal, Discrimination and Unfair Labour Practices* 405.

[1123] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 405. Cf *Sun Couriers (Pty) Ltd v CCMA* 2002 (23) ILJ 189 (LC).

[1124] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 405.

[1125] Grogan *Dismissal, Discrimination and Unfair Labour Practices* 405.

[1126] Grogan *Dismissal, Discrimination and Unfair Labour Practices* 405.

[1127] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 220.

[1128] This is evident from the reasoning of the Labour Appeal Court in *Somyo v Ross Poultry Breeders (Pty) Ltd* 1997 (7) BLLR 862 (LAC) at 866: "An employer who is concerned about the poor performance of an employee is normally required to appraise the employee's work performance; to warn the employee

Substantive fairness calls on the employer to prove the incapability of the employee.[1129] An adequate reason will only exist if it can be illustrated that the employee's failure to meet the required standard is due to poor work performance.[1130] Item 9 of the Code of Good Practice: Dismissal assists in de facto level contextualising of the fair reason requirement. Evaluating the substantive fairness of an incapacity dismissal, guided by the item 9 requirements, calls for an objective assessment of the relevant employee's work performance.[1131]

3 2 2 2 2 Ill Health or Injury

When ill health or injury renders it difficult or impossible for an employee to perform his or her contractually undertaken functions, an employer is authorised to make an informed and fair decision to dismiss.[1132] Item 10 of the Code of Good Practice: Dismissal indicates that ill health or injury will not constitute a fair reason for dismissal in the absence of the following considerations:[1133]

> What was the cause of the injury or illness? What is the extent to which the employee is unable to perform duties? Were alternatives to termination

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that if his work performance does not improve, he might be dismissed; and to allow the employee a reasonable opportunity to improve his performance."

[1129] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 405 – 406. It will not suffice for the employer to prove simply that the performance standard of the business was not met.

[1130] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 407; *White v Medpro Pharmaceuticals (Pty) Ltd* 2000 (10) BALR 1182 (CCMA) at 1187.

[1131] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 405. The Industrial Court early on in *Gostelow v Datakor Holdings (Pty) Ltd t/a Corporate Copolith* 1993 (14) ILJ 171 (IC) already indicated that work performance must be evaluated from both the employer and the employee's perspective to enable a value judgment to be drawn as to the objective and reasonable justifiability of a dismissal. This is now also recognised by the guidelines in item 9(b)(i) and (ii) in the Code of Good Practice: Dismissal. See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 406.

[1132] See Van Eck and Lombard 2004 (1) *TSAR* 20 at 32. If operational necessity so dictates, the employer can fill the position of the injured or ill employee, rendering him or her redundant and terminating his or her employment. See *Davies v Clean Deale CC* 1992 (12) ILJ 1230 (IC) at 1233.

[1133] It is not only physical illness that may constitute a valid reason for dismissal. In *X v Elvey International (Pty) Ltd* 1995 (16) ILJ 1210 (IC), the Industrial Court indicated that even mental illness or stress can fall within the nature, degree and extent of the guidelines found in item 10. See Basson et al *Essential Labour Law* 141. Cf *NEHAWU v SA Institute for Medical Research* 1997 (2) BLLR 146 (IC).

considered or was the adaptation of the duties of the employee considered? Was the employee afforded the opportunity to state a case and given the opportunity to be represented by a trade union representative or fellow employee?[1134]

In determining the impact of the degree of the incapacity on the decision to dismiss, the productivity of the employee requires consideration.[1135] In *Davies v Clean Deale CC*,[1136] the Industrial Court identified guidelines to assist in the evaluation of fair ill health or injury dismissals:[1137]

(a) If the disability is due to workplace related injury or illness, the employer has a greater duty to accommodate the employee.[1138]

(b) The employer must first determine, in consultation with the employee, whether he or she is capable of performing his or her employment duties (as required prior to injury or illness), and if not, determine the extent of that inability.[1139]

(c) After consultation, the employer must determine whether the duties of the employee can be adapted to allow him or her to exercise those duties in a manner that allows for him or her to fulfil the functions as previously done, whether alone or with reasonable assistance.[1140]

[1134] Van Eck and Lombard 2004 (1) *TSAR* 20 at 32. Cf *Lynoch v Cereal Packaging Ltd* [1988] IRLR 510 at 512 as referred to by Grogan *Dismissal, Discrimination and Unfair Labour Practices* 419.

[1135] See Basson et al *Essential Labour Law* 141. Cf *Philander v Eco Car Hire CC* 2001 (6) BALR 631 (CCMA).

[1136] 1992 (12) ILJ 1230 (IC).

[1137] The court in *Food Workers Council of SA v SA Breweries Ltd* 1992 (13) ILJ 204 (IC) at 208 referred to these guidelines with approval. See *Carr v Fisons Pharmaceuticals* 1994 (7) BLLR 10 (IC) at 15.

[1138] See *Davies v Clean Deale CC* 1992 (12) ILJ 1230 (IC) at 1232 – 1233. The employer's duty to accommodate the incapacitated employee somewhere within the business will weigh heavier than an employee suffering from an unrelated illness of injury. See Basson et al *Essential Labour Law* 141 – 142. Cf *Carr v Fisons Pharmaceuticals* 1995 (16) ILJ 179 (IC).

[1139] See *Davies v Clean Deale CC* 1992 (12) ILJ 1230 (IC) at 1232 – 1233. The permanent or temporary nature of the ill health of injury is also an important consideration when considering the adequacy of the dismissal. See Basson et al *Essential Labour Law* 141.

[1140] See *Davies v Clean Deale CC* 1992 (12) ILJ 1230 (IC) at 1232 – 1233.

(d) If the employee cannot return to the position held prior to the injury or illness, the employer must ascertain whether an alternative position (even if at reduced salary) is available.[1141]

An employer's decision to dismiss will only be considered substantively fair if a serious effort has been made to "adapt the employee's duties or position or to find alternative work"[1142] within the confines of the relevant business.

3 2 2 3 Operational Requirements

Section 213 of the LRA defines operational requirements as "requirements based on the economic, technological, structural or similar needs of an employer". It is clear that a dismissal based on the operational requirements of a business is the only option in the three-fold permissible dismissal scheme that does not relate to an employee's conduct or capacity.[1143] The substantive fairness requirement in this context is a factual one.[1144] Respect for the employer's prerogative to organise his or her business structures as he or she sees fit leads to substantive fairness, at its most basic, requiring two considerations:

> Firstly, the employer must prove that the proffered reason is one based on the operational requirements of the business ... Secondly, the employer must prove that the operational reason actually existed and that it was the real reason for the dismissal.[1145]

[1141] See *Davies v Clean Deale CC* 1992 (12) ILJ 1230 (IC) at 1232 – 1233.

[1142] Basson et al *Essential Labour Law* 142. Cf *Tither v Trident Steel* 2004 (4) BALR 404 (MEIBC); *NUMSA obo Swanepoel and Oxyon Services CC* 2004 (25) ILJ 1136 (BCA); Grogan *Dismissal, Discrimination and Unfair Labour Practices* 424.

[1143] See *Durban Integrated Municipal Employees Society v Tongaat Town Board* 1993 (2) LCD 54 (IC); Grogan *Dismissal, Discrimination and Unfair Labour Practices* 428.

[1144] The factual evaluation calls for a holistic consideration of all the evidence according to the court in *FAWU v SA Breweries Ltd* 2004 (11) BLLR 1093 (LC). See Basson et al *Essential Labour Law* 151 – 152.

[1145] Basson et al *Essential Labour Law* 151.

Substantive fairness requires that the employer does not abuse his or her prerogative when making business-based decisions.[1146] What a fair dismissal for operational requirements calls for is the de facto contextualisation of the fairness considerations.[1147] To accomplish this, the employer must prove the fairness of the decision by illustrating that it was based on facts that translate into the economic, technological, structural or similar business needs.[1148]

Managerial deference for the employer's right to organise his or her business has led to the judicial acceptance that an increase in profitability or an improvement of efficiency can qualify as a fair reason.[1149] Granting the employer some leeway in the manner in which he or she opts to regulate the operational aspects of business, does not undermine the proportional balance of interests required by the right to fair labour practices.[1150] Fairness still functions as a comparator:[1151]

> *To this extent the court is entitled to enquire as to whether a reasonable basis exists* on which the decision, including the proposed manner, to dismiss for operational requirements is predicated. Viewed accordingly, the test becomes less deferential and the court is entitled to examine the content of the reasons given by the employer, albeit that the enquiry is not directed to

[1146] Restraining abuse of power in the unequal employment relationship is the general purpose underlying the incorporation of substantive fairness within the scope of labour law.

[1147] In *OCGAWU v Country Fair Foods (Pty) Ltd* 2001 (12) BLLR 1358 (LC) at par 90, the Labour Court endorsed this understanding.

[1148] This by no means implies that dismissal for operational reasons will only be substantively fair if the reason related to a necessary cut in costs or expenses. See Basson et al *Essential Labour Law* 151.

[1149] See *Hendry v Adcock Ingram* 1998 (19) ILJ 85 (LC) at 92; Basson et al *Essential Labour Law* 151. This perspective was also confirmed in *Fry's Metals (Pty) Ltd v NUMSA* 2003 (24) ILJ 133 (LAC) at par 33 (as referred to in *Mazista Tiles (Pty) Ltd v NUM* 2005 (3) BLLR 219 (LAC) at par 57). See also *Mineworkers Union and Solidarity obo Macgregor v SA National Parks* 2006 (27) ILJ 818 (LC); *Forecourt Express (Pty) Ltd v SA Transport and Allied Workers Union* 2006 (27) ILJ 2537 (LAC).

[1150] See *SACTWU v Discreto – a Division of Trump and Springbok Holdings* 1998 (12) BLLR 1228 (LAC) at par 8.

[1151] See *BMD Knitting Mills (Pty) Ltd v SACTWU* 2001 (7) BLLR 705 (LAC) at par 19 per Davis AJA.

> whether the reason offered is the one which would have been chosen by the court. *Fairness, not correctness is the mandated test.*[1152]

In *CWIU v Algorax (Pty) Ltd*,[1153] Zondo JP however explained that judicial respect for the employer's prerogative does not render his or her operational decisions incontestable, as respect shown for the employer's specific business expertise "is not absolute and should not be taken too far".[1154] In *FAWU v SA Breweries Ltd*,[1155] Gamble AJ explained that the courts have moved towards a "less deferential test for proof of substantive fairness" in retrenchment cases, as it amounts to no-fault dismissals, which is "meant to be a measure of last resort".[1156] In placing reliance on *General Food Industries Ltd t/a Blue Ribbon Bakeries v FAWU*,[1157] Gamble AJ in *FAWU v SA Breweries Ltd*[1158] opted for a quote from the academic work of Rycroft[1159] to summarise the courts' perspective:

> In summary, an employer intending to restructure by way of redefining jobs and making all or a group of existing jobs redundant must be able to show: (i) a *reasonable and commercial rationale* for the decision to restructure; (ii) that the *particular decision* has been taken in a manner which is also fair to the employees to be retrenched; (iii) that the retrenchment of the employees is essential to achieve *the purposes of the restructuring*; (iv) that the criteria for appointment to the "new" jobs are clear and justifiable, linked specifically to the new job description; (v) that guidance is given to employees as to which of the restructured jobs they might be eligible [sic]; (vi) that employees are

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[1152] *BMD Knitting Mills (Pty) Ltd v SACTWU* 2001 (7) BLLR 705 (LAC) at par 19. Emphasis added. Brassey et al *The New Labour Law* 94 note that there is "no commercial rationale for an unreasonable order". See Marais *Onbillike Arbeidspraktyke* 35.

[1153] 2003 (11) BLLR 1081 (LAC).

[1154] *CWIU v Algorax (Pty) Ltd* 2003 (11) BLLR 1081 (LAC) at par 69. See also Grogan *Dismissal, Discrimination and Unfair Labour Practices* 442.

[1155] 2004 (11) BLLR 1093 (LC).

[1156] *FAWU v SA Breweries Ltd* 2004 (11) BLLR 1093 (LC) at par 40. See Christianson 2004 *ASSAL* 610 at 641.

[1157] 2004 (7) BLLR 667 (LAC).

[1158] *FAWU v SA Breweries Ltd* 2004 (11) BLLR 1093 (LC).

[1159] Rycroft 2002 (23) *ILJ* 678.

given an opportunity in the interview to answer any questions about past performance that might be used as a criterion for not appointing them to the job; and (vii) that the eventual selections are *objectively justifiable*.[1160]

These principles form the basis for the substantive fairness evaluation of a dismissal for operational reasons.[1161] When considering the principles, the fifth and sixth considerations tend to align more with procedural fairness considerations, while the emphasised elements read like a rationality review as found in administrative law.[1162] The Labour Court adapted this element of reasonableness as an element of substantive fairness, but nevertheless holds that fairness and not rationality is to be regarded as the proper test,[1163] as an objectively justifiable reason translates into a fair reason.[1164] However, the substantive fairness that the judiciary requires looks similar to reasonableness, because fairness does not require correctness.[1165]

4 RECONCILIATION OF THE ADMINISTRATIVE AND LABOUR LAW PERSPECTIVES

While administrative law has primarily and in general terms recognised the variable potential of reasonableness at a de jure (macro) level, labour law has allowed a conceptual fairness understanding to develop at de facto level through contextualised guidelines. This is evident from the judicial consideration given to the fairness element in unfair labour practice and dismissal cases.[1166] Reasonableness, in administrative law, has not been granted similar specific guidance at a de facto level, regardless of the

[1160] *FAWU v SA Breweries Ltd* 2004 (11) BLLR 1093 (LC) at par 58. Emphasis added.

[1161] See Christianson 2004 *ASSAL* 610 at 642.

[1162] The existence of a rational link between the particular decision and the purpose sought renders the decisions objectively justifiable and therefore reasonable.

[1163] See *FAWU v SA Breweries Ltd* 2004 (11) BLLR 1093 (LC) at par 153 per Gamble AJ.

[1164] Cohen 2007 (19) *SA Merc LJ* 26 at 28 declares that the reasons proffered by an employer for the retrenchment of employees must be "properly and genuinely justifiable by operational requirements". See also *SACTWU v Discreto (A Division of Trump & Springbok Holdings)* 1998 (12) BLLR 1228 (LAC).

[1165] See *BMD Knitting Mills (Pty) Ltd v SACTWU* 2001 (7) BLLR 705 (LAC) at par 19.

[1166] The de facto level contextualisation is also evident in the extent to which those considerations have been legislatively endorsed as guidelines in pursuit of fairness.

fact that rationality and proportionality considerations are generally associated with reasonableness evaluations.[1167]

There is a real danger of labour law's contextualised conceptualism warping into formalistic conceptualism, if the judiciary does not carefully approach the codification of fairness as mere guidelines. The judiciary must constantly remind itself that the codified labour law fairness considerations are simply indicators that developed in an attempt to highlight the underlying values endorsed by the concept of fairness in specialised contexts over the years. Indicators of this nature cannot be relied upon to oust general reasonableness considerations in every context, because of the presence of an employment nature to the legal relationship, as it in fact requires a specific context to inform the de jure level recognised concepts. Formalism will stifle the variable nature of a fairness evaluation if guidelines are judicially elevated to strict directives.

To the extent that labour law codifies fairness consideration, the factors emanating from such codification are flexible in nature and must be so respected and applied by the judiciary. The character of the contextually developed specialised fairness guidelines reveal the capacity to co-operate and merge with the abstract general normative pillars of administrative law.[1168]

It is possible for the de jure level administrative law understanding of reasonableness to find expression (to variable degrees) in various specialised de facto labour law contexts, even if these contexts are legislatively pre-defined by the LRA's provisions regulating fairness in dismissals and other labour practices. This reconciliation is possible, as both specific labour law and general administrative law at its most basic endorse the duty to act fairly.

[1167] Although it can be argued that PAJA does give specific content to rationality through the factors identified in s 6(2)(f)(ii), it still amounts to mere de jure level contextualism, which has a general character as it does not provide guidance as to the de facto applications of the factors.

[1168] The considerations underlying the labour law approach to misconduct illustrate this fact, when consideration is given to the factors that influence the possible sanctions. The flexibility of the apparent codification is also evident when disciplinary rules are considered.

4 1 A Shared Duty to Act Fairly

While labour law easily embraced the substantive element of fairness, administrative law at first viewed it with suspicion. Despite this, some administrative law specialists early on acknowledged that the duty to act fairly called for a wider standard than mere procedural fairness,[1169] with a fairness enquiry focussing on both "what is done and how it is done".[1170] This perspective of the duty to act fairly, reminds of labour law's requirement for both a fair reason and a fair procedure as components of a fair decision.[1171] The substantive element of fairness has emerged in a general form in administrative law as the concept of reasonableness.[1172]

Every legal relationship determines the essential applicable canons of fair play.[1173] In a situation where the legal relationship is a public employment relationship, it is characterised by the presence of public power. The templates of the fair play canons associated with the general factors that underlie a reasonableness evaluation are informed by the specialised substantive fairness considerations as dictated by the specific relationship.[1174] The broad reasonableness factors gain substance in the public employment context when used as a framework for a de facto level substantive fairness

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[1169] See Baxter 1979 (96) *SALJ* 607 at 628; *HTV Ltd v Price Commission* [1976] ICR 170 at 186 and 189 per Denning MR and Scarman LJ; Chapter Three, part 2 2 1.

[1170] *Maxwell v Department of Trade and Industry* [1974] 2 All ER 122 at 132 per Lawton LJ.

[1171] The requirement of a fair reason describes labour law's substantive fairness at its most simplistic.

[1172] Along with the constitutionalisation of the right to just administrative action, the judiciary has somewhat reluctantly developed the substantive dimension of variable reasonableness concept. See Chapter Three, part 3 5 2.

[1173] An undertaking to determine the content of the concept of fairness will always result in a finding that fairness is a value judgment, dependent on the factual matrix of every case. See *Greater Letaba Local Municipality v Mankgabe NO* 2008 (3) BLLR 229 (LC) at paras 28 – 29.

[1174] The nature of the employment relationship (determined by the presence or absence of public power) determines the extent to which fairness dictates the essential canons of fair play within that relationship. See Currie and De Waal *Bill of Rights Handbook* 587; Smit 2003 (2) *Stell LR* 205 at 213 – 214. The de facto level employment specific considerations are necessary, as Règimbald 2005 (31) *Man LJ* 239 at 156 points out that reasoning of this nature (based on broad factors comparable to the *Bato Star*-guidelines) although good in theory, does "not answer the question as to how one must assign weight to considerations that pull in different directions, even if the standard of reasonableness ... allows for a 'somewhat probing examination'".

enquiry.[1175] It is possible for the specific context of a specialised fairness analysis, viewed within the de jure level framework of the general reasonableness factors, to require consideration of the substantive implications of a decision.[1176]

In the application of the broad *Bato Star*-guidelines to the evaluation of, for example, a substantively fair dismissal, it becomes apparent that general reasonableness and specialised substantive fairness function in a complementary manner. This should not come as a surprise, as administrative law is based on "the underlying principle that the duty to act fairly rests on anyone who is called upon to decide anything in the exercise of public power".[1177]

4 2 Substantive Fairness within a Reasonableness Framework

Once the formalistic labels are discarded, the essence of the concepts of reasonableness and fairness reveals a shared rationale, the duty to act fairly, which allows for interdependence between general reasonableness and specific fairness.[1178]

[1175] Employment considerations assign weight and content to the broad based factors as per the needs of the specific dispute. In the de facto contextualisation of the de jure level *Bato Star*-guidelines, De Ville 2004 (20) *SAJHR* 577 at 608 encourages the judiciary to scrutinise the factors underlying a reasonableness evaluation on a continual basis. Navsa AJ in *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 108 reiterated the Constitutional Court's perspective: "[S]crutiny of a decision based on reasonableness introduced a substantive ingredient into review proceedings. In judging a decision for reasonableness, it is often impossible to separate the merits from scrutiny." Cf Currie and De Waal *Bill of Rights Handbook* 677; *Stanfield v Minister of Correctional Services* 2003 (12) BCLR 1384 (C).

[1176] While the public power context will allow labour law to draw on the developed reasonableness guidelines, the employment context will allow the expansion of these considerations on a substantive level in a manner that administrative law in general may possibly view as to extreme. This is justified in a labour law context, as labour law allows for substantive fairness considerations in the review of an employment decision.

[1177] Wakwa-Mandlana and Plasket 2005 *ASSAL* 104 at 119 with reference to *Board of Education v Rice* [1911] AC 179 at 182.

[1178] This shared rationale allowed for the Industrial Court, in developing the concept of fair labour practices, to look towards reasonableness as a standard. The approach initially adopted by the Industrial Court resembles the balance required in an administrative law reasonableness enquiry. Labour law at an early stage therefore recognised labour practices as substantively fair if reasonable in relation to the

Reasonableness in general requires a decision to be defensible.[1179] The correlation between administrative law reasonableness and labour law substantive fairness becomes even more obvious when one considers that a defensible labour practice or dismissal requires that the employer must justify the reason he or she proffers for the related decision.[1180]

Although not expressly declared as a functional framework for the substantive fairness evaluation of unfair labour practices and dismissals by the judiciary, the *Bato Star*-guidelines for reasonableness are clearly identifiable in labour law.[1181] The possibility of normative interdependence is further emphasised by the fact that labour law has implicitly shown acceptance of the administrative law idea of deference.[1182]

When so simplified, it illustrates that the basic substantive dimensions of reasonableness and adequate reasons in administrative law are compatible with labour law, to such an extent that it almost appears as if the general reasonableness framework was designed to facilitate a specialised substantive fairness enquiry in the context of unfair labour practices and dismissals as discussed above. Consequently, if an employer failed to apply his or her mind, the decision may be challenged and judicial interference will be justified.[1183]

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reasons given. See Chapter Two, parts 2 3, 2 4 and 3 5; Marais *Onbillike Arbeidspraktyke* 15; Poolman *Principles of Unfair Labour Practice* 16; *Lefu v Western Areas Gold Mining Co* 1985 (6) ILJ 380 (IC) at 387; *Robbertze v Matthew Rustenburg Refineries (Wadeville)* 1986 (7) ILJ 64 (IC) at 70.

[1179] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 219. The synonym for defensible is justifiable, which is the description that administrative law ascribes to a reasonable (adequate) decision.

[1180] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 219.

[1181] These guidelines being the nature of the decision, the identity of the decision-maker, the range of relevant factors, the reasons given for the decision, the impact of the decision on the affected individual, and the nature of the competing interests.

[1182] See parts 2 1 3 and 3 1 1.

[1183] See *SAMWU obo Damon v Cape Metropolitan Council* 1999 (20) ILJ 714 (CCMA) at 718. See also Basson et al *Essential Labour Law* 189; Du Toit et al *Labour law through the Cases* LRA 8–17. Cf *Mashegoane v University of the North* 1998 (1) BLLR 73 (LC); *PSA obo Petzer v Department of Home Affairs* 1998 (19) ILJ 412 (CCMA).

It is in evaluating the appropriateness of the purpose of conduct where moral defensibility (as viewed from a constitutional perspective) moves towards the substantive justice balance required in employment decisions. The substantive element of reasonableness is especially evident when considering what will constitute a reasonable reason.[1184] Reasonableness does not require correctness or perfection.[1185] In unison with labour law, the requirement of adequate reasons in administrative law merely dictates that what constitutes a satisfactory reason will ultimately depend on the circumstances of a case.[1186] The duty to give adequate reasons for a decision runs through general administrative law into specific labour law, without any forced superficial legal reasoning. Both at general administrative and specialised labour law level, a decision will be inadequate and unfair if the evidence on which a decision is based is not properly considered rendering the decision "arbitrarily, irregularly and otherwise ... [not] in accordance with reason and justice".[1187]

The judiciary should recognise that, when it comes to fairness and the ideals that underlie it, no set standard artificially excluding reasonableness as rationality or proportional can justifiably be formulated, as "new guidelines ... will emanate from ... court[s] in future"[1188] on a case-by-case basis. In light of statements like these, uttered by the then Industrial Court, it is difficult to see how the broad constitutional strides made in administrative law with regard to the variable abstract concept of reasonableness cannot find a co-operative balance with the ever evolving scope of substantive fairness as associated with labour law.

[1184] See *Dendy v University of the Witwatersrand* 2005 (5) SA 357 (W) at par 53.

[1185] See Steinberg 2006 (123) *SALJ* 264 at 266; *Standard Bank of Bophuthatswana Ltd v Reynolds NO* 1995 (3) SA 74 (B) at 94. The de jure contextualisation of reasonableness as rationality in the context of dismissal based on operational requirements when applied as framework for the specialised evaluation of substantive fairness illustrates this fact.

[1186] Cf *Rèan International Supply Company (Pty) Ltd v Mpumalanga Gaming Board* 1999 (8) BCLR 918 (T) at 926. Hoexter *Administrative Law* 428 explains that the adequacy of the reasons will also depend on the statutory context in which the reasons are required. Therefore, labour legislation can be relevant to the determination of the adequacy of the reasons requested when an employment decision also amounts to administrative action.

[1187] *Oskil Properties (Pty) Ltd v Chairman of the Rent Control Board* 1985 (2) SA 234 (SE) at 246. See also Hoexter *Administrative Law* 420.

[1188] *Durand v Ellerine Holdings Ltd* 1991 ILJ 1076 (IC) at 1083.

Fairness must be capable of meaningful application in a polycentric context.[1189] The process whereby courts develop the guidelines for fair labour practices on a case-by-case basis is crucial if fairness is to continue to be more than a mere moral adjunct. If fairness in labour law is unduly restricted and isolated from other areas of the law, it runs the risk of losing touch with the transformative nature and social value of South Africa's legal system.[1190] Judicial neglect of this nature will render fairness an empty formalistic concept disharmonious with the constitutional and social values it is fundamentally ordained to endorse. Judicial neglect of this nature will undermine transformation, as it is in fairness' association with the de jure level contextualised variable nature of reasonableness that one finds its transformative potential.[1191]

Courts must refrain from such neglect if they aim to give full expression to the interdependent spirit of the Constitution. What is required is an acknowledgment that our courts must take a practical principled approach to public employment disputes that allow for normative interdependence if practically (and therefore contextually) required. This is possible within the scope of labour law as "[t]he whole tenor of *progress* in labour law is *to fair labour practices* and justice for employees and employers and *away from a narrow construction*".[1192]

4 3 Reconciling *Bato Star* and *Sidumo*

The fact that de facto pre-determined employment related guidelines for fairness have been judicially developed and legislatively codified is not ground enough for the exclusion of de jure level developed reasonableness considerations, such as those articulated by the Constitutional Court in the seminal case of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*.[1193]

[1189] Fairness, as the core of labour law, is a flexible concept that is dependent on variables, such as the factors influencing general reasonableness, to obtain substantive meaning.

[1190] Judicial neglect and disregard for the obligation to develop law in line with the normative value system of the Constitution is unforgivable.

[1191] See Steinberg 2006 (123) *SALJ* 264 at 276.

[1192] *Wyeth SA (Pty) Ltd v Manqele* 2005 (26) ILJ 749 (LAC) at 764. Emphasis added. See also Dekker 2007 (19) *SA Merc LJ* 372 at 374.

[1193] 2004 (7) BCLR 678 (CC).

Steinberg explains that the elements found in the *Bato Star*-analysis, when simplified, merely call for a two-step process of contextualisation: "The first entails locating the issue at hand in its appropriate constitutional setting ... The second step entails an analysis of the factual setting in which the question of reasonableness arises."[1194] This approach allows for both de jure (first step) and de facto (second step) contextualisation as associated with general administrative law and specific labour law respectively. Consequently, the Constitutional Court in *Sidumo v Rustenburg Platinum Mines Ltd*[1195] translated the administrative law developed *Bato Star*-approach to reasonableness into labour law terms. It may therefore be useful to compare the *Bato Star* and *Sidumo*-judgments.

As explained, administrative law acknowledges that the concept of reasonableness, at its most basic, requires the standard of rationality, which (when considering the substantive interests that cling to fundamental rights) can expand to considerations of proportionality.[1196] In the *Sidumo*-judgment, the Constitutional Court impliedly (albeit in the context of a dismissal) acknowledged this scale of reasonableness as associable with employment standards and the understanding of fairness.[1197] Knowledge of the legislative provisions and guidelines informing the de facto context of the dispute, as well as the relevant de jure standard of reasonableness evaluation, provides guidance for the degree of deference as respect owed to the decision-maker's discretion. Consequently, the provisions and guidelines that codify the jurisprudentially identified standards that inform fairness in relation to dismissals and other labour practices draw

[1194] Steinberg 2006 (123) *SALJ* 264 at 277.

[1195] 2007 (12) BLLR 1097 (CC).

[1196] The factual context of a dispute informs the reasonable degree of deference owed.

[1197] Myburgh 2009 (30) *ILJ* 1 at 19 explains that a reading of *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) reveals that reasonableness can be approached in a process-based manner or a result-based manner. This in effect translates to the basis that De Ville *Judicial Review* 213 identified for (process-based) rationality as reasonableness and (result-based) proportionality as reasonableness. Myburgh 2009 (30) *ILJ* 1 at 19 explains the difference in emphasis: "Typically, the result-based cause of action would be invoked when there has been a consideration of all relevant factors but it is contended that the result is, nevertheless, unreasonable, whereas the process-related cause of action would be invoked when there is a controversy about whether all materially relevant factors were considered." See also Myburgh 2009 (30) *ILJ* 1 at 4. The focus in the *Sidumo*-judgment appeared to be primarily result-based.

this general understanding of reasonableness into the scope of a specialised understanding of fairness.[1198]

The newly ascribed character of deference as respect that emanates from the Constitutional Court's *Sidumo*-reasoning now arguably informs the understanding of this ultimate question, namely "whether there was a fair reason for the dismissal (or labour practice) and whether it was in accordance with a fair procedure".[1199]

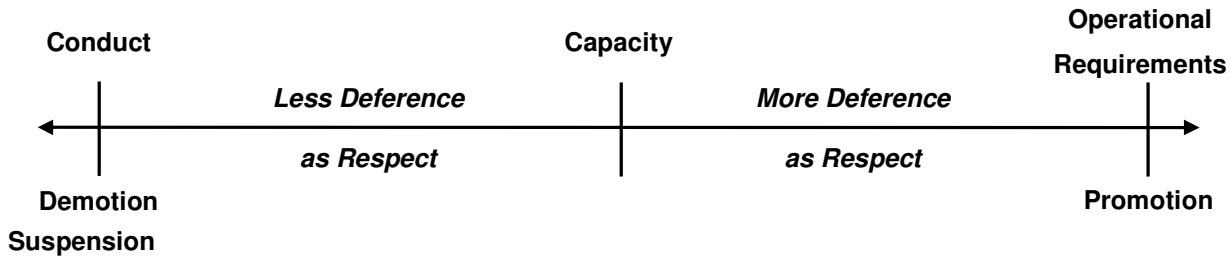

Illustration 3: The Deference Scale

Similar to general reasonableness, the degree of deference (applied to different employment type decisions) functions on a sliding scale. As demonstrated by the preceding discussion, as well as the illustration above, deference as respect allows for

[1198] This specialisation of administrative law reasonableness through its association with labour law fairness will be useful for the contextual protection of the right to fair labour practices, as long as formalism does not creep into the understanding and application of the relevant LRA provisions and guidelines. Grogan *Dismissal, Discrimination and Unfair Labour Practices* 46 observes that certain criteria have been recognised as "hallmarks of unfair [employment] conduct". Jurisprudence has recognised the presence of unfairness where favour is shown to a specific employee or group "on the basis of irrelevant criteria", where the employer acts in an arbitrary fashion (regardless of established rules), where the employer acts irrationally in that he or she acts "on the basis of unproven or untested views and suppositions" and where the rights and interests of the employee is or stands to be adversely affected without an opportunity for him or her to state his or her side of the story.

[1199] Grogan 2006 *ASSAL* 605 at 633. Cf *SABC v CCMA* 2006 (6) BLLR 587 (LC). Formalism threatens to creep into the judiciary's reasoning when guidelines are elevated to a labour law equivalent of jus cogent norms, which in turn attracts the idea of non-derogation. It is undeniable that substantive fairness has evolved into a labour law version of an erga omnes obligation for employer and employees alike, but formalistically clinging to distinctions and guidelines shows a disregard for the universal fairness obligation. Judicial respect for labour law's erga omnes obligation merely calls on the judiciary to consider one ultimate question that remains universal in all employment disputes.

stricter judicial scrutiny of the adequacy of the reasons underlying decisions of a disciplinary character, such as misconduct related dismissal, demotion or suspension.[1200] The degree of legislative regulation of employment type decisions differ, as indicated by the discussion surrounding the adequacy of reasons related to varying types of dismissal and labour practices. Consequently, the degree of regulation influences the degree of deference for the employer's decision and affects his or her margin of appreciation.[1201]

An evaluation of the categories in which a dismissal or a labour practice related decision can be justifiable, brings about the logical conclusion that the reason for the decision must relate to the ground that impelled the employer to take certain steps.[1202] The variable nature of reasonableness renders it adaptable to an employment context. In turn, the variable nature of fairness allows for its functioning within the framework of general reasonableness in an employment specific context. Interdependence, so allowed, gives context specific content to both the flexible de facto level substantive fairness and the de jure level reasonableness.

Accordingly, the holistic consideration of all the relevant factors in the context of every case in essence informs reasonableness and fairness on the sliding scale. If the factors underlying the reasonableness/fairness evaluation, objectively considered by a reasonable decision-maker, reveal substantive irregularities that render the decision unreasonable and unfair, the degree of interference is determined as per the type of employment decision and the related degree of deference.

The blurring of the notional lines that influence deference as respect should not render it conceptually difficult to keep in mind that specific contextual fairness remains the ultimate focus in applying the general *Bato Star*-factors within the reasonableness

[1200] Stricter scrutiny is justifiable in that the legislature has curbed the scope of managerial prerogative in this context with prescribed parameters for decisions of this nature.

[1201] For example, when it comes to the evaluation of the fair reason for dismissal, an employer's managerial prerogative is less restricted when the decision is based on operational reasons than is the case when it is based on misconduct.

[1202] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 217.

framework.[1203] The specific substantive labour fairness evaluation easily falls within the general framework of the reasonableness evaluation of the *Bato Star*-analysis. Reasoning of this nature brings considerable value to the deliberate vagueness of fair labour practices within the scope of s 23 of the Constitution in the context of public employment. The LRA similarly embraces a vague test for substantive fairness, as it also does not attempt to define the concept of fairness.[1204] The interdependent reasoning therefore carries the same value-added potential at legislative level. The specific element the LRA brings to the flexible evaluation of substantive fairness is the required identification of a fair reason for a dismissal or other labour practices within the context of the decision, whether it relates to promotion, demotion, suspension, conduct, capacity or operational requirement decisions. Unfortunately, these specific types of employment decisions are at the root of the artificial distinction between variable labour substantive fairness considerations and variable administrative reasonableness considerations.[1205] The courts appear to embrace the perspective that once a decision is specifically classifiable as relating to an unfair labour practice or an unfair dismissal, the administrative law related general reasonableness framework does not warrant consideration. The legislative codification of the specific types of decisions appears to reveal a practical rather than a prescriptive rationale. This rationale in reality invites courts to be innovative in the contextual determination of the weight ascribed to the factors underlying the substantive fairness enquiry.[1206]

[1203] Grogan *Dismissal, Discrimination and Unfair Labour Practices* 218 emphasises that "the division between dismissals related to the conduct or capacity of employees, and those related to the employer's operational requirements, is not absolute".

[1204] See the reasoning in *NEHAWU v UCT* 2003 (2) BCLR 154 (CC).

[1205] Grogan *Dismissal, Discrimination and Unfair Labour Practices* 219 comments: "[C]ourts operating under the 1956 LRA resisted applying these terms inflexibly. By codifying the forms of [employment decisions] ... in the current LRA, the legislature probably intended the expressions to be nothing more than guides for selecting the forum for particular kinds of dismissal disputes, and for *assisting the relevant forum to choose the appropriate principles when deciding the disputes*." Emphasis added.

[1206] For examples, see Grogan *Dismissal, Discrimination and Unfair Labour Practices* 219.

5 CONCLUSION

The debate that surrounds the simultaneous application of ss 23 and 33 of the Constitution has given rise to the perspective that the relationship between administrative and labour law makes for uneasy bedfellows.[1207] This perspective underlies the turf-war between the High Court and the Labour Court as Chapters Eight and Nine illustrate. The negative perspective that flows from this power play can be avoided, if employment related fairness is viewed as a specialised function against the general understanding of reasonableness. This perspective is to be preferred above one that regards the one right (and interrelated concepts) as a legal limitation of the other right (and interrelated concepts). Such a limitation-based approach will see the victorious right influenced by the jurisdictional interests of a specific court and not the merits of every individual case.

Recognition of the applicability of the s 33 right (in addition to the s 23 right) in a public employment dispute does not deprive labour law of the recognition and protection of the duty to act fairly within an employment context.[1208] Labour law, in embracing the idea of fair labour practices, can fulfil its regulatory function without unduly limiting other applicable rights and interests, as it is "a hybrid of private and public laws".[1209]

The idea of normative interdependence that supports expression of this hybrid character or labour related rights underlies the holistic character of the fundamental rights in the Constitution.[1210] In short, normative interdependence regards fundamental rights as mutually supportive, co-operative and not exclusionary in their protection and promotion, because the normative basis of fundamental rights is reconcilable. It is

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[1207] See Quinot 2000 *Resp Mer* 16.

[1208] Cf *Fedlife Assurance Ltd v Wolfaart* 2001 (12) BLLR 1301 (SCA) paras 11 – 15; *Denel (Pty) Ltd v Vorster* 2004 (25) ILJ 659 (SCA) at 665.

[1209] *Parry v Astral Operations Ltd* 2005 (10) BLLR 989 (LC) at 999 – 1000. Cohen 2007 (19) *SA Merc LJ* 26 at 28 explains that at the establishment of the employment relationship, labour law draws heavily on the contractual rules of private law. The continued existence and viability of the employment relationship is statutorily safeguarded by public law through "the protection of *both* the employees and employers". Emphasis added. See also Van Jaarsveld 2006 (18) *SA Merc LJ* 355 at 356.

[1210] See Chapter Seven for a discussion of the doctrine of normative interdependence that underlies the interdependent fundamental rights-relationship.

clearly visible in the substantive fairness and reasonableness components of the rights to fair labour practices and just administrative action respectively. The underlying rationale of both substantive fairness and reasonableness allows for easy co-operation between these two rights.

Normative co-operation at a substantive level is possible where the presence of public power allows for contextual intersection between the rights.[1211] This is especially true in light of the fact that labour law merely requires *a* fair reason for a substantively fair employment decision. Labour law does not prescribe a set type or list of fair reasons, in a similar fashion as administrative law merely requires *a* reasonable reason. Both labour and administrative law therefore merely requires *an* adequately justifiable reason in the circumstances of a specific case. Further support for this normative co-operation is noticeable in the fact that a correct and unified perspective of judicial deference illustrates that labour law functions as a specialised version of the general administrative law perspective that only inadequacy merits interference.

Labour law is a specialised field of regulatory rules.[1212] General administrative law regulates administrative type public power by means of general concepts.[1213] Thus, the concept of reasonableness has a general regulatory function, while substantive fairness translates general reasonableness guidelines into specialised regulatory considerations. Although the character of fairness renders it difficult to pen down the precise meaning of

[1211] Driver and Plasket 2003 *ASSAL* 69 at 102 note that the normative link between general reasonableness and specific substantive fairness is unfortunately hampered by the fact that courts tend to "run the concepts of lawful, reasonable and procedurally fair administrative action into each other". See for example the judgment of Smuts AJ in *Mohammed v Minister of Correctional Services* 2003 (6) SA 169 (SE). A reason for conceptual confusion can be found in the fact that development of the nature of unreasonableness review post-1994 has been limited, as courts are cautious of any administrative law concept that calls for limited objective consideration of the merits without entering the realm of appeals. See Driver and Plasket 2003 *ASSAL* 69 at 93. The development of a constitutional understanding of reasonableness has mostly taken place within the context of socio-economic rights. See *Government of the RSA v Grootboom* 2000 (11) BCLR 1169 (CC) and *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) BCLR 569 (CC).

[1212] See Chapter Two.

[1213] See Chapter Three.

fairness, "reasonable people can generally recognise acts that are patently unfair, and can discern the reasons that make them unfair".[1214]

The Constitution endorses the understanding that reasonable considerations guide the equitable standard required by fairness, specifically substantive fairness,[1215] for every employment decision.[1216] Administrative law has developed to recognise that reasonableness is determined on a scale. The de jure contextualisation of a disputed decision determines the required degree of reasonableness. Reasonableness at its most basic level requires mere rationality, while stringent regulation of the unequal power relationship requires proportionality considerations. Within a specific labour law setting, this general administrative law understanding is identifiable. In the de facto contextualisation of a dismissal for operational reasons, the basic understanding of reasonableness as rationality can for example direct the specialised fairness enquiry. On the other hand, the regulation of, for example, a misconduct dismissal under the LRA and the Code of Good Practice: Dismissal is more severe. As a result, the fairness enquiry in that context calls for proportionality considerations. At that point of intersection, general proportionality infiltrates the specialised understanding of unfair labour practices.[1217]

In summary, once the general framework of reasonableness finds application in a specific employment context, it attracts that specific nature and content. Both the concepts of fairness and reasonableness are flexible in nature and variable in

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[1214] Grogan *Dismissal, Discrimination and Unfair Labour Practices* 45. Stulberg 1998 (13) *Ohio St J on Disp Resol* 909 at 911 comments that substantive fairness amounts to "the functional equivalent of the difference principle in Rawls' scheme" of justice. See Rawls *A Theory of Justice* 75 – 83.

[1215] The substantive and procedural dimensions of the fairness principle was confirmed by the Labour Court in *Booysen v SAPS* 2008 (10) BLLR 928 (LC) at par 15. See Du Toit et al *Labour Law through the Cases* LRA 8–2.

[1216] Grogan 2005 *ASSAL* 585 at 587 appropriately notes that the "overlap between labour and administrative law inherited from the pre-constitutional dispensation has *expanded* with the arrival of a constitutional right to fair and rational administrative action". Emphasis added.

[1217] The extension of the general constitutional substantive due process concept into the specific substantive standard renders it possible to impose liability on the party in an employment relationship who causes harm to the other party without justification. See Perritt *Employee Dismissal Law and Practice* 11–79.

content.[1218] In the specific employment context, a de jure contextualised version of reasonableness guidelines inform the nature of specialised substantive fairness. General reasonableness provides the framework in which the variable content of substantive fairness is determined. Due to the variable nature of reasonableness, the context informs the content of the concept. This formula forms the basis of the substantive reasonableness-fairness relationship[1219] that aligns with the normative interdependence of constitutional rights, as Chapter Seven illustrates. However, the substantive dimension of fairness is complex and not easily grasped and accepted by the judiciary, as Chapters Eight and Nine highlights. In contrast to this new and constitutionally informed formula of substantive interdependence, the procedural dimension of fairness has been a shared aim of administrative and labour law since the initial acceptance of the duty to act fairly. It is closely associated with the principles of natural justice, specifically the audi alteram partem principle. The compatibility of the approach of administrative and labour law to procedural fairness is the focus of Chapter Six.

[1218] Cf Grogan *Dismissal, Discrimination and Unfair Labour Practices* 45. At certain levels, depending on the context in which the concepts are referred to, the content can render the concepts synonyms due to the similarity in nature. It is therefore possible for fairness to translate into reasonableness as embraced by administrative law.

[1219] Similar reasoning sees employment-specific substantive fairness as finding application within the general reasonableness framework due to the presence of public power. Regardless of the angle at which one views reasonableness and substantive fairness, the contextual result remains the same. Phrased differently, if one removes the specialised contextual considerations from the substantive fairness evaluation in an employment disputes (as characterised by the presence of public power) the general framework of a reasonableness enquiry remains.

CHAPTER SIX
PROCEDURAL FAIRNESS: A SHARED CONCEPT

1 INTRODUCTION

The judiciary relies strongly on the rule of law, a foundational constitutional principle,[1220] as a type of constitutional compass to assist it in evaluating whether a decision is just.[1221] The reason for this being that, intrinsic within the constitutional understanding of the rule of law, is the "moral value of fair procedure".[1222] Substantive and procedural considerations collectively inform a moral understanding of fair employment decisions.[1223] The importance of the conceptual distinctions lies in the fact that procedural unfairness may render an employment decision unfair, even if the decision is justifiable based on a fair reason.[1224] Procedural fairness supplements substantive fairness, in providing an element of transparency and an opportunity for dialogue that supports the substantive interdependence of general reasonableness and specific substantive fairness.[1225] A discussion of procedural fairness within the scope of this study is a prerequisite for the evaluation of interdependence between ss 23 and 33 the Constitution based on the shared normative influence of fairness.

As there is no single set of principles that inform natural justice,[1226] the focus of this chapter falls on the determination of the extent to which administrative and labour law share a similar perspective of procedural fairness, and the degree of reconciliation

[1220] See s 1 of the Constitution.

[1221] See Currie and De Waal *Bill of Rights Handbook* 10 – 13.

[1222] Allan *Constitutional Justice* 77.

[1223] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 414.

[1224] See *NUM v Libanon Gold Mining Co Ltd* 1994 (15) ILJ 585 (LAC) at 586. Cf Basson et al *Essential Labour Law* 137; Grogan *Dismissal, Discrimination and Unfair Labour Practices* 414.

[1225] In *POPCRU v Minister of Correctional Services* 2006 (4) BLLR 385 (E) at par 76, Plasket J referred to the judgment of Megarry J in *John v Rees* [1970] Ch 345 at 402 and pointed out that context-specific procedural fairness grants structure to the fairness evaluation.

[1226] See *Chairman, Board of Tariffs and Trade v Brenco Inc* 2001 (4) SA 511 (SCA) at par 14. See also *NAAWU v Pretoria Precision Castings (Pty) Ltd* 1985 (6) ILJ 369 (IC) at 378; *S v Baleka* 1986 (1) SA 361 (T) at 382; *Robbertze v Matthew Rustenburg Refineries (Waseville) (Edms) Bpk* 1986 (7) ILJ 64 (IC) at 68 – 69; *Bosch v THUMB Trading (Pty) Ltd* 1986 (7) ILJ 341 (IC) at 344.

practically endorsed.[1227] Part 2 will show that procedural fairness, from both a labour and administrative law perspective, seeks to promote the same core values. To illustrate the practicality of a unified approach to procedural fairness, the basic administrative law understanding of the concept will briefly be reiterated in part 3.[1228]

This administrative law perspective allows for comparison with the labour law perspective of procedural fairness in part 4. From a labour law perspective, the emphasis will fall on the core values of procedural fairness, namely transparency (part 4 1) and dialogue (part 4 2). The extent to which a right to representation is recognised will be considered in part 4 3.[1229] This comparative exercise will illustrate that procedural interdependence is justified, due to a shared aim underlying the pursuit of justice in both labour and administrative law.

Ultimately, Chapter Six illustrates that the audi alteram partem rule has developed to embrace ideas of transparency and dialogue, with due regard to the flexible constitutional perspective of fairness. Labour and administrative law incorporate these ideas of transparency and dialogue through a shared procedural fairness rationale.

[1227] The development of administrative and labour law reveals a similar procedural perspective of this moral requirement, unlike the substantive perspective. Due to this difference in historical development (the focus of the discussion in Chapters Two and Three) and the reflection of the underlying substantive concepts of the rights to just administrative action and fair labour practices (in Chapter Five) a closer look at the relevant procedural dimensions is called for, before the possible reconciliation of these concepts can be considered. While Chapter Five reveals how reasonableness and fairness considerations can co-operatively inform the ss 23 and 33 constitutional rights at a substantive level, Chapter Six accordingly aims to show that the procedural relationship between administrative and labour law proves that normative interdependence is possible and in fact jurisprudentially recognised.

[1228] For a detailed discussion see Chapter Three, parts 2 2 and 3 5 1.

[1229] Representation considerations are necessary, as the expression of the fairness dimensions of transparency and dialogue may require legal assistance where complex circumstances surround a dispute.

2 PROCEDURAL FAIRNESS AND THE CORE VALUES IT SEEKS TO PROMOTE

The Industrial Court drew on public sector principles to develop a labour law understanding of procedural fairness.[1230] As such, administrative law acted as a source for labour law's development of procedural fairness. A contemporary unified perspective of procedural fairness perspective has now emerged with the Constitution as the shared supreme source.

Procedural fairness must not merely be understood in instrumental terms.[1231] It has its roots in the social exchange theory.[1232] It requires consideration of "the influence of normative ... and contextual ... elements on justice dynamics".[1233] Procedural fairness, as a constitutional duty with a flexible core,[1234] no longer requires the judiciary to look for forced arguments to protect and promote the rights and interests of the affected individuals.[1235] The acceptance of this flexible character is mirrored in the fact that both labour and administrative law recognise that there is no set formula for a procedurally fair hearing, as the nature of the hearing is determined by the circumstances of the

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[1230] See Chapter Two, part 2 3.

[1231] See Submissions of the Amici Curiae: Community Law Centre (UWC) and Centre on Housing Rights and Evictions (COHRE) in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* Case No: CCT 24/07 at par 134. See also Quinot 2007 (8) *ESR Review* 25 at 26.

[1232] The theory results from the intersection between economics, psychology and sociology. The social exchange theory emerges in various forms that can be simplified to "the same central concept of actors exchanging resources via a social exchange relationship", as explained by Devan *Theories Used in IS Research: Social Exchange Theory* http://www.istheory.yorku.ca/Socialexchangetheory.htm (2009/04/22). Homans 1958 (63) *Am J Soc* 597 at 606 explains that the goods or resources being interchanged can be material or non-material (symbols, approval or prestige). The exchange at the point of intersection promotes equilibrium.

[1233] Mossholder, Bennett and Martin 1998 (19) *J Organiz Behav* 131 at 132. See also Morgan and Sawyer 1979 (42) *Social Psych Quart* 71.

[1234] See *Administrator, Transvaal v Theletsane* 1991 (2) SA 192 (A) at 206; *Council for Scientific and Industrial Research v Fijen* [1996] 2 All SA 379 (A) at 388; *Chairman, Board of Tariffs and Trade v Brenco Inc* 2001 (4) SA 511 (SCA) at par 14; *Smith v Minister of Environmental Affairs and Tourism, RSA* [2003] 1 All SA 628 (C) at 638.

[1235] See Quinot 2007 (8) *ESR Review* 25 at 26.

dispute.[1236] A checklist approach to procedural fairness is associated with formalism, as the listed requirements attract rigid application.[1237] This approach is rejected "in favour of substantial compliance with the norms of fair process".[1238] Recognition of the flexible character allows for pragmatic expression of the core rules of natural justice within the idea of fair play,[1239] in accord with the context of every case.[1240]

Despite the acknowledgment of contextually sensitive procedural standards as an element of fairness, a well-defined understanding of procedural fairness has emerged through the recognition of two basic tenets:[1241] "the right to be heard and the right to be subjected to impartial enquiry".[1242] These tenets are also reflected in the natural justice "maxims audi alteram partem ('hear the other side') and nemo iudex in propria causa ('no one may be a judge in his own case')".[1243] The adaptation of procedural fairness to a variety of settings, as guided by these tenets, allows the judiciary to not only see that

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[1236] Mossholder, Bennett and Martin 1998 (19) *J Organiz Behav* 131 at 133 note that "the concept of contextual procedural justice can be found ... in terms of individuals' perceptions of ... justice". See *Council for Scientific and Industrial Research v Fijen* [1996] 2 All SA 379 (A) at 387 – 377; *Moropane v Gilbeys Distillers & Vinterns (Pty) Ltd* 1997 (10) BLLR 1320 (LC); *Concorde Plastics (Pty) Ltd v NUMSA* 1998 (2) BLLR 107 (LAC) at 113; *Komane v Fedsure* 1998 (2) BLLR 215 (CCMA); Cohen 2005 (17) *SA Merc LJ* 32 at 33, 36 and 46.

[1237] See Cohen 2005 (17) *SA Merc LJ* 32 at 36; *Mahlangu v CIM Deltak, Gallant v CIM Deltak* 1986 (7) ILJ 346 (IC) at 357; *Cornelius v Howden Africa Ltd t/a M & B Pumps* 1998 (19) ILJ 921 (CCMA). Cf Aram and Salipante 1981 (6) *The Academy of Management Review* 197 at 198.

[1238] Cohen 2005 (17) *SA Merc LJ* 32. See *Molelane Toyota v CCMA* 1999 (6) BLLR 555 (LC) at 560. Cf *Mondi Timber Products v Tope* 1997 (3) BLLR 263 (LAC).

[1239] See *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 (8) BLLR 699 (SCA) at par 4; Du Toit 2008 (125) *SALJ* 95 at 96 – 97.

[1240] Context is determined in terms of social perspective, which implies that procedural fairness must be variable as its dynamics can affect multiple individuals in distinguishable situations that cannot be understood in terms of any one meaning. Cf Mossholder, Bennett and Martin 1998 (19) *J Organiz Behav* 131 at 133.

[1241] See Aram and Salipante 1981 (6) *The Academy of Management Review* 197 at 198.

[1242] Cohen 2005 (17) *SA Merc LJ* 32 at 46. See also *Anglo American Farms t/a Boschendal Restaurant v Komjwayo* 1992 (13) ILJ 573 (LAC) at 587; *Hauser v Partnership in Advertising (Pty) Ltd* 1994 (11) BLLR 36 (IC) at 39; *Olivier v Foschini Group Ltd* 1995 (8) BLLR 102 (IC) at 110 – 111.

[1243] Cohen 2005 (17) *SA Merc LJ* 32 at 35. See *Concorde Plastics (Pty) Ltd v NUMSA* 1998 (2) BLLR 107 (LAC) at 115.

justice is done, but also that justice is perceived to be done in the eyes of society.[1244] It is due to this perception that participation is a crucial ingredient of procedural fairness.[1245]

In the employment context, procedural fairness aims to promote industrial peace.[1246] Three reasons have been identified for the incorporation of the general idea of due process in the field of employment: practical necessity, normative perspective and theory of participation.[1247] Practical justification is found in the fact that the maintenance of procedural fairness outside the courtroom creates "a fair and less costly means of resolving disputes".[1248] The fact that "the concept of due process [lies] at the heart of the law of governance",[1249] which transcends the public/private law divide, forms the basis of normative justification.[1250] Through the theory of participation, due process brings a 'voice' to the employment relationship "as a type of feedback from employees and thus as a mechanism of recuperation and adaptation".[1251] The theory of participation emphasises the importance of the promotion of dialogue, a core value of procedural fairness and a shared ideal of both labour and administrative law. The opportunity to participate in the decision-making process grants individuals "a sense of control, participation and accordingly significance and worth".[1252] It endorses the

[1244] In *De Lange v Smuts NO* 1998 (7) BCLR 779 (CC) at par 131, Mokgoro J highlighted the foundational design and important purpose of procedural fairness. See also Aram and Salipante 1981 (6) *The Academy of Management Review* 197 at 198.

[1245] See also Aram and Salipante 1981 (6) *The Academy of Management Review* 197 at 201; Mossholder, Bennett and Martin 1998 (19) *J Organiz Behav* 131 – 132; *Kotze v Rebel Discount Liquor Group (Pty) Ltd* 2000 (2) BLLR 138 (LAC) at par 145 per Conradie JA.

[1246] See *Concorde Plastics (Pty) Ltd v NUMSA* 1998 (2) BLLR 107 (LAC) at 115.

[1247] See Aram and Salipante 1981 (6) *The Academy of Management Review* 197 at 198.

[1248] Aram and Salipante 1981 (6) *The Academy of Management Review* 197 at 198.

[1249] Aram and Salipante 1981 (6) *The Academy of Management Review* 197 at 198.

[1250] In overcoming the divide, the normative justification allows for the transition and synergy of norms with a similar rationale in both spheres, where the promotion of justice requires it. See Aram and Salipante 1981 (6) *The Academy of Management Review* 197 at 198.

[1251] Aram and Salipante 1981 (6) *The Academy of Management Review* 197 at 198. Quinot 2007 (8) *ESR Review* 25 at 27 presents a similar view of the theory of participation in the context of administrative law.

[1252] Submissions of the Amici Curiae: Community Law Centre (UWC) and Centre on Housing Rights and Evictions (COHRE) in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg*

constitutional value of dignity.[1253] When it comes to the possibility of an employee losing his or her job, labour law recognises that the "employee is entitled to be treated with respect ... and to emerge from the process with some semblance of dignity".[1254]

Dialogue, as a dignity informed value of procedural fairness, calls for an element of transparency.[1255] Although formalism is to be avoided, the codification of the existing administrative and labour law procedural fairness perspective promotes the idea of transparency, as it increases participation and confidence in the process through the provision of adequate notice and sufficient information.[1256] The idea of transparency operates against arbitrary action and decisions.[1257] Without the element of transparency as a component of procedural fairness, the capricious exercise of discretion results in unfair conduct and decisions.[1258] Through its acceptance and specialised contextualisation of the principles of natural justice, labour law acknowledges the beneficial element of transparency in countering unfair procedural conduct. However, unlike administrative law, labour law does not frequently give express recognition to the element of transparency. The consideration of transparency is rather implied when evaluating the procedural fairness of an employment decision.

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v City of Johannesburg Case No: CCT 24/07 at par 136. See also Quinot 2007 8(1) *ESR Review* 25 at 26. Nedelsky 1989 *Yale LJ & Feminism* 7 at 27 emphasises this rationale.

[1253] In *Minister of Health NO v New Clicks South Africa (Pty) Ltd* 2006 (1) BCLR 1 (CC) at par 627, Sachs J emphasised the importance of this dialogue element in the promotion of the value of dignity. Mossholder, Bennett and Martin 1998 (19) *J Organiz Behav* 131 embrace the dialogue-dignity understanding of procedural fairness. See also Quinot 2007 (8) *ESR Review* 25 at 27 for a discussion of this perspective of procedural fairness as endorsed by administrative law.

[1254] *OCGAWU v Country Fair Foods (Pty) Ltd* 2001 (12) BLLR 1358 (LC) at par 93. This is equally true of the rationale for substantive fairness. See Chapters, part 3 1.

[1255] Jacobs *Regulatory Reform in the Netherlands* 125 identifies transparency as a component of procedural fairness, as it "is essential to establishing a stable and accessible regulatory environment that … ensures against undue influence by special interests".

[1256] See Ginsburg and Chen *Administrative Law and Governance in Asia* 108. Cf Jacobs *Regulatory Reform in the Netherlands* 125.

[1257] Such action is regarded as unfair from both a labour and administrative law perspective. See Ginsburg and Chen *Administrative Law and Governance in Asia* 108.

[1258] See Ginsburg and Chen *Administrative Law and Governance in Asia* 108.

The procedural fairness elements of dialogue and transparency require that an employee be granted an opportunity to be heard before a decision that adversely affects him/her is taken. This perspective gives expression to the LRA objective of industrial peace.[1259] It carries no weight that a hearing might not make any difference to the employee's fate.[1260]

In short, the importance of procedural fairness resides in the fact that it "facilitates the reasonable realisation of other (substantive) rights ... [and is] a central element of both a *priori* design ... and of *ex post facto* scrutiny, when courts constitutionally assess … state action"[1261] as associated with public employment decisions. As such, the absence of a hearing amounts to "a manifest failure of natural justice".[1262] This fact is emphasised by the administrative law perspective of procedural fairness that gives expression to the core values as set out above.

3 ADMINISTRATIVE LAW PERSPECTIVE

A brief overview of the administrative law understanding of procedural fairness is necessary to identify the general rules associated with this dimension of fairness, to allow for a comparison with the labour law perspective. Chapter Three illustrates that these rules function at de jure (macro) level within the realm of general administrative

[1259] See *Concorde Plastics (Pty) Ltd v NUMSA* 1998 (2) BLLR 107 (LAC) at 115.

[1260] See *Administrator, Transvaal v Zenzile* 1991 (1) SA 21 (A) at 37; *Yichiho Plastics (Pty) Ltd v Muller* 1994 (15) ILJ 593 (LAC) at 603; *Concorde Plastics (Pty) Ltd v NUMSA* 1998 (2) BLLR 107 (LAC) at 113 – 115; Quinot 2007 (8) *ESR Review* 25 at 27.

[1261] Submissions of the Amici Curiae: Community Law Centre (UWC) and Centre on Housing Rights and Evictions (COHRE) in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* Case No: CCT 24/07 at par 141. This illustrates the close link between the de facto contextualised substantive and procedural dimensions of fairness. Brassey 1990 (11) *ILJ* 213 at 218 explains: "The reason for dismissal determines the form of the process – enquiry or consultation – and shapes its content; without a reason, the form would be amorphous and the content empty. And of course, having fixed on the reason, the employer is bound to it as a justification for that dismissal; were it otherwise, were he subsequently permitted to rely on some other reason, the due process requirement would become a dead letter."

[1262] *Concorde Plastics (Pty) Ltd v NUMSA* 1998 (2) BLLR 107 (LAC) at 114.

law and gain a specific de facto dimension when applied in specialised fields, such as labour law.

At de jure level, the audi alteram partem principle requires proper, reasonable and timeous notice, disclosure of sufficient information, an opportunity to be heard and reasons for the administrative decision.[1263] Where justified by the circumstances of a dispute, the right to representation forms part of the cluster of considerations that give expression to the audi alteram partem principle.[1264]

The constitutional right to just administrative action reflects a broad understanding of the natural justice principles, and finds expression in the flexible approach encapsulated in s 3 of PAJA that codifies the macro-level sub-rules of procedural fairness.[1265] While the meaning of administrative action within the context of s 3(1) is controversial,[1266] it is

[1263] See Burns and Beukes *Administrative Law* 321. The focus of Chapter Five includes a discussion of the right to reasons, due to its close proximity to the right to *adequate* reasons. The other general components of audi alteram partem will be analysed in this chapter.

[1264] Where an individual is not allowed an opportunity to present his side in circumstances where a decision carries the potential to adversely affect the rights and interests of the individual, a violation of the audi alteram partem principles occurs. See *Logbro Properties CC v Bedderson NO* [2003] 1 All SA 424 (SCA) at par 25; Burns and Beukes *Administrative Law* 331.

[1265] See Hoexter *Administrative Law* 330; *Walele v City of Cape Town* 2008 (11) BCLR 1067 (CC) at par 28 per Jafta AJ.

[1266] Section 1 of PAJA qualifies the s 33 concept of administrative action. Although s 3 of PAJA refers to that concept, the scope thereof is controversial. Cf *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (10) BCLR 931 (SCA) per Nugent JA; *Walele v City of Cape Town* 2008 (11) BCLR 1067 (CC) at paras 29, 31 and 35 per Jafta AJ and paras 125 and 126 per O'Regan ADCJ. Hoexter *Administrative Law* 359 argues that s 3 introduces a contradiction. Although s 1 of PAJA is by no means an example of great drafting technique, its place as the definition-clause cannot be ignored. In contrast to s 1 that only focuses on possible rights-infringements, s 3 sets standards for procedural fairness where both rights and legitimate expectations of individuals are adversely affected. As such, s 3 of PAJA can be interpreted as widening the restrictive perspective of s 1, when dealing with procedural fairness. Academics however admit to the possibility of a contrary restrictive perspective of the procedural fairness provision. For academic proposals as to a solution for this apparent conflict, see Burns and Beukes *Administrative Law* 113 and 217, Currie and Klaaren *Benchbook* 93, De Ville *Judicial Review* 222 – 223 and Hoexter *Administrative Law* 359. The judiciary, in avoiding a declaration of unconstitutionality of certain PAJA provisions in the light of such conflict and controversy, unfortunately still jump through

undeniable that s 3(2) "provides for certain minimum requirements of procedural fairness in s 3"[1267] as the basic standard for fairness. There may however be circumstances where these minimum requirements will be insufficient.[1268] In such circumstances, contextual adaptability is endorsed by the fact that s 3(5) of PAJA allows for procedural provisions in another empowering provision[1269] to be followed, as long as it can be regarded as fair within the general nature of the principle.[1270] Section 3(5) is a legislative acknowledgment that there is no set generic procedural fairness formula.[1271] This permissible 'difference' does however not necessarily allow for a choice that disregards the minimum core in s 3(2).[1272] What is certain is that the choice should not amount to less protection than would be the norm,[1273] and what would constitute the norm will depend on the circumstances of the case.[1274]

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interpretative hoops to read the Act in an acceptable manner until such time as Parliament decides to address the conflict and controversy.

[1267] Plasket *Administrative Action: The Constitution and the Promotion of Administrative Justice Act 3 of 2000* par 14. The minimum requirements are stipulated in s 3(2): adequate notice of proposed administrative action; reasonable opportunity to make representation; clear statement of administrative action; adequate notice of the right of review or appeal and adequate notice of the right to request reasons. See also Hoexter *Administrative Law* 332 – 338.

[1268] See Plasket *Administrative Action: The Constitution and the Promotion of Administrative Justice Act 3 of 2000* 15; *Harksen v DPP* [2002] 1 All SA 284 (C).

[1269] Hoexter *Administrative Law* 344 points out that the inclusion of an agreement within the definition of empowering provision, "allows also for contractual freedom to stipulate the requirements of fairness in individual cases". However, this cannot be regarded as "the contractual waiver or exclusion of fairness: the procedure must still be 'fair' even though it may be 'different'".

[1270] See Hoexter *Administrative Law* 344.

[1271] See Hoexter *Administrative Law* 344. This provision is an important contribution, if read as a method to circumvent administrators from merely upholding the appearance of even-handed behaviour in resorting to s 3(2) as a checklist, as Grey 1982 (27) *McGill LJ* 360 at 365 emphasises: "It is certain that someone who is biased or determined to take a particular course of action will often bend over backwards to appear even-handed or indeed well-disposed. It would be sad if the sole effect of the growth of fairness was a proliferation of manuals written to help officials clothe their decisions in the garb of fairness."

[1272] See Hoexter *Administrative Law* 344. Grey 1982 (27) *McGill LJ* 360 at 365 explains that even a minimum requirement for fairness "is necessarily fluid and variable".

[1273] See Hoexter *Administrative Law* 344.

[1274] This approach is clearly articulated in s 3(2)(a) of PAJA.

The decision maker cannot constantly switch between the 'different' procedure and s 3(2) of PAJA.[1275] This is of particular importance in disciplinary procedures affecting public employees. If a specific disciplinary code, stipulating specific procedures, is in place, the State (as employer) cannot take away comprehensive protection found in the code in favour of s 3(2) when disciplinary procedures commence.[1276] This approach is in line with the idea that the concept of procedural fairness is relative.[1277] At de jure level, general administrative law therefore adopts "a broader general test of fairness"[1278] adaptable to the demands of every context in which it regulates power relationships.[1279] The principles are also contextualised at the de facto level, with due regard to workplace specific (non-rigid) disciplinary codes that outline preferred disciplinary procedures.[1280]

The interest of the affected individual must be balanced in relation to the decision by the empowered decision-maker in the administrative relation. The acknowledgment of interests at play in a legal relationship is the equation-tool by which the general rules of fairness translates into the contextually required equity standard of the applicable de jure level principles and procedures.[1281] A set list of interests that qualify for the protection of procedural fairness cannot be predetermined in a formalistic manner.[1282]

[1275] There must be some degree of certainty and consistency. Furthermore, the fair alternative within the circumstances must grant similar or more extensive protection than that found in s 3(2) of PAJA. This is evident from the judgment of Plasket J *POPCRU v Minister of Correctional Services* 2006 (4) BLLR 385 (E) at par 71.

[1276] See *Denel (Pty) Ltd v Venter* 2004 (25) ILJ 659 (SCA) at par 15 per Nugent JA. See also Hoexter *Administrative Law* 344.

[1277] See Perritt *Employee Dismissal Law and Practice* 11–88. The judiciary has accepted that the de jure level constitutional perspective of procedural fairness recognises "the need for flexibility in the application of the principles of fairness in a range of different contexts", as explained in *Chairman, Board on Tariffs and Trade v Brenco Inc* 2001 (4) SA 511 (SCA) at par 14.

[1278] Burns and Beukes *Administrative Law* 333.

[1279] This administrative law perspective of procedural fairness is jurisprudentially endorsed by Corbett CJ in *Du Preez v Truth and Reconciliation Commission* 1997 (4) BCLR 531 (A) at 544.

[1280] See Perritt *Employee Dismissal Law and Practice* 11–88.

[1281] See *Van Huyssteen v Minister of Environmental Affairs and Tourism* 1995 (9) BCLR 1191 (C) at 1213; *De Lange v Smuts NO* 1998 (7) BCLR 779 (CC) at par 153. The specific interests of the parties to

The labour law approach to unfair labour practices (as found in the context of promotions, demotions and suspension)[1283] and dismissals on the ground of misconduct, incapacity and operational requirements provides a specialised (pre-determined) context for the application of the test for procedural fairness, also associated with administrative law.[1284]

4 LABOUR LAW PERSPECTIVE

Although the application of the rule is firmly established in both labour and administrative law,[1285] there is no fixed formula for adherence to the audi alteram partem rule in either.[1286] Labour law has adapted the rules of procedural fairness to specialised and probable unfair labour practice and unfair dismissal scenarios.[1287] However, labour law does not regard specialisation as judicial licence to interpret procedural guidelines as set rules.[1288]

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the employment relationship informs the de facto level contextualisation that provides a complementary understanding to the general de jure level idea of procedural fairness.

[1282] See *Van Huyssteen v Minister of Environmental Affairs and Tourism* 1995 (9) BCLR 1191 (C) at 1214; Burns and Beukes *Administrative Law* 332.

[1283] As acknowledged in Chapter Five, there are other examples of unfair labour practices, but the evaluation focuses specifically on these three examples, because employers are confronted with considerations of promotions, demotions and suspensions on a regular basis in practice. These forms of labour practices allow for a good comparative basis.

[1284] Cf *Chairman, Board on Tariffs and Trade v Brenco Inc* 2001 (4) SA 511 (SCA) at par 14; Burns and Beukes *Administrative Law 333*.

[1285] See Chapter Two, parts 2 3 and 3 5 for a discussion of the role of the audi alteram partem rule from a traditional common law, as well as a regulatory contemporary, perspective. See *Modise v Steve's Spar Blackheath* 2000 (5) BLLR 496 (LAC) at paras 16 and 17 per Zondo AJP; Cf *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A); Chapter Three, part 2 1 2.

[1286] See *Truth and Reconciliation Commission v Du Preez* 1996 (3) SA 997 (C) at 1008.

[1287] In *Modise v Steve's Spar Blackheath* 2000 (5) BLLR 496 (LAC) at par 126, the Labour Appeal Court admitted as much in stating that the legislation and codes in place "have, to a large degree, been distilled from the practice of the previous 15 years".

[1288] See *Moropane v Gilbeys Distillers and Vintners (Pty) Ltd* 1997 (10) BLLR 1320 (LC) at 1324; *Molelane Toyota v CCMA* 1999 (6) BLLR 555 (LC) at 560; *NCBAWU v Masinga* 2000 (2) BLLR 171 (LC); *Eddels SA (Pty) Ltd v Sewcharan* 2000 (9) BLLR 1038 (LC); Burns and Beukes *Administrative Law* 321;

When determining whether a decision amounts to an unfair labour practice or unfair dismissal, equity demands consideration of the procedural dimension of fairness as a pragmatic manifestation of the principles of natural justice.[1289] When dealing with dismissal for misconduct,[1290] incapacity[1291] or operational reasons,[1292] procedural fairness is a standard requirement in all three instances. The difference lies in the fact that the objective that contextually informs the procedural dimension of fairness associated with these three grounds of dismissal differs. Contextual pragmatic considerations similarly determine whether employment decisions (that do not result in dismissal) amount to unfair labour practices.[1293] However, the mere fact that an employee has a right to be heard, does not guarantee the result that the employee desires.[1294]

4 1 Transparency: Notification and Sufficient Information

Transparency of the dispute resolution process is an important component of procedural fairness and finds expression in the requirement of adequate notice and sufficient information, as it renders the process open, gives an affected individual a voice and limits the abuse of power.[1295] A dispute resolution process that ignores the requirements of adequate notice and sufficient information ignores the constitutional principles of openness, transparency, accountability and fairness.[1296]

Cohen 2005 (17) *SA Merc LJ* 32 at 35 – 36. Cf the expression of the natural justice tenets in the ILO Convention 158 of 1982.

[1289] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 58; *Concorde Plastics (Pty) Ltd v NUMSA* 1998 (2) BLLR 107 (LAC).

[1290] See items 4 – 5 of the Code of Good Practice: Dismissal.

[1291] See item 8 and 10 of the Code of Good Practice: Dismissal.

[1292] See s 189 of the LRA.

[1293] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 58.

[1294] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 58. This is reconcilable with the administrative law idea that it is not for the court to substitute the employer's decision for what it regards to be the best decision; it must merely regulate power relationships to facilitate fair decisions.

[1295] See Stiglitz and Charlton *Fair trade for all* 82.

[1296] See *Actaris South Africa (Pty) Ltd v Sol Plaatje Municipality* [2008] 4 All SA 168 (NC) at par 25. Cf *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province* [1997] 4 All SA 363 (Ck). The public

In a constitutional context, transparency gives expression to procedural fairness as interactional justice.[1297] Although not always expressly identified as requirements in pursuit of transparency, labour law gives expression to the adequate notice and sufficient information ideals. The Code of Good Conduct: Dismissal, for example, calls on employers to notify employees of anticipated disciplinary steps, as well as relevant information.[1298] The judiciary has confirmed that the considerations underlying transparency must be of an adequate and sufficient standard,[1299] and acknowledged that (akin to the administrative law perspective) it is possible for a fresh procedure to cure the transparency deficiencies of the initial process.[1300]

4 1 1 Unfair Labour Practices

4 1 1 1 Promotion

Procedural fairness demands adherence to applicable procedure when an employer considers the promotion of an employee.[1301] The employer must be transparent about the preferred policy and criteria that regulate the selection process.[1302] Knowledge of this nature will empower an employee who wants to challenge any irregularities, for example, where an employer without good reason departs from a set practice,[1303] the

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administration focussed s 195(1)(g) of the Constitution identifies the link between transparency and timely, accessible and accurate information.

[1297] Van der Bank, Engelbrecht and Strümpher 2008 (6) *SAJHRM* 1 at 2 explain that "[i]nteractional justice refers to the thoroughness of the information provided (i.e. informational justice)".

[1298] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 336.

[1299] See *Union of Pretoria Municipal Workers v Stadsraad van Pretoria* 1992 (13) ILJ 1563 (IC); *Korsten v MacSteel (Pty) Ltd* 1996 (8) BLLR 1015 (IC); *Van Eyk v Minister of Correctional Services* 2005 (27) ILJ 1706 (LC); Grogan *Dismissal, Discrimination and Unfair Labour* Practices 336.

[1300] See Du Toit et al *Labour Law through the Cases* LRA 8–15.

[1301] Du Toit et al *Labour Law through the Cases* LRA 8–15 explain that the procedure, in terms of which such a decision is considered, may originate in "legislation, a collective agreement, company policy or an established practice".

[1302] See Basson et al *Essential Labour Law* 190.

[1303] See *NUTESA v Technikon Northern Transvaal* 1997 (4) BLLR 467 (CCMA). See also Basson et al *Essential Labour Law* 190.

promotion strategy is changed retrospectively,[1304] the selection panel is improperly composed[1305] or the minimum requirement is reduced after application time has lapsed.[1306] Transparency requires real and not just superficial information sharing.[1307]

4 1 1 2 Demotion

Transparency is a particularly important element of procedural fairness where a decision has a disciplinary character. A demotion is an example of such a decision that carries the potential to constitute an unfair labour practice.[1308] Due to its disciplinary character, labour law requires that the same procedural approach to fairness be adopted with demotions as is associated with dismissals: An employer must inform an employee of the possible realisation of a decision and the reasons therefore.[1309] Transparency requires an employer provide an employee with sufficient information and promotes effective participation in the dialogue stage for all the affected parties.[1310]

4 1 1 3 Suspension

Suspension is another employment decision that is classifiable as an unfair labour practice if not approached in a transparent manner. The dialogue element of procedural fairness in the context of a suspension decision does not require an employer to grant

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[1304] See *NUTESA obo Members v Border Technikon* 2005 (12) BALR 1302 (CCMA). See also Du Toit et al *Labour Law through the Cases* LRA 8–19.

[1305] See *Van Rensburg v Northern Cape Provincial Administration* 1997 (18) ILJ 1421 (CCMA). See also Basson et al *Essential Labour Law* 190.

[1306] See *PSA obo Van Zyl v Department of Correctional Services* 2008 (29) ILJ 215 (BCA). See also Du Toit et al *Labour Law through the Cases* LRA 8–19.

[1307] In *IMATU/Greater Pretoria Metropolitan Council* 1999 (12) BALR 1459 (IMSSA), an employee who was affected by a non-promotion decision was found to be the victim of an unfair labour practice because he, on enquiry as to the reason for being overlooked, received only a cryptic reply without substantive reason for the preference of the successful candidate. See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 57.

[1308] See Du Toit et al *Labour Law through the Cases* LRA 8–20.

[1309] See Du Toit et al *Labour Law through the Cases* LRA 8–20; *TOWU obo Malan v Commuter Handling Services (Pty) Ltd* 2006 (3) BALR 327 (CCMA). A decision to demote an employee will be fair if mitigating factors exist in circumstances that would usually justify dismissal.

[1310] Adherence to the dialogue stage is also required for a procedurally fair dismissal. See part 4 1 2.

an employee a hearing before a decision to dismiss.[1311] It does call for the employer to inform the employee of the suspension (including the reasons for and the terms and conditions of the suspension)[1312] and afford the employee the opportunity to influence the decision.

4 1 2 Unfair Dismissal

4 1 2 1 Conduct

Transparency is a key ingredient for procedural fairness in the context of misconduct dismissals, as an employee has the right to be informed of the nature of the alleged misconduct and the pertinent details of the charges.[1313] Absence of such information can render a hearing procedurally defective.[1314] Transparency, as an element of the required fair play, is also evident in the standard idea that an individual should receive timely notice of the proceedings.[1315] The degree of transparency, so understood, is

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[1311] See Basson et al *Essential Labour Law* 194.

[1312] See Basson et al *Essential Labour Law* 194.

[1313] The disclosure does not call for the precision of criminal charges, but must clearly indicate which rules have allegedly been violated. The charges are usually presented in writing and an employer must read and explain the charges to an illiterate employee. Such disclosure usually accompanies the notification of the disciplinary hearing. In *Korsten v MacSteel (Pty) Ltd* 1996 (8) BLLR 1015 (IC), the Industrial Court explained that the required information allows for proper preparation by the employee to utilise the opportunity to state his or her case. See Basson et al *Essential Labour Law* 126; Cameron 1988 (9) *ILJ* 147 at 153; Du Toit et al *Labour Law through the Cases* Sch8–12; Grogan *Dismissal, Discrimination and Unfair Labour Practices* 335; *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) at 652; *Mahlangu v CIM Deltak, Gallant v CIM Deltak* 1986 (7) ILJ 346 (IC) at 357; *Ndindwa v Mnquma Local Municipality* [2003] JOL 11026 (Tk) at par 5.

[1314] Practice dictates that an employer must not only inform an employee of the details of the charges, but also of the surrounding facts. However, procedural fairness merely requires the disclosure of information comprehensive enough to enable the employee to determine the basis of the allegations against him or her. See *Turner v Jockey Club South Africa* 1974 (3) SA 633 (A); *MAWU v Transvaal Processed Nuts, Bolts and Rivets (Pty) Ltd* 1988 (9) ILJ 129 (IC); Basson et al *Essential Labour Law* 126; Cameron 1988 (9) *ILJ* 147 at 153; Grogan *Dismissal, Discrimination and Unfair Labour Practices* 335. Cf *Bassett v Servistar (Pty) Ltd* 1987 (8) ILJ 503 (IC).

[1315] Notification includes the date, time and place of the hearing. The employee must be given fair time to prepare a response to the allegations for the disciplinary hearing. See *Administrator, Transvaal v*

determined according to the circumstances and complexity of the case, as well as the particularity of the charges.[1316]

This shared administrative and labour law transparency-perspective is emphasised by the phrasing of s 3(2)(b)(i) of PAJA[1317] and item 4(1) of the Code of Good Practice: Dismissal.[1318] In *POPCRU v Minister of Correctional Service*,[1319] Plasket J elaborated on the shared transparency perspective by relying on s 3(2)(b)(i) to determine whether the notice given in a collective labour context could be described as adequate. In casu, the Department of Correctional Services sent a letter to striking public employees stating that that they faced dismissal due to their unauthorised absence and gross insubordination.[1320] The Department stated that the employees facing dismissal had 48 hours to make representation as to why their services should not be terminated, in absence of which their dismissal would become official.[1321] Plasket J reasoned that, regardless of the attempt to grant the employees an opportunity to state their case, 48 hours could not be said to constitute adequate notice as contemplated by s 3(2)(b)(i) of PAJA.[1322]

Adequate notice however requires a balanced approach: the employee deserves a reasonable time to prepare his or her case, but the disciplinary hearing must take place

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Theletsane 1991 (2) SA 192 (A); Burns and Beukes *Administrative Law* 322; Devenish, Govender and Hulme *Administrative Law and Justice* 284.

[1316] See *FAWU v BB Bread (Pty) Ltd* 1987 (8) ILJ 704 (IC); *Ndindwa v Mnquma Local Municipality* [2003] JOL 11026 (Tk) at par 7; Basson et al *Essential Labour Law: Volume One* 193; Devenish, Govender and Hulme *Administrative Law and Justice* 284; Grogan *Dismissal, Discrimination and Unfair Labour Practices* 335.

[1317] Section 3(2)(b)(i) of PAJA requires adequate notice of the nature and purpose of the proposed action. See Burns and Beukes *Administrative Law* 225.

[1318] Item 4(1) requires that the employee be notified of the allegations using a form and language that the employee can reasonably understand. Although neither s 3 nor item 4(1) makes express reference to the disclosure of information, the absence of express wording makes no difference, as fairness from both an administrative and labour law perspective calls for a contextual evaluation. See Hoexter *Administrative Law* 334.

[1319] 2006 (4) BLLR 385 (E).

[1320] See *POPCRU v Minister of Correctional Services* 2006 (4) BLLR 385 (E) at par 14.

[1321] See *POPCRU v Minister of Correctional Services* 2006 (4) BLLR 385 (E) at par 14.

[1322] See *POPCRU v Minister of Correctional Services* 2006 (4) BLLR 385 (E) at par 73.

without unreasonable delay.[1323] These two seemingly contradictory reasonableness requirements are in fact reconcilable, as an employer will not waive his or her right to institute disciplinary action if it is delayed due to an employee's request for adequate time to prepare.[1324]

4 1 2 2 Capacity

As the concept of fairness is variable in nature, the guidelines for procedural fairness are not set in stone.[1325] Generally, when the poor work performance of employees are at issue, procedural fairness requires an employer to inform the "poor performers of their deficiencies and to give them an opportunity to improve with proper assistance and guidance".[1326] Proper notification, as one of the rules of procedural fairness, calls on an employer to warn an employee prior to action being taken.[1327] A clear initial warning serves the purpose of informing the employee of his or her underperformance and subsequent monitoring.[1328] If, after appropriate assistance and reasonable opportunity to improve, the employee is still underperforming, the employer must issue a final warning to inform the employee of the continued deficiency and a pending hearing.[1329]

[1323] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 336. In *Department of Public Works, Roads and Transport v Motshoso* 2005 (10) BLLR 957 (LC), a three-year delay of a disciplinary hearing was held to be unreasonable.

[1324] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 336 – 337.

[1325] Preliminary requirements such as the initial warning of a risk of dismissal, may be overlooked in cases where incapacity manifests itself as gross incompetence, results in serious consequences, attaches to an employee that is incapable or unwilling to change, or holds the position of a senior manager. See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 415.

[1326] Grogan *Dismissal, Discrimination and Unfair Labour Practices* 414. Items 8 and 9 of the Code of Good Practice: Dismissal emphasises the inherently adaptable requirements for a procedurally fair dismissal on the ground of poor work performance. The specialised contextual test for a reasonable opportunity and assistance, as found in item 8, is an objective one. See Basson et al *Essential Labour Law* 136 – 139; Du Toit *Labour Law through the Cases* Sch8–26; Grogan *Dismissal, Discrimination and Unfair Labour Practices* 414 – 416; *Gostelow v Datakor Holdings (Pty) Ltd t/a Corporate Copilith* 1993 (14) ILJ 171 (IC); *Schreuder v Nederduitse Gereformeerde Kerk, Wilgespruit* 1999 (20) ILJ 1936 (LC).

[1327] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 415; *Visser v Safair Freighters (Edms) Bpk* 1989 (10) ILJ 529 (IC).

[1328] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 415.

[1329] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 417.

Even though a dismissal on the ground of poor work performance is regarded as a no fault dismissal, the hearing that precedes such a decision takes the form of a disciplinary hearing for misconduct.[1330] In the absence of the disciplinary element, hearings of this nature are rather termed incapacity inquiries.[1331]

4 1 2 3 Operational Requirements

The LRA maintains procedural transparency in the context of dismissals on the ground of operational requirements, by requiring employers to issue employees with written notices of their contemplated retrenchment. Section 189 of the LRA gives the impression that an employer should offer this written notice in a singular document that relays "all relevant information".[1332]

If consultation in the context of operational requirements is to be adequate and fair, the employees (and their representatives) cannot be "kept in the dark about the facts that have led the employer to conclude that retrenchment is necessary".[1333] Transparency in the procedure will be lacking unless the employees and their representatives have received "sufficient information to appraise or challenge the employer's proposals or to formulate alternatives".[1334] The dialogue requirement will be ineffective if not all relevant information is disclosed in writing.[1335] However, the employees are not entitled to unlimited information regarding the operation of the employer's business, but only relevant information.[1336]

[1330] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 417. See also Du Toit *Labour Law through the Cases* Sch8–26.

[1331] Grogan *Dismissal, Discrimination and Unfair Labour Practices* 417 explains that incapacity inquiries are aimed at establishing "whether the employee is capable of attaining an acceptable standard of work".

[1332] Section 189(3) of the LRA gives an indication of what evidence may be regarded as relevant. See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 452.

[1333] Grogan *Dismissal, Discrimination and Unfair Labour Practices* 464.

[1334] Grogan *Dismissal, Discrimination and Unfair Labour Practices* 464.

[1335] See s 189(3) of the LRA. Grogan *Dismissal, Discrimination and Unfair Labour Practices* 464 notes that only then can a fair degree of transparency be said to be present, as all parties will be able to "make informed representations and suggestions on the subjects for mandatory consultation".

[1336] Relevance is contextually determined in terms of the facts of every specific case. Grogan *Dismissal, Discrimination and Unfair Labour Practices* 464 explains that relevance along with "adequacy must be

4 2 Dialogue: Opportunity to make Representation

The de jure level administrative law perspective of the audi alteram partem rule emphasises that the facilitation of dialogue is central to the promotion of procedural fairness.[1337] Prior to the Constitution, much of the Industrial Court's jurisprudence focussed on the protection of private sector employees' right to be heard.[1338] Consequently, labour law also views the audi alteram partem rule as a "rudimentary principle of work-place justice"[1339] that endorses dialogue through participation.[1340] Procedural fairness of this nature relates to both fair labour practices and just administrative action, as constitutionally protected in ss 23 and 33.[1341] Procedural fairness, so understood, gives expression to interactional justice, as it refers to

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measured against the intended purposes for which the information is requested". Cf *Atlantis Diesel Engines (Pty) Ltd v NUMSA* 1995 (1) BLLR 1 (A); *NUMSA v Comark Holdings (Pty) Ltd* 1997 (18) ILJ 516 (LC); *United People's Union of SA v Grinaker Duraset* 1998 (19) ILJ 107 (LC).

[1337] See Devenish, Govender and Hulme *Administrative Law* 304.

[1338] See Cameron 1988 (9) *ILJ* 147. Cf *Transport and General Workers Union v S Bothma and Son Transport* 1987 (8) ILJ 343 (IC); *Whitcutt v Computer Diagnostics and Engineering (Pty) Ltd* 1987 (8) ILJ 356 (IC); *Long v Chemical Specialities Tvl (Pty) Ltd* 1987 (8) 523 (IC); *King v Beacon Island Hotel* 1987 (9) ILJ 485 (IC); *Kantolo v Super Rent (Cape) (Pty) Ltd t/a Connaught Motors and Super Rent Truck Hire* 1988 (9) ILJ 123 (IC).

[1339] *Building Construction and Allied Workers Union v E Rogers and C Buchel CC* 1987 (8) ILJ 169 (IC) at 176.

[1340] As illustrated in Chapter Three, part 2 2 1 administrative law came to a similar pre-constitutional understanding, in equating the rules of natural justice (including audi alteram partem) with the duty to act fairly. See Basson et al *Essential Labour Law* 127; Burns and Beukes *Administrative Law* 52; Grogan *Dismissal, Discrimination and Unfair Labour Practices* 331. A vast number of labour cases have emphasised dialogue as associated with natural justice, by acknowledging the fact that an employee is entitled to a disciplinary hearing prior to his or her dismissal. See Cameron 1988 (9) *ILJ* 147 at 150; *Transport and General Workers Union v S Bothma and Son Transport* 1987 (8) ILJ 343 (IC) at 355; *King v Beacon Island Hotel* 1987 (8) ILJ 485 (IC) at 489 – 490; *Long v Chemical Specialist Tvl (Pty) Ltd* 1987 (8) ILJ 523 (IC) at 534; *Govender v MA Motala Lads Hostel* 1987 (8) ILJ 809 (IC) at 812; *Kantolo v Super Rent (Cape) (Pty) Ltd t/a Connaught Motors and Super Rent Truck Hire* 1988 (9) ILJ 123 (IC) at 128.

[1341] Both sections embrace procedural fairness in the pursuit of justice. See Burns and Beukes *Administrative Law* 320; *Yates v University of Bophuthatswana* 1994 (3) SA 815 (B) at 836.

interpersonal justice[1342] (as supplement to informational justice)[1343] by giving expression to the dignity of the affected individuals.[1344]

Dialogue, through consultation and the opportunity to state one's case, underpins this consensus-based approach to just dispute resolution.[1345] Dialogue assists in the contextual evaluation of fairness by facilitating a judgment on the substantive elements of the case. If forces parties to comprehend that the justice of the outcome depends on the context, nature and scope of the issue in dispute.[1346]

4 2 1 Individual Context

The right to be heard or the right to make representation generally attracts the assumption of an oral hearing prior to a decision being taken.[1347] There exists no justification for this assumption.[1348] Constitutionally understood, it is however logical to deduce that the context of a case may render it unfair to hold a hearing in the absence

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[1342] Van der Bank, Engelbrecht and Strümpher 2008 (6) *SAJHRM* 1 at 2 define interactional justice "as the perceived fairness of the interpersonal treatment used to determined outcomes". It refers to "the amount of dignity and respect … demonstrated when presenting an undesirable outcome".

[1343] Van der Bank, Engelbrecht and Strümpher 2008 (6) *SAJHRM* 1 at 2 explain that thoroughness of information provided determined the presence or absence of informational justice.

[1344] See Van der Bank, Engelbrecht and Strümpher 2008 (6) *SAJHRM* 1 at 2. Jurisprudence stresses the need for a hearing before dismissal as an expression of interpersonal justice in both the common law and fair labour practice context. See *Concorde Plastics (Pty) Ltd v NUMSA* 1998 (2) BLLR 107 (LAC) at 113. Cf *Administrator, Transvaal v Zenzile* 1991 (1) SA 21 (A) at 39 – 40; *Zondi v Administrator, Natal* 1991 (12) ILJ 497 (A) at 505; *Anglo American Farms t/a Boschendal Restaurant v Komjwayo* 1992 (13) ILJ 573 (LAC) at 587; *Black Allied Workers Union v Prestige Hotels CC t/a Bluewaters Hotel* 1993 (14) ILJ 963 (LAC) at 971.

[1345] The idea of participation, as found in administrative law, gives practical effect to the dialogue component of procedural fairness. See Allan *Constitutional Justice* 77 – 78; Fishkin *The Dialogue of Justice* 128. Cf Valerie and Levi *Trust and Governance* 279.

[1346] See Allan *Constitutional Justice* 80.

[1347] See Hoexter *Administrative Law* 334; Grogan *Dismissal, Discrimination and Unfair Labour Practices* 336.

[1348] There is also no common law right to appear in person at an oral hearing. See Burns and Beukes *Administrative Law* 323; Hoexter *Administrative Law* 334.

of a person or on written representation alone, as this would negate the rationale of the right to be heard.[1349]

While administrative law has no general default position,[1350] both labour and administrative law regard the real question to be whether an individual has been granted a real opportunity to state his or her case.[1351] Ultimately, the equity-based question of representation depends on the context in which the question arises.[1352]

4 2 1 1 Unfair Labour Practices

4 2 1 1 1 Promotion

Although the employee does not necessarily have a right to automatic promotion, a non-promotion decision does affect the interest of the employee.[1353] Consequently, the procedural fairness dialogue element calls for the employer to inform the employee of the decision.[1354] Dialogue is further emphasised by the fact that the employee can claim an opportunity to make representation, if a legitimate expectation of promotion

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[1349] See Currie and Klaaren *Benchbook* par 3.17; Hoexter *Administrative Law* 341 – 342; Grogan *Dismissal, Discrimination and Unfair Labour Practices* 339. Cf *Fraser v Children's Court, Pretoria North* 1996 (8) BCLR 1085 (T); *Davies v Chairman, Committee of the Johannesburg Stock Exchange* 1991 (4) SA 43 (W); *Helderberg Butcheries (Stellenbosch) (Pty) Ltd v Municipal Valuation Court, Somerset West* 1977 (4) SA 99 (C).

[1350] Sections 3(2) and 3(3) of PAJA support this common law perspective. Section 3(2)(b)(ii) acknowledges that a minimum standard of procedural fairness allows for a "reasonable opportunity to make representation", while the opportunity to appear in person is recognised as an optional requirement in s 3(3)(c), as the opportunity to represent your case in writing may be sufficient in certain circumstances. PAJA therefore allows for the de jure contextual determination of the manner and form in which audi alteram partem can find expression. See Hoexter *Administrative Law* 334.

[1351] See Hoexter *Administrative Law* 342; *Barlin v Licensing Court for the Cape* 1924 AD 472 at 480.

[1352] See Hoexter *Administrative Law* 342.

[1353] This is usually the case with employees in senior positions. See Du Toit et al *Labour Law through the Cases* LRA 8–18.

[1354] This was confirmed in *PSA obo Badenhorst v Department of Justice* 1999 (20) ILJ 253 (CCMA). The commissioner reasoned that the employee is entitled to a reasonable opportunity to promote his or her candidature. See Du Toit et al *Labour Law through the Cases* LRA 8–18.

exists.[1355] However, the employer's failure to adhere to the contextually informed standard of procedural fairness will not necessarily entitle the employee to an actual promotion.[1356]

4 2 1 1 2 Demotion

The judiciary has accepted that a decision to demote an employee, in the absence of an opportunity for that employee to state his or her case, amounts to a procedurally unfair labour practice.[1357] Consultation and counselling is required prior to a decision to demote being implemented.[1358] The employee is entitled to an opportunity to make representation.[1359] In the absence thereof, the demotion can amount to an unfair labour

[1355] Administrative and labour law recognise that a legitimate expectation is more than a spes and less than a right. It entitles the employee to be heard before an adverse decision is taken and can be said to be present if an express promise was made to an employee or a regular practice exists that would justify an expectation of promotion. An employer can therefore create a legitimate expectation of promotion through words or conduct. See Basson et al *Essential Labour Law* 190; Du Toit *Labour Law through the Cases* LRA 8–18; Grogan *Dismissal, Discrimination and Unfair Labour Practices* 58. Cf *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 at 943 – 944; *PSA v Department of Correctional Services* 1998 (7) BALR 854 (CCMA); *Meyer v Iscor Pension Fund* 2003 (5) BLLR 439 (LAC).

[1356] See *National Commissioner of the SA Police Service v Basson* 2006 (27) ILJ 614 (LC); Grogan *Dismissal, Discrimination and Unfair Labour Practices* 58 – 59.

[1357] See Du Toit et al *Labour Law through the Cases* LRA 8–20; Grogan *Dismissal, Discrimination and Unfair Labour Practices* 59.

[1358] See *Van Niekerk v Medicross Health Care Group (Pty) Ltd* 1998 (8) BALR 1038 (CCMA) at 1043; Du Toit et al *Labour Law through the Cases* LRA 8–20.

[1359] See *Koopman v City of Cape Town* 2005 (5) BALR 563 (CCMA); Du Toit et al *Labour Law through the Cases* LRA 8–21.

practice.[1360] A fair demotion therefore requires both a fair reason and a fair procedure.[1361]

4 2 1 1 3 Suspension

Circumstances allowing, the employer must grant the employee and opportunity to be heard prior to him or her being suspended.[1362] The opportunity to be heard does not necessarily translate into the employee being granted an oral hearing.[1363] The employee must be granted the opportunity to make representation prior to a decision being taken,[1364] as a suspension has an adverse impact on the future of the employee's career as well as on his or her reputation.[1365] Fairness further requires that the employer follow the relevant regulations, disciplinary code, or in the absence thereof, follow the general principles of natural justice.[1366] The audi alteram partem principle cannot be overlooked.[1367] The scope of the principle merely differs depending on whether the suspension is preventative or punitive in nature.[1368] Where suspension has

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[1360] The Labour Appeal Court confirmed this in *Van der Riet v Leisurenet t/a Health and Racquet Clubs* 1997 (6) BLLR 721 (LAC). See Du Toit *Labour Law through the Cases* LRA 8–20 and 8–21*; Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services* 2008 (12) BLLR 1179 (LAC). Cf *SALSTAFF obo Vrey v Datavia* 1999 (6) BALR 757 (IMSSA); *Plaatjies v RK Agencies* 2005 (1) BALR 77 (CCMA).

[1361] Cf *Glass v University of Zuluand* 2006 (4) BALR 388 (CCMA) where the commissioner found that the employer was not obligated to consult the employee as the disciplinary code made provision for demotion as a disciplinary measure. See Du Toit et al *Labour Law through the Cases* LRA 8–20.

[1362] See *SAPO Ltd v Jansen van Vuuren NO* 2008 (8) BLLR 798 (LC) at par 39.

[1363] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 73.

[1364] An opportunity to make representation after suspension would still be considered fair if the employer can be said to have an open mind. See *Dladla v Council of Mbombela Local Municipality* 2008 (8) BLLR 751 (LC).

[1365] See *Muller v Chairman of the Ministers' Council: House of Representatives* 1991 (12) ILJ 761 (C); Grogan *Dismissal, Discrimination and Unfair Labour Practices* 74.

[1366] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 73. Cf *Marcus v Minister of Correctional Services* 2005 (26) ILJ 75 (SE).

[1367] See *Muller v Chairman of the Ministers' Council: House of Representatives* 1991 (12) ILJ 761 (C); Grogan *Dismissal, Discrimination and Unfair Labour Practices* 74.

[1368] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 74. Du Toit et al *Labour Law through the Cases* LRA 8–24 note that the same effect may result from both preventative and punitive suspension. Cf *Ngwenya v Premier of KwaZulu-Natal* 2001 (8) BLLR 924 (LC).

a disciplinary character, the requirements for a fair hearing are the same as for an inquiry preceding a decision to dismiss on the ground of misconduct.[1369] However, logically a full-scale inquiry is not necessary in the case of preventative suspension.[1370] In the case of a suspension pending a disciplinary hearing, a reasonable suspension period is required.[1371] The mere fact that an inquiry is to follow does not imply that the audi alteram partem principle can be ignored.[1372] In contrasts, a punitive suspension does require a formal hearing.[1373] In short, the dialogue requirement will be adhered to if the investigation takes place in reasonable time, all relevant factors are taken into consideration and the employer informs the employee of the applicable process without undue delay.[1374]

4 2 1 2 Unfair Dismissal

4 2 1 2 1 Conduct

The s 3(2) of PAJA codification of the general minimum standards of procedural fairness is mirrored in a specialised manner by item 4 of the Code of Good Practice: Dismissal.[1375] However, in giving expression to the nature of the value of fairness, neither item 4(1) nor s 3(2) stipulates exact form-guidelines for the expression of this

[1369] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 74; *County Fair v CCMA* 1998 (6) BLLR 577 (LC); *South African Breweries Ltd (Beer Division) v Woolfrey* 1999 (5) BLLR 525 (LC). Du Toit et al *Labour Law through the Cases* LRA 8–25 explain that suspension without pay is only justified in circumstances where dismissal would be justified absent any mitigating factors.

[1370] Procedural fairness in the context of preventative suspension calls for a misconduct inquiry within a reasonable time. See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 73 – 74; *Minister of Labour v General Public Service Sectoral Bargaining Council* 2007 (5) BLLR 467 (LC).

[1371] See Du Toit et al *Labour Law through the Cases* LRA 8–25; *Naidoo v Rudolph Chemicals (Pty) Ltd* 2008 (6) BALR 497 (NBCCI).

[1372] See Du Toit et al *Labour Law through the Cases* LRA 8–25.

[1373] See Du Toit et al *Labour Law through the Cases* LRA 8–25. Cf *Ngwenya v Premier of KwaZulu-Natal* 2001 (8) BLLR 924 (LC); *Dladla v Council of Mbombela Local Municipality* 2008 (8) BLLR 751 (LC).

[1374] See *Mabilo v Mpumalanga Provincial Government* 1999 (8) BLLR 821 (LC) at par 17.

[1375] See *Webber v Fattis & Monis* 1999 (20) ILJ 1150 (CCMA) at par 20. Item 4(1) requires that the employee be allowed the opportunity to present his or her case in response to the allegations made against him or her.

right, as the form the right to be heard takes on depends on the circumstances.[1376] Absent formalistic prescriptions, the form of dialogue that facilitates "reflection before any decision to dismiss"[1377] is nevertheless regarded as an essential component for procedural fairness. As a disciplinary hearing for misconduct implies possible dismissal that affects the livelihood of the employee, the required dialogue gravitates towards personal appearance at the hearing.[1378] However, if the employee is unreasonable in refusing to attend the hearing, the employer cannot be faulted for continuing with the enquiry in his or her absence.[1379]

In line with the labour law perspective, PAJA does not regard the right to appear in person as a minimum core procedural fairness requirement.[1380] The gravity of the issue dictates whether a formal hearing is required.[1381] In labour law, this translates into the consideration of whether the rights and interests of the accused employee outweigh those of the employer and the other employees when considering the scope of the natural justice benefits in the particular circumstances of the dispute.[1382] An employee must merely be granted a real opportunity to state his or her case and address any

[1376] See Basson et al *Essential Labour Law* 127 and 193.

[1377] *Avril Elizabeth Home for the Mentally Handicapped v CCMA* 2006 (9) BLLR 833 (LC) at 841.

[1378] Grogan *Dismissal, Discrimination and Unfair Labour Practices* 339 explains that "[a] disciplinary hearing held in the absence of the accused employee is generally unfair". See also Burns and Beukes *Administrative Law* 323; Currie and Klaaren *Benchbook* par 3.17; Grogan *Dismissal, Discrimination and Unfair Labour Practices* 339; Hoexter *Administrative Law* 341 – 342. Cf *Helderberg Butcheries (Stellenbosch) (Pty) Ltd v Municipal Valuation Court, Somerset West* 1977 (4) SA 99 (C); *Malapile v Germiston Ceramics and Potteries* 1988 (9) ILJ 855 (IC); *Davies v Chairman, Committee of the Johannesburg Stock Exchange* 1991 (4) SA 43 (W); *Fraser v Children's Court Pretoria North* 1996 (8) BCLR 1085 (T).

[1379] Before the employer takes such action, a reasonable attempt must be made to determine an absent employee's whereabouts. See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 339 – 340 for further discussion and examples of unreasonable absence.

[1380] Section 3(3) of PAJA. Cf s 3(2) of PAJA.

[1381] See *South African Jewish Board of Deputies v Sutherland NO* 2004 (4) SA 368 (W) at par 34; Hoexter *Administrative Law* 342.

[1382] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 341.

adverse evidence.[1383] The employee must therefore comprehend the proceedings if he or she is fully to participate.[1384] Although the right to state one's case extends to participation, both labour and administrative law hold that it is the extent of this discretionary element of fairness, and not the element itself, that is less certain.[1385] Consequently, calling and cross-examining witnesses are not rights that form an inherent part of the natural justice rules.[1386] Section 3(3) of PAJA allows the administrator to exercise his or her discretion in allowing the questioning of witnesses,[1387] while item 4 of the Code of Good Practice: Dismissal does not provide any guidelines on the matter. Similarly, the chairperson has the discretion to determine whether the facts of the case call for cross-examination to be allowed in pursuit of workplace justice.[1388] As such, neither labour nor administrative law recognises a general right to cross-examine or refute evidence. However, if the context of the case calls for such an opportunity in pursuit of fairness, the opportunity to cross-examine may be viewed as a necessary component of an individual's real opportunity to respond.[1389]

As the purpose of a hearing is to determine whether the employee is at fault, the presiding officer must evaluate the evidence and weigh up the respective perspectives of the employer and employee. In determining whether the employee is at fault, the presiding officer is required to evaluate the evidence presented.[1390] If the presiding officer does not approach the evidence with an open mind, he or she will be open to

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[1383] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 340; *Jeffrey v Persetel (Pty) Ltd* 1996 (1) BLLR 67 (IC) at 79. Cf Baxter *Administrative Law* 553; Hoexter *Administrative Law* 340.

[1384] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 340.

[1385] See Hoexter *Administrative Law* 340. Grogan *Dismissal, Discrimination and Unfair Labour Practices* 340.

[1386] See Burns and Beukes *Administrative Law* 325.

[1387] See Burns and Beukes *Administrative Law* 325.

[1388] See Basson et al *Essential Labour Law* 127.

[1389] The necessity of such an opportunity in the context of every individual case is the yardstick against which this discretionary element is measured from both a labour or administrative law perspective. Necessity is evaluated with due regard to what the interest of justice requires in a particular set of facts. For a discussion of the employment context implications, see Cameron 1988 (9) *ILJ* 147 at 156 and Grogan *Dismissal, Discrimination and Unfair Labour Practices* 341. Cf Hoexter *Administrative Law* 340.

[1390] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 344.

claims of bias.[1391] The required absence of bias links to the duty to act in good faith.[1392] Any impression of bias is unacceptable, as the appearance of a fair procedure is just as important as an actual fair procedure.[1393]

4 2 1 2 2 Capacity

When it comes to a decision to dismiss an employee because of incapacity (whether due to poor work performance or ill health), procedural fairness demands that the affected employee be assessed and consulted.[1394] The required assessment prior to a decision being taken enhances dialogue through consultation.[1395] This fact was emphasised by the reasoning of the Industrial Court in *Gostelow v Datakor Holdings (Pty) Ltd t/a Corporate Copilith*,[1396] where it was held that "without an assessment, any

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[1391] Both labour and administrative law recognise the rule against bias. See Burns and Beukes *Administrative Law* 320 – 321; Grogan *Dismissal, Discrimination and Unfair Labour Practices* 344 – 345; *Yates v University of Bophuthatswana* 1994 (3) SA 815 (B) at 836. For further discussion on the rule against basis see *Anglo American Farms t/a Boschendal Restaurant v Komjwayo* 1992 (13) ILJ 573 (LAC) at 583, where the court quoted Cameron 1986 (7) *ILJ* 183 at 213.

[1392] In the context of a disciplinary hearing, the presiding officer must act with the absence of bias for good faith to be present. See *Hauser v Partnership in Advertising (Pty) Ltd* 1994 (11) BLLR 36 (IC) at 39 per Pio AM. Cf *Kotze v Rebel Discount Liquor Group (Pty) Ltd* 2000 (2) BLLR 138 (LAC) at par 45. In commenting on the trilogy of Appellate Division cases (*Council of Review, South African Defence Force v Mönnig* 1992 (3) SA 482 (A); *BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers' Union* 1992 (3) SA 673 (A); *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A)) in which the common law test for disqualifying bias was refined, the Labour Appeal Court in *Mondi Timber Products v Tope* 1997 (3) BLLR 263 (LAC) at 272 observed that "[w]hat emerges from these cases is that the test for disqualification is not actual bias but a reasonable apprehension of bias".

[1393] See Cameron 1986 (7) *ILJ* 183 at 213.

[1394] See Du Toit et al *Labour Law through the Cases* Sch 8–26 to Sch 8–27. The importance of dialogue was emphasised in *Henn v Eskom* 1996 (6) BLLR 747 (IC) at 761, with reference to *Hendricks v Mercantile & General Reinsurance Co of SA Ltd* 1994 (15) ILJ 304 (LAC). See also *Old Mutual Group Schemes v Dreyer* 1999 (20) ILJ 2030 (LAC) at 2031.

[1395] In *Davies v Clean Deals CC* 1992 (13) ILJ 1230 (IC), it was confirmed that an employee is entitled to participate in such an investigation or assessment. See Du Toit et al *Labour Law through the Cases* Sch 8–30.

[1396] 1993 (14) ILJ 171 (IC). The reasoning of the Industrial Court in this judgment is reflected in the criteria found in item 9(b) of the Code of Good Practice: Dismissal. See Du Toit et al *Labour Law through the Cases* Sch 8–26.

judgment regarding the employee's performance will be neither objective nor reasonable".[1397]

4 2 1 2 3 Operational Requirements

The dialogue component of the fair procedure duty of the employer is higher in the case of operational requirement dismissals than dismissal for another reason.[1398] Dismissal for operational requirements draws the dialogue requirement closer to the substantive dimension of fairness.[1399] In this context, the dialogue component finds expression through consultation in good faith.[1400] If the consultation-based dialogue component is lacking, fairness will be lacking.[1401] Item 3 of the Code of Good Practice on Dismissals Based on Operational Requirements therefore calls for a consultation process that commences as soon as the employer contemplates reduction of the workforce by

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[1397] Du Toit et al *Labour Law through the Cases* Sch 8–26. This sentiment was echoed by the Labour Appeal Court in *NUM v Libanon Gold Mining Co Ltd* 1994 (15) ILJ 585 (LAC) at 586. See also See Du Toit et al *Labour Law through the Cases* Sch 8–27.

[1398] See *Chetty v Scotts Select A Shoe* 1998 (19) ILJ 1465 (LAC) at par 24; Du Toit et al *Labour Law through the Cases* LRA 8–57.

[1399] See Basson et al *Essential Labour Law* 156. In *SACTWU v Discreto (A Division of Trump & Springbok Holdings)* 1998 (12) BLLR 1228 (LAC) at par 8, Froneman DJP confirmed that it is difficult to draw a distinction between the substantive and procedural dimensions of fairness in the context of dismissal on the ground of operational requirements. See also *De Bruin v Sunnyside Locksmith Supplies (Pty) Ltd* 1999 (8) BLLR 761 (LC); *Wheeler v Pretoria Propshaft Centre CC* 1999 (11) BLLR 1213 (LC); *Johnson & Johnson (Pty) Ltd v CWIU* 1999 (20) ILJ 89 (LC); *Broll Property Group (Pty) Ltd v Du Pont* 2006 (27) ILJ 269 (LAC).

[1400] This is reflected in s 189(2) of the LRA, which calls for the consulting parties to partake in a process aimed at reaching consensus. The LRA however does not define 'consultation' in this specific context, but it is informed by the purpose behind s 189. Manamela 2006 (14) *JBL* 27 at 28 accordingly proclaims that "[p]rior consultation remains the crux of the procedural fairness of a dismissal based on operational requirements".

[1401] See *Broll Property Group (Pty) Ltd v Du Pont* 2006 (27) ILJ 269 (LAC) at par 26; *Grogan Dismissal, Discrimination and Unfair Labour Practices* 483. Manamela 2006 (14) *JBL* 27 at 28 explains that, for any substantive fairness to be present, the employer must meet the procedural consultation requirement "at the stage when a final decision to dismiss has not yet been reached but the possibility of dismissal has been foreseen".

means of retrenchment.[1402] According to the main purpose behind s 189 of the LRA is "to achieve a joint consensus"[1403] through a "joint problem solving exercise".[1404] Thus, the dialogue process only has value when consultation takes place at the appropriate stage.[1405] In facilitating dialogue to such an extent that it maintains an environment conducive to substantive fairness,[1406] the procedural fairness required for operational dismissals also gives expression to the administrative law idea of participation.

In the absence of an attempt to seek consensus, the reason for the non-compliance must be determined.[1407] Scrutinising a consultation process to determine the presence or absence of procedural fairness is no easy task, as the LRA endorsed duty to consult "clearly goes beyond the employer simply having to give employees or their representative trade unions an opportunity to give advice or an opportunity to make representations".[1408] *Adequate* consultation is required.[1409]

[1402] In *Keil v Foodgro (A division of Leisurenet Ltd* 1998 (12) BLLR 1228 (LAC) at par 10, it was confirmed that the dialogue requirement gains effect "through the constructive engagement implicit in this process ... [through which] the need to retrench is confirmed as well as the selection of those employees who are to be retrenched".

[1403] *Johnson & Johnson (Pty) Ltd v CWIU* 1999 (20) ILJ 89 (LC) at 96. See also Du Toit et al *Labour Law through the Cases* LRA 8–55; *Atlantis Diesel Engines (Pty) Ltd v NUMSA* 1995 (1) BLLR 1 (A); *Alpha Plant and Services (Pty) Ltd v Simmonds* 2001 (3) BLLR 261 (LAC). For consensus to be reached, consultation (as required by s 189(1) of the LRA) is necessary.

[1404] *Atlantis Diesel Engines (Pty) Ltd v NUMSA* 1995 (1) BLLR 1 (A) at 6.

[1405] See *Atlantis Diesel Engines (Pty) Ltd v NUMSA* 1995 (1) BLLR 1 (A) at 6. However, the Labour Court in *Johnson & Johnson (Pty) Ltd v CWIU* 1999 (20) ILJ 89 (LC) at 96 explained that a checklist approach to the requirements in s 189 of the LRA is not appropriate, as "[t]he proper approach is to ascertain whether the purpose of the section ... has been achieved". See also *Sikhosana v Sasol Synthetic Fuels* 2000 (1) BLLR 101 (LC) at 106.

[1406] See *Johnson & Johnson (Pty) Ltd v CWIU* 1999 (20) ILJ 89 (LC) at 100. Cf *Dhlamini v Faraday Wholesale Meat Supply* 1999 (8) BLLR 771 (LC).

[1407] Procedural fairness requires that consultation must take place, regardless of whether it is the employer's perspective that it would make no difference to his or her ultimate decision. See *SACTWU v Discreto (A Division of Trump & Springbok Holdings)* 1998 (12) BLLR 1228 (LAC) at par 9; *Johnson & Johnson (Pty) Ltd v CWIU* 1999 (20) ILJ 89 (LC) at 97; Du Toit et al *Labour Law through the Cases* LRA 8–55 with reference to *Whall v BrandAdd Marketing (Pty) Ltd* 1999 (6) BLLR 626 (LC) at paras 24 – 25.

[1408] *CWIU v Johnson & Johnson (Pty) Ltd* 1997 (9) BLLR 1186 (LC) at 1201.

4 2 1 2 3 1 Large-scale retrenchment

Section 189A of the LRA alters the content and scope of the dialogue component of operational requirement dismissals.[1410] While the transparency requirement of notice remains unaltered regardless of the scale of the retrenchment, a facilitator may be appointed to assist with the promotion of participatory dialogue in the context of a large-scale retrenchment.[1411] In the event of such facilitation, the employer will only be allowed to retrench employees 60 days after notice of the contemplated retrenchments has been issued.[1412] Thereafter employees have two options: embark on a protected strike or refer their dispute to the Labour Court.[1413] If the Labour Court is approached, an order can be obtained "compelling the employer to comply with a fair procedure, restraining the employer from dismissing an employee before complying with a fair

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[1409] The Appellate Division in *Atlantis Diesel Engines (Pty) Ltd v NUMSA* 1995 (1) BLLR 1 (A) at 6 explained that "[t]he scope and extent of the consultation may be attenuated in certain circumstances because of eg considerations of urgency or confidentiality or some equally compelling reason".

[1410] The aim of s 189A of the LRA is merely to see to it that open-dialogue in a fair procedure is ensured in the context of intended large-scale retrenchments prior to a decision to dismiss employees for operational reasons being finalised. Section 189A(1) indicates what constitutes a large scale retrenchment. See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 448.

[1411] Consensus-seeking facilitation must take place in terms of the time requirements set out in the applicable regulations promulgated by the Minister of Labour. See s 189A(3) of the LRA; Grogan *Dismissal, Discrimination and Unfair Labour Practices* 447. In the event that a facilitator is not appointed and notice of the intended retrenchments has been issued, the dispute may be referred to the CCMA within 30 days by any of the parties. See also s 189A(13) of the LRA.

[1412] See s 189A(7) of the LRA; Grogan *Dismissal, Discrimination and Unfair Labour Practices* 447; *NUM v De Beers Consolidated Mines* 2006 (27) ILJ 1909 (LC). Cf *Leoni Wiring Systems (East London) v NUMSA* 2007 (28) ILJ 642 (LC).

[1413] It is open to employees or their trade unions to apply to the Labour Court for an order compelling the employer to comply with a fair procedure during the consultation process. Employees can therefore compel an employer to give expression to the dialogue dimension of procedural fairness. Section 189A of the LRA grants employees and their trade unions an opportunity to utilise their collective power through the option of protected strikes, as well as recourse to the Labour Court. See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 447.

procedure, directing the employer to reinstate an employee until it has complied with a fair procedure, or award compensation, if no other order is appropriate".[1414]

4 2 2 Collective Context

A fair dismissal for strike participation calls for two procedural elements: a fair ultimatum and observance of the audi alteram partem rule.[1415] A fair ultimatum requires that the employer clearly communicate what is demanded of the striking employees in a manner that is understood by the strikers, indicate when and where they must comply, indicate what the sanction will be if they fail to comply with the ultimatum, allow the striking employees the time to reflect and respond by either complying with or rejecting the ultimatum.[1416] The communicated ultimatum should amount to a bona fide attempt by the employer to persuade employees to resume their work.[1417]

Initially labour law viewed (unprotected) strikers as having waived their right to a pre-dismissal hearing.[1418] At that stage, a fair ultimatum alone was generally regarded sufficient to dismiss employees partaking in a strike in a procedurally fair manner,[1419] as

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[1414] The option of approaching the Labour Court should be resorted to with caution, as the aim is not to stifle the consultation process if the employer is genuinely attempting to address any flaws or obstructions in the dialogue process. See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 448.

[1415] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 533. The opinion that the employees deserve dismissal due to their actions does not warrant neglect of the procedural dimension of fairness, as procedural deficiencies can affect the substantive fairness of the dismissal. See *S v Makwanyane* 1995 (6) BCLR 665 (CC) at par 137 (per Chaskalson P) and par 331 (per O'Regan J); *POPCRU v Minister of Correctional Services* 2006 (4) BLLR 385 (E) at paras 79, 80, 81 and 83 per Plasket J.

[1416] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 535 – 537. Cf *Performing Arts Council (Transvaal) v Paper Printing Wood & Allied Workers Union* 1992 (13) ILJ 1439 (LAC); *Plaschem (Pty) Ltd v CWIU* 1993 (14) ILJ 1000 (LAC); *ICS Group t/a Dairybelle (Bloemhof) v National Union of Food Beverages Wine Spirits and Allied Workers Unions* 1998 (19) ILJ (LAC); *Ramotsepane v Barmot Truck Hire* 2002 (6) BLLR 525 (LAC); *NULAW v Bader Bop (Pty) Ltd* 2004 (25) ILJ 1469 (LC).

[1417] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 535 – 537.

[1418] See *Modise v Steve's Spar Blackheath* 2000 (5) BLLR 496 (LAC) at paras 19 and 93 per Zondo AJP.

[1419] Cf the Code of Good Practice: Dismissal, which also does not specifically provide that employers must comply with the audi alteram partem rule before dismissing illegal strikers. Therefore, no provision

the ultimatum would otherwise be ineffective.[1420] In *NUMSA v Malcomess Toyota (a division of Malbak Consumer Products (Pty) Ltd)*,[1421] the Labour Court in fact reasoned that requiring a hearing after the dismissal of strikers "would be tantamount to the employer second-guessing its own decision"[1422] without resolving the underlying issues.[1423]

This initial stance did not leave the labour court unsympathetic to the plea of employees who did not partake in the strike out of free will, or who were absent due to illness during the time of the strike.[1424] It was acknowledged that it would be reasonable to invite dismissed employees to, for example, show that they were intimidated to partake in the strike action,[1425] but reasoned that it would be impractical to allow for individual hearings prior to the dismissal of strikers.[1426] An exception however emerged in the form of the argument that "a hearing should nonetheless be given to the collective bargaining representative of the strikers and to those who bona fide believed that, as a result of whatever reason, their absence was justified".[1427]

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for a hearing before dismissal is found in the Code when the dismissals of illegal strikers are under consideration. See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 542.

[1420] See Grogan D*ismissal, Discrimination and Unfair Labour Practices* 543 - 544. *Cf NUMSA v Fibre Flair CC t/a Kango Canopies* 1999 (20) ILJ 1859 (LC).

[1421] 1999 (20) ILJ 1867 (LC).

[1422] *NUMSA v Malcomess Toyota (a division of Malbak Consumer Products (Pty) Ltd)* 1999 (20) ILJ 1867 (LC) at par 123.

[1423] See *NUMSA v Malcomess Toyota (a division of Malbak Consumer Products (Pty) Ltd)* 1999 (20) ILJ 1867 (LC) at par 123.

[1424] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 544.

[1425] See *NUMSA v Malcomess Toyota (a division of Malbak Consumer Products (Pty) Ltd)* 1999 (20) ILJ 1867 (LC) at par 120. Respect for the audi alteram partem rule, so understood, ensures the protection and promotion of substantive fairness, as a dismissal of an employee who was sick during the time of the strike, could not amount to a fair reason for dismissal. Fair treatment is multi-dimensional. Information on which to base a fair dismissal can only properly be obtained if an opportunity to make representation is granted to employees.

[1426] See Brassey 1990 (11) *ILJ* 213. Cheadle, as referred to in *Modise v Steve's Spar Blackheath* 2000 (5) BLLR 496 (LAC) at par 26, draws a distinction between adherence to the audi alteram partem rule before and after dismissal.

[1427] Brassey 1990 (11) *ILJ* 213 at 226. Cf *MAN Truck and Bus SA (Pty) Ltd and United African Motor and Allied Workers Union* 1991 (12) ILJ 181 (ARB) at 192.

From an administrative law point of view, De Ville notes that it will only be justifiable to comply with the audi alteram partem rule after the decision is taken if the circumstances of the case are exceptional.[1428] It is however required that the decision-maker retain "a sufficiently open mind to allow herself to be persuaded that she should change her decision and the affected individual must not have suffered prejudice by being afforded a hearing afterwards".[1429] The judgment in *Van Zyl v New National Party*[1430] supports the idea that a hearing after the fact is to be the exception rather than the rule, as it is in "accord with the general common-law practice that procedural justice must be observed before rather than after, the taking of an administrative decision".[1431] Proper regard must be had to the object, nature and purpose of administrative decisions as weighed against the likely effect of the decision in the context of the constitutional ethos of efficiency and good governance (as it relates to the right to just administrative action).[1432]

[1428] De Ville *Judicial Review* 245 explains that this will for example be the case "where the matter is one of urgency or where for some other reason it was not possible to hear the person before the taking of a decision".

[1429] De Ville *Judicial Review* 245. Cheadle, as referred to in *Modise v Steve's Spar Blackheath* 2000 (5) BLLR 496 (LAC) at par 26, appears to respect the cautionary comments of De Ville and the judiciary in the administrative law context. The administrative law exceptions remind of labour law's exceptions identified in crisis-zone cases. See Basson et al *Essential Labour Law: Volume 1* 196 – 197. Cf *Lefu v Western Areas Gold Mining Co Ltd* 1985 (6) ILJ 307 (IC); Cameron 1988 (9) *ILJ* 147. See also *Lebota v Western Areas Gold Mining Co Ltd* 1985 (6) ILJ 299; *NUM v Buffelsfontein Gold Mining Co Ltd (Beatrix Mines Division)* 1988 (9) ILJ 341 (IC).

[1430] 2003 (10) BCLR 1167 (C) at par 96.

[1431] *Van Zyl v New National Party* 2003 (10) BCLR 1167 (C) at par 96. The court found that ss 3(2)(b) and 3(3) of PAJA do not reveal a contrary legislative intent. A departure from the procedural fairness provisions in s 3(2), as provided for in s 3(4), must consequently be reasonable and justifiable in the context of every case. See Submissions of the Amici Curiae: Community Law Centre (UWC) and Centre on Housing Rights and Evictions (COHRE) in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* Case No: CCT 24/07 at par 143.

[1432] See Hoexter *Administrative Law* 343. Similar to the perspective of the Labour Appeal Court in *JDG Trading (Pty) Ltd t/a Price 'n Pride v Brunsdon* 2000 (1) BLLR 1 (LAC) at par 58, administrative law embraces the general rule of audi alteram partem compliance prior to the decision, with exceptions only allowed if reasonable and justifiable in the circumstances. See also *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A).

Convergence of labour and administrative law is obvious when considering the scope of the audi alteram partem rule, as reflected in *Modise v Steve's Spar Blackheath*.[1433] The majority acknowledged that labour law usurped the audi alteram partem rule in a manner similar to that of administrative law.[1434] In considering the development of employment and administrative jurisprudence relating to the audi alteram partem rule, Zondo AJP found that "in the context of dismissal, an employer is obliged to observe the audi rule where his decision may adversely affect an employee's rights".[1435] In true

[1433] 2000 (21) ILJ 519 (LAC).

[1434] *Modise v Steve's Spar Blackheath* 2000 (5) BLLR 496 (LAC) at par 20 per Zondo AJP. Although the majority noted that there was no reason to read the audi alteram partem rule as different in content from the audi alteram partem rule acknowledged in administrative law, Zondo AJP qualified the path audi alteram partem took to reach labour law. Although Zondo AJP argued that the audi alteram partem principle was rooted in employment law via the English law, it must not be forgotten that administrative law, as embraced in South Africa, also has its roots in English law and has historically strongly been influenced by developments in that jurisdiction. Cf Grogan *Dismissal, Discrimination and Unfair Labour Practices* 544. See Chapter Three, part 2 2 for a discussion of the development of procedural fairness in administrative law. Administrative law's traditional influence on public employment resulted in all dismissals (regardless of individual misconduct or collective strike participation) requiring respect for the employee's right to state his or her case. Zondo AJP emphasised that an employee does not waive his or her right to be heard when partaking in a strike. See *Modise v Steve's Spar Blackheath* 2000 (5) BLLR 496 (LAC) at paras 20, 39 and 47 per Zondo AJP. See also Grogan *Dismissal, Discrimination and Unfair Labour Practices* 544 – 545. Cf *Laws v Rutherford* 1924 AD 261 at 263; *Hepner v Roodepoort-Maraisburg Town Council* 1962 (4) SA 722 (A) at 778; *Mayekiso v Minister of Health and Welfare* 1988 (9) ILJ 227 (W); *Mokoena v Administrator of the Transvaal* 1988 (9) ILJ 398 (W); *Mokopanele v Administrator, Oranje-Vrystaat* 1988 (9) ILJ 779 (O); *Zenzile v Administrator of the Transvaal* 1989 (10) ILJ 34 (W); *Administrator, Transvaal v Zenzile* 1991 (1) SA 21 (A); *Zondi v Administrator, Natal* 1991 (12) ILJ 497 (A).

[1435] *Modise v Steve's Spar Blackheath* 2000 (5) BLLR 496 (LAC) at par 36 per Zondo AJP. Zondo AJP drew a distinction between the issuing of an ultimatum and the granting of a disciplinary hearing. Prior to the issuing of an ultimatum, the right to be heard grants the representatives of the strikers the opportunity to explain why an ultimatum should not be issued. If the strikers ignore the ultimatum, then dismissal may follow. After dismissal, the right to be heard grants the employees (collectively or individually, depending on the circumstances) the opportunity to deny involvement altogether or explain the circumstances surrounding their participation, for example intimidation. Basson et al *Essential Labour Law* 316 explain that it is not a requirement that a proper hearing be held prior to the ultimatum, but merely "that genuine contact should be made with the employees and their representatives". See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 545. See also *Mzeku v Volkswagen SA (Pty) Ltd* 2001 (8)

variable nature, the fairness of the opportunity to be heard in the strike context depends on the circumstances.[1436] Ironically, the judicial expansion of the audi alteram partem rule in the collective labour law context occurred with consideration of the reasoning of the Appellate Division in *Administrator, Transvaal v Zenzile*.[1437]

Administrative law, as developed under s 33 of the Constitution, does not stand blind to the possibility that procedural fairness can find expression in a collective context. Although s 4 of PAJA does not refer to strikes, it allows for the protection and promotion of procedural fairness in instances where the rights of the public in general are adversely affected.[1438] The required public interest must be affected by a decision where "constitutional, statutory or common law rights of members of the public are at issue".[1439] If a group's labour rights potentially stand to be affected collectively by an administrative decision, s 4(1) requires that an inquiry be held and that the group be allowed an opportunity to share their perspective with the decision maker.[1440] Administrative law is not ignorant of the idea that the flexible concept of fairness can

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BLLR 857 (LAC), where the employer reached agreement with the trade union prior to the issuing of an ultimatum. *Karras t/a Floraline v SA Scooter and Transport Allied Workers Unions* 2001 (1) BLLR 1 (LAC) at paras 26 – 28 confirms that this perspective is in line with item 6(2) of the Code of Good Practice: Dismissal, which stipulates that "[p]rior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt".

[1436] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 545. This fact was emphasised in *Modise v Steve's Spar Blackheath* 2000 (5) BLLR 496 (LAC) at par 96.

[1437] 1991 (1) SA 21 (A). Some academics and judges view the *Zenzile*-judgment as irrelevant in light of the constitutional and legislative extension of the right to fair labour practices to public sector employees. See the discussion in Chapter Eight, part 3 1.

[1438] Within the scope of s 4, PAJA regards the term 'public' as including "any group or class of the public". Burns and Beukes *Administrative Law* 242 explain that s 4 finds application when a decision of an administrative nature, relating to the interest of a group of the public, reveals a general impact of significant public effect. Section 4 can therefore also be read as referring to the interests of public employees as a group.

[1439] Burns and Beukes *Administrative Law* 242.

[1440] Section 4(1) of PAJA further stipulates that this must take place within the context of a fair procedure. The form of the fair procedure is left to the discretion of the decision-maker.

find expression in a collective manner, as longs as it amounts to a fair opportunity to make representation.[1441]

As the standard and form of fairness is contextually determined, at both a de jure and de facto level, it is illogical to argue that administrative and labour law cannot co-operate in the promotion and protection of fairness in a collective context, such as strike dismissals). Both labour and administrative law emphasise the importance of adherence to the audi alteram partem rule. Item 4(4) of the Code of Good Practice: Dismissal only allows an employer to dispense with pre-dismissal procedures in "exceptional circumstances". Labour law does not allow for absolute exceptions to the rule. It only allows for an exception to the rule prior to dismissal, if the circumstances so demand. An employer must still allow the dismissed employee to state his or her case after the fact. From an administrative law perspective, s 3(4)(a) of PAJA does allow for deviation from the minimum standards in s 3(2), which includes the audi alteram partem rule, "if it is reasonable and justifiable in the circumstances".[1442]

4 3 Representation

Transparency and dialogue form the underlying values of procedural fairness. Circumstances may arise where adherence to the values of transparency and dialogue become problematic. Without a legal representative to ensure that these values are effectively adhered to, the individual facing potential adverse affects through the impact

[1441] The collective element of the opportunity to be heard in administrative law was also acknowledged in the common law context in *R v Hodos and Jajhbay* 1927 TPD 101. The case concerned the interests of a group ordered to move by a general decree. See Devenish, Govender and Hulme *Administrative Law and Justice* 283.

[1442] Section 3(4)(b) of PAJA lists the relevant factors that an administrator must take into account when determining whether a s 3(4)(a) departure is reasonable and justifiable: the objects of the empowering provision; the nature and purpose of, and the need to take, the administrative action; the likely effect of the administrative action; the urgency of taking the administrative action or the urgency of the matter; and the need to promote an efficient administration and good governance. See also s 3(5) of PAJA that reads as follows: "Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure." Cf *SANDU v Minister of Defence: In re SANDU v Minister of Defence* 2003 (9) BLLR 932 (T).

of a decision by the State or private employer may be at a disadvantage in complex cases.

With regard to legal representation, two issues require evaluation:

1. Is there a general right to legal representation?[1443]
2. Does labour law allow for the possibility that the absence of legal representation can allow for a finding of procedural fairness, as has been the case in administrative law?[1444]

Both labour and administrative law acknowledge that the right to legal representation is not part of the audi alteram partem rule.[1445] In the context of employment law, an employee facing a disciplinary procedure is entitled to assistance, but not necessarily legal representation.[1446] Item 4(1) of the Code of Good Practice: Dismissal states that the employee should be entitled to representation by or the assistance of a fellow employee or trade union representative.[1447] Labour law makes this concession for two reasons: moral support for the employee and balancing the employee's position against that of the employer.[1448] These two purposes collectively strive to ensure the

[1443] See De Ville *Judicial Review* 182.

[1444] In *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee* 2000 (4) SA 621 (C) at paras 28 – 41, the decision of the disciplinary committee was set aside due to the committee's failure to consider the allowance of legal representation. See De Ville *Judicial Review* 182.

[1445] Basson et al *Essential Labour Law* 324 – 325 note that the constitutional right to procedural fairness does not alter the common law as far as legal representation is concerned. Van Dokkum 2000 (21) *ILJ* 836 – 837 elaborates on the rationale for this general approach in an employment context.

[1446] The assistance referred to can come in the form of a trade union representative or fellow employee. See Basson et al *Essential Labour Law* 127.

[1447] While legal representation is allowed in the case of review to the Labour Court and the Labour Appeal Court, there is no absolute right to legal representation at a disciplinary enquiry or the CCMA in cases concerning misconduct or incapacity dismissals. In terms of rule 25(1)(a) of the CCMA Rules, legal representation is generally not allowed at the conciliation stage. At the arbitration stage, the CCMA generally allows legal representation, except at incapacity or misconduct dismissal disputes. See Collier *Disciplinary Enquiries* 1 http://www.lexisnexis.co.za/ServicesProducts/presentations/17th/DebbieCollier.doc.

[1448] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 343.

maintenance of fairness and the pursuit of justice in the disciplinary process.[1449] This form of representation does not exclude the possibility of legal representation at all disciplinary enquiries, as the complexity of the case and the relevant disciplinary code determines the employee's entitlement to legal representation.[1450]

Although the Public Service Disciplinary Code and Procedure does not as a rule allow for legal representation at a disciplinary hearing,[1451] its provisions do not prohibit the presiding officer from allowing representation of this nature in his or her discretion.[1452] The Supreme Court of Appeal in *MEC: Department of Finance, Economic Affairs and Tourism, Northern Province v Mahumani*[1453] confirmed the existence of this discretion in complex and difficult cases.[1454] The discretion must be exercised in a fair manner[1455] and calls for consideration as to whether it is reasonable for the applicant to present his or her own case.[1456]

[1449] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 343.

[1450] See Grogan *Dismissal, Discrimination and Unfair Labour Practices* 342.

[1451] See Basson et al *Essential Labour Law* 127. Clause 7.3(e) of the code reads as follows: "In a disciplinary hearing, neither the employer nor the employee may be represented by a legal practitioner." See *Schoon v MEC, Department of Finance, Economic Affairs and Tourism, Northern Province* 2003 (9) BLLR 963 (T) at par 20.

[1452] See Basson et al *Essential Labour Law* 127.

[1453] 2005 (2) BLLR 173 (SCA).

[1454] See Basson et al *Essential Labour Law* 127.

[1455] See Basson et al *Essential Labour Law* 128; Collier *Disciplinary Enquiries* 1; *Majola v MEC, Department of Public Works, Northern Province* 2004 (25) ILJ 131 (LC).

[1456] In echoing this understanding of discretion, the court in *Afrox Ltd v Laka* 1999 (5) BLLR 467 (LC) referred to the factors mentioned in s 140(1) of the LRA in the exercise of the discretion. This section (since repealed and replaced by a similar rule 25 of the CCMA Rules) stipulated that parties are not entitled to legal representation at arbitration proceedings unless (in the absence of consent between all the parties) "the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering – (i) the nature of the question of law raised by the dispute; (ii) the complexity of the dispute; (iii) the public interest; and (iv) the comparative ability of the opposing parties or their representatives to deal with the arbitration of the dispute". Where an earlier agreement to allow legal representation has been reached, a decision to ignore such an agreement amounts to legal misconduct on the side of the arbitrator. This analysis was followed in *Vaal Toyota (Nigel) v Motor Industry Bargaining Council* 2002 (10) BLLR 936 (LAC). The Supreme Court of Appeal in *MEC: Department of Finance, Economic Affairs and Tourism, Northern Province v Mahumani* 2005 (2) BLLR

The exercise of the discretion brings with it certain responsibilities.[1457] In *Mafongosi v United Democratic Movement*,[1458] the applicants challenged their dismissal on the ground of procedural unfairness. On the day of their disciplinary hearing, the employees arrived without legal representation. As a result, the presiding officer postponed the hearing for a week. According to the applicants, a week was insufficient to obtain the legal representation to which they were entitled in the context of the case.[1459] Jafta AJP reiterated that there is no right to legal representation in the common law roots of administrative law (and therefore labour law),[1460] but exceptions discretionarily granted in individual cases must be respected.[1461] Jafta AJP found that the applicants had been treated unfairly. De Ville argues that s 3(3)(a) of PAJA lends itself to the interpretation that legal representation is a requirement "in serious and complex cases".[1462]

In *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee*,[1463] the Supreme Court of Appeal confirmed that the general approach does not unjustifiably

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173 (SCA) also embraced this perspective. If the circumstances dictate that it would be fair and reasonable to allow such representation and it is refused, the refusal amounts to a procedural injustice. See *Commuter Handling Services (Pty) Ltd v Mokoena* 2002 (9) BLLR 843 (LC).

[1457] Grogan *Dismissal, Discrimination and Unfair Labour Practices* 344 explains that presiding officers must allow representatives to perform the function for which their presence is discretionarily allowed and not unjustly hinder them from doing so.

[1458] [2003] 1 All SA 441 (Tk).

[1459] The applicants lacked the funds to obtain legal representation and could not raise the required funds in the period of a week. See *Mafongosi v United Democratic Movement* [2003] 1 All SA 441 (Tk) at paras 14 – 15.

[1460] See *Mafongosi v United Democratic Movement* [2003] 1 All SA 441 (Tk) at par 16.

[1461] The High Court in *Mafongosi v United Democratic Movement* [2003] 1 All SA 441 (Tk) at par 16 elaborated: "[W]here such right has been given common sense dictates that the beneficiary of such right would be entitled to its full employment without hindrance from the decision-maker who should afford the affected party the opportunity to exercise the right. The right to legal representation is extremely important in any proceedings and therefore the decision-maker is bound not to pay lip-service thereto."

[1462] De Ville *Judicial Review* 254. Cf *Du Preez v Truth and Reconciliation Commission* 1997 (4) BCLR 531 (A). Baxter *Administrative Law* 555 also acknowledges the idea that the right to legal representation is given effect to in complex cases. See also Wiechers *Administrative Law* 211. The Industrial Court (as the predecessor of the Labour Court) also acknowledged the discretion to allow legal representation, if the legal and factual issues of a case were complex. See Pretorius 1986 (7) *ILJ* 18 at 21.

[1463] 2002 (23) ILJ 1531 (SCA).

limit any constitutional right.[1464] The court emphasised that every case should be separately evaluated to determine whether an individual is entitled to such representation by taking into account "the nature of the charges brought, the degree of factual or legal complexity attendant upon considering them, [and] the potential seriousness of the consequences of an adverse finding".[1465] In *Schoon v MEC, Department of Finance, Economic Affairs and Tourism, Northern Province*,[1466] the High Court supplemented these factors with the following:

> [T]he potential suitably qualified lawyers, ... the availability of the person who may well represent the applicant, the fact that there is a legally trained person presenting the case against the applicant, and any other fact relevant to the fairness or otherwise of confining the applicant to the kind of representation for which the representation rule expressly provides.[1467]

[1464] For similar reasoning, *Netherburn Engineering CC t/a Netherburn Ceramics v Madau* 2003 (10) BLLR 1034 (LC) per Landman J.

[1465] *Hamata v Chairperson, Peninsula Technikon, Internal Disciplinary Committee* 2002 (23) ILJ 1531 (SCA) at par 21. See also *Mafongosi v United Democratic Movement* [2003] 1 All SA 441 (Tk) at paras 16 – 18; *Schoon v MEC, Department of Finance, Economic Affairs and Tourism, Northern Province* 2003 (9) BLLR 963 (T). Prior to the decision of *Hamata v Chairperson, Peninsula Technikon, Internal Disciplinary Committee* 2000 2002 (23) ILJ 1531 (SCA), the Industrial Court already took note of the following considerations in exercising its discretion to allow or refuse legal representation: "The complexity of the legal and factual issues in any case ... [t]he serious nature of the proceedings and, in particular, the potential consequences for the livelihood and status of an applicant in losing his job ... [a] party's personal standard of education, his experience and knowledge ... [t]he history of the matter ... [t]he necessity to maintain a balance between the parties to ensure fair play ... [t]he purpose of any objection raised against legal representation [as] ... [i]t may often be the case that the only purpose that a party can have in objecting to legal representation is to gain an unfair tactical advantage over an untrained and inexperienced opponent." See Pretorius 1986 (7) *ILJ* 18 at 21.

[1466] 2003 (9) BLLR 963 (T). The case concerned a disciplinary enquiry relating to the alleged misconduct of an employee who was denied legal representations at the hearing.

[1467] *Schoon v MEC, Department of Finance, Economic Affairs and Tourism, Northern Province* 2003 (9) BLLR 963 (T) at par 27. The court reasoned that the provisions of the Public Service Disciplinary Code and Procedure informed the applicable context of the fairness evaluation. After taking into consideration all the relevant factors to establish the degree of complexity, the court found there to be no contextual reason to justify the denial of legal representation. See *Schoon v MEC, Department of Finance, Economic Affairs and Tourism, Northern Province* 2003 (9) BLLR 963 (T) at par 30.

Although jurisprudence generally accepts that legal representation is a refutable right, both labour and administrative law require that the employer, chairperson or administrator apply their minds to the individual's request for assistance by a legal representative.[1468] Although the colloquial phrasing of the underlying discretion may differ in labour and administrative law jurisprudence, the crux remains the same. Fairness demands that legal representation be allowed if it is required to give the affected individual a *real* opportunity to state his or her case.[1469] Even the s 3 PAJA inspired argument that representation should be allowed "in serious and complex cases"[1470] merely boils down to one single consideration in both labour and administrative law: Does fairness demand it? The discretionary privilege of legal representation can be regarded as a sine qua non for the right to a fair hearing, if it is essential to the expression of the substance of procedural fairness.[1471]

5 CONCLUSION

Although transparency and dialogue dimensions of procedural fairness are explicitly or implicitly recognised, procedural fairness has no fixed parameters, as it is contextually determined.[1472] Administrative and labour law share a similar flexible understanding of the guidelines for the protection and promotion of procedural fairness:

- Both labour and administrative law require reasonable notification of disciplinary proceedings, with no apparent conflict between s 3(2) of PAJA and item 4(1) of the Code of Good Practice: Dismissal.

[1468] The Supreme Court of Appeal in *MEC: Department of Finance, Economic Affairs and Tourism, Northern Province v Mahumani* 2005 (2) BLLR 173 (SCA) confirmed this.

[1469] This is what is implied from the factors identified in *Afrox Ltd v Laka* 1999 (5) BLLR 467 (LC), *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee* 2002 (23) ILJ 1531 (SCA) and *Schoon v MEC, Department of Finance, Economic Affairs and Tourism, Northern Province* 2003 (9) BLLR 963 (T).

[1470] De Ville *Judicial Review* 254. See Pretorius 1986 (7) *ILJ* 18 at 21.

[1471] See *Cuppan v Cape Display Supply Chain Services* 1995 (16) ILJ 846 (D) at 847; *Chamane v The Member of the Executive Council for Transport, Kwazulu-Natal* 2000 (10) BLLR 1154 (LC) at 1159.

[1472] See *Nkomo v Administrator, Natal* 1991 (12) ILJ 521 (N). Both administrative and labour law contextually embrace the principles of natural justice.

- The absence of a reasonable disclosure of the allegations against the employee renders a disciplinary hearing procedurally defective from both a labour and administrative law procedural fairness perspective.
- Both labour and administrative law recognise the right to be granted an opportunity to make representations (whether in person or in writing) as the core fairness element of the audi alteram partem rule and procedural fairness in general. PAJA's provisions dealing with individual and collective fairness are reconcilable with procedural fairness as developed in labour law with regard to the right to be heard in the individual and collective context. If PAJA is reconcilable with this aspect of labour law, then administrative law in general does not hamper labour law's maintenance of procedural fairness elements in the employment relationship.
- Although labour law holds a more generous position as to the presence of the individual at the enquiry, administrative law tends to embrace situations that grant more rather than less protection of rights and interests than found in the minimum standards of s 3(2) of PAJA.
- Both labour and administrative law similarly embrace the basic test of fairness that requires freedom from bias in the disciplinary proceedings.
- As to the right to legal representation, both labour and administrative law recognise that there is no absolute right to legal representation. However, both acknowledge that it would be grossly irregular for such representation to be denied in complex and serious cases. Item 4(1) of the Code of Good Practice: Dismissal, rule 25 of the CCMA Rules and s 3(3)(a) of PAJA reflect this perception and can be read in a complementary fashion.

From a practical perspective, labour and administrative law stand in agreement as to the regulatory approach to and rationale for procedural fairness. Labour law has adapted the procedural fairness perspective of administrative law to the employment

context, as a supplement to substantive fairness, in cases where the rights and interest of employees stand to be affected by unfair labour practices and dismissals.[1473]

The mere fact that labour law has historically mimicked administrative law's procedural fairness standards and trends can bring to question the necessity of administrative law considerations within the contemporary, constitutionally influenced, labour law approach to procedural fairness. In *Chirwa v Transnet Ltd*,[1474] the Constitutional Court in fact went so far as to state, "that because the LRA has been extended to virtually all employees, including those in the public sector, it is no longer necessary to apply the principles of administrative law to the field of employment relations".[1475] It is true that administrative law was pre-constitutionally stretched to its limits in attempting to grant public employees protection that resembled that of fair labour practices. It is also true that the developments in administrative law at that time were mimicked by the Industrial Court in giving expression to the procedural dimension of the concept of fair labour practices. It is furthermore true that the administrative law based understanding of procedural fairness has infiltrated labour legislation currently giving effect to the constitutional right to fair labour practices. Is it then also true that, because of this shared history, administrative law procedural fairness considerations have nothing to add to the labour law understanding of procedural fairness?

If it can indeed be argued that there is no longer a basis for the consideration of the justice principles underlying administrative law because labour law has already adopted those considerations, it can also be said that labour law no longer has to have regard to the principles underlying the Constitution as these principles have been adopted in the LRA. Such an argument is ludicrous and clearly out of step with the Constitution. The mere fact that the Constitution is being 'mimicked' in other areas of the law does not lessen its importance and applicability. The same holds true for the now constitutionally endorsed administrative law considerations that forms the traditional basis of the labour law understanding of procedural fairness.

[1473] This is the case regardless of whether one is dealing with an employment relationship in the private or public sector.

[1474] 2008 (2) BLLR 97 (CC).

[1475] *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 134.

An interdependent approach allows for the one right associated with one area of the law (expressing these principles) to consider on a continuous basis the innovative methods with which the other right associated with another area of the law (sharing these principles) applies those procedural values of justice.[1476] If a reconciliation of administrative law principles in the realm of labour law is regarded as 'superfluous', it may cause labour law to lose its fairness axis. Absent the possibility of considering the 'superfluous' administrative law considerations of procedural fairness, labour law may develop an inclination to look at the procedural fairness guidelines from a purely informational justice perspective, neglecting the required interpersonal justice perspective.[1477] Procedural fairness requires an interactional approach to justice, as is evident from the flexible character it attracts. A co-operative attitude towards the shared core justice perspective of administrative law, presents labour law with the continuous opportunity to test its balanced approach to justice. An interdependent approach allows for the value based checks-and-balances of justice. In fact, the doctrine of interdependence functions all the better when two rights share normative cores, as will become evident from the discussion in Chapter Seven.

In reflection, it is submitted that interdependence at a procedural level is easily identifiable and justifiable. The interrelated nature of substantive fairness and reasonableness is less obvious. One reason for this is to be found in the judiciary's continued pre-occupation with formalism. Holistically viewed, the obvious along with the hidden, the dimensions of fairness give expression to the doctrine of interdependence as embraced by the spirit and purport of the Constitution. It allows for ss 23 and 33 of the Constitution to find expression in a mutually supportive manner, without showing any disregard to the regulatory aim of labour law in public employment. At its core, labour law requires justice in the workplace. The Constitution requires that justice be maintained in a manner that is compatible with its content. That content includes s 23, which is the primary focus of the LRA. However, that content also groups s 23 together with other fundamental rights in the Bill of Rights (such as s 33) in an attempt to give comprehensive contextual protection to individuals on a case-by-case basis.

[1476] See Chapter Seven for a detailed discussion of the constitutionally endorsed doctrine of interdependence.

[1477] See part 4 2.

CHAPTER SEVEN

A CONSTITUTIONAL PERSPECTIVE ON THE INTERACTION BETWEEN LABOUR AND ADMINISTRATIVE LAW

1 INTRODUCTION

The adoption of the Constitution (specifically the Bill of Rights) serves as proof of the choice to promote certain rights central to the social, economic, and political discourse.[1478] Fundamental rights do not merely regulate relationships, but also stand in relationship to one another. These enshrined rights, such as the rights to fair labour practices and just administrative action, do not exist in a vacuum. The constitutional context brings with it a normative value system that informs all fundamental rights even if not specifically so articulated in the provision of a specific right. The normative considerations ensure that the spirit of the Constitution is holistically expressed. 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.

This constitutional idea of normative interdependence is endorsed in the public employment context by the fact that both administrative and labour law rights are aimed at the promotion of social justice, which is central to the constitutional value of democratic accountability.[1479] By merely admitting to the existence of this shared constitutional perspective, a causal link is noticeable in the relationship between labour and administrative law.

[1478] See Nedelsky 1993 (1) *Rev of Const Studies* 1 at 13

[1479] Administrative law and its associated rights give expression to the ideal of democratic justice through the idea of democratic accountability. Section 1 of the LRA specifically identifies the promotion of social justice as one of its primary purposes. In addition, labour law claims procedural fairness to be one of the key normative elements on which it relies to realise this purpose. Furthermore, one of the three dimensions of procedural fairness is democratic participation. The idea of democratic participation also resides in the idea of collective bargaining. Democracy and participation in the workplace are yet more purposes identified by the LRA to be realised along with the ideal of social justice.

In similar fashion, it can be reasoned that fairness, as a constitutional norm, has the potential to encapsulate the interrelated character of the rights and concepts associated with both labour and administrative law, as Chapters Five and Six illustrate.[1480] Unfortunately, South African jurisprudence reveals an inclination to undermine the value and flexibility of broad concepts, such as fairness, due to the (traditional) judicial tendency to perceive formalism as legal certainty.[1481] This results in the denial of fairness as an interdependent norm. Archaic formalism of this nature has led to the compartmentalisation of constitutional rights.

Formalists view fairness, as associated with labour and administrative law, as 'two' apparently different concepts due to the traditionally constructed absolute autonomous character of both labour and administrative law. As a result, formalism undermines the idea that fairness in a specialised labour law context carries the potential to amount to fairness in a general administrative law context

To successfully scrutinize the judiciary's (flawed) perspective in Chapters Eight and Nine, it is necessary to evaluate the relationship between the rights of the Bill of Rights with due regard to three constitutional principles to allow for an informed evaluation of the specific relationship between ss 23 and 33. Consideration will be given to flexibility as the first constitutional principle (part 2 1). This principle acknowledges that the flexible nature of the norms underlying the rights to fair labour practices and just administrative action (as discussed in Chapters Five and Six) is in fact a general theme underlying the idea of rights as relationships. This idea of flexibility will be linked to the doctrine of interdependence as endorsed by the jurisprudence of the Constitutional Court (part 2 2). The third constitutional principle, the judicially developed understanding

[1480] The concept of fairness as referred to here, incorporate both procedural fairness and substantive fairness (within the general framework of reasonableness) and associated concept of lawfulness as far as it is not at odds with fairness. Pre-constitutional jurisprudence revealed that conduct that may be regarded as lawful (such as the termination of a contract of employment upon proper notice without reasons at common law) does not by implication bring about a just or fair result. As a result, Harmse JA in *Council of Scientific and Industrial Research v Fijen* [1996] 2 All SA 379 (A) at 386 declared that "[a] lawful dismissal is not necessarily a fair dismissal". However, if lawfulness is viewed within the context of constitutional justice it carries the potential to fall within the general understanding of fairness, because constitutional lawfulness properly understood will never be intended to bring about an unjust result.

[1481] This tendency is highlighted in Chapters Eight and Nine.

of specificity, that in practice undermines the first two principles, will also be outlined and discussed (part 2 3).

The aim of this exercise is to assist in the evaluation of the relationship between the rights to fair labour practices and just administrative action and their associated legal principles in the chapters to follow.

2 CONSTITUTIONAL PRINCIPLES

2 1 Flexibility

Nedelsky points out that "[i]t is hard to believe in timeless values with immutable content"[1482] as propagated by legal formalists. The value and right of equality is a perfect example, as the content and legal understanding of equality has shifted from formal to substantive over the years, yet it is still termed equality. In contrast to formalism, conceptualism is unavoidable.[1483]

[1482] Nedelsky 1993 (1) *Rev of Const Studies* 1. Frant 1993 (37) *American J Pol Sc* 990 at 991 elaborates that "[r]ules cannot be perfect, and following them rigidly will inevitably result in many suboptimal decisions". Howard 1965 (44) *Tex L Rev* 35 at 37 holds that "[e]ven the best of rules, based on the soundest considerations of policy and justice, can survive beyond its time and become anachronistic".

[1483] Throughout its development, South African law has illustrated a fondness to rely on (autonomous) conceptualism as a type of formalism in the pursuit of legal certainty. Hoexter 2004 (4) *Macquarie LJ* 165 at 168 however explains that such judicial logic relies "on technical or mechanistic reasoning instead of substantive principles, and … prefer formal reasons to moral, political, economic or other social considerations". This casts a negative light of conceptualism. Formalism and conceptualism are not synonyms. Conceptualism can however be distorted when applied in a formalistic milieu. The positive element of conceptualism in the law has given birth to principles such as fairness, reasonableness and lawfulness. Botha 2002 (4) *TSAR* 612 at 616 – 617 explains that "our conceptual system [is] ... 'grounded in, and constantly tested by, our experiences and those of other members of our culture in our daily interaction with other people and with our physical and cultural environments'". Conceptualism in its true and proper sense therefore requires contextual evaluation and application. However, when the judiciary attempts to give a fixed or predictable content to inherently flexible concepts, conceptualism falls into the trap of formalism. Botha 2002 (4) *TSAR* 612 at 620 therefore emphasises that "[c]ontext and purpose are central to categorisation ... [and] judgments of the proximity of an object to what is seen as the central case of the category in question invariably rest upon an evaluation of context and purpose". Hoexter *Administrative Law* 201 explains that conceptual reasoning should thus not evolve into an all-or-nothing

Formalism can be avoided if legal perspectives stay true to the essence and reality of the relevant normative concepts. The concepts only gain substantive meaning when contextualised in terms of the reality of every case.[1484] When concepts are adapted to the context of every case, it requires judicial acknowledgment of the "need to confront the history of rights and acknowledge the depth of the changes that have taken place in both popular and legal understandings of rights".[1485] The character of a constitution as a living instrument in fact necessitates this requirement.[1486] The South African

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approach, used to justify the use of the concept in terms of a threshold question. According to Poole 2005 (25) *Oxford J Legal Stud* 697 at 701 (with reference to Barzun), that unity (as found in conceptualism) does not imply uniformity as "essential unity … within constitutionalism stems from an agreement on three essential matters: first, that it is possible to identify a set of values regarded as essential to human flourishing; second, that it is possible in the form of rights; and third, that these values and rights are most consistently recognized and protected by" constitutionally entrenched rights and the law giving effect thereto. Scott 1989 (27) *Osgoode Hall LJ* 769 at 810 – 811 also emphasises that "the principle of interdependence ... underlies and informs ... unity of purpose". Such unification is rooted in the Constitution: "In each of your national Constitutions you have a single document, but the laws enforcing the Constitution are always different laws enacted successively, even if they converge." See the Plenary of the GA (Cassin from France) A/PV 375 (1952) (France) 514/19 at 21. Such a convergence or meeting of legislative regulation is identifiable in the relationship between PAJA and the LRA, as the two statutes have a compatible constitutional purpose, namely constraint of the abuse of power. As a result, it cannot be declared that the provisions of the LRA and PAJA can be "kept scrupulously separate" in all context. See Scott 1989 (27) *Osgoode Hall LJ* 769 at 811.

[1484] See Nedelsky 1993 (1) *Rev of Const Studies* 1 at 3.

[1485] Nedelsky 1993 (1) *Rev of Const Studies* 1 at 3.

[1486] In *Tyrer v UK* (1978) 2 EHRR 1 at par 30, the European Court of Human Rights declared that the European Convention of Human Rights (the counterpart of the South African Bill of Rights) "must be viewed 'as a living instrument ... which must be interpreted in the light of the present-day conditions'". It was accordingly emphasised that the application of human rights must be interpreted and evaluated from a contextual perspective. In the South African context Sachs J emphasised the "organic and ever-evolving" nature of the constitutional principles in *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 150. This is an important observation and consideration, as it is undeniable that "we are living in a changing society", as Chaskalson CJ 1989 (5) *SAJHR* 293 at 296 so eloquently states. Scott 1989 (27) *Osgoode Hall LJ* 769 at 829 further notes that in line with the living instrument character of instruments which enshrine human rights for the benefit of society, it also holds true that, "[i]f the totality of evidence suggests that interdependence is a more meaningful concept now than it was in the early [years] ... [the judiciary] must take this into account". Consequently, even though administrative law and labour law rights where legally separate pre-constitutionally due to the social, economic and political

Constitution, with its intentional inclusion of a Bill of Rights, is such a living instrument, retaining an adaptable character through its flexible normative value system. These organs adapt to the circumstances in which the instrument finds it application – it responds to the idea of legal evolution.[1487] Consequently, the rights of fair labour practices and just administrative action, informed by the living norm of fairness, are not isolated in function. These rights must be interpreted and applied with regard to the contemporary political,[1488] social[1489] and economic contextual considerations[1490] of legal evolution.[1491]

To be effectively interpreted, the variable character of the principles (such as fairness and reasonableness) underlying the relevant rights must be judicially acknowledged. Formalism undermines this exercise. The variability of fairness and reasonableness, as concepts of justice, allows its content to vary according to the circumstances of every case.[1492] Flexibility forms a crucial element of fairness. It allows for the realisation of a

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influences of the time, that does not automatically justify the separation of the right to fair labour practices and just administrative action post-constitutionally. This realisation is complimented by the fact that rights are not isolated in function and must take account of and find application within the *contemporary* political, social and economic considerations as Nedelsky 1993 (1) *Rev of Const Studies* 1 at 3 elaborates: "We need to conform the history of rights and acknowledge the depth of the changes that have taken place in both popular and legal understandings of rights."

[1487] At the Constitutional Amendment Bills public hearings of the Justice and Constitutional Development Portfolio Committee on 14 September 2001, Chaskalson CJ explained that the Constitution is not "a rock-like institution ... [that] always give[s] effect to the intentions of the original parties to the agreement".

[1488] It is possible to link the presence of public power to political considerations. As history has revealed political tides have had an immense influence on the development or stagnation of labour and administrative law. See Chapter Two, part 2 and Chapter Three, part 2 for a discussion of the historic development of both areas of the law.

[1489] The promotion of social justice is an inherent aim of both labour and administrative law.

[1490] The influence of economic considerations on both the public and private sector is undeniable. Strike action in the private sector has the potential to affect the economic stability of a country (and therefore the public sector). Similarly, any economic action in the public sector directly affects the private sector. See Chapter Four, part 3 3.

[1491] See Botha 2002 (4) *TSAR* 612 at 616 – 617.

[1492] See Hoexter *Administrative Law* 201.

just outcome in every individual legal dispute.[1493] Permitting the context-specific application of a variable concept, such as fairness, allows for the following enquiry: What is the content of the duty of fairness in the particular public employment situation?[1494]

This acknowledgment of variability is not limited to a fairness enquiry.[1495] The variable nature of the concept of lawfulness also requires "the courts to apply different degrees of rigour in different circumstances to the question whether a statutory formality has been complied with".[1496] The concept of reasonableness is "not cast in stone, and it is quite possible for a court to decide that what is reasonable in one case is unreasonable in another".[1497]

[1493] From an administrative law perspective, Hoexter *Administrative Law* 201 notes that "the courts have long accepted (at common law, and now under the Constitution and the PAJA) that fairness is something to be tailored to suit the circumstances of the case before them". As such, the idea of "[v]ariability is well established in the context of procedural fairness, where an appreciation of flexibility is particularly crucial to the smooth running of the administration". Labour law draws on the administrative law understanding of procedural fairness and similarly accepts its required contextual variability as explained in Chapter Six.
The acceptance of variable norms of justice is also a general understanding embraced in labour law. The Labour Appeal Court in *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen* 1997 (18) ILJ 361 (LAC) at 365 explained that "[n]either employer nor employee benefits from a static employment concept where their respective rights and obligations are cast in stone at the commencement of the employment relationship".

[1494] See Dyzenhaus and Fox-Decent 2001 (51) *Univ Toronto LJ* 193 at 211. Hoexter *Administrative Law* 201 explains that the courts should ask positive rather than negative questions: "The right question is not 'when and on what basis may we *withhold* fairness from an aggrieved individual?' but 'what does fairness require in the particular case?"

[1495] Hoexter *Administrative Law* 201.

[1496] Hoexter *Administrative Law* 201. The fact the constitutionally imported variable element of lawfulness allows a court to evaluate the required degree of lawfulness applicable in every case, renders it more possible and plausible that a lawful decision can amount to a fair decision if these concepts are (contextually) interpreted in pursuit of supreme constitutional justice.

[1497] Hoexter *Administrative Law* 201. This fact has been emphasised by the Constitutional Court on more than one occasion. See Chapter Three, parts 2 3 and 3 5 2; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (7) BCLR 678 (CC) at par 45 per O'Regan J; *Minister of Health v New Clicks SA (Pty)* 2006 (1) BCLR 1 (CC) at par 145 per Chaskalson CJ.

Even though the essence of a norm must not be affected by its variation in contextual application,[1498] formalistic compartmentalisation of constitutional rights remains inadequate when called upon to balance unique contextual interests.[1499] Formalism undermines the unique character of every dispute and inhibits the proper development of knowledge obtained from past experiences.[1500] Consequently, O'Regan J in *Sidumo v Rustenburg Platinum Mines Ltd*[1501] declared formalistic jurisprudence to be "at odds with the substantive vision of the Constitution".[1502] Building on this identification of formalism as a judicial evil, Sachs J explained that *Sidumo*-type cases illustrate "the need for our constitutional jurisprudence ... to move away from unduly rigid compartmentalisation so as to allow judicial reasoning to embrace fluid concepts of hybridity and permeability in those matters".[1503] Although not explicitly articulated, Sachs J presented the doctrine of interdependence as the answer to the problem of archaic formalism.[1504]

This acknowledgment of hybridity and permeability "leads to direct and unrestrained engagement with the particular constitutional interests and values at stake"[1505] within the specific context of every case. It allows for contextualisation of human rights in a situation-sensitive manner, based on normative interdependence, which maximises the promotion of affected rights. In turn, it minimises the impact of formalism. This approach appropriately places the focus on constitutional justice and its underlying variable

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[1498] Türmen *Contemporary Issues in Human Rights* 3. Chaskalson 1989 (5) *SAJHR* 293 at 297 argues that "[a]ll law must postulate some kind of common denominator of just instinct in the community". In South Africa, the Constitution, with its underlying normative value system, now forms the common denominator in South Africa's transformative community.

[1499] See Nedelsky 1993 (1) *Rev of Const Studies* 1 at 4.

[1500] See De Smith, Woolf and Jowell *Judicial Review* 173. South Africa's pre-constitutional jurisprudence is proof enough of this fact.

[1501] 2007 (12) BLLR 1097 (CC).

[1502] *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 135.

[1503] *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 142.

[1504] In *NCGLE v Minister of Justice* 1998 (12) BCLR 1517 (CC) at par 126, Sachs J reasoned that "[o]ne of the great gains achieved by following a situation-sensitive human rights approach is that analysis focuses not on abstract categories, but on the lives as lived and the injuries as experienced by different groups in society".

[1505] *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 159.

norms. The acknowledgment that "the very notion of a fair labour practice requires that *fairness be the touchstone throughout*"[1506] forces one to admit that fairness is the determining factor in issues calling for substantive consideration. If the pursuit of fairness in a specific case calls for consideration of administrative law aspects, for example general reasonableness guidelines, the applicability of the right to just administrative action cannot be ignored in favour of a judicial attempt to preserve the legal regulatory power of labour law in an absolute autonomous form. Allowing a formalistic limitation based on such a traditional perspective[1507] undermines the spirit of the Constitution,[1508] as well as the flexible character of norms such as fairness and reasonableness.[1509]

2 2 Interdependence

The Constitution (specifically the Bill of Rights) embraces a transformative vision.[1510] That vision accepts the idea of contextual conceptualism,[1511] which in turn finds

[1506] *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 145 per Sachs J. Emphasis added.

[1507] The traditional or purist perspective holds that labour law should regulate employment decisions without interference from other legal specialities, such as administrative law.

[1508] The Constitution must in fact be the first point of call in any equity-based evaluation in pursuit of justice. Rawls 1985 (14) *Phil & Publ Aff* 223 at 246 – 247 explains the relationship between fairness and justice: "Justice as fairness seeks to identify the kernel of an overlapping consensus, that is, the shared intuitive ideals which when worked up into ... conception of justice turns out to be sufficient to underwrite a just constitutional regime." See also Currie 1999 (15) *SAJHR* 138 at 145; Stacey 2007 (22) *SAPL* 79 at 84. Plasket (PhD Rhodes 2002) 45 – 46 notes that it has been held, "[that] the principle of fundamental justice includes both procedural and substantive due process". Cf *Singh v Minister of Employment and Immigration* 1985 (14) CRR 13 (SCC).

[1509] Note that the level of uncertainty associated with flexible norms is also associated with a transformative constitution. See Klare 2008 (1) *CCR* 129 at 130. Bowman 1986 (5) *Auckland ULR* 361 correctly emphasises that it is "[t]he non-procedural content of fairness" that allows for reasonableness to overlap with the substantive element of fairness.

[1510] See Klare 2008 (1) *CCR* 129 at 133.

[1511] Contextual conceptualism calls for the context-specific application of variable concepts, such as fairness and reasonableness. Cf De Vos 2001 (17) *SAJHR* 258 at 261 and 263.

meaningful expression through the doctrine of normative interdependence.[1512] De Vos accordingly reasons that, "[d]epending on the particular context, many rights would thus be interrelated and would be mutually supportive".[1513]

Section 1 of the Constitution expressly identifies the basic principles that tie together the constitutional provisions to be human dignity, equality, the advancement of human rights and freedoms, non-discrimination, democracy, constitutional supremacy and the rule of law.[1514] These values, as "abstract foundational norms",[1515] must be invoked as interpretive tools in aligning general law with the spirit and purport of the Constitution.

Both the rights to fair labour practices and just administrative action have been described as unusual constitutional inclusions in the Bill of Rights.[1516] Even though included in the Constitution for different reasons, these two rights are not completely separable in all circumstances. In *Nakin v MEC, Department of Education, Eastern Cape Province*,[1517] Froneman J emphasised that "[f]undamental constitutional rights do not operate in tightly fitted compartments".[1518] The reason for this being that fundamental rights "overlap and are interconnected"[1519] in many, if not most

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[1512] De Vos 2001 (17) *SAJHR* 258 at 264 notes that, "[i]f one accepts that the Constitution encompasses a transformative vision ... then it becomes difficult not to accept that the various rights in the Bill of Rights must be viewed as interdependent, interrelated and mutually supporting". The normative value system of the Constitution informs the interdependence of the fundamental rights as the common denominator.

[1513] De Vos 2001 (17) *SAJHR* 258 at 264.

[1514] See Currie and De Waal *Bill of Rights Handbook* 7 fn 30.

[1515] Currie and De Waal *Bill of Rights Handbook* 8.

[1516] The former was included as a compromise. See Chapter Two, part 2 4. The latter's uniqueness lies in the fact that a constitution in principle sets out to regulate the exercise of public power. If not viewed within the context of South Africa's particular history, such a specific provision for just administrative action is superfluous. See Pillay 2005 (20) *SAPL* 413 at 414 with reference to Farina 2004 (19) *SAPL* 489 at 499. Cf Currie and De Waal *Bill of Rights Handbook* 8.

[1517] 2008 (5) BLLR 489 (Ck).

[1518] *Nakin v MEC, Department of Education, Eastern Cape Province* 2008 (5) BLLR 489 (Ck) at par 31.

[1519] *Nakin v MEC, Department of Education, Eastern Cape Province* 2008 (5) BLLR 489 (Ck) at par 31. Admittedly not all rights have a reconcilable normative basis (such as found in the relationship between ss 23 and 33 of the Constitution) to justify the application of the doctrine of normative interdependence. Some rights-relationships may call for considerations of normative pluralism (what Van der Walt 2008 (1) *CRR* 77 at 88 explains as indicative of a "conflict between two opposing normative values or ideologies").

instances.[1520] The legal justification for judicial reliance on normative interdependence of human rights is therefore rooted in the Constitution.[1521] In relying on the idea of normative hybridity,[1522] Sachs J in *Sidumo v Rustenburg Platinum Mines Ltd*[1523] identified "[t]he idea of *permeability* … as one means of giving practical legal effect to the abstract doctrine of interdependence".[1524] The hybridity of concepts or norms propagated by Sachs J is an inherent and crucial element of the permeable pragmatism

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Klare 2008 (1) *CCR* 129 at 132, in commenting on Van der Walt's argument, explains that where normative pluralism is present the judiciary will be required to consider "the tension between stability and transformation" calling into consideration the subsidiarity theory. An in-depth analysis of normative pluralism (and the subsidiarity principle as far as it relates to competing rights or legislation) falls outside the scope of this study, which (as explained in Chapter One) focuses on a specific rights-relationship where normative interdependence (and its requirement of normative unity) is argued to be present. It can however be stated in passing that in denying the normative interdependent nature of ss 23 and 33 of the Constitution (as Chapters Five and Six clearly reflects) by means of arguments based on conceptual formalism, the judiciary may be creating false impressions of normative pluralism and attract unnecessary stability/transformation tension questions. The normative relationship between ss 23 and 33 as described within this study does not require a "patchwork compromise". See Van der Walt 2008 (1) *CRR* 77 at 87.

[1520] See *Nakin v MEC, Department of Education, Eastern Cape Province* 2008 (5) BLLR 489 (Ck) at par 31.

[1521] In *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 148, Sachs J stated: "Acceptance of hybridity is based on the fact that protected rights in a constitutional democracy overlap, intersect and mutually reinforce each other. Though, in particular factual situations, the *interest secured by the rights might collide*, there can be no intrinsic or categorical incompatibility between the rights themselves. Courts should not feel obliged to obliterate one right through establishing the categorical or classificatory pre-eminence of another. On the contrary, the task of the courts is to seek wherever possible to balance and reconcile the constitutional interests involved. In this endeavour, the courts will be strongly guided by the constitutional values at stake." Emphasis added.

[1522] See *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 142.

[1523] 2007 (12) BLLR 1097 (CC).

[1524] Permeability is defined by Scott 1989 (27) *Osgoode Hall LJ* 769 at 771 as "the openness of a treaty [or legislation] dealing with one category of human rights to having its norms used as vehicles for the direct or indirect protection of norms of another treaty [or legislation] dealing with a different category of human rights". The idea of interdependence and permeability (as understood by Scott, as well as Sachs J in his *Sidumo*-judgment) has also been referred to as "connexity" and linked to the idea of social justice. See Hudson *Towards a Just Society: Law, Labour and Legal Aid* 107 – 117.

of the doctrine of interdependence.[1525] The emphasis placed on the theoretical doctrine of interdependence and its operational alter ego of permeability is not a new idea for the Constitutional Court, but has now presented itself with the potential to pierce the formalistic veil separating the true relationship between labour and administrative law.

Interdependence (and permeability) was first acknowledged by the Constitutional Court in *NCGLE v Minister of Justice*,[1526] where Ackermann J emphasised the inappropriateness of the separation of and pecking order approach to rights based on the outdated assumption that "rights have to be compartmentalised and then ranked in descending value".[1527] This interdependent perspective is supported by the reality that multiple violations of the rights of a specific person, group or society as a whole can take place simultaneously:[1528]

> Human rights are better approached and defended in integrated rather than a disparate fashion. The rights must fit the people, not the people the rights. This requires looking at rights and their violations from a person-centred rather than a formula-based position, and analysing them contextually rather than abstractly.[1529]

As a result, Ackerman J approved a contextual approach to the interdependent application of rights. The judge recognised that "[o]ne consequence of an approach based on context and impact would be the acknowledgment that"[1530] the grounds and

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[1525] Scott 1989 (27) *Osgoode Hall LJ* 769 at 771 explains that hybrid norms are "[n]orms that overlap, either implicitly as a product of the interpretative process or explicitly on the face of the textual provisions, [and] are particularly relevant".

[1526] 1998 (12) BCLR 1517 (CC).

[1527] *NCGLE v Minister of Justice* 1998 (12) BCLR 1517 (CC) at par 112. The case specifically called for the consideration of the interdependence of the rights of equality and dignity, as the arguments before the court concerned the constitutionality of anti-sodomy laws. Although the context and rights under consideration do not directly relate to ss 23 and 33, the general legal reasoning impacts on every case concerning fundamental rights.

[1528] See *NCGLE v Minister of Justice* 1998 (12) BCLR 1517 (CC) at par 112.

[1529] *NCGLE v Minister of Justice* 1998 (12) BCLR 1517 (CC) at par 112.

[1530] *NCGLE v Minister of Justice* 1998 (12) BCLR 1517 (CC) at par 113.

values underlying rights can intersect,[1531] so that those rights call for evaluation in a unified fashion and "not separately and abstractly".[1532]

Following this initial endorsement of the doctrine of interdependence, the effective promotion and protection of socio-economic rights have since called on the Constitutional Court to acknowledge the interdependence of human rights in *Government of the Republic of South Africa v Grootboom*[1533] and *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development*.[1534] As socio-economic and labour rights traditionally share the status of second generation rights, the Constitutional Court's acceptance of the interdependence of fundamental rights in the socio-economic context is informative and holds specific significance for the development of labour law. The Labour Court has specifically identified labour law as an area of the law that gives expression to socio-economic rights:

> Labour and employment law under the *Constitution compels a mind shift* from a linear common law approach *to a polycentric socio-economic approach. After all, labour rights fall under the broad family of socio-economic rights.* Not to treat them as such would defeat the aims of the Constitution.[1535]

[1531] In *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) BCLR 1 (CC) at par 49, Ackerman J also made the argument that individual constitutional values are interdependent in giving substance to each other in the same manner in which values inform rights as the basis of the interdependence of human rights: "Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction … Although freedom is indispensable for the protection of dignity, it has an intrinsic constitutional value of its own. It is likewise the foundation of many of the other rights that are specifically entrenched. Viewed from this perspective, the starting point must be that an individual's right to freedom must be defined as widely as possible, consonant with a similar breadth of freedom for others."

[1532] *NCGLE v Minister of Justice* 1998 (12) BCLR 1517 (CC) at par 113.

[1533] 2000 (11) BCLR 1169 (CC).

[1534] 2004 (6) BCLR 569 (CC).

[1535] *Jonker v Okhahlamba Municipality* 2005 (6) BLLR 564 (LC) at par 27. Emphasis added. The Constitutional Court on numerous occasions emphasised the importance of the concept of reasonableness in determining whether socio-economic rights have been infringed. See Steinberg 2006 (123) *SALJ* 264 at 276. It is only logical that the labour rights (as a variation of socio-economic rights) should embrace a similar reasonableness perspective in the evaluation of fair labour practices.

Administrative law does not stand unaffected by the development of the doctrine of interdependence as it relates to socio-economic rights. In fact, it is in the socio-economic contexts where it is most evident that administrative law's general principles are remarkably invasive and "permeate virtually every facet of the legal system".[1536] The relationship between the right to just administrative action and socio-economic rights illustrates that, depending on the context of the case, rights in the Bill of Rights are mutually supportive, as "different rights will often operate in support of each other, since the realisation of one right may be dependent on the realisation of another".[1537]

Constitutional jurisprudence to date shows that one right can potentially have a variety of dimensions that renders its application in different circumstances (usually calling for the presence of another right) a practical reality and not merely theoretical.[1538] The Constitutional Court has declared "[a]ll rights in our Bill of Rights [to be] ... inter-related and mutually supporting".[1539]

Sachs J, as the champion of the doctrine of interdependence, in *Minister of Health v New Clicks SA (Pty)*[1540] explained that fluid hybridity of norms and rights call for a hybrid regulatory system finding application in a range of contextual possibilities. Accordingly, the application of normatively informed rights calls for a "difference of emphasis rather than of kind".[1541] The point of intersection between the rights to fair

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[1536] Baxter *Administrative Law* 2, quoted in Devenish, Govender and Hulme *Administrative Law and Justice* 8.

[1537] De Vos 2001 (17) *SAJHR* 258 at 264. See also the Constitutional Court's support for this perspective in *Bernstein v Bester NO* 1996 (4) BCLR 449 (CC) at par 67, *Mistry v Interim National Medical and Dental Council of SA* 1998 (4) SA 1127 (CC) at par 16 and *NCGLE v Minister of Justice* 1998 (12) BCLR 1517 (CC) at paras 31 and 114.

[1538] See *Government of the RSA v Grootboom* 2000 (11) BCLR 1169 (CC) at par 83 per Yacoob J.

[1539] *Government of the RSA v Grootboom* 2000 (11) BCLR 1169 (CC) at par 23. Mokgoro J in *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) BCLR 569 (CC) at par 41 elaborated on the growing constitutional doctrine of interdependence in stating that rights "reinforce one another at the point of intersection".

[1540] 2006 (1) BCLR 1 (CC).

[1541] *Minister of Health v New Clicks SA (Pty)* 2006 (1) BCLR 1 (CC) at par 640.

labour practices and just administrative action on the spectrum informs the public employment contextual content of the applicable hybrid regulatory system.[1542]

Past constitutional cases (although not dealing specifically with the relationship between administrative and labour rights in a public employment context) "emphasised the intersection and inter-relatedness of different protected rights in particular manners, and highlighted the influence of overlapping values"[1543] at appropriate points of intersection.[1544] As a result, Sachs J proclaimed that, "far from promoting eclecticism, acknowledgment where appropriate of hybridity encourages paying appropriate attention in a focused way to the context, the interests and values involved".[1545] For that

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[1542] A comparison can be drawn between this point of intersection approach and the sliding scale approach to the determination of the degree of a reasonableness evaluation (as either rationality or proportionality) as developed in administrative law. See Chapters Three and Five.

[1543] *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 152. For similar reasoning in a public employment context with specific reference to ss 23 and 33 of the Constitution, see *Nakin v MEC, Department of Education, Eastern Cape Province* 2008 (5) BLLR 489 (Ck) at par 35 per Froneman J.

[1544] See *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 153. The Constitutional Court's jurisprudence reveals a related rights (or neighbouring rights) interdependence perspective, in perceiving rights as mutually reinforcing and dependent but still distinct. Rights are regarded as equally important, therefore complimentary yet separate. As such, indirect permeability is preferred by the court, as "distinct from organic permeability because it involves the question whether a right ... applies to a right ... not whether this latter right is part of the former". See Scott 1989 (27) *Osgoode Hall LJ* 769 at 783. In contrast, when considering the interdependence of values and rights, the Constitutional Court tends to lean more to the idea of organic interdependence and therefore direct permeability. As such, constitutional values are regarded as the core of the rights and thereby informing the rights. For an example of the latter see *Dawood v Minister of Home Affairs* 2000 (8) BCLR 837 (CC) and *Prinsloo v Van der Linde* 1997 (6) BCLR 759 (CC).

[1545] *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 156. In support of the separatist approach to the different rights enshrined in the Bill of Rights, academics grasp to decisions such as *Dawood v Minister of Home Affairs* 2000 (8) BCLR 837 (CC) for Constitutional Court logic apparently in support thereof. It is true that the Constitutional Court in the context of the facts and rights applicable in casu found that the overlap of rights called for the determination of the "more specific right" in determination of the "primary constitutional breach". In casu, the court was called upon to consider the right to dignity (which is also recognised as a constitutional value and inclined to direct permeability) and reasoned as follows: "Section 10 … makes it plain that dignity is not only a *value* fundamental to our Constitution, it is a justifiable and enforceable right that must be respected and protected. In many cases

reason formalism is countered by the application of the doctrine of interdependence as "more weight is given to context, interests and values [and therefore constitutional justice], and less to categorical reasoning".[1546]

An interdependent approach is not unknown to labour law. Labour law specifically relies on the variable principle of fairness as a dual-purpose norm, substantive and procedural, in giving effect to its constitutional character.[1547] To this end, the LRA includes the principles of natural justice as developed in administrative law as a dimension of procedural fairness.[1548]

The idea of the interdependence is also not unfamiliar in administrative law. Sossin explains that interdependence is an undeniable factor within the context of contemporary administrative law:

> Administrative relationships, and administrative law, ought to be organized around the ideal of interdependency. A fair, impartial and reasonable decision cannot be divorced from the needs, expectations and rights of

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however, *where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right* ..." Emphasis added. This argument of the Constitutional Court should be read within its proper context and permeability-perspective as explained. The Constitution specifically enshrines the values of human dignity, equality and freedom. Although constitutional values have been rendered enforceable as rights in the Bill of Rights, it is logical that in certain circumstances where appropriate they may be better promoted and protected by rights that are more specific in an organic interdependent manner. However, the rights to fair labour practices and just administrative action are already such specific rights that grant expression to the fundamental values of the Constitution, and must be viewed from a related rights interdependence perspective. Consequently, the reasoning in *Dawood v Minister of Home Affairs* 2000 (8) BCLR 837 (CC) cannot merely be transferred onto the constitutional relationship between labour and administrative law. Argyriades 2003 (69) *Int Rev Admin Sc* 521 at 524 explains: "[C]onvergence in some areas may be paralleled with differences in others. These need to be acknowledged and understood, refined and redefined over time and in several contexts".

[1546] *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 156.

[1547] See *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 42.

[1548] The Constitutional Court admitted as much in *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 42, where Skweyiya J stated that while "the procedural fairness requirements will satisfy the *audi alteram partem* principle and the rule against bias ... an employee is [also] protected from arbitrary and irrational decisions, through substantive fairness requirements and a right not to be subjected to unfair labour practices".

> affected parties. An intimate approach to administrative law is intended to shift our focus from the form to the substance of … rights [at issue] …[1549]

The implicit recognition of interdependence in both labour and administrative law allows for a purposive approach to the disclosure and consideration of social, economic, moral and political factors within the scope of public employment. Such an approach would result in the mutual interests of both parties being effectively regulated through maximum constitutional protection. Effective regulation allows for labour equity *and* administrative integrity to be recognised and promoted as constitutional aspirations.

The advantage of the constitutionally enforced interrelationship and interdependence between administrative and labour law is found in the fact that "[r]eliance on the administrative justice provisions focus on ensuring that public power is exercised lawfully, reasonably and procedurally fairly, and other specific rights [such as fair labour practices] will be used to test the moral content of the law".[1550] Consequently, 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".[1551] In *Nakin v MEC, Department of Education Cape Province*,[1552] Froneman J best described the impact of this realisation on public employment:

> The nature of the legal employment relationship between the applicant, a public employee, and the department, and organ of state, is a complex one that is not ... capable of exclusionary compartmentalisation ... The common law contract of public employment is 'framed' by administrative law principles and should include, as a constitutionally mandated implied legal 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

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[1549] Sossin 2002 (27) *Queen's LJ* 809 at 854.

[1550] Govender in Corder and Van der Vijver *Realising Administrative Justice* 50. See also *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) at par 19. South Africa's legal history, in a labour and administrative law context is evident of the law's need for moral content. For that reason, "[o]bligations divorced from corresponding rights become intolerable". See Chaskalson 1989 (5) *SAJHR* 293 at 298.

[1551] *Nakin v MEC, Department of Education Cape Province* 2008 (5) BLLR 489 (Ck) at par 37.

[1552] 2008 (5) BLLR 489 (Ck).

> 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*.[1553]

When the underlying values and norms are given proper consideration, it becomes apparent that the Constitution calls for a holistic interpretation.[1554] The normative value system of the Constitution itself creates and allows for overlap of fundamental provisions, which in turn allows for a normative overlap of two branches of law. In *POPCRU v Minister of Minister of Correctional Services*,[1555] Plasket J consequently declared that such an "overlap of two or more branches of law is not unusual in our legal system."[1556] Consequently, clear separation between labour and administrative law is as much a contemporary legal myth as the divide between private and public law.[1557]

Value-based constitutional interdependence is further identifiable within the job or sector-specific context of public employment. In *Johannesburg Municipal Pension Fund*

[1553] *Nakin v MEC, Department of Education Cape Province* 2008 (5) BLLR 489 (Ck) at par 50. Emphasis added.

[1554] This is evident from the Constitutional Court's reasoning in *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 149: "The values of the Constitution are strong, explicit and clearly intended to be considered part of the very texture of the constitutional project [as is evident from a reading of ss 1, 36(1) and 39(1)(a)]. They are implicit in the very structure and design of the new democratic era. The letter and the spirit of the Constitution cannot be separated, just as the values are not free-floating ... so is the text not self-supporting, awaiting occasional evocative enhancement. The role of constitutional values is certainly not simply to provide a patina of virtue to, otherwise bald, neutral and discrete legal positions. Text and values work together in integral fashion to provide the protections promised by the Constitution. And by their nature, values resist compartmentalisation [and therefore formalism]." If the values that inform rights in an organic interdependent manner resist compartmentalisation, the character of the rights so informed cannot promote compartmentalisation.

[1555] 2006 (4) BLLR 385 (E).

[1556] *POPCRU v Minister of Correctional Services* 2006 (4) BLLR 385 (E) at par 61.

[1557] In *POPCRU v Minister of Correctional Services* 2006 (4) BLLR 385 (E) at par 61 fn 66, Plasket J further declared: "We no longer believe the myth that administrative law and contract cannot mix."

v City of Johannesburg,[1558] Malan J explained that "[s]ection 195 [of the Constitution] expresses the *broad values and principles* upon which public administration is founded".[1559] One of these broad values (as stipulated in s 195(1)(i)) is that public employment practices must be based on fairness.[1560]

In *Chirwa v Transnet Ltd*,[1561] Ngcobo J noted that the provisions found in s 195 echo the s 23 right to fair labour practices and s 33 right to just administrative action.[1562] Supplementary to s 195 and interrelated to ss 23 and 33, is "section 197(2) [which] provides that the terms and conditions of employment in the public service must be regulated by national legislation".[1563] Ngcobo J elaborated on this comment:

> *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*.[1564]

This statement of Ngcobo J is proof of the fact that associated rights and, by implication, associated legislation can be read in a complementary fashion that supports

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[1558] 2005 (6) SA 273 (W).

[1559] *Johannesburg Municipal Pension Fund v City of Johannesburg* 2005 (6) SA 273 (W) at par 17. See also *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services* 2006 (10) BLLR 960 (LC) at paras 48 and 51. In *Transnet Ltd v Chirwa* 2007 (1) BLLR 10 (SCA) at par 16, Mthiyane JA stated that "[s]ection 195 does not create rights, but sets out the basic values and principles that govern public administration". Even though the Supreme Court of Appeal has stated that no right to relief can be founded on s 195 values, those values can inform rights such as s 23 and 33 because the Constitution is characterised as a normative value-based system.

[1560] On appeal to the Constitutional Court, Ngcobo J in *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 146 noted that "[s]ection 195 which sets out the basic values and principles governing public administration, includes as part of those values and principles, 'empowering and personnel management practices based on ... fairness. These provisions contemplate fair employment practices ... [Consequently] dismissals in the public service must comply with the values set out in section 195(1)". See Chapter Four, part 3 2 2.

[1561] 2008 (2) BLLR 97 (CC).

[1562] See *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 146.

[1563] *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 146.

[1564] *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 147. Emphasis added.

the spirit and purport of the Constitution in the promotion and protection of s 23 through the LRA. In commenting on the relationship between the LRA (giving effect to s 23) and the Public Service Act (giving effect to s 197),[1565] Ngcobo J elucidated that, "[f]or its part, the Public Service Act which governs among other things, the 'terms and conditions of employment', expressly provides that the power to discharge an officer or employee 'shall be exercised with due observance of the applicable provisions of the Labour Relations Act 1995'".[1566] This is proof of hybridity in the legislature's attempt to give effect to the provisions of the Constitution, as s 197 is undeniably linked to the public administration, which in turn attracts the principles of administrative law.

Supplementary to the principles and values in ss 195 and 197, is the fact that the exercise of public power, even in employment relationships, has to be exercised in an accountable, responsive and transparent manner.[1567] These values carry great historical and constitutional meaning.[1568] Even though it is arguable that consideration of those values "may give rise to and account for difference in the content given to fair labour practices in public employment relationships, compared to those for private employment relationships"[1569] it does not take anything away from labour law's context-

[1565] Section 197 of the Constitution reads as follows:

"(1) Within public administration there is a public service for the Republic, which must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day.

(2) The terms and conditions of employment in the public service must be regulated by national legislation. Employees are entitled to a fair pension as regulated by national legislation.

(3) No employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause.

(4) Provincial governments are responsible for the recruitment, appointment, promotion, transfer and dismissal of members of the public service in their administrations within a framework of uniform norms and standards applying to the public service."

[1566] *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 147.

[1567] See *MEC, Department of Roads and Transport, Eastern Cape v Giyose* 2008 (5) BLLR 472 (E) at par 22 per Froneman J.

[1568] See *MEC, Department of Roads and Transport, Eastern Cape v Giyose* 2008 (5) BLLR 472 (E) at par 33.

[1569] *MEC, Department of Roads and Transport, Eastern Cape v Giyose* 2008 (5) BLLR 472 (E) at par 22 per Froneman J.

specific approach.[1570] Contextually informed considerations of additional values can only enrich the development of labour law.

The fact that labour law can embrace extension through the principles developed under administrative law was emphasised by Jafta JA in *Old Mutual Life Assurance Co SA Ltd v Gumbi*.[1571] In taking stock of labour law's development, Jafta JA explained that the requirement of audi alteram partem was extended to the employment relationship in pursuit of fairness and justice in the workplace.[1572] Consequently, allowing administrative law to find application along with labour law in a public employment context does not carry with it the potential to undermine labour rights, but rather to endorse and enrich such rights.

The doctrine of interdependence is rooted in the legal reality that "the Constitution which regulates the exercise of *all power*, and entitles *all persons* not only to fair labour practices (as enacted in the LRA) but also to just administrative action (now embodied in PAJA)"[1573] is the supreme authoritative starting point of every attempt at dispute resolution. This statement emphasises that ss 23 and 33 and the legislation giving effect thereto can function interdependently if circumstances allow.

In summary, the normative basis of all rights and legislation reside in the supreme Constitution. In the case of ss 23 ad 33, the relevant norms are fairness, reasonableness and lawfulness with one shared supreme objective, namely

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[1570] In *MEC, Department of Roads and Transport, Eastern Cape v Giyose* 2008 (5) BLLR 472 (E) at par 33, Froneman J noted that "[t]he exercise of public power in individual employment relationships ... [is] not primarily concerned with democratic values of accountability, responsiveness and openness ... [as the] exercise of that public power affects individuals at the first level as employees, not as concerned citizens". As a result, the judicial "scrutiny of the exercise of this specific form of public power would, at a particular level, primarily be concentrated on employment concerns and only secondarily on democratic and public administration concerns". Administrative concerns are nevertheless present and not to be completely ignored.

[1571] 2007 (8) BLLR 699 (SCA).

[1572] See *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 (8) BLLR 699 (SCA) at par 7; *MEC, Department of Roads and Transport, Eastern Cape v Giyose* 2008 (5) BLLR 472 (E) at par 24.

[1573] *Transnet Ltd v Chirwa* 2007 (1) BLLR 10 (SCA) at par 49 per Cameron JA. Emphasis added.

constitutional justice. This perspective was emphasised by Froneman J in *MEC, Department of Roads and Transport, Eastern Cape v Giyose*:[1574]

> [T]here 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*, I would respectfully suggest, *a convergence and harmonisation 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.[1575]

2 3 Specificity

The diverse range of fundamental rights enshrined in the Bill of Rights are each individually provided for in separate provisions which allows a distinction to be drawn in the interpretation and application of the rights.[1576] This perspective allows for a distinction, but it does not prescribe distinction. Within the scope of this interpretation of the fundamental rights, there is room for the recognition of flexibility and the interdependent application of the rights. Unfortunately, this constitutionally allowed distinction has warped into a constitutional principle of specificity that regards separate provisions as a directive for interpretative distinction.[1577]

The principle of specificity regards it as a necessity to separate specialised rights when giving effect to such rights through legislation. The principle is elevated to a

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[1574] 2008 (5) BLLR 472 (E).

[1575] *MEC, Department of Roads and Transport, Eastern Cape v Giyose* 2008 (5) BLLR 472 (E) at par 17. Emphasis added.

[1576] It is arguable that such a separation and denial of flexibility and normative interdependence (where appropriately proven to be present in a rights-relationship) can give rise to considerations of normative pluralism which in turn can give rise to fears of normative anarchy and uncertainty which (according to Dewar and Amis, as referred to by Van der Walt 2008 (1) *CCR* 77 at 88) "can be avoided as long as contradictions are restricted by common purpose".

[1577] The Constitutional Court in *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) has recently applied this restrictive interpretative constitutional approach in an attempt to clarify the relationship between labour and administrative rights in the public employment context.

constitutional principle through reasoning that the Constitution inherently recognises the need for specificity when effect is given to the fundamental rights, as a modern complex society based on the rule of law requires specialisation.[1578] In *Gcaba v Minister for Safety and Security*,[1579] the Constitutional Court identified the right to fair labour practices (and the LRA) and the right to just administrative action (and PAJA) as two such rights.

This understanding of specificity embraces the development of set rules in terms of specialised legislation in giving effect to specific rights. The underlying rationale for this is that set rules allow for speedy resolution of disputes and effective protection of specific rights within a particular area of the law. Based on this perspective, Cheadle proclaims:

> 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 s 33 of the Constitution does not apply to administrative decisions concerning employment and labour relations because those relations are comprehensively dealt with under s 23.[1580]

[1578] See *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 56.

[1579] 2009 (12) BLLR 1145 (CC) at par 56.

[1580] Cheadle 2009 (30) ILJ 741. In *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 (6) SA 4 (CC) at par 93, Ngcobo J stated that "[o]ur Constitution does not sanction a state of normative anarchy". The fear of normative anarchy is associated with the idea of normative pluralism, which in turn forces the judiciary to choose one set of values over another on a case-by-case basis, thereby requiring the implementation of the principle of legal subsidiarity as far as it relates to competing rights/legislation. This reminds of the specificity reasoning of Cheadle. See Klare 2008 (1) *CCR* 129 at 132; Van der Walt 2008 (1) *CCR* 77 at 82. In the scope of this study, in the absence of competing rights and norms, the LRA and PAJA should be viewed as complementary legislation and not kept strictly separate based on specificity arguments. In line with this understanding, the idea of subsidiarity (in as far as it relates to legislation), in the words of Van der Walt 2008 (1) *CRR* 77 at 111, finds application as follows: "If more than one statute … complement each other, the subsidiarity principle should be that …

The 'constitutional' principle of specificity, as sketched by Cheadle, amounts to nothing more than mere formalistic categorisation as pre-constitutionally embraced by the judiciary. Judicial reasoning that either labour or administrative law can regulate public employment, but not both simultaneously because specificity prevents it, will result in one constitutional principle being favoured over another.[1581] Viewed against its historic landscape, both labour and administrative law pre-constitutionally struggled to shed the shackles of classification.[1582]

Specificity as an absolute barrier to interdependent interpretation and application of fundamental rights stands in conflict to the Constitutional Court's earlier jurisprudence that clearly indicates that fundamental rights must be generously interpreted.[1583]

The acknowledgment of normative interdependence allows for the realisation of the maximum protection and promotion of fundamental rights as per the context of every

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complementary legislation must be applied to optimally give effect to the Bill of Rights and to promote the spirit, purport and objects of the Bill." This perspective of subsidiarity is reconcilable with the doctrine of interdependence as outlined in Chapter One, part 5 2.

[1581] See Poole 2000 (29) *ILJ (UK)* 61 at 65; Chapter Eight.

[1582] See *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at paras 135, 142 and 151. In *SACWU v Afrox Ltd* 1999 (10) BLLR 1005 (LAC) at par 22, per Froneman DJP explained that the evolution from the old to the new legal system is informative in that it illustrates that the normative value system informs all areas of the law, especially labour law.

[1583] Cf *S v Zuma* 1995 (4) BCLR 401 (CC) at par 14; *S v Williams* 1995 (3) SA 632 (CC) at 648 – 649. See *Concorde Plastics (Pty) Ltd v NUMSA* 1998 (2) BLLR 107 (LAC) at 126. In *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 105, Navsa AJ correctly pointed out that formalism of this kind has no place in the current constitutional milieu: "[It is a] misconception that the rights ... 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* ... In the present context, these rights in part overlap and are interconnected." Emphasis added. Note that Navsa AJ made reference to rights protection in plural and not merely a singular right. One dispute and set of facts can therefore require the protection of more than one right, the protection of which an applicant is entitled too. The context of every case dictates the appropriate constitutional interdependence of the rights, and norms informing them. In a context requiring the interdependent protection of both ss 23 and 33 the scope of the rights indicate the relevant norms (fairness, reasonableness and lawfulness) as linked to the constitutionalised rule of law (and associated value of legality).

case.[1584] The formalistic idea of specificity however counters the constitutionally endorsed doctrine of normative interdependence. Specificity, so understood, limits the degree of protection in any context, as it prescribes the interpretation of those rights and the associated specialised legislation in isolation. Specificity in this sense negates the idea of maximum protection through constitutionally endorsed normatively informed interdependence of fundamental rights.

The principle of specificity may be regarded as a constitutional principle proper only if it is relied upon to identify the preferred particular system of law in which a specific right is traditionally given effect to, without interpretative consideration of other rights and legislation, and if an interdependent approach is not required in the context of the case. Maximum protection must remain the ultimate goal and an interdependent expression of the purport of the Constitution the default position.

3 CONCLUSION

The first two constitutional principles, namely flexibility and interdependence, are true constitutional principles and seek to address formalistic interpretation and application of fundamental rights. In contrast, the third principle of specificity is a relic of the past. The idea of specificity has judicially, and somewhat artificially, been granted a constitutional colour, but in reality merely adopts as its interpretative basis the formalistic reasoning the first two constitutional principles seek to address.

The conflict between flexibility and interdependence, on the one hand, and absolute specificity on the other, places strain on the development of a workable constitutional relationship between labour and administrative law.

In accepting constitutional specificity as an absolute principle, the judiciary is not interpreting fundamental rights within the scope of the Constitution, but rather interpreting the rights in isolation in the pre-constitutional understanding of the branches of law with which the specific rights can be associated. Specificity is undeniably present, as each fundamental right is included in its own section in the Bill of Rights and each

[1584] As Steinberg 2006 (123) *SALJ* 264 at 281 states, this is evident from the fact that "[a] standard of reasonableness that incorporates proportionality, fairness, equality and dignity, is likely to offer considerable protection to the interests" of the adversely affected individuals.

fundamental right has its own historic reason for its inclusion in the Bill of Rights. If that were the beginning and the end of the application and interpretation of constitutional provisions, the arguments of the Constitutional Court in *Chirwa v Transnet Ltd*[1585] (as endorsed by Cheadle)[1586] would stand free of criticism. The Constitution however demands more of the judiciary tasked with protecting and promoting the values and rights enshrined therein. The Constitution requires that each individual set of facts be evaluated within its own unique context and that the applicable rights and their protective scope be determined with due regard to that context. Specificity as endorsed by Cheadle does not allow contextualisation to dictate the applicable rights.

In South Africa, the values and principles of the Constitution are the common denominators in South Africa's transformative community. In the constitutionalised labour and administrative rights, the specific common denominator is the concept of flexible fairness as associated with the variable concept of reasonableness.[1587] The bottom line is that fairness (as a variable norm) calls for "a balanced and equitable assessment"[1588] of every case in its specific context.[1589] The specific branch of law and its associated rules should not prescribe and predetermine the protective constitutional scope of fundamental rights regardless of contextual demands.

It is true that the Bill of Rights include a variety of specific rights each with a traditional affiliation to a specific branch of law. A specific provision, such as the right to fair labour practices and its associated specialised legislation, must however be interpreted with due regard to the ultimate spirit and purport of the Constitution as a living instrument, not the other way around.[1590] A relative form of specificity can claim a constitutional right of existence if made subject to the flexibility endorsed interdependent core of the Constitution. In *Holomisa v Argus Newspapers Ltd*,[1591] Cameron J made the following

[1585] 2008 (2) BLLR 97 (CC).

[1586] Cheadle 2009 (30) *ILJ* 741.

[1587] See Chapters Three, Five and Six.

[1588] *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 271.

[1589] In a certain context, constitutional fairness may require the application of both labour law's substantive fairness and administrative law's reasonableness to reach such a result. See *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 271.

[1590] The Bill of Rights in turn must be viewed within the holistic scope of the Constitution.

[1591] 1996 (2) SA 588 (W) at 603.

constitutionally inspired comment as to the duty that rests of the judiciary to adhere and apply the Constitution:

> In a system founded only on the common law and statute, the Appellate Division's findings would be judicially definitive. But the terrain of the law in South Africa has profoundly changed. All South African courts must now, as a first duty, take into account the provisions of the Constitution, particularly its fundamental rights provisions. As observed earlier, the Constitution is designed to create a new legal order in South Africa. In fulfilling this aim, the Constitution treads a prudent path between legal revolution and legal continuity … But the requirements that the fundamental rights guarantees be given 'due regard' may entail that even the high authority of pre-constitution judicial determination be superseded. To have 'due regard' to something means to take it into proper account, to give appropriate consideration to it. The phrase 'spirit, purport and objects' is broad and encompassing. It includes the values which underlie the Constitution, the objectives the Constitution as a whole seeks to attain, and the enactment's sense, tenor and ostensible meaning ...[1592]

In theory, the constitutional principles discussed in this chapter and viewed in isolation are uncontroversial. However, and in practice, the first two principles are of greater constitutional importance due to their concern for contextual consideration. Formalistic thinking conflicts with the spirit and purport of the Constitution. The judiciary is tasked with giving expression to the Constitution and its underlying contextually variable principles. In this vein, the purpose of Chapter Eight will be to evaluate the attitude of the South African judiciary (up to and including the decision of the Constitutional Court in the *Chirwa*-judgment) to the interaction between labour and administrative law in light of the discussion in Chapters Five and Six, as well as the principles discussed in this chapter. In turn, Chapter Nine will consider judicial developments after the *Chirwa*-decision. In particular, Chapter Nine will consider the extent to which the Constitutional Court has endorsed the doctrine of interdependence that emerged from its own jurisprudence in support of the spirit and purport of the Constitution.

[1592] *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) at 603.

CHAPTER EIGHT

JUDICIAL PERSPECTIVES ON THE RELATIONSHIP BETWEEN LABOUR AND ADMINISTRATIVE LAW: 1980s UP TO *CHIRWA V TRANSNET LTD*

1 INTRODUCTION

Under the influence of the Constitution, no branch of the law (regardless of historical development)[1593] functions in an absolute autonomous manner.[1594] Both labour law and administrative law now carry the character of relative autonomy, regardless of labour law's traditional description as sui generis.[1595] Both these constitutionally influenced specialised spheres of law are susceptible to social, economic and political considerations,[1596] while retaining "a degree of autonomy in relation to those systems that it may in turn be able to influence".[1597] The relative autonomous character of labour and administrative law supports the idea of interdependence in public employment as informed by the flexible normative overlap between reasonableness and substantive fairness and a shared procedural fairness perspective.[1598] A normative overlap is

[1593] See Chapters Two and Three for a discussion on the development of labour and administrative law respectively.

[1594] See *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the RSA* 2000 (3) BCLR 118 (CC) at par 44.

[1595] See Chapters Three and Four. Cf Jabbari 1994 (2) *Oxford J Legal Stud* 189 at 195.

[1596] As Chapter Two, part 3 4 and Chapter Three, part 3 4 outlines, labour law initially progressed due to social, economic and political influences, while administrative law stagnated in formalism because of such influences. As such, both labour and administrative law are legal products of social reality. See Jabbari 1994 (2) *Oxford J Legal Stud* 189 at 197.

[1597] Jabbari 1994 (2) *Oxford J Legal Stud* 189 at 195.

[1598] The identification of a contextual setting (public employment) for the interdependent application of fundamental rights by no means implies simplicity, as every individual public employment dispute carries its own unique contextual considerations. See Chapter Four, part 3 2. See also Chapters One, part 5 2 and Seven, part 2 2 for a discussion of the doctrine of interdependence. See Chapters Five and Six for a discussion of the interdependent nature of the norms that underlie labour and administrative law.

undeniably present when fairness is evaluated in the public employment context.[1599] This overlap, as well as the realisation that public power is potentially present where the State acts as employer,[1600] has given rise to a debate about the proper legal approach to and forums in which to resolve public employment disputes.

The aim of this chapter is to test the various arguments that underlie the debate against the understanding of normative interdependence.[1601] The discussion reflects a mixed judicial perspective, as the arguments do not necessarily relate to one another, and do not all find application in every case. What all these arguments do have in common, is that the judiciary has to some degree relied on these sometimes vague and very simplistic arguments in an attempt to solve the contemporary conundrum of the labour and administrative law relationship. The two main schools of thought underlying the rights-relationship, with which the mixed arguments are associated, can be outlined as follows:

> On one view any type of employment is a relationship that should properly be governed by labour law, including the rights contained in s 23 of the Constitution, to the exclusion of administrative law, the PAJA and the rights in s 33. On another view the exercise of public powers inevitably attracts administrative law as well as labour law, so that remedies are available in both branches of law in cases of public-sector employment.[1602]

[1599] Under the Constitution, the overlap has escalated with the enactment of the LRA and PAJA, which give effect to ss 23 and 33 respectively. See Grogan 2006 22(2) *Employment LJ* (Electronic Version); Chapters Five, Six and Seven.

[1600] See Chapter Three, parts 3 1, 3 2 and 3 3; Chapter Four, parts 2 3 and 3; Chapter Nine, part 2 2.

[1601] The evaluation of the various arguments is limited by the following two considerations. Firstly, comments as to the reading of the Constitution are confined to the relationship between ss 23 and 33 of the Constitution, as the core of labour and administrative law respectively. Secondly, comments are informed by the understanding that the doctrine of normative interdependence cannot find application where conflict (and associated arguments for justifiable limitations) is present. See the understanding of the idea of interdependence as outlined in Chapter One and Seven, part 2 2.

[1602] Hoexter *Administrative Law* 194. In *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 128, Ngcobo J gave a similar summary of the current legal division.

The first school of thought (part 3) reminds of traditional formalistic separatism, now seemingly protected by the principle of specificity if left unqualified.[1603] It will be shown that formal separatism is largely based on four questionable arguments, namely that the *Zenzile*-principle is no longer good law (part 3 1); an (over)simplification of the goals of labour and administrative law (part 3 2); a specific (albeit sometimes questionable) interpretation of the relationship between the LRA and PAJA (part 3 3); and the idea of "law-ousting-law"[1604] (part 3 4). The second school of thought focuses on jurisdictional conflict (part 4). Consideration will be given to the jurisdictional argument proffered in favour of the Labour Court (part 4 1) and the argument underlying the parallel choice of cause of action and associated forums (part 4 2). What is immediately apparent is that both schools of thought (at least to some degree) rely on contextual difference for the 'proper' understanding of the rights-relationship.[1605]

An evaluation of these arguments requires, as point of departure, consideration of the traditional judicial perspective (part 2). Specific consideration will be given to the idea that administrative law pre-constitutionally only influenced the public employment context out of necessity (part 2 1). This perspective in turn requires an evaluation of the decision in *Administrator, Transvaal v Zenzile*[1606] (part 2 2).

Following the evaluation of the two schools of thought (part 3 an 4), it will be illustrated that these arguments are not the only options available to the judiciary with which to resolve the debate, as the idea of genuine interdependence has to some degree started to influence judicial reasoning. Consideration will be given to the extent to which the judiciary has acknowledged the constitutionally supported doctrine of interdependence,

[1603] See Chapter Seven, part 2 3. In an attempt to circumvent interdependence as part of the essence of constitutionalism, post-apartheid separatists hold that the Constitution itself separates labour and administrative rights in unconnected provisions. Separatists further proclaim that the jurisdictional conflict between the Labour and High Courts necessitates such an approach. See part 3 for a detailed discussion of the associated arguments.

[1604] This description is borrowed from the academic work of Stacey 2008 (125) *SALJ* 307 at 323.

[1605] See Chapter Four, part 3 1 for a discussion of the impact of contextual considerations.

[1606] 1991 (1) SA 21 (A).

in the absence of normative conflict,[1607] in their evaluation of the rights-relationship between ss 23 and 33 of the Constitution (part 6).

The ultimate aim of this chapter is to illustrate that, when properly scrutinised from a constitutional interdependent perspective, most arguments supporting the two schools of thought appear to be judicially misunderstood and misconstrued. Although the doctrine of interdependence has been identified and accepted,[1608] questions remain about the extent to which the judiciary applies the doctrine of interdependence in the contextual reality of public employment when proclaiming to give full expression to their constitutional duty to promote the fundamental rights and freedoms.

2 TRADITIONAL APPROACH

2 1 Necessity

Traditionally the focus fell on common law contract-based regulation of public employment.[1609] A paradigm shift came with the recognition of the potential of the principle of fairness in the pursuit of justice in the public workplace in *Administrator, Transvaal v Traub.*[1610] It led to the recognition that "the question whether a public official is bound to adhere to the rules of natural justice turns not on proof of the actual or

[1607] See Chapters Five and Six.

[1608] See Chapters One and Seven.

[1609] See Grogan 1991 (108) *SALJ* 599. In *Staatsdiensliga van Suid-Afrika v Minister van Waterwese* 1990 (2) SA 440 (NC) at 448, it was held that adherence to the principles of natural justice were not required in cases where a public employment contract was terminated for reason of redundancy on due notice.

[1610] 1989 (4) SA 731 (A). The senior hospital house officers and interns were refused (re)appointment by the director and denied the opportunity to state their case. Prior to the refusal, the affected individuals criticised the hospital's policy in a letter published in a medical journal. On the facts of the case, the duty to act fairly was held to dictate that an opportunity to present their case should have been granted. *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A) is generally referred to as an important administrative law case due to its expansion of the principles of natural justice and the acceptance of the doctrine of legitimate expectation. Hlophe 1990 (107) *SALJ* 198 also links the case was also linked to "the field of labour law as it established that employees with legitimate expectations must be accorded a fair hearing [as far as circumstantially possible] before being refused reappointment".

potential infringement of some legal right but on *considerations of fairness*".[1611] At the time, this form of reasoning was the only manner in which fairness could become a required element in public employment relationships in a manner similar to that recognised by private sector labour legislation.[1612] It resulted in the development of a subtle form of normative interdependence between labour and administrative law norms based on necessity.[1613] From the perspective of effectivist or foundational interdependence,[1614] administrative law fairness at the time rendered fair labour practices less illusionary in a public employment context.[1615] This influence was reflected in the reasoning of the Appellate Division in *Administrator, Transvaal v Zenzile*:[1616]

> The fact that by the law of contract an indisputable right may have accrued to an employer to dismiss his employee does not, for the purposes of

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[1611] Grogan 1991 (108) *SALJ* 599 at 601. Emphasis added. See *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A) at 840. Grogan 1992 (109) *SALJ* 186 at 192 comments that "*Traub* … invites the courts to extend procedural protection to cases, such as those involving some dismissals, where the facts 'cry out' [in the words of Corbett CJ] for a legal remedy". Judicial review was accepted out of necessity. Although Grogan 1991 (108) *SALJ* 237 states that "[i]t is trite law that the position of ... [public] employees differs from that of their common-law counterparts in that they can challenge a decision to dismiss them in terms of the ordinary principles of judicial review", this cannot justify the classification of public employment as a status distinguishable from private employment.

[1612] At the time, the State as employer and public employees were susceptible to legislative exclusion. See Van Eck and Jordaan-Parkin 2006 (27) *ILJ* 1987 at 1989; Chapter Two, part 2 3.

[1613] See Scott 1989 (27) *Osgoode Hall LJ* 769 at 780. See also Raz 1984 (93) *Mind* 194 at 198 as referred to by Scott 1989 (27) *Osgoode Hall LJ* 769 at 781 fn 32. The idea of necessity first required a link to already acknowledged norms of administrative law and then expansion into employment aspects.

[1614] Scott 1989 (27) *Osgoode Hall LJ* 769 at 780 – 781 explains that effectivist or foundational interdependence is present where "[t]o protect right x will mean directly protecting right y." Interdependence of this nature can only be practically possible if there is a "degree of explicit overlap". See Chapter One.

[1615] In the legal relationship under consideration, fairness (as linked to considerations of lawfulness and reasonableness) pre-constitutionally provided the basis for interdependent protection, and today it continues to do so in pursuit of constitutional justice.

[1616] 1991 (1) SA 21 (A). The case concerned the dismissal of hospital employees who partook in a work-stoppage. They were issued an ultimatum to return by a certain time. The employees refused and were summarily dismissed without being afforded a hearing.

administrative law, mean that the requirements of natural justice can have no application in relation to the actual exercise of such right. And when ... the exercise of the right to dismiss is disciplinary, the requirements of natural justice are clamant.[1617]

2 2 The *Zenzile*-Principle

In *Administrator, Transvaal v Zenzile*,[1618] the Appellate Division revealed a judicial awareness of the legal necessity[1619] to recognise the interrelatedness of administrative and labour law,[1620] when contextually so required. The *Zenzile*-judgment therefore had two dimensions, one pragmatic (based on necessity) and the other rooted in law. The extension of fairness as a creative solution to address the exclusion of public employees from fair labour practice regulation was only possible because of the existence and presence of a specific legal fact, namely the presence of public power in employment decisions of the State (acting as employer).

Due to the fact that the *Zenzile*-case was decided on specific employment facts (the summary termination of employment without a hearing in reaction to a work stoppage), it did not "give unambiguous guidance on the scope of public-sector employees' procedural rights"[1621] for dismissals based on other reasons[1622] and notice requirements. It did show potential for extension, due to the flexible nature of the

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[1617] *Administrator, Transvaal v Zenzile* 1991 (1) SA 21 (A) at 36 per Hoexter JA. In terms of this pre-constitutional statement, the law of contract may grant/create the rights, but does not play the primary role in the regulation of the rights. Grogan 1991 (108) *SALJ* 599 at 603 explains that "[t]he disciplinary element of an administrative action ha[d] been singled out primarily for purposes of extending the scope of the audi principle beyond the restrictions imposed by the 'prior-rights' doctrine and the equally stultifying principle that audi did not find application in a contractual context".

[1618] 1991 (1) SA 21 (A).

[1619] Necessity is a characteristic of organic or direct interdependence. See Chapter One and Chapter Seven, part 2 2.

[1620] Although the court referred to contract law, it must be kept in mind that the mere presence of a contract in an employment relationship is merely evidence of the creation of such a relationship and does not characterise it. See Chapter Two, part 3 2 where it is explained that an employment relationship carries a status different from that existing between ordinary contracting parties.

[1621] Grogan 1991 (108) *SALJ* 599 at 604.

[1622] For example, redundancy instead of discipline. This illustrates the unavoidable influence of context.

concept of fairness.[1623] The *Zenzile*-judgment ignited a judicial debate[1624] about the development and application of the principles of natural justice beyond mere summary dismissal.[1625] It called for consideration of the broader potential of the principle of fairness (and associated norms), as found in administrative law,[1626] in the context of dismissal disputes.[1627]

In *Administrator, Transvaal v Theletsane*,[1628] the Appellate Division expanded on its understanding of fairness by accepting that the scope thereof is dependent on the circumstance of every case.[1629] Didcott J, in *Sibiya v Administrator, Natal*[1630] found that it could also be reasoned, on principle or logic, that fairness requires the extension of the *Zenzile*-principle to all terminations of employment regardless of the form of notice

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[1623] See Grogan 1991 (108) *SALJ* 237 at 244; Olivier 1994 (9) *SAPL* 50 at 56.

[1624] See *Sibiya v Administrator, Natal* 1991 (12) ILJ 530 (D) at 532 per Didcott J.

[1625] See Grogan 1991 (108) *SALJ* 599 at 600.

[1626] Fairness considerations were contextualised as administrative law principles in a pre-constitutional effort to grant public employees access to civil courts for decisions akin to unfair labour practices, because the previous LRA denied public employees access to the Industrial Court and its equity jurisdiction. See Chapter Two, part 2 3.

[1627] Reasons varied from breach of contract (*Administrator, Transvaal v Zenzile* 1991 (1) SA 21 (A)), redundancy (*Staatsdiensliga van Suid-Afrika v Minister van Waterwese* 1990 (2) SA 440 (NC) to misconduct. See Grogan 1992 (109) *SALJ* 186 at 192.

[1628] 1991 (2) SA 192 (A). In this case, the respondents sought and order declaring their dismissal for their participation in a stay-away unlawful, in the absence of the opportunity to state their case in a hearing prior to their dismissal.

[1629] In *Administrator, Transvaal v Theletsane* 1991 (2) SA 192 (A) at 209, the Appellate Division stated that "[n]o specific, all-encompassing test can be laid down for determining whether a hearing is fair – everything will depend upon the circumstances of the particular case". In *Nkomo v Administrator, Natal* 1991 (12) ILJ 521 (N) at 527 (a case where it was held unfair to give written ultimatum letters to illiterate employees, without verbal explanation that their participation in an illegal strike would lead to dismissal), Page J explained that "[t]he courts have been careful not to lay down fixed parameters for the type of hearing required by the audi alteram partem rule as the question of whether a particular hearing was a fair one depends on the circumstances of each case". See also Hersch 1993 (14) *ILJ* 1131 at 1135; Olivier 1994 (9) *SAPL* 50 at 57; *SA Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A) at 13 per Milne JA.

[1630] 1991 (2) SA 591 (D). The services of employees (employed temporarily in a full-time capacity) were terminated on one month's notice, without the opportunity to make representations prior to the decision.

or reason.[1631] It was held that an approach to the contrary would disregard the requirement of lawfulness where the State exercises its right to dismiss, which depends "on the way in which it was exercised, [and] on the procedure that was then followed".[1632]

The *Zenzile*-approach by no means ignored the reality that at the time the judiciary relied on administrative law principles to regulate employment relationships in the public sector.[1633] Didcott J in *Sibiya v Administrator, Natal*[1634] admitted this, by declaring that a contemplated invasion of the right of public servants was "sufficient *in the field of employment* to bring the rule [of procedural fairness] into operation".[1635] On appeal, the court clearly identified the justification for reliance on administrative law principles in the sphere of public employment to be, "[a]s in the *Zenzile* case ... [the fact that] the employer was a public authority whose decision to dismiss *involved the exercise of a*

[1631] See *Sibiya v Administrator, Natal* 1991 (2) SA 591 (D) at 593. See also Grogan 1991 (108) *SALJ* 599 at 600 for a summary of Didcott J's *Sibiya*-reasoning.

[1632] *Sibiya v Administrator, Natal* 1991 (2) SA 591 (D) at 593.

[1633] See Van Eck and Jordaan-Parkin 2006 (27) *ILJ* 1987 at 1989; *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A); *Administrator, Transvaal v Zenzile* 1991 (1) SA 21 (A); *Administrator, Natal v Sibiya* 1992 (4) SA 532 (A). Although within the public sector context the audi principles were nevertheless found to protect the idea of fairness in an employment relationship, the Appellate Division did not identify it as an administrative law relationship for purposes of the application of the principle. It was merely argued that the employer in the employment relationship was a public authority, which attracted the principles of natural justice to employment decisions in that context. Van Eck and Jordaan-Parkin 2006 (27) *ILJ* 1987 at 1989 explain that the historic context of these cases necessitated administrative law reasoning within the context of the public *employment* relationship. It was therefore the context, not the nature of the relationship, which influenced the court's reasoning. See Chapter Four, parts 3 1 and 3 2.

[1634] 1991 (2) SA 591 (D). The services of employees (employed temporarily in a full-time capacity) were terminated on one month's notice. The employees were not granted the opportunity to make representations at a hearing prior to the decision to dismiss them being taken.

[1635] *Sibiya v Administrator, Natal* 1991 (2) SA 591 (D) at 593. Emphasis added. The reasoning of Grogan 1991 (108) *SALJ* 599 at 606 is questionable, as he argues that the judgment placed public employment relationships "squarely where it belongs – in the domain of administrative law". It is submitted, that Didcott J merely reasoned that administrative law principles logically found application *within* "the field of employment" due to the normative interdependence present (at that stage not yet expressly acknowledged), as it was appropriate in the context of such cases.

public power".[1636] Through this statement, the court revealed the crux of the general *Zenzile*-principle: It is not the fact that one is dealing with a public employee that attracts the underlying ideals of the rule of law (and administrative law), but that a public employer exercises public power while being party to the employment relationship.

Although the pragmatic considerations underlying the extension of fairness may no longer exist (as public employees are now included in legislation dealing with fair labour practice), the legal fact (and the associated *Zenzile*-principle) remains intact when viewed against the background of our Constitution.

3 FORMALISTIC SEPARATISM

Those jurists wishing to maintain a separation between labour and administrative law and the associated rights generally rely on four arguments: the inapplicability of the *Zenzile* line of cases, the goal of labour law (as expressed in the LRA), the interpretation of statutes and the idea that the applicability of labour law cancels out the applicability of administrative law. Although these arguments are not necessarily related or collectively relied upon in practice, the rationale behind each remains the same, namely separatism. It is therefore necessary to evaluate the strength of each argument.

3 1 The Apparently Unnecessary *Zenzile* Line of Decisions

Zenzile-type cases are widely relied upon as justification for the presence of administrative law within the regulatory framework of public employment disputes,[1637]

[1636] *Administrator, Natal v Sibiya* 1992 (4) SA 532 (A) at 539. Emphasis added.

[1637] Preceding the *Zenzile*-judgment was the case of *Administrator, Orange Free State v Mokopanele* 1990 (3) SA 780 (A), in which the Appellate Division was granted the opportunity (in the context of strike dismissals) to decide on the legal status of public employees. Grogan 1991 (12) *ILJ* 1 labels it "a test case of considerable importance". The respondent employees (contractually employed as cleaners) refused to work until hospital authorities recognised their trade union. They were presented with dismissal ultimatums. The respondents returned to work, but were nonetheless dismissed for their participation in the strike. Following the reasoning of the judgment in *Mokoena v Administrator of Transvaal* 1988 (4) SA 912 (W), the court a quo set aside the dismissals as wrongful and unlawful. See Grogan 1991 (12) *ILJ* 1 at 2 – 3. In *Administrator, Orange Free State v Mokopanele* 1990 (3) SA 780 (A) at 783, the court (taking into consideration the court a quo judgment of Van Coller J in *Mokopanele v Administrateur, Oranje Vrystaat* 1988 (9) ILJ 779 (O)) in determining the scope of the application of the principles of natural

as it reveals a pre-constitutional call for the avoidance of formalistic categorisation.[1638] It is therefore logical that those supporting a separation between labour and administrative law will proclaim that administrative law considerations have no place in the regulation of public employment, as "any type of employment is a relationship that should properly be governed by labour law".[1639] This perspective flows from the judicial tendency to regard administrative law "as removed from those legal relations that govern private and commercial affairs, such as marriage, property, contract and companies".[1640] Corder points out that this is a mistaken judicial attitude "to which only the wilfully blind continue to adhere",[1641] as the public/private divide or statutory/contract distinction in employment relationships and disputes "rests on historical accident rather than any point in principle".[1642] It is illogical to classify employment relationships and disputes as only having a private law character due to the presence of contractual considerations. Those that seek to exclude administrative law principles from public employment rely on the absence of public power, an approach premised on continued adherence to the orthodox public/private divide in the determination or categorisation of employment relationships and disputes.[1643] Two such examples can be found in *PSA*

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justice reflected upon the fact that the dismissals were given by a statutorily authorised body. The following considerations were highlighted: (1) This was not a *pure* case of a master and servant relationship since the action taken against the applicants was based solely on statutory powers. (2) The discharge of any worker necessarily affected his or her rights and the applicants were therefore entitled to be heard before being summarily discharged. (3) Even leaving aside the applicants' pension rights, non-observance of the rules of natural justice can render a discharge unlawful. The failure of the administration to grant the applicants and opportunity to be heard rendered the dismissals invalid.

[1638] This is clear from the court's refusal to regard public employment as classified as and regulated by 'purely' one area of law, be it contract, labour or administrative law. According to Baxter 1979 (96) *SALJ* 607 at 610 and 627, the judiciary already pre-*Zenzile* started moving away from a traditional approach of forced classification towards a flexible and functional approach of contextual conceptualism.

[1639] Hoexter *Administrative Law* 194. See for example *Theron v Ring van Wellington van die NG Sendingkerk van Suid-Afrika* 1976 (2) SA 1 (A) and *Turner v Jocky Club of South Africa* 1974 (3) SA 633 (A) for examples of the impact of the principle of natural justice on the private employment sector.

[1640] Corder 1989 (5) *SAJHR* 1.

[1641] Corder 1989 (5) *SAJHR* 1.

[1642] Fredman and Morris *State as Employer* 268.

[1643] Within the scope of this study, the public/private divide argument must not be read as an attack on the fact that the definition of administrative action is primarily based on the identification of *public* power,

obo Haschke v MEC for Agriculture[1644] and *SAPU v National Commission of the South African Police Service*,[1645] in which the Labour Court reverted to the public/private divide and associated compartmentalisation that the *Zenzile*- and *Sibiya*-judgments attempted to avoid.

In *PSA obo Haschke v MEC for Agriculture*,[1646] Pillay J held that administrative and labour law are mutually exclusive as public law considerations (as associated with public power) are irreconcilable with labour law.[1647] In *SAPU v National Commission of the South African Police Service*,[1648] Murphy AJ found inspiration in this divisional approach.[1649]

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as required by PAJA and endorsed by the Constitutional Court. What is regarded as questionable, and even outdated, is the argument that the character of an employment relationship must be categorised as private and not public on the understanding that the contract law basis renders it purely private giving rise to the assumption that public power (and therefore administrative action) is absent, rendering (public) administrative law considerations irrelevant.

[1644] 2004 (8) BLLR 822 (LC).

[1645] 2006 (1) BLLR 42 (LC).

[1646] 2004 (8) BLLR 822 (LC). The union contended (on behalf of the applicant) that the respondent's refusal to promote the applicant amounted to *both* an *unfair* labour practice and an *unfair* administrative action. Counsel for the applicant initially alleged that the respondent failed to adhere to the provisions of PAJA in the process of affirmative action appointments. This argument was later withdrawn. In the interest of justice, Pillay J proceeded to comment on the relationship between labour and administrative law and the applicability of PAJA to labour disputes.

[1647] In *PSA obo Haschke v MEC for Agriculture* 2004 (8) BLLR 822 (LC) at par 11, Pillay J reasoned: "Labour law is not administrative law. They may share many common characteristics. However, administrative law falls exclusively in the category of public law, whereas labour law has elements of administrative law, procedural law and commercial law."

[1648] 2006 (1) BLLR 42 (LC). The applicant saw the change in the shift system of the SA Police as a unilateral change to the terms and conditions of employment. The bargaining council took the matter under review. The applicant urgently approached the court for a restraining order pending the review, based on the argument that the respondent had breached the bargaining council constitution, a court order, a collective agreement and the rights of the police member's right to just administrative action. This case is an example of the school of thought supporting reliance on labour law and s 23 of the Constitution to the exclusion of administrative law and s 33 of the Constitution.

[1649] See Stacey 2008 (125) *SALJ* 307 at 321.

Prior to the *SAPU*-judgment, "a long line of decisions had held that employment-related decisions taken by public sector employers in the exercise of statutory powers involved the exercise of public power".[1650] In the *SAPU*-case, Murphy AJ found the Commissioner's power to determine the working hours to be sourced in statute,[1651] but declared himself in agreement with the Constitutional Court that "the source of the power, while relevant, is not necessarily decisive".[1652] Murphy AJ emphasised the consideration of the nature of the power[1653] and found "nothing inherently public about setting the working hours of police officers".[1654] Although it was correctly stated that courts have to consider the nature of the power exercised, Murphy AJ somewhat restrictively based his enquiry on the public/private divide approach that predates the

[1650] In acknowledging this in *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services* 2006 (10) BLLR 960 (LC) at paras 62, 63 and 69, Freund J (in approving the general *Zenzile*-principle) reasoned that the legislature in enacting PAJA must have been aware of the "line of decisions in which employment-related decisions taken by public sector employers in the exercise of statutory powers had been held to involve the exercise of public powers". Freund J held that "[t]here is nothing in the definition of 'administrative action' which suggests an intention to alter the principle established by these decisions". As the LRA does not directly deal with employment decisions taken in the public interest (as authorised in the Public Service Act 103(P) of 1994) Freund J could not accept "that the extension of the [LRA] … to the public sector demonstrates an intention by the lawgiver to remove rights that public sector employees already had within the realms of administrative law ... [as] section 157(2) of the LRA ... demonstrates an assumption that the State in its capacity as an employer may execute 'administrative acts' or conduct which may violate fundamental constitutional rights".

[1651] Section 24(1) of the South African Police Services Act 68 of 1995.

[1652] *SAPU v National Commissioner of South Africa* 2006 (1) BLLR 42 (LC) at par 51. In doing so, Murphy AJ considered *Logbro Properties CC v Bedderson NO* [2003] 1 All SA 4242 (SCA), a case in which the Supreme Court of Appeal was confronted with the argument that tender conditions gave rise to contractual rights and fell outside the sphere of administrative law. The Supreme Court of Appeal rejected this argument and held that it is, depending on the facts of the case, possible for a contractually endorsed decision or action to amount to an administrative action. See *SAPU v National Commission of the South African Police Service* 2006 (1) BLLR 42 (LC) at paras 51 – 52; Hoexter *Administrative Law* 176 and 195.

[1653] Cf *President of the RSA v SARFU* 2000 (1) SA 1 (CC) in which a similar consideration was emphasised.

[1654] *SAPU v National Commissioner of South Africa Police Service* 2006 (1) BLLR 42 (LC) at par 51. Murphy AJ reasoned that the "nature of the power exercised and the function performed in the setting or agreeing of shift times does not relate to the government's conduct in its relationship with its citizenry to which it is accountable in accordance with the precepts of representative democracy and governance".

constitutional call for a single legal system.[1655] Labour law, as aligned with the Constitution, cannot function properly on traditional contractual (private) law considerations alone.[1656] The *SAPU*-perspective that public employment decisions no longer involve the exercise of public power, disregards the jurisprudence developed by the Industrial Court. The Industrial Court, the initial overseer of the concept of fairness, moved away from conventional lawfulness consideration associated with contract law, and allowed for the development of labour law "beyond the contractual paradigm in order to explain the new relationship between employer and worker".[1657] While Murphy AJ confined contractual considerations to the private sphere without full consideration of

[1655] See *SAPU v National Commissioner of South Africa Police Service* 2006 (1) BLLR 42 (LC) at paras 51 – 53. Ngcukaitobi and Brickhill 2007 (28) *ILJ* 769 at 770 explain that the "orthodox position at common law was that the mere existence of a contract was sufficient to render the relationship a private law one which excludes the principles of natural justice". In *SAPU v National Commissioner of South Africa Police Service* 2006 (1) BLLR 42 (LC) at paras 54 – 55, Murphy AJ admitted that his reasoning in favour of a purely private law perspective based on the fact that the "Constitution draws an explicit distinction between labour and administrative practices as two distinct species of jurisdictional acts ... forms of regulation, review and enforcement" may be perceived as "strained or artificial". While recognising the unification and transformative objective of the Constitution to create one legal system, subject only to it as the supreme source. Murphy AJ unfortunately reverted to traditional categorisation even though he submitted that such reasoning may be described as formalistic by some.

[1656] In *Van Neel v Jungle Oats Company* (Unreported) Case Nr NHK 11/2/170, (quoted in Marais *Onbillike Arbeidspraktyke* 12 fn 55), it was emphasised that, "[i]n order to accommodate the multitude of doubtful situations inherent in labour relations ... certain equitable latitude outside the strict scope of law of contract must ... be tolerated and permitted in order that principles might evolve 'wat self gestalte in die arbeidsreg kan aanneem'".

[1657] Du Toit 2008 (125) *SALJ* 95 at 99 explains: "In *Steel, Engineering & Allied Workers Union of SA v Trident Steel (Pty) Ltd* Landman AM first distinguished between 'the narrow contractual relationship between the respondent and its employees [and] the wider employment relationship which existed between them'. Following several contrary decisions by the Industrial Court, the Appellate Division [in *National Automobile & Allied Workers Union v Borg-Warner SA (Pty) Ltd*] eventually upheld the notion of an 'employment relationship' capable of existing outside the bounds of contract, governed by equity and terminating only 'when both parties agree, or when equity permits'." Strydom (LLD UNISA 1997) 9 explains that with such reasoning the Industrial Court recognised the new essence of labour law, namely that "the contract of employment cannot be separated from the economic and social realities within which it comes into being". Properly perceived, public employment stretches beyond the realm of contract law.

the character of this 'new relationship',[1658] Plasket J in *POPCRU v Minister of Correctional Service*[1659] attempted to bring some constitutional logic to the debate. The judgment turned on the consideration of the obscure concept of public power.[1660] In

[1658] In *SAPU v National Commission of the South African Police Service* 2006 (1) BLLR 42 (LC) at par 52, Murphy AJ reasoned that employment contracts are contextually distinguishable from tender contracts. Tendering was held to have a public nature and serving a public interest in contrast to employment relationships with its immediate objective and impact on the parties to the relationship internally.

[1659] 2006 (4) BLLR 385 (E). This case, dealing with the dismissal of correctional officers, is an example of the fusion of collective labour law and administrative law. A disciplinary code and procedure had been agreed upon as part of a collective agreement (recorded as Resolution 1 of 2001). In *SAPU v National Commissioner of the South African Police Service* 2006 (1) BLLR 42 (LC) at par 71, Murphy AJ held that s 23 of the LRA affirmed the unique nature of collective agreements, as it "gives statutory force to such agreements including the variation of pre-existing contracts of employment, even those of a non-unionised minority of the workforce". In *Hlope v Minister of Safety and Security* 2006 (3) BLLR 297 (LC) at par 19, Van Niekerk J stated that s 23 of the LRA "confirms the binding nature of collective agreement and provide for their terms into individual contracts of employment". A collective agreement between the State and its employees creates a source of employment regulation. In light of *POPCRU v Minister of Correctional Service* 2006 (4) BLLR 385 (E) at par 72, it can be argued that, if a public employer acts with the power and authority granted in terms of such a collective agreement and implements employment decisions in accordance with the collectively altered employment contract, such an exercise of collective and contractual power by such an employer as an organ of state could qualify as an administrative action in terms of s 1 of PAJA. The contractual power is clothed with the statutory force of for example Resolution 1 of 2001 and no longer indirectly linked to the implementation of legislation by an organ of state. On the *POPCRU*-facts, the disciplinary procedure from which the respondents diverted was put in place by a collective agreement. The fact that the employer was not allowed to follow any procedure that could be proven fair does not justify an argument that administrative law precluded labour law from exercising the flexible principle of procedural fairness as developed in labour jurisprudence. Section 23 of the LRA binds an employer to a collectively agreed procedure, much as s 3 of PAJA. Absent an agreed procedure, PAJA would have dictated fair procedures that include the minimum content of fairness (s 3(2)(b)) as sufficient as long as the affected parties where granted an opportunity to be heard. Plasket J emphasised that neither in labour nor administrative law is fairness "licence to opportunistically or expediently depart from agreed or prescribed procedures which otherwise bind the decision-maker".

[1660] In *POPCRU v Minister of Correctional Services* 2006 (4) BLLR 385 (E) at paras 52 – 54, Plasket J found the argument that a decision to dismiss does not constitute an exercise of public power (and as such a decision does not affect the public at large) unconvincing. The judgment mainly focused on the impact of public power and not on whether administrative law rights and legislation oust labour law rights and legislation. Considering the public interest element of public power, Plasket J found that "the statutory

considering the *Zenzile*-principle,[1661] Plasket J emphasised the fact that the power relied upon in that case – despite the presence of an employment contract - had a statutory basis[1662] and reasoned that the dismissal decision had a similar statutory

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basis of the power to employ and dismiss correctional officers, the subservience of the respondents to the Constitution generally and section 195 in particular, the public character of the Department and the pre-eminence of the public interest in the proper administration of prisons and the attainment of the purposes specified in section 2 of the Correctional Services Act all strengthen my view that the powers that are sought to be reviewed in the matter are public powers as envisaged by the common law, the Constitution and the PAJA". Plasket J commented on this issue: "[P]ublic power is not limited to exercises of power that impact on the public at large. Indeed many administrative acts do not. The exercise of public power to arrest is a good example of an administrative action that would only have a significant impact on the arrestee and perhaps, the complainant ... *[W]hat makes the power involved a public power is the fact that it has been vested in a public functionary who is required to exercise it in the public interest*, and not in his or her own private interest or at his or her own whim." Emphasis added. In determining the species of public power, the focus should not fall on the functionary, but on the function. See *President of the RSA v SARFU* 2000 (1) SA 1 (CC) at par 143. Plasket J's reasoning goes a step further, in calling for consideration of the relation between the function and a public interest. See Brand 2006 (3) *JQR* (Electronic Version).

[1661] The principle being that public employment contracts do not fall beyond the reach of administrative law where public power is present in the exercise of an employment decision. See part 2 2.

[1662] See the Correctional Services Act 111 of 1998. An organ of state gains the authority and capacity to employ and conclude an employment contract from statute. If the employment contract then prescribes the terms for dismissal or refers to the legislation regulating public employment as forming part of that contract, then the organ of state's decision to dismiss cannot be severed from the public power with which the employment relationship came into being. See Chapter Nine, part 2 2. Since the coming of the Constitution, the private/public divide in the employment context has been shifted to the periphery of legal reasoning along with formalistic conceptualism, as it does not embrace the idea of transformative constitutionalism. This is evident from the fact that conduct of private persons or organisations can also be classified as public in nature and falling within the regulatory scope of administrative law generally and PAJA specifically. In *Tirfu Raiders Rugby Club v SA Rugby Union* [2006] 2 All SA 549 (C) at par 28, Yekiso J explained that it is the legal reality that where it can be said that the public has a sufficient interest in the decision of a private association, as it has the potential to affect the public, that decision is public in nature. See Brand 2006 (3) *JQR* (Electronic Version); *Van Zyl v New National Party* 2003 (19) BCLR 1167 (C). Currie and De Waal *Bill of Rights Handbook* 659 however emphasise, with reference to *Marais v Democratic Alliance* 2002 (2) BCLR 171 (C) at par 51, "that mere public interest in a decision does not make it an exercise of public power or the performance of a public function".

basis.[1663] In *Nell v Minister of Justice and Constitutional Development*,[1664] Southwood J also made it clear that s 33 of the Constitution "is designed to control the conduct of the public administration, ie when it exercises public power".[1665] As such, s 33 of the Constitution gives recognition to the general *Zenzile*-principle.[1666] Consequently, it "is clear from this case and the *Zenzile* and *Sibiya* judgments that conduct may constitute administrative action even where it takes place in … [an employment] contractual context".[1667]

Recognition of the conflicting approaches in the *POPCRU*- and *SAPU*-judgments, as well as the cases following each,[1668] reveals that the relationship between labour and administrative law cannot be determined by a general rule stipulating either that these branches of law must be kept separate, or must always interact. A general denial of

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[1663] Along with this, Plasket J in *POCRU v Minister of Correctional Service* 2006 (4) BLLR 385 (E) at par 54 reasoned that "the public character of the Department ... [and the] pre-eminence of the public interest in the proper administration of prisons and the attainment of the purposes specified in section 2 of the Correctional Services Act" indicated that the decision constituted an exercise of public power amounting to an administrative action. See Brand 2006 (3) *JQR* (Electronic Version).

[1664] 2006 (7) BLLR 716 (T). This case concerned the suspension of the applicant (a senior deputy master of the High Court) for the alleged inappropriate acceptance of gifts. The applicant approached the High Court and argued that the action of the department infringed on his right to just administrative action. In answer, the respondent argued that the court did not have the necessary jurisdiction to decide the matter, as the decision to review did not amount to an administrative action.

[1665] *Nell v Minister of Justice and Constitutional Development* 2006 (7) BLLR 716 (T) at par 19.

[1666] See part 2 2.

[1667] *Nell v Minister of Justice and Constitutional Development* 2006 (7) BLLR 716 (T) at par 19.

[1668] Ngcobo J in *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) specifically weighed the judgment of *POCRU v Minister of Correctional Service* 2006 (4) BLLR 385 (E) against that of *SAPU v National Commissioner of South Africa Police Service* 2006 (1) BLLR 42 (LC). Cases following *POPCRU* are *Simelela v MEC for Education, Province of the Eastern Cape* 2001 (9) BLLR 1985 (LC), *Johannesburg Municipal Pension Fund v City of Johannesburg* 2005 (6) SA 273 (W), *Nell v Minister of Justice and Constitutional Development* 2006 (7) BLLR 716 (T) and *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services* 2006 (10) BLLR 960 (LC). Cases following *SAPU* are *Greyvenstein v Kommisaris van die SA Inkomste Diens* 2005 (26) ILJ 1395 (T), *Hlope v Minister of Safety and Security* 2006 (3) BLLR 297 (LC), *Louw v SA Rail Commuter Corporation Ltd* 2005 (26) ILJ 1960 (W), *Western Cape Workers Association v Minister of Labour* 2006 (1) BLLR 79 (LC).

public power amounts to formalistic categorisation.[1669] Jurists that still support the public/private divide as a method of excluding public power considerations from public employment disputes, appear to ignore the Constitutional Court's reasoning in *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council*,[1670] that "powers exercised [by the State] in terms of contract can nevertheless be public".[1671] Consequently, the denial of the presence of public power (per the *Zenzile*-principle understanding) by reasoning that labour law relies on contractual considerations cannot stand.[1672] Public power can only be said to be absent if so determined in a case-specific evaluation of the nature of the decision.

In summary, it is not the constitutional aim of administrative law to *advance* labour law.[1673] It is, however, the constitutional aim of administrative law to control the exercise of public power. The *Zenzile*-judgment should not be regarded as incorrect in emphasising the possibility of the contextual presence of public power in public employment decisions.[1674] The impact of the formalistic compartmentalisation that

[1669] See Chapter Nine, part 3 6, for a discussion of the Constitutional Court's articulation of a general presumption that labour practices do not amount to administrative actions, along with the inherent danger of such a presumption inspiring formalistic categorisation.

[1670] 2006 (11) BCLR 1255 (CC).

[1671] Stacey 2008 (125) *SALJ* 307 at 317.

[1672] See Stacey 2008 (125) *SALJ* 307 at 318.

[1673] Phrased differently, administrative law no longer has to act as a surrogate for labour law in the context of public employment.

[1674] Although it is true, as pointed out by Mthyiyane JA in *Transnet Ltd v Chirwa* 2007 (1) BLLR 10 (SCA) at par 15, that the "factual matrix in which *Zenzile* [and] *Sibiya* were decided has changed", the general principle regarding the regulation of public power can still find application in the current constitutional milieu. In *Transnet Ltd v Chirwa* 2007 (1) BLLR 10 (SCA) at paras 51 – 55, Cameron JA emphasised that the general *Zenzile*-principle is based on legal logic and principle and not merely historical necessity. In casu, Cameron JA acknowledged the apparent conflicting judgments on public power, namely *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC* 2001 (10) BCLR 1026 (SCA) and *Logbro Properties CC v Bedderson NO* [2003] 1 All SA 424 (SCA) "turned on its own facts", which required the contextual adaptation of the applicable norms and therefore did not erase the general *Zenzile*-principle that the exercise of public power attracts the principles of administrative justice. In *Transnet Ltd v Chirwa* 2007 (1) BLLR 10 (SCA) at par 55, Cameron JA noted that this reasoning also applied to employment relationships. Consequently, it is undeniable that "employment with a State organ triggers a public dimension that imposes public duties that the courts will supervise".

underlies attempts to oust the legal principle underlying the *Zenzile*-ratio has unfortunately also impacted on the manner in which the underlying purpose of the relevant legislation is perceived (part 3 2) and the manner in which rules of interpretation impact on the implementation of the relevant legislation (part 3 3), while also informing the law-ousting-law approach (part 3 4).

3 2 Oversimplified Purpose of the LRA

Labour rights and administrative justice cannot be simplified to justify separation from other rights. Such an undue simplification for the sake of an 'easy' formalistic solution makes a mockery of the vision of the Constitution. In his *SAPU*-judgment, Murphy AJ emphasised that "[t]he two rights are entrenched in two separate provisions in the Constitution, each with its own aims and specialised legislation (the LRA and PAJA) that seeks to give effect to its own distinction objectives".[1675] In *Chirwa v Transnet Ltd*,[1676] Skweyiya J echoed this understanding by articulating the apparent objectives of administrative and labour law as follows:

> The purpose of the administrative justice provisions is to bring about procedural fairness in dealings between the administration and members of the public. The purpose of labour law as embodied in the LRA is to provide a

[1675] As explained by Skweyiya J in *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 46.

[1676] 2008 (2) BLLR 97 (CC). Ms Chirwa, a human resources executive manager of the Transnet Pension Fund Business Unit, was dismissed after an enquiry by her supervisor on grounds of inadequate performance, incompetence and poor employee relations. She challenged her dismissal based on procedural unfairness in the CCMA. When conciliation failed, she decided to approach the High Court instead of taking her case further within the labour relations dispute resolution mechanisms. In front of the High Court is was argued on behalf of Ms Chirwa that her dismissal violated her constitutional right to just administrative action, as given effect to by PAJA. The application of the principles of natural justice led the court to find that Ms Chirwa's dismissal was unfair. An order of reinstatement was granted. Transnet appealed to the Supreme Court of Appeal. The court did not reach a unanimous verdict. The majority found that the review of the dismissal did not fall within the scope of PAJA. Ms Chirwa challenged the decision of the Supreme Court of Appeal in the Constitutional Court. It was argued, on behalf of Ms Chirwa, that the dismissal was reviewable under ss 3 and 6 of PAJA, as Transnet is an organ of state and therefore exercises public power when it acts.

> comprehensive system of dispute resolution mechanisms, forums and remedies that are tailored to deal with all aspects of employment.[1677]

This is an oversimplification of the underlying aim of both administrative and labour law. Firstly, "a comprehensive system of dispute resolution" is not the only purpose of the LRA.[1678] It is merely one of the primary objectives identified in s 1 of the LRA.[1679] The LRA cannot be treated as a candy shop from which the judiciary can pick the objectives to which it wants to give effect in the application of the Act. Section 1 of the LRA seeks to advance the multi-dimensional purpose of labour law and s 23 as articulated in the LRA. The purpose of labour law, as revealed in the LRA, is more complex than Skweyiya and Ngcobo JJ gave credit in their separate majority *Chirwa*-judgments.[1680]

[1677] *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 47.

[1678] See ss 1 and 3 of the LRA.

[1679] Section 1 identifies the following labour objectives: "The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are –

(a) to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution;

(b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;

(c) to provide a framework within which employees and their trade unions, employers and employers' organizations can –

(i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and

(ii) formulate industrial policy; and

(d) to promote –

(i) orderly collective bargaining;

(ii) collective bargaining at sectoral level;

(iii) employee participation in decision-making in the workplace; and

(iv) the effective resolution of labour disputes."

[1680] In his dissenting *Chirwa*-judgment, Langa CJ (with Mokgoro and O'Regan JJ concurring) expressed himself in agreement with the reasoning of O'Regan J in *Fredericks v MEC for Education and Training, Eastern Cape* 2002 (2) BLLR 119 (CC). He emphasised that a literal rather than a purposive reading should be applied to s 157 of the LRA and declared the judgments of Skweyiya and Ngcobo JJ to be in conflict with the earlier *Fredericks*-reasoning. Langa CJ further cautioned the judiciary to not substitute the legislator's choices with their own preferred policy considerations. See *Chirwa v Transnet Ltd* 2008

The simplification also robs administrative law of a proper understanding of its purpose. In *Minister of Health and another v New Clicks SA (Pty)*,[1681] Sachs J formulated a proper description of the purpose of administrative law:

> I believe that s 33 of the Constitution of the Republic of South Africa, 1996 and PAJA are together designed to control the exercise of public power in a special and focused manner, with the object of protecting individuals or small groups in their dealings with the public administration from unfair processes or unreasonable decisions.[1682]

The primary purpose of administrative law is to restrain the abuse of public power.[1683] The requirement of procedural fairness is a tool to realise this purpose. Procedural fairness also forms a component of the regulatory framework of labour law. Put differently, a genuine interdependent approach is not stifled by the purposes of either labour or administrative law, properly considered. In fact, the objectives of the LRA encourages interpretation and application with due regard to the Constitution.[1684]

Section 23 of the living Constitution is the reason for and the basis of the LRA. In giving effect to s 23, that right must be understood within its proper context, as an interdependent constitutional right. It is not free-floating and must not be seen as such when considering the objects of the LRA, which would be an approach that disregards the spirit, purport and object of the Constitution. The purpose of the LRA must be advanced by fulfilling its primary objects. The primary objects of legislation cannot be read in isolation from the purpose it is said to advance. Any person applying the LRA

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(2) BLLR 97 (CC) at paras 160 – 170; Chapter Nine, part 3 3. See also *Nonzamo Cleaning Services Cooperation v Appie* 2008 (9) BLLR 901 (Ck) at par 30.

[1681] 2006 (1) BCLR 1 (CC).

[1682] 2006 (1) BCLR 1 (CC) at par 583.

[1683] See Chapter Three, part 3 1.

[1684] In *Concorde Plastics (Pty) Ltd v NUMSA* 1998 (2) BLLR 107 (LAC) at 125, Marcus AJ reasoned that "[t]he interpretative injunction contained in section 35(3) of the interim Constitution means that the Labour Relations Act must be interpreted in accordance with the spirit, purport and object of ... [the] Constitution". See also *SACWU v Afrox Ltd* 1999 (10) BLLR 1005 (LAC) at par 18 per Froneman DJP. Pargellis (quoted in Schubert 1967 (16) *Journal of Public Law* 16) explains that the Constitution is a living instrument continually changing "in every age to the level of culture attained". See part 3 3 for a discussion of the interpretation-based argument for separatism.

must interpret its provisions to give effect to its primary objects (as the means to the ends of the advancement of the LRA purpose), in compliance with the Constitution (which includes the right to just administrative action) and the public international law obligations of South Africa.[1685] Consequently due consideration must be given to the advancement of economic development, social justice, labour peace and the democratisation of the workplace. An oversimplification as found in *Chirwa v Transnet Ltd*[1686] undermines these pertinent considerations. In truth, the purpose of both labour and administrative law is completely reconcilable when properly considered - both labour and administrative law aim to curb the abuse of power in an unequal power relationship by balancing relevant interests.

3 3 Interpretative Limitation of the LRA and PAJA[1687]

In *Chirwa v Transnet Ltd*,[1688] the majority also considered the interpretative dimension of the relationship between PAJA and the LRA and, with strong reliance on s 210 of the LRA, concluded that the LRA trumps PAJA in the sphere of employment.[1689] It is ironic that the *Chirwa*-majority (and other pro-separatists judgments), who regarded the pre-

[1685] See s 3 of the LRA.

[1686] 2008 (2) BLLR 97 (CC).

[1687] Although the discussion of interpretative rules may appear vague and unnecessary it usually forms the basis or point of departure in pro-separation judgments. Even if minimal, the role of the rules of interpretation calls for brief consideration.

[1688] 2008 (2) BLLR 97 (CC).

[1689] In *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 50, Skweyiya J reasoned: "Only the Constitution itself or a statute that expressly amends the LRA can take precedence in application to such labour matters. When PAJA was promulgated ... section 210 [of the LRA] remained untouched [in its provision that 'if any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any act expressly amending this Act, the provisions of this Act will prevail']. The Legislature ... enacted PAJA without altering section 210 ... [I]t would appear that the Legislature intended that PAJA should not detract from the pre-eminence of the LRA and its specialised labour dispute mechanism." As PAJA is constitutionally ordained to give effect to s 33, the practical extension to the constitutional provision, it can arguably be read as falling within the s 210 reference to the law protected by the Constitution. PAJA does not expressly amend the LRA. The LRA's specific provisions must be read in line with the Constitution (which includes s 33) and consequently the general provisions of PAJA, even if PAJA does not find direct application due to the fact that the LRA is specialised. See Chapter Seven, part 2 3.

constitutional *Zenzile*-line of cases as no longer applicable, revert to pre-constitutional interpretation cases to justify their approach. One such case is *Barker v Edgar*,[1690] where reliance was placed on the maxim generalia specialibus non derogant to find that each statute must be left to regulate its own subject-matter,[1691] creating the presumption "that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly".[1692] As is evident from the *Sidumo v Rustenburg Platinum Mines Ltd*,[1693] an argument that the constitutionally endorsed normative content of PAJA interpretatively supplements that of the LRA does not qualify as interference by the former with the latter.[1694] PAJA is a general reflection of the specific normative regulation that is found in the LRA.[1695] It supplements the specialised provisions of the LRA where those specific provisions are silent on crucial

[1690] [1898] AC 748 (PC).

[1691] Subject-matter is not easily divisible, without encroaching on one or more rights through an attempt to separately regulate another right.

[1692] *Barker v Edgar* [1898] AC 748 (PC) at 754 (cited in *R v Gwantshu* 1931 EDL 310). See *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 101 per Navsa AJ. In *The Vera Cruz* 1884 (10) App Cas 59 at 68 (referred to by Conradie J in *Transnet Ltd v Chirwa* 2007 (1) BLLR 10 (SCA) at par 28) it was reasoned that "if anything be certain it is this, that where there are general words in the later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered or derogated from merely by force of such general words, without any indication of a particular intention to do so".

[1693] 2007 (12) BLLR 1097 (CC). The case concerned the dismissal of a security guard with a clean service record of 15 years, dismissed for negligence after an internal disciplinary inquiry, an internal appeal and failed conciliation. The applicant successfully challenged his dismissal in the CCMA. The Labour Court found no reviewable irregularities. On appeal, the Labour Appeal Court found that dismissal was not a justifiable sanction in the circumstances of the case. On appeal to the Supreme Court of Appeal, dismissal was held to be a fair sanction. The case ended with the Constitutional Court finding that a reasonable decision-maker could reach the same conclusion as the commissioner (ie that dismissal was not justified).

[1694] Legislative supplementation should not be regarded as interference. See *Transnet Ltd v Chirwa* 2007 (1) BLLR 10 (SCA) at par 29 per Conradie JA.

[1695] It is therefore not necessary to apply *The Vera Cruz*-argument to interpret PAJA's away or to fight its application as an indirect repeal or alteration of the LRA.

issues, such as the constraint of *public* power.[1696] A shared constitutional and normative basis allows for such a supplementary perspective.[1697] Contemporary legislation cannot be allowed to find application in isolation, as per the *Barker*-perspective in the absence of any element of interference or normative conflict, when one considers the existence of a single legal system based on the holistically viewed Constitution, as the supreme informative core of all legislation.[1698] Froneman J in *MEC, Department of Roads and Transport, Eastern Cape v Giyose*[1699] accordingly emphasised that legislation (as is the case with the common law) "should be interpreted, developed and applied to give expression to the fundamental right to fair labour practices for the parties in an employment relationship".[1700] Such an interpretative approach does not exclude PAJA endorsed reasoning, but also does not grant it free reign to trample over other fundamental rights in regulating the promotion of just administrative action.[1701]

[1696] With regard to the other normative overlaps between lawfulness, reasonableness and procedural fairness, PAJA cannot be regarded as an (interfering) extension if the overlap already existed in legal theory when the LRA (as the specific Act) was enacted prior to the general PAJA.

[1697] As Chapters One and Seven reflects, the doctrine of normative interdependence can only function in the absence of normative conflict.

[1698] PAJA was enacted in terms of s 33(3) to give expression to the right to just administrative action, which forms part of the holistically viewed Constitution. In commenting on the *SAPU*- and *Haschke*-judgments, Conradie JA in *Transnet Ltd v Chirwa* 2007 (1) BLLR 10 (SCA) at par 26 noted that "the interpretational difficulties to which the provisions of the LRA and PAJA have given rise can only be addressed by a *holistic approach*". Emphasis added.

[1699] 2008 (5) BLLR 472 (E).

[1700] *MEC, Department of Roads and Transport, Eastern Cape v Giyose* 2008 (5) BLLR 472 (E) at par 18. This is also reflected in the reasoning of Van der Walt 2008 (1) *CRR* 77 at 111 as far as the applicability of the idea of subsidiarity in the application of complementary specialised and general legislation.

[1701] In *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at paras 89, 91 and 92, Navsa AJ elucidated: "Section 33(3) of the Constitution provides that national legislation must be enacted to give effect to the right to administrative action that is lawful, reasonable and procedurally fair. Section 145 of the LRA constitutes national legislation in respect of 'administrative action' within the specialised labour law sphere. Of course, section 145 has to meet the requirements of section 33(1) of the Constitution ie it has to provide for administrative action that is lawful, reasonable and procedurally fair ... Nothing in section 33 of the Constitution precludes specialised legislative regulation of administrative action such as section 145 of the LRA alongside general legislation such as PAJA ... PAJA is a codification of the common law grounds of review. It is apparent, though, that it is not regarded as the

In short, in the absence of pre-constitutionally developed interpretative constraints, PAJA does not preclude normative interdependence between labour and administrative law. Specialised provisions, as found in the LRA,[1702] must be read against the backdrop of general legislation through the prism of the Constitution with its interdependent normative value based system.[1703] The LRA in fact prescribes, in s 3, "that its provisions must be interpreted in compliance with the Constitution".[1704] This presents proof of the co-operative intent of the legislature in enacting statutes in conformity with the Constitution and its underlying, supreme values.

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exclusive legislative basis of review." In *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at paras 145 and 146, Sachs J agreed with the broad manner in which Navsa AJ interpreted s 145 of the LRA and found that Ngcobo J too viewed s 145 broadly regardless of the fact that he (unlike Navsa AJ) found no administrative action to be present. Consequently, Sachs J found himself in "the pleasant but awkward position of agreeing with colleagues who disagree with each other … [as] the rationale of each of their judgments is essentially the same". Sachs J noted that both Navsa AJ and Ngcobo J "unsurprisingly arrive at the same outcome ... because, in substance, thought not in form, they concur in the context, interests and values involved". Both to some extent (albeit unwittingly) relied on the idea of normative interdependence in interpreting s 145.

[1702] In *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at paras 94, 100 and 103, Navsa AJ emphasised that the "LRA is specialised negotiated legislation giving effect to the right to fair labour practices". The inclusion of public sector employment within the scope of the negotiated LRA was the will of all role players: "The State, in both its executive and legislative arms, was involved in finalising the LRA together with persons representing business, labour and community [or public] interests … [More specifically, the] Legislature had knowledge of section 210 of the LRA and deliberately decided not to repeal ... section 145 of the LRA ... [which] resulted from intense negotiations that led to the enactment of the LRA."

[1703] This line of reasoning is reconcilable with the *Sidumo*-reasoning of Navsa AJ. Navsa AJ proclaimed that it is possible for an administrative action to be present in a labour law context and not directly regulated by PAJA. It was argued, that s 33 of the Constitution informs the application of the LRA in such circumstances. Navsa AJ did consider the PAJA based development of concepts, such as reasonableness, as it relates to s 33 and indirectly applied the jurisprudence relating to the application of PAJA. In doing so, Navsa AJ illustrated how general legislation can be indirectly relied upon to give normative based expression to specialised legislation where the two instruments are drawn into the same context through simultaneous applicability of two fundamental constitutional rights.

[1704] *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 105.

3 4 Law-ousting-law[1705]

With the constitutionalisation of the right to fair labour practices and the inclusion of public servants within the regulatory ambit of the LRA, the argument emerged that the application of administrative law in the context of public employment disputes is unnecessary.[1706] This perspective is evident in the reasoning in the *SAPU*-, *Haschke*- and *Chirwa*-judgments. While it is true that PAJA may not find direct application due to applicability of specialised legislation, this understanding should not undermine the applicability of the norms associated with s 33 of the Constitution.[1707] Stacey refers to arguments ignoring such norms as the "law-ousting-law" approach, because it allows for the denial of "the constitutional protections of rights to administrative justice where they are nevertheless applicable".[1708] It is submitted that this law-ousting-law argument (or what Cheadle likes to refer to as the demarcation of constitutional rights and legislation)[1709] is based on a one-dimensional reading of the Bill of Rights, as far as the relationship between the rights to fair labour practices and just administrative action is concerned, as it embraces the idea of absolute specificity with no regard for the twin constitutional imperatives of flexibility and interdependence, in circumstances where there is no normative conflict in the rights-relationship.[1710]

[1705] The title is borrowed from the academic work of Stacey 2008 (125) *SALJ* 307 at 323.

[1706] See Stacey 2008 (125) *SALJ* 307 at 320.

[1707] See Ngcukaitobo and Brickhill 2007 (28) *ILJ* 769. The rigid review argument raised by Pillay J, no longer poses a problem. In *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at paras 89, 91 and 92, Navsa AJ explained that PAJA does not have to find direct application in cases where labour matters stand to be reviewed in terms of s 145 of the LRA, but that s 145 must be infused with s 33 constitutional principles.

[1708] Stacey 2008 (125) *SALJ* 307 at 324.

[1709] Cheadle 2009 (30) *ILJ* 741 at 747 – 748 articulates his *Chirwa*-based law-ousting-law understanding: "The CC has accordingly held that s 33 does not apply to decisions made by the state as employer that are subject to s 23 and that therefore the PAJA does not apply either. This means that if a public employer's decision is an unfair labour practice either under s 23(1) of the Constitution or any legislation giving effect to it, then that decision is not administrative action for the purposes of either s 33 of the Constitution or PAJA. It follows from this that even if a dismissal constitutes the exercise of public power and meets all the requirements of the definition of administrative action under PAJA, the dismissal would still not constitute an administrative action for the purposes of s 33 on the Constitution and PAJA."

[1710] See Chapter Seven, part 2 2.

As already discussed, the *SAPU*-arguments of Murphy AJ are open to criticism in the employment context, as it is based on the orthodox private/public divide that endorses formalistic categorisation of employment disputes.[1711] Any argument that the Bill of Rights endorses a public/private divide in the protection of the rights of parties to an employment dispute, given the Constitution's transformative character that supports more rather than less protection, is questionable.[1712] In the *Haschke*-judgment, Pillay J nevertheless attacked administrative law's applicability from numerous angles.[1713] These arguments have resurfaced among commentators in light of the *Chirwa*-judgment in the form of the law-ousting-law argument.

It is submitted, in light of the jurisprudence to date, that the supporters of the idea that s 23 of the Constitution provides for comprehensive protection (thereby ousting s 33 constitutional protection) are in fact reacting to an underlying fear that recognition of a s 33 based cause of action will undermine the applicability of the LRA, which aims to unify both public and private employment relationships.[1714] This argument fails to take into consideration that the LRA is specific in its provisions in giving effect to s 23, while s 33 and its associated legislation (PAJA) adopts a general approach. Both rights and associated legislation share the same constitutional framework, and due to the specific/general character does not create normative conflict (pluralism) if properly

[1711] See part 3 1.

[1712] This argument must not be confused with an argument that the Bill of Rights does not allow for a distinction in the manner in which rights and obligations find application in respect of private and public actors. It is not the intention of this dissertation to delve into arguments surrounding horizontal application. The focus is restricted to the argument as to the applicability of both administrative and labour rights (as enshrined in the Constitution) in public sector employment disputes.

[1713] Pillay J formulated the following arguments in the *Haschke*-judgment: any deficiency in labour legislation can be supplemented by the s 23 right to fair labour practices; the s 6 review in PAJA is too rigid when viewed against the s 145 review of the LRA; and the rationality test as found in administrative and labour law is different. See Ngcukaitobo and Brickhill 2007 (28) *ILJ* 769 at 773.

[1714] In truth, this argument is a jurisdictional argument that has been generalised into an argument that labour law and administrative law are mutually excluding. This argument attempts to preclude public employees from bypassing the dispute resolution mechanisms found in the LRA: the CCMA, the Labour Court and the Labour Appeal Court. However, the jurisdictional debate should not overshadow and undermine the pursuit of merit-based justice by means of the genuine interdependent normative purpose of labour and administrative fairness.

understood.[1715] This allows for the substance of the LRA to be read against the general normative backdrop of PAJA (albeit indirectly applied),[1716] while both must be interpreted through the prism of the Constitution.[1717]

In the absence of normative conflict, Cheadle nevertheless appears to support the idea that the presence of labour rights ousts the application of administrative law considerations on the basis that the *Chirwa*-majority "decided that the scope of administrative action in s 33 does not extend to include labour practices contemplated in s 23".[1718] Both the *Chirwa*-majority and Cheadle base this view on the idea that the specific provision for separate labour and administrative rights in the Bill of Rights justifies such an approach. If the two dimensions of the *Zenzile*-judgment are correctly understood, the validity of this approach (if confined to the traditional over-extension of administrative law principles to protect public servants) cannot be faulted.[1719] The Bill of Rights however appears to leave intact the core second *Zenzile*-dimension, namely the purpose of "administrative law as a means of controlling public power and affirming the dignity of individuals".[1720] If the approach of Cheadle and the *Chirwa*-majority is broadly interpreted to also exclude co-operative and interdependent application of fundamental rights, then it stands in stark contrast to the purport of the Bill of Rights that (in the absence of normative conflict) calls for maximum protection.[1721] If, in the absence of any normative conflict, the presence of the right to fair labour practices is understood as ousting (or limiting) the applicability of the right to just administrative action, then the

[1715] See Chapters Five and Six. See Klare 2008 (1) *CCR* 129 and Van der Walt 2008 (1) *CCR* 77 for a detailed discussion of normative pluralism.

[1716] See *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) per Navsa AJ; Chapter Ten.

[1717] In terms of the doctrine of avoidance, direct application of the Constitution should not be the first point of call. See *S v Mhlungu* 1995 (3) SA 867 (CC). Indirect application should nevertheless primarily focus on giving effect to constitutional considerations.

[1718] Cheadle 2009 (30) *ILJ* 741 at 745.

[1719] See parts 2 2 and 3 1.

[1720] Ngcukaitobi 2008 (29) *ILJ* 841 at 846. This is the primary basis of the *Zenzile*-principle.

[1721] See *POPCRU v Minister of Correctional Service* 2006 (4) BLLR 385 (E) at paras 58 – 61; Van der Walt 2008 (1) *CCR* 77 at 111.

former will go through the same process of over-extension.[1722] Labour law and the associated rights are simply not designed to control public power.[1723] In the absence of the tension associated with normative pluralism,[1724] the law-ousting-law argument rests on a "disjunctive interpretation of ss 23 and 33".[1725] The idea "that the existence of one right negates the other is not consonant with the principles underlying the Constitution".[1726]

In summary, the words of Stacey are appropriate:

> 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 of the Bill of Rights. Moreover, it seems wholly inconsistent with the principle that the Bill of Rights applies to all law [in terms of s 8(1) of the Constitution] as well as the [s 2 constitutional] principle that law or conduct inconsistent with the Constitution is invalid. As Plasket J says in *POPCRU*, this approach fails to give individuals the full measure of their fundamental rights'. He goes on to

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[1722] Hoexter *Administrative Law* 12 appropriately explains that "[t]he constitutional recognition of a profusion of fundamental rights means that there is rather *less* work for administrative-law review to do than in the past: its 'social function' has *diminished accordingly*". Administrative law is not absolutely ousted and labelled as having no value in its application along with other fundamental rights; it merely has a lesser role in the post-constitutional public employment context. As O'Regan J so pertinently pointed out in *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 125 (with reference to Wade and Forsyth *Administrative Law* 886), both the LRA and PAJA can be described as "social legislation of the twentieth century" when viewed against the historic struggle of labour and administrative law pre-constitutionally. The public consequently has an inherent social interest in the protection and promotion of both ss 23 and 33, as well as the legislation giving effect thereto. If the current role of administrative law is ousted, it would merely create a situation of reverse-over-extension and "we may end up with a formalist jurisprudence ... at odds with the substantive vision of our Constitution". See *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 135. Sachs J shared this concern in *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at paras 142 and 151.

[1723] See Ngcukaitobi 2008 (29) *ILJ* 841 at 862.

[1724] See Klare 2008 (1) *CCR* 129; Van der Walt 2008 (1) *CCR* 77.

[1725] Ngcukaitobi 2008 (29) *ILJ* 841.

[1726] Ngcukaitobi 2008 (29) *ILJ* 841.

note that there is 'nothing incongruous' about more than one fundamental right applying to the same act.[1727]

4 JURISDICTIONAL DILEMMA

Although the LRA came into operation with predictions of simplicity, uncertainty surrounds the proper interpretation and application of s 157,[1728] which regulates the jurisdiction of the Labour Court. The apparent simplicity of s 157(2) has encouraged public servants to read it as allowing them to approach the High Court with complaints about employment decisions affecting them.[1729] However, recent experience has shown that the judiciary has struggled to come to terms with s 157 and its import for the interaction between labour and administrative law. In his *Giyose*-judgment,[1730] Froneman J went as far as to identify compartmentalisation or separation of administrative and labour law as the cause of the contemporary jurisdictional problem.[1731]

[1727] Stacey 2008 (125) *SALJ* 307 at 324. Footnotes omitted. Cf *Booysen v SAPS* 2008 (10) BLLR 928 (LC) at par 31, where it was reasoned that the "ambit of the constitutional right to fair administrative action does not extend to employment decisions of a public sector employer".

[1728] Section 157 of the LRA reads as follows:

"(1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has *exclusive jurisdiction* in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.

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

(a) employment and from labour relations;

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

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

[1729] Some employees relied on their right not to be unfairly dismissed and/or affected by unjust administrative action when calling upon the High Court to exercise its jurisdictional power. See Grogan 2006 22(2) *Employment LJ* (Electronic Version).

[1730] 2008 (5) BLLR 472 (E).

[1731] In light of *MEC, Department of Roads and Transport, Eastern Cape v Giyose* 2008 (5) BLLR 472 (E) at par 26 it can be argued that judicial denial of the normative link between ss 23 and 33 of the

4 1 Concurrent versus Exclusive Jurisdiction

In *Fredericks v MEC for Education and Training, Eastern Cape*,[1732] the applicants approached the Constitutional Court with a claim based on ss 9 and 33 of the Constitution, based on breach of a collective agreement by the employer.[1733] The

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Constitution, is but "a transparent attempt to exclude the jurisdiction of" either the High or Labour Courts, depending on the forum considering the jurisdictional scope of the other. Unfortunately, the Constitutional Court's *Chirwa*-ruling showed signs of such a denial based on jurisdictional arguments.

[1732] 2002 (2) BLLR 119 (CC).

[1733] 2002 (2) BLLR 119 (CC). The State attempted to reduce the number of teachers in its service, by offering voluntary retrenchment procedure. A number of teachers applied and were granted voluntary retrenchment packages. The applicants applied for these packages and were refused. They alleged that the respondents' conduct was in conflict with the Constitution and invalid because of an infringement of the Bill of Rights and approached the High Court to set aside the refusal and order the respondents to approve their packages. The High Court regarded it as a s 24 LRA matter concerning the interpretation of a collective agreement and held that its jurisdiction was ousted by the LRA as a dispute to be dealt with by the CCMA. The applicants approached the Constitutional Court. Prior to the *Fredericks*-judgment, the decision of the Supreme Court of Appeal in *Fedlife Assurance Ltd v Wolfaardt* 2001 (12) BLLR 1301 (SCA) was the focus of the jurisdictional debate. In that case, Nugent AJA held that s 157(1) does not grant the Labour Court exclusive jurisdiction over the employment relationship in general, as the common law entitlements of an employee is not abrogated by the LRA. The court held the focus to fall on whether the employee claims his dismissal to be either unfair or unlawful. If unfairness is alleged the Labour Court can claim exclusive jurisdiction, but if unlawfulness is at issue then the unfairness issue is incidental and outside the scope of s 157(1) allowing employees to approach the High Court to claim damages in terms of the traditional jurisdiction of the court. It is submitted that reference to the concept of fairness as incidental is inaccurate. The coexistence of fairness and lawfulness considerations linked to ss 23 and 33 allows for concurrent jurisdiction when determining the lawfulness of an administrative action with due regard to the effect of fairness on that evaluation. Any other reading would dictate a forced conceptual distinction. See the minority judgment of Froneman AJA in *Fedlife Assurance Ltd v Wolfaardt* 2001 (12) BLLR 1301 (SCA) at paras 10 – 13. The mere fact that a claim falls outside the scope of s 157(1) does not imply that it falls outside the jurisdictional power of the Labour Court. It merely means that the Labour Court does not have exclusive jurisdiction to decide the substantive merit of the claim. The context of a case may necessitate considerations of fairness in evaluating lawfulness. Fairness is an essential consideration even if the lawfulness of the decision is challenged. See *Marievale Consolidated Mines Ltd v President of the Industrial Court* 1986 (7) ILJ 152 (T) per Goldstone J. The determination of the presence or absence of unfair labour practices involves both issues of law, as well as value judgments. See *NUMSA v Vetsak Co-operation Ltd* 1996 (6) BLLR 697 (A) at 705 and 709 per Nienaber JA; Grogan 2001 17(6) *Employment LJ* (Electronic Version); Grogan 2006 22(2) *Employment LJ* (Electronic Version).

Constitutional Court had to decide whether the Labour or High Court had jurisdiction. Consideration was given to the terms of s 169 of the Constitution that grant the High Court jurisdiction in constitutional matters, and found it to be conceivable that a dismissal can have constitutional implications, over which the High Court has jurisdiction in terms of s 169.[1734] It was confirmed that s 169 jurisdiction is not absolute as the section itself, for example, provides that the High Court has no jurisdiction where Parliament has assigned the determination of a constitutional matter to another court with similar status to the High Court (such as the Labour Court). However, s 24 of the LRA (which deals with disputes about the interpretation of the application of collective agreements) was not to be understood as excluding the jurisdiction of the High Court to determine constitutional matters, as the CCMA (which is given jurisdiction in terms of s 24) is not a court and therefore not of similar status to the High Court. The Constitutional Court found no provision in the LRA that assigns exclusive jurisdiction to the Labour Court in such instances and held that the High Court erred in its finding that it did not have the necessary jurisdiction.[1735] In terms of the *Fredericks*-judgment, the LRA does not afford the Labour Court a general all-encompassing jurisdiction in all employment matters. The jurisdiction of the High Court in terms of s 169 of the

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See also *NUM v Free State Consolidated Gold Mines (Operations)* 1995 (12) BLLR 8 (A); *Majola v D & A Timbers (Pty) Ltd* 1996 (9) BLLR 1091 (LAC); *NUM v Black Mountain Development Corporation* 1997 (4) BLLR 685 (A); *Air Products (Pty) Ltd v CWIU* 1998 (1) BLLR 1 (LAC) (the minority judgment of Froneman DJP). Cf *Sibiya v Administrator, Natal* 1991 (2) SA 591 (D) per Didcott J.

[1734] If a s 33 issue therefore arises in a public employment context, the High Court cannot be denied its power to decide the merits of a claim based on that right. See Editor 2006 22(2) *Employment LJ* (Electronic Version).

[1735] O'Regan J in *Fredericks v MEC for Education and Training, Eastern Cape* 2002 (2) BLLR 119 (CC) at paras 38 – 39 explained: "Section 157(1) … has the effect of depriving the High Court of jurisdiction in matters that the Labour Court is required to decide except where the Labour Relations Act provides otherwise. Deciding which matters fall within the exclusive jurisdiction of the Labour Court requires an examination of the Labour Relations Act to see which matters fall 'to be determined' by the Labour Court. It is clear that the overall scheme of the Labour Relations Act does not confer a general jurisdiction on the Labour Court to deal with all disputes arising from employment. As Nugent JA held in *Fedlife Assurance Ltd:* '… s 157(1) does not purport to confer exclusive jurisdiction upon the Labour Court generally in relation to matters concerning the relationship between employer and employees.' Instead the Act provides for a careful and complex division of responsibilities between bargaining councils, the CCMA and the Labour Court and Labour Appeal Court."

Constitution "is not ousted by section 157(1) simply because a dispute is one that falls within the overall sphere of employment relations".[1736] The court explained that the "High Court's jurisdiction will only be ousted in respect of matters that 'are to be determined' by the Labour Court in terms of the Act".[1737] The Constitutional Court ultimately formulated the following understanding of ss 157(1) and (2) of the LRA in the public employment context:

> There is no express provision of the Act affording the Labour Court jurisdiction to determine disputes arising from an alleged infringement of constitutional rights by the State acting in its capacity as employer, other than section 157(2). That section provides that challenges based on constitutional rights arising from the State's conduct in its capacity as employer is a matter that may be determined by the Labour Court, concurrently with the High Court. Whatever else its import, section 157(2) cannot be interpreted as ousting the jurisdiction of the High Court since it expressly provides for a concurrent jurisdiction ... Whatever the precise ambit of section 158(1)(h), it does not expressly confer upon the Labour Court constitutional jurisdiction to determine disputes arising out of alleged infringements of the Constitution by the State acting in its capacity as employer. Given the express conferral of jurisdiction in such matters by section 157(2), it would be reading the Act to interpret section 158(1)(h) read with section 157(1), as conferring on the Labour Court an exclusive jurisdiction to determine a matter that has already been expressly conferred as a concurrent jurisdiction by section 157(2). Section 158(1)(h) cannot therefore be read as conferring a jurisdiction to determine constitutional matters upon the Labour Court sufficient … to exclude the jurisdiction of the High Court.[1738]

Subsequent to this decision, the legal community was left with the impression that the *Fredericks*-judgment settled the High Court jurisdictional question in employment

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[1736] *Fredericks v MEC for Education and Training, Eastern Cape* 2002 (2) BLLR 119 (CC) at par 40.

[1737] *Fredericks v MEC for Education and Training, Eastern Cape* 2002 (2) BLLR 119 (CC) at par 40. See *Nonzamo Cleaning Services Cooperation v Appie* 2008 (9) BLLR 901 (Ck) at par 16.

[1738] *Fredericks v MEC for Education and Training, Eastern Cape* 2002 (2) BLLR 119 (CC) at paras 41 and 43.

matters.[1739] The clarity was short lived, as uncertainty resurfaced with the Constitutional Court's own *Chirwa*-judgment.

In *Chirwa v Transnet Ltd*,[1740] the Constitutional Court was again called upon to decide whether the High Court had concurrent jurisdiction with the Labour Court.[1741] Unlike the approach of O'Regan J in the *Fredericks*-judgment, the *Chirwa*-majority did not base their decision on a critical evaluation of s 157. Skewyiya and Ngcobo JJ (each with a majority judgment) opted to consider the policy basis of the LRA[1742] and held that the specialised Labour Court should have jurisdiction in all labour matters.[1743] Ngcobo J

[1739] See *Nonsamo Cleaning Services Cooperation v Appie* 2008 (9) BLLR 901 (Ck) at par 17. The case concerned the expulsion of members of a workers' co-operative in alleged contravention with the (now repealed) Co-operatives Act 91 of 1981.

[1740] 2008 (2) BLLR 97 (CC).

[1741] The applicant approached the High Court on the basis that her dismissal violated her s 33 right and the provisions of PAJA. The High Court accepted jurisdiction, reviewed the dismissal and ordered reinstatement. The respondent appealed to the Supreme Court of Appeal and the majority held that the dismissal did not fall to be reviewed in terms of PAJA. The applicant approached the Constitutional Court and claimed that she had two causes of action, one under the LRA and one in terms of s 33 as read with PAJA. The applicant was of the view that this choice allowed her to approach the High Court instead of a labour forum based on the concurrent jurisdiction found in s 157(2) of the LRA.

[1742] Skweyiya J, who decided the matter based on jurisdiction alone, considered the drafting history of the LRA and found that the High Court could not exercise jurisdiction in dismissal disputes if those disputes fall within the LRA, because LRA based rights are linked to specific dispute resolution procedures, which resulted from negotiations between relevant labour role players. Skweyiya J identified that Ms Chirwa expressly relied on the LRA in the formulation of her unfair dismissal claim in the court a quo. He accordingly reasoned that Ms Chirwa had to follow the procedures set out in the LRA, as the High Court did not have concurrent jurisdiction with the Labour Court in unfair dismissal matters. As such, Skweyiya J decided that it was unnecessary to decide whether her dismissal amounted to administrative action. He did however note that, if such a determination was necessary, he agreed with the judgment of Ngcobo J. Cf *Nonzamo Cleaning Services Cooperation v Appie* 2008 (9) BLLR 901 (Ck) at par 24. Ngcobo J in turn reasoned that the scheme of the LRA is all-embracing and does not allow for interference from other courts in the jurisdiction of specialised labour forums. Ngcobo J read s 157(2) as granting the Labour Court the jurisdiction to hear causes of action founded on fundamental rights other than s 23 also.

[1743] The policy reasoning on which this finding is based, does not pose an insurmountable obstacle to the doctrine of interdependence in public employment disputes. A finding that the Labour Court cries jurisdictional king in employment disputes merely grants it the extended capacity (in terms of s 157(2)) to

placed great reliance on the purpose underlying the LRA.[1744] In the absence of legislative intervention, Ngcobo J argued that s 157(2)[1745] within the context of the primary objectives of the LRA,[1746] allowed for a narrow reading of s 157(2)[1747] to the effect that concurrent jurisdiction only exists where direct reliance is placed on the Bill of Rights in the absence of subordinate legislation. Section 157(2) of the LRA was declared an unfortunate error that must be read narrowly until amended by the legislature.[1748] The majority attempted to justify this narrow interpretation with the

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rely on the interdependent right to administrative justice, where such issues are raised in an unfair labour practice dispute.

[1744] See part 3 2.

[1745] It is submitted that, in pursuit of the jurisdictional solution, the judiciary tends to focus only on a selective part of the s 1 identified primary objectives of the LRA, namely "to give effect to and regulate the fundamental rights conferred by s [23] of the Constitution ... [and] 'the effective resolution of labour disputes'". See for example *NAPTOSA v Minister of Education, Western Cape Government* 2001 (4) BCLR 388 (C) at 395.

[1746] In *Nonzamo Cleaning Services Cooperation v Appie* 2008 (9) BLLR 901 (Ck) at par 29, the High Court summarised the reasoning of Ngcobo J: "[I]t could not have been the intention of the Legislature to allow an employee to raise what was essentially a labour dispute under the LRA as a constitutional issue under the provisions of section 157(2). This would frustrate the primary objects of the LRA and permit an astute litigant to bypass the dispute-resolution process of the LRA." With respect, the reasoning of Ngcobo J is questionable. It cannot be the intention of the legislature to legislate in disregard of the Constitution. It can also not be correct to interpret the objects of the LRA in the context of its negotiation only, with no regard to the current context in which the living Constitution finds application. Such an approach shows no regard for the fact that legislation giving effect to specific constitutional rights must, in the first instance, be interpreted to give effect to the spirit and purport of the Constitution. Such a narrow interpretation of s 157(2) does not grant proper consideration to the purpose of the Constitution as the supreme law, to which all other legal perspectives must yield.

[1747] In his narrow reading of s 157(2), Ngcobo J appeared to have merely taken account of two objectives of the LRA: the establishment of a comprehensive labour law framework and the establishment of superior labour courts. In *Nonzamo Cleaning Services Cooperation v Appie* 2008 (9) BLLR 901 (Ck) at par 28, the High Court further commented on the reasoning of Ngcobo J: "The application of the section 157(2) had to be confined ... to those instances, if any, where a party relies on the provisions of the Bill of Rights. He added that this was subject to the constitutional principle that where legislation is enacted to give effect to a constitutional right, a litigant may not bypass the legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard."

[1748] The proposed Superior Courts Bill and 14th Constitutional Amendment clearly indicate that the legislature is aware of and attempting to address the jurisdictional problems in the South African legal

argument that concurrent jurisdiction would lead to the development of conflicting jurisprudence with the potential to undermine the 'one stop shop' nature of the LRA.[1749]

Grogan describes these policy-based findings as "sweeping conclusions".[1750] It undermines the fact that concurrent jurisdiction has a very specific legal meaning. It is

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system. The acceptance of any Act of this nature will render the jurisdictional debate moot, and eventually bring to the forefront the true basis of the relationship between labour and administrative law: the underlying norms and values of the Constitution, specifically lawfulness, reasonableness and fairness. See Editor 21(3) *Employment LJ* (Electronic Version).

[1749] See Grogan 2009 25(5) *Employment LJ* (Electronic Version). The forum-shopping-fear motivation for the description of the word 'concurrent' in s 157(2) of the LRA as unfortunate reminds of the reasoning of Murphy AJ in *SAPU v National Commissioner of the Police Service* 2006 (1) BLLR 42 (LC) at par 55. See Hoexter 2008 (1) *CCR* 209 at 219. Cf Grogan 2006 22(2) *Employment LJ* (Electronic Version). In *United National PSA of SA v Digomo NO* 2005 (12) BLLR 1169 (SCA), the Supreme Court of Appeal however raesoned that "the High Court's jurisdiction extends to reviewing acts by the State in its capacity as employer". Froneman J in *Nakin v MEC, Department of Education, Eastern Cape Province* 2008 (5) BLLR 489 (Ck) at par 30 commented on the jurisdictional fallacy embraced by the *Chirwa*-majority: "The coherence of an emerging labour and employment jurisprudence is not primarily and necessarily determined by its development in one exclusive forum, but rather by the degree to which it gives proper expression to the constitutional entitlement of everyone, in terms of section 23(1) of the Constitution, to fair labour practices. Approached from that perspective, the question that needs to be asked is whether the coherence of employment law has gained or lost from administrative law insights relating to employment in the public sector … developments are leading to greater coherence in employment jurisprudence, not to divergence and parallel systems of law. If that is the case, does it matter as a matter of substance rather than form where the development takes place, in the civil courts or in the labour court?"

[1750] Grogan 2006 22(2) *Employment LJ* (Electronic Version) refers to examples such as *PSA obo Haschke v MEC for Agriculture* 2004 (8) BLLR 822 (LC) and *SAPU v National Commissioner of the Police Service* 2006 (1) BLLR 42 (LC). In *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at paras 171 – 179, Langa CJ also expressed concern with reliance on policy-based reasoning. Grogan therefore reasons that "[a]lthough it may be desirable to treat public sector ... and private sector employees according to the *same principles*, the fact remains that most of the power exercised by public sector employers in respect of their employees are regulated by statute or regulation, and cannot merely be regarded as mere contractual powers." This emphasises the argument that although public and private employment relationships are substantively similar in nature and attract similar regulatory principles as, the context in which those similar regulatory principles find application may differ. See Chapters Four, Five and Six. See also *United National Public Service Association of SA v Digomo NO* 2005 (12) BLLR 1169 (SCA).

doubtful that the legislature would have opted to include the word in an extensively negotiated act without having regard to the legal meaning and consequence of the word "concurrent" when linked to jurisdiction.

The apparent contradiction between the *Fredericks*- and *Chirwa*-judgments has resulted in conflicting lower court rulings.[1751] Regardless of the fact that the Constitutional Court in its *Fredericks*-judgment ruled that even where a dispute requires arbitration in terms of the LRA it does not oust the jurisdiction of the High Court,[1752] the argument that administrative law principles undermine the collective bargaining component of the labour system has surfaced post-*Chirwa*. This perspective does not afford a proper understanding of the purpose and underlying principles of administrative law. Properly perceived, nothing in administrative law undermines collective bargaining.[1753] In his *POPCRU*-judgment, Plasket J was confronted with an employment dispute with a collective character and, with due regard to administrative law considerations, evaluated ss 157(1) and 157(2) of the LRA and concluded that the LRA (keeping in consideration s 169 of the Constitution) does "not purport to oust the jurisdiction of the High Court to determine the constitutionality of conduct of organs of state in the field of employment".[1754] Plasket J interpreted s 157(2) as extending Labour Court review jurisdiction to employment decisions made by the State, which fall outside the scope of the LRA and is traditionally associated with the jurisdiction of the High Court.[1755] In

[1751] See Hoexter 2008 (1) *CCR* 209 at 219.

[1752] See Editor 2008 24(5) *Employment LJ* (Electronic Version).

[1753] In fact, PAJA acknowledges that collective situations call for procedural fairness where the rights and interest of individuals (through an employer's response to their collective participation) are adversely affected. See s 4 of PAJA. Note that administrative law does not undermine the fact that some rights are obtained through collective bargaining. Administrative law looks at the adverse effect on the rights of an individual, and does not dissect the legally acknowledged procedure by which rights have already been obtained. Labour law's approach to strike dismissals is reconcilable with this understanding. See Chapter Six, part 4 2 2, for an evaluation of procedural fairness in the collective context as embraced by administrative and labour law.

[1754] *POPCRU v Minister of Correctional Services* 2006 (4) BLLR 385 (E) at par 39.

[1755] See *POPCRU v Minister of Correctional Services* 2006 (4) BLLR 385 (E) at par 39. In *Rampola v MEC for Education Limpopo* 2006 (27) ILJ 591 (T), the High Court accepted the idea of extended jurisdiction, but added a further dimension. Van Rooyen AJ reasoned that the High Court's jurisdiction must shrink proportionally if the Labour Court's jurisdiction is extended. Grogan 2006 22(3) *Employment*

terms of this reading, the Labour Court can consider administrative principles as it relates to employment disputes before it.[1756]

Although the Constitutional Court in its *Chirwa*-judgment preferred a more restrictive reading of s 157(2), the majority did not expressly overrule its earlier *Fredericks*-judgment.[1757] This left the Labour and High Courts confused as to which Constitutional Court case to follow where an employment dispute calls for consideration of both judgments. Consequently, Froneman J in *Nakin v MEC, Department of Education, Eastern Cape Province*[1758] declared the lower courts free to follow the *Fredericks*-judgment.[1759] In *Nonzamo Cleaning Services Co-operative v Appie*,[1760] the full bench of the Eastern Cape High Court in fact went as far as to declare the two judgments irreconcilable.[1761]

LJ (Electronic Version) holds this interpretation of Van Rooyen AJ to be irreconcilable with s 157 as a whole. Grogan supports the interpretation of *Fredericks v MEC for Education and Training Eastern Cape* 2002 (2) BLLR 119 339

(CC) and formulates the following s 157(2) interpretation: "[I]f the LRA is properly interpreted, not only does the High Court have jurisdiction to review labour related matters in which the State is employer, but the Labour Court may adjudicate such matters on the same principles as the High Court should a litigant place such a matter before it."

[1756] This perspective aligns with that of the Constitutional Court in *Fredericks v MEC for Education and Training Eastern Cape* 2002 (2) BLLR 119 (CC).

[1757] The Constitutional Court merely distinguished these two cases on a factual basis.

[1758] 2008 (5) BLLR 489 (Ck). The case concerned a dispute regarding the alleged non-payment of a school principal's salary by the Department of Education. The employee approached the High Court to review the employer's conduct under PAJA.

[1759] See Editor 2008 24(5) *Employment LJ* (Electronic Version). In *Nonzamo Cleaning Services Co-operative v Appie* 2008 (9) BLLR 901 (Ck) at par 31, the High Court noted that Froneman J based the apparent contradiction on the fact that "both *Fredericks* and *Chirwa* dealt with situations where the direct dispute-resolution procedures in terms of the LRA were, firstly, conciliation and, failing that, arbitration".

[1760] 2008 (9) BLLR 901 (Ck).

[1761] 2008 (5) BLLR 489 (Ck). The High Court in *Nonzamo Cleaning Services Cooperation v Appie* 2008 (9) BLLR 901 (Ck) at par 39 explained: "Where a court overrules its own earlier decision on the law, it is customary to do so expressly and to indicate the reasons for its findings. In the absence of express statement ... in *Chirwa* that *Fredericks* is overruled, one must examine those judgments and the circumstances in which they were delivered ... Skweyiya J distinguished the judgment in *Fredericks*, but on a basis not material to the conflict in the judgments, and Ngcobo J does not refer to *Fredericks*.

Logic dictates that s 157(2) of the LRA cannot be read as ousting the traditional jurisdiction of the High Court.[1762] It can also be deduced that concurrent jurisdiction does not bestow on the High Court the jurisdiction to resolve LRA specific issues reserved for the Labour Court.[1763] The logical conclusion is then that the traditional High Court jurisdiction is extended to the Labour Court (without taking anything away from the former), while also granting the Labour Court its own exclusive LRA based jurisdiction.[1764]

It is evident that s 157(2) concurrent jurisdiction includes employment related conduct of the State, when it acts with public power.[1765] The exercise of public power triggers the protection provided for individuals in s 33 of the Constitution, while s 23 is brought to the forefront because an employment decision infringes on an employee's right to fair labour practices.[1766] Therefore, the alleged jurisdictional complexity does not lie in the wording of the section, but in the practical effect ascribed to it by the judiciary.[1767]

Neither Skweyiya J nor Ngcobo J refers to the judgment of the Chief Justice. Skweyiya J and Ngcobo J, as well as the other judges who concurred in their judgment, must however have been aware of the comments of the Chief Justice regarding the clear conflict between their judgments and *Fredericks*. They nevertheless proceeded to deliver their judgments. It must be accepted therefore that they intended to overrule *Fredericks* to the extent that their judgments are in conflict with that of O'Regan J. It follows that this Court is obliged to apply the law as stated in *Chirwa*." See Editor 2008 24(5) *Employment LJ* (Electronic Version).

[1762] See Grogan 2006 22(2) *Employment LJ* (Electronic Version).

[1763] In his *POPCRU*-judgment, Plasket J implicitly rejected such an argument. Grogan 2006 22(3) *Employment LJ* (Electronic Version) notes that "[t]he LRA gives exclusive jurisdiction to the Labour Court to adjudicate all matters which are to be determined by the Labour Court in terms of the LRA".

[1764] Any other interpretation would run contrary to the exclusive jurisdiction conferred upon it by s 157(1) of the LRA. This understanding of s 157(1) does not justify a reading of s 157(2) that restricts the original jurisdiction of the High Court in public employment cases.

[1765] One can therefore assume that the legislature was open to the reality of public power being exercised by the State when making decisions that affect public employment relationships.

[1766] See Ngcukaitobi 2008 (29) *ILJ* 841.

[1767] The complexity resides in the potential polycentric nature of one adverse decision that affects more than one fundamental right.

4 2 Merit-based Jurisdictional Reasoning

Apart from the fact that the Constitutional Court's jurisdictional *Chirwa*-ruling is based on policy rather than legal arguments,[1768] Ngcobo J also delved into the substantive considerations underlying the evaluation of administrative action to justify the court's jurisdictional finding in favour of the Labour Court. Ngcobo J found that a decision to dismiss cannot constitute an administrative action and consequently ruled that the absence of an administrative action implied that the High Court does not have jurisdiction in such cases.[1769]

In his minority judgment, Langa CJ considered the legal framework within which the relationship between labour and administrative law is evaluated. Langa CJ correctly emphasised "that the substantive merits of a claim"[1770] should not form the basis of the jurisdictional determination of a court's power to hear the review.[1771] It should be regarded as an evaluation separate from the jurisdictional question, to safeguard the pursuit of justice and not lose sight of the merits in the shadow of formalities. Langa CJ explained that the jurisdictional debate follows two (interpretative) schools of thought:

[1768] See the concern expressed by Langa CJ in *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at paras 171 – 179 with a policy-based approach.

[1769] Ngcobo J held that the State's decision to dismiss amounted to the exercise of public power, but not administrative action. Ngcobo J found that the public power in casu lacked one of the listed administrative action criteria found in *President of the RSA v SARFU* 2000 (1) SA 1 (CC), namely the implementation of legislation. See *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 138. Hoexter 2008 (1) *CCR* 209 at 224 explains that Ngcobo J "treated a single factor as decisive in a manner arguably not contemplated by the Court in *SARFU*". Ngcobo J however appeared to regard the real issue as the fact "that the dismissal was 'more concerned with labour and employment relations' than with administration". As a result of this approach, Ngcobo J emphasised "the formal division in the Constitution between labour relations and administrative conduct".

[1770] *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 155.

[1771] Langa CJ in *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 169 explained that "[t]he determination of whether the dismissal does constitute administrative action is part of the merits of the claim, not a jurisdictional requirement". In *Nakin v MEC, Department of Education, Eastern Cape Province* 2008 (5) BLLR 489 (Ck) at par 15, Froneman J (commenting on the *Chirwa*-judgment) noted that, contrary to the two majority judgments), Langa CJ also dismissed the appeal, but did not do so on jurisdictional grounds. O'Regan and Mokgoro JJ agreed with the minority judgment of Langa CJ.

the purposive approach[1772] and the literal approach.[1773] Langa CJ also acknowledged the existence of a normative overlap between labour law (s 23) and administrative law (s 33)[1774] as far as the principle of fairness is concerned, as it is the main normative basis that carries both rights. The judge held that jurisdictional questions dominating the jurisprudence must not be decided on the existence or not of this normative overlap.[1775] It was however noted that the acceptance of normative interdependence "may bring in its wake some potential procedural difficulties".[1776] The possible jurisdictional or logistical difficulties accompanying this substantive reality (as revealed on a case-by-case basis) must be addressed by the legislature and should not lead to the neglect of

[1772] In *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 161, Langa CJ explained that this school of thought "claims to give effect to the purpose of the LRA to have labour disputes adjudicated solely within the structures it created". This approach tends to blur the lines between the jurisdictional and normative elements of the relationship between labour and administrative law. For an example of such reasoning, see *Mgijima v Eastern Cape Appropriate Technology Unit* 2000 (2) SA 291 (Tk) at 309. See Chapter Nine, part 4.

[1773] Langa CJ further explained in *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 162 that the literal school of thought only views "those matters explicitly assigned to the Labour Court by the LRA ... [as] excluded from the High Court's jurisdiction". Accordingly the reasoning of this school of thought "relies primarily on what it regards to be the plain meaning of the section" without being entirely unaware of the substantive concerns. See for example *Mbayeka v MEC for Welfare, Eastern Cape* 2001 (4) BCLR 374 (Tk) at par 24.

[1774] See *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 167.

[1775] See *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 167. In casu, the Constitutional Court had an opportunity to elaborate on the doctrine of interdependence as identified by Sachs J in *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC). Regrettably, the question whether Ms Chirwa's dismissal amounted to administrative action was linked to the question whether the High Court had jurisdiction to hear her case. In *Nakin v MEC, Department of Education, Eastern Cape Province* 2008 (5) BLLR 489 (Ck) at par 13, Froneman J noted that, "as far as the *jurisdiction* [debate is concerned] ... the recent judgment of the Constitutional Court in *Chirwa v Transnet Ltd* ... may have disturbed a settled state of affairs, but ... it did not have the effect of overruling the existing state of law" that generally accepts that the High Court shares jurisdiction with the Labour Court "to determine alleged fundamental rights disputes in relation to the conduct of the State in its capacity as an employer, and civil law disputes arising from the common law contract of employment". Froneman J's respectful hesitation to follow the reasoning of the Constitutional Court in *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) is limited to jurisdictional arguments.

[1776] *MEC, Department of Roads and Transport, Eastern Cape v Giyose* 2008 (5) BLLR 472 (E) at par 32.

the relevant substantive considerations applicable in the circumstances of every case.[1777]

In conclusion, it is submitted that there is no merit in the pragmatic argument that a concurrent jurisdiction will create uncertainty and a dual legal system in employment disputes. The fact that both the High and Labour Courts can arguably claim jurisdiction should not be regarded as an overwhelming obstacle, as "[s]ubstantive coherence in employment law may thus be achieved and developed in different courts, provided that these courts give a broadly similar effect to the underlying constitutional right to fair labour practices".[1778] In his *Nakin*-judgment, Froneman J commented that "[i]nstitutional control of the process can be achieved by various means".[1779] It is however primarily the Constitutional Court's task to stabilise the legal system "[i]f the coherence of employment law is disturbed in any way ... by giving proper direction on the substantive content of employment law in accordance with the Constitution".[1780]

Unfortunately, formalists are "tempted to find that questions of law are jurisdictional questions".[1781] In embracing (albeit unintentionally) a degree of formalistic reasoning, the Constitutional Court has allowed interdependent consideration of the underlying norms as applied to the merits of every dispute to fall prey to the jurisdictional turf-war between the Labour and High Courts in the application of s 157 of the LRA. The judiciary cannot exclude merit-based justifiable administrative law considerations based on the factual finding required by s 157 for the determination of scope of jurisdiction.

[1777] Langa CJ in *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 178 explained: "The final concern relates to possible incoherence in the law which may develop from having two different courts adjudicating the issue. I do not think this is a serious problem. Our law often develops with conflicting opinions from different divisions of the High Court. That has not posed any intractable problems as disputes may ultimately be settled on appeal." In *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 44, Navsa AJ made it clear that the only tension between the LRA and PAJA are time limits and jurisdiction, both which the legislature can address.

[1778] *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 178.

[1779] *Nakin v MEC, Department of Education, Eastern Cape Province* 2008 (5) BLLR 489 (Ck) at par 37.

[1780] *Nakin v MEC, Department of Education, Eastern Cape Province* 2008 (5) BLLR 489 (Ck) at par 39.

[1781] Dyzenhaus and Fox-Decent 2001 (51) *Univ Toronto LJ* 193 at 199.

Properly construed, s 157 does not restrict the concurrent jurisdiction of either the High or Labour Courts with regard to adjudication of administrative action claims.[1782]

5 PARALLEL CHOICE

5 1 Cause(s) of Action

The exercise of public power, even in an employment context, attracts the control and regulation of administrative law.[1783] The either/or perspective propagated by the purists (whether from the perspective of labour or administrative law) must be replaced by a not-only-but-also perspective. This shift in perspective is based on the reasoning of Cameron JA in *Boxer Superstores Mthatha v Mbenya*[1784] that "particular conduct may *not only* constitute an unfair labour practice ... *but* may *also* give rise to other rights of action".[1785]

Reasoning of this nature gives expression to the *Fedlife*- and *Fredericks*-judgments of the Supreme Court of Appeal and the Constitutional Court respectively recognised the idea that employment related decisions or conduct "may give rise to more than one cause of action".[1786] With this admission, the judiciary granted recognition to the fact that more than one area of the law can find application, and possibly overlap, in one set of circumstances.

Following this approach, the Labour Court in *Simelela v Member of the Executive Council for Education, Province of the Eastern Cape*[1787] declared that "[i]n addition to

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[1782] Grogan 2006 22(2) *Employment LJ* (Electronic Version) notes that the legislature must have been aware of cases such as *Administrator, Transvaal v Zenzile* 1991 (1) SA 21 (A), *Administrator, Transvaal v Theletsane* 1991 (12) ILJ 506 (A) and *Administrator, Natal v Sibiya* 1992 (4) SA 532 (A), in which the Appellate Division regarded public employment decisions as administrative action.

[1783] See Hoexter *Administrative Law* 194.

[1784] 2007 (8) BLLR 693 (SCA).

[1785] *Boxer Superstores Mthatha v Mbenya* 2007 (8) BLLR 693 (SCA) at par 6. Emphasis added.

[1786] *POPCRU v Minister of Correctional Services* 2006 (4) BLLR 385 (E) at par 63.

[1787] 2001 (9) BLLR 1085 (LC). Educators were instructed not to report for duty at their school, supplied with a task team report on their misconduct and transferred to another school. They approached the High Court in an effort to prevent the initial transfer. The respondents conceded that they lacked the authority to transfer the applicants. Thereafter the applicants received letters informing them that they could make

fair administrative action, state employees are afforded a constitutional right to fair labour practices".[1788] In *United National PSA of SA v Digimo NO*,[1789] the Supreme Court of Appeal confirmed the possibility that "[p]articular conduct of an employer might constitute both an 'unfair labour practice' ... and it also might give rise to other rights of action".[1790] The *POPCRU*-judgment of Plasket J expanded on this possibility and elucidated that "[t]here is nothing incongruous about individuals having more legal protection rather than less, or of more than one fundamental right applying to one act, or more than one branch of law applying to the same set of facts".[1791] This perspective was endorsed by Cameron JA in *Transnet Ltd v Chirwa*,[1792] as Ms Chirwa's facts triggered two constitutional rights.[1793] On appeal to the Constitutional Court, Langa CJ further explained that "[t]he mere fact that her claims arose from the employment context cannot rob them of their administrative nature".[1794]

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representations on the subject of their proposed transfer. The applicants did not make use of this opportunity and were transferred. The applicants again approached the court to prevent transfer and requested reinstatement in their previous positions. After consideration of the facts, the court ordered reinstatement.

[1788] *Simelela v Minister of the Executive Council for Education, Province of the Eastern Cape* 2001 (9) BLLR 1085 (LC) at par 56.

[1789] 2005 (12) BLLR 1169 (SCA).

[1790] *United National PSA of SA v Digomo NO* 2005 (12) BLLR 1169 (SCA) at par 14. The statement is mere bone without flesh as the judgment, although widely cited in favour of a choice of cause of action between labour and administrative rights, was not based on the nature of labour and administrative law. In *United National PSA of SA v Digomo NO* 2005 (12) BLLR 1169 (SCA) at par 4, the court rather chose to add another level to the jurisdictional façade that suppresses any true reflection of the substance of the relationship between labour and administrative law. In ignoring substantive normative considerations it was declared that the claim "to enforce the right … to fair administrative action – a right that has its source in the Constitution and that is protected by section 33 - … is *clearly cognisable in the ordinary courts*". Emphasis added.

[1791] *POPCRU v Minister of Correctional Services* 2006 (4) BLLR 385 (E) at par 60.

[1792] 2007 (1) BLLR 10 (SCA).

[1793] See *Transnet Ltd v Chirwa* 2007 (1) BLLR 10 (SCA) at par 57.

[1794] *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 173. Langa CJ emphasised the equal constitutional importance of and access to labour and administrative rights in *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 175, as "[a] litigant is entitled to full protection of both rights, even when they seem to cover the same ground".

The jurisprudential admission that an applicant has a choice in cause of action (in that the public employee can rely on either the right to fair labour practices or the right to just administrative action or even both if he or she so chooses) is proof of the underlying normative interdependence in the relationship between labour and administrative law.[1795]

In his *Chirwa*-judgment, Ngcobo J (in contrast to the reasoning of Langa CJ) noted disagreement "with the view that a public sector employee, who challenges the manner in which a disciplinary hearing that resulted in his or her dismissal [was conducted], has two causes of action, one flowing from the LRA and another from ... PAJA".[1796] It is submitted that this argument restricts the protective spirit of the Constitution based on Ngcobo J's perceived intention behind the enactment of the LRA.[1797]

Ngcobo J did not expressly address the fact that the LRA is silent on the regulation of public power in public employment decisions, other than the references to public employment in ss 157(2) and 158(1)(h) of the Act. As such, it can hardly be said that the LRA comprehensively usurps the function of administrative law, thereby not requiring reliance on normative based interdependence and compatible aims to restrain the abuse of power. It is simply a matter of the presence of public power contextually calling for additional regulation and constraint. That employer merely happens to be an organ of State, which in turn attracts constitutional scrutiny in terms of the rule of law. It is not a case of differential treatment based on superficial ideas about status or

[1795] See *Nakin v MEC, Department of Education, Eastern Cape Province* 2008 (5) BLLR 489 (Ck) at par 48 per Froneman J.

[1796] *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 149.

[1797] Ngcobo J articulated his perspective in *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at paras 148 and 149 as follows: "Labour and employment rights such as the right to a fair hearing, substantive fairness and remedies for non-compliance are now codified in the LRA. It is no longer necessary, therefore, to treat public sector employees differently and subject them to the protection of administrative law ... The starting point under our Constitution is that all workers should be treated equally and any deviation from this principle should be justified. There is no reason in principle why public sector employees who fall within the ambit of the LRA should be treated differently from private sector employees and be given more rights than private sector employees."

privilege.[1798] Public employees are only granted rights that contextually can be justified. Public power – not status - is the key contextual influence determining whether the right to just administrative action can be relied on in addition to the right to fair labour practices.[1799] Context influences the relevant rights and the associated concepts.

In the *Nakin*-judgment, Froneman J commented that "perhaps the majority of *Chirwa* tried to tell us that the conceptual choice should be made in terms of the LRA and not PAJA), but conceptual choices can be manipulated in order to avoid voicing the real substantive reasons why one choice is made in preference to another".[1800] To avoid such an injustice, it must be remembered that whatever cause of action a public employee relies upon, the outcome of the case should be fair and just to both parties to the administrative/employment relationship.[1801] The choice of one cause of action

[1798] See Chapter Four. Ngcobo J appeared not to appreciate that the Constitution does not require employment relationships to be carbon copies of each other. Equal treatment does not require absolute sameness.

[1799] For an in depth discussion of the role of public power (as a contextual consideration) in a balanced approach to employment decisions as administrative action, see Chapter Nine, part 2 1. At this stage of the study, public power is specifically not discussed in isolation (from a mere administrative law perspective) as a theoretical element of administrative action, as it is the aim of this study to present a contextual perspective of public power as part of an analytical methodology in response to the concerns outlined in Chapter One. It is further reasoned that only once all conceptual elements are simplistically viewed (absent any formalistic preconceptions) can the role of public power be considered objectively within the context of the debate (as to the relationship between the rights to fair labour practices and just administrative action) as part of the solution and not central to the problem.

[1800] *Nakin v MEC, Department of Education, Eastern Cape Province* 2008 (5) BLLR 489 (Ck) at par 48.

[1801] The normative interdependence of labour and administrative rights requires that constitutional justice must always prevail. It is a non-derogable judicial obligation. Fairness in relying on one cause of action should not hold the inherent possibility of an alternative unfair result in following another cause of action. The duty to uphold the objects of the Constitution is extended to all courts and not merely to selective forums. An interpretation of this nature is irreconcilable with the spirit and purpose of the Constitution. Consequently, a forced choice (by the public employee wishing to challenge an employment decision) supports the elitist idea that labour law can oust the protection offered by administrative rights. Such a perspectives cannot stand, as Plasket J emphasised in *POPCRU v Minister of Correctional Services* 2006 (4) BLLR 385 (E) at par 60 that "the protection afforded by labour law and administrative law are complementary and cumulative".

cannot be a means of undermining the constitutional justice that flows from the other.[1802]

If a public employment decision can give rise to more than one infringement, an employee may have more than one cause of action, which can result in more than one remedy. These remedies, if the dispute is properly construed with due regard to the Constitution, will be reconcilable.[1803]

5 2 Remedies

Stacey explains that a premise has developed "that our law does not admit the possibility of two remedies in two separate branches of law for a single act".[1804] Some jurists have therefore raised the issue of remedies, specifically a difference in remedies, to show that administrative and labour law is irreconcilable.

[1802] In *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 176, Langa CJ made this unmistakably clear with his statement that the fact "that the rights to fair labour practices and just administrative action may overlap in the case of public employees is not a reason to sacrifice one right without a clear [and constitutionally justifiable] legislative provision to the contrary".

[1803] In *MEC, Department of Roads and Transport, Eastern Cape v Giyose* 2008 (5) BLLR 472 (E) at par 35, Froneman J explained that, regardless of the cause of action an applicant chooses, "[t]he eventual outcome ... will be the same" if fairness and justice remain the judicial compass. In *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 155 fn 171, Sachs J also stated that apparently different choices might be virtually identical "in relation to philosophy, approach and evaluation of relevant material and ultimate outcome".

[1804] Stacey 2008 (125) *SALJ* 307 at 324. See also Hoexter *Administrative Law* 194. In *Transnet Ltd v Chirwa* 2007 (1) BLLR 10 (SCA) at par 31, Conradie JA emphasised that "PAJA and the LRA, differ fundamentally in the substantive remedies they provide". To stress a *fundamental* difference is perhaps too severe when properly considered within the context of interdependence and not merely in the historic context. Conradie JA did, however, draw a distinction between the usual (traditional) and the contemporary position: "If an application for review of administrative action succeeds, the applicant is *usually* entitled to no more than a setting aside of the impugned decision and its remittal to the decision-maker to apply his mind afresh. *Except* where unreasonableness is an issue the reviewing court does not concern itself with the substance of the applicant's case and only in *rare cases* substitutes its decision for that of the decision-maker." Emphasis added. Where administrative and employment decisions coincide in the public employment sector with the exercise of managerial and public power by a public employer such an exceptional substantive unreasonable reviewable decision can present itself.

If it is accepted, constitutionally speaking, that labour rights cannot prevent the applicability of administrative rights in the absence of normative conflict, then the remedies associated with those rights must be open to aggrieved public servants. Administrative action, premised on the presence of public power determined on a case-by-case basis, will necessarily attract a public remedy.[1805]

[1805] In *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) BCLR 300 (CC) at par 29, Moseneke DCJ explained: "It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. *In each case the remedy must fit the injury. The remedy must be fair ... It must be just and equitable in the light of the facts*, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public law remedies and not private law remedies. *The purpose of a public law remedy is to pre-empt or correct or reverse an improper administrative function.*" Emphasis added. As the emphasised passage indicates, there is nothing in principle about "public" law remedies that stand in conflict with the equity based remedial approach adopted by the LRA in giving expression to s 23. In *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) BCLR 300 (CC) at paras 99 and 100, Sachs J stated: "Both the interim Constitution and the final Constitution envisage a right to just administrative action. The implication is that a constitutionalised form of judicial review is intended to cover the field, both in substantive and remedial terms. To my mind it would not only be jurisprudentially inelegant and functionally *duplicatory to permit remedies under constitutionalised* administrative law, *and remedies under the common law, to function side by side*. It would be constitutionally impermissible." Sachs J concluded that the "existence of this constitutionally-based public law remedy renders it *unnecessary and inappropriate to hybridise and stretch the common-law* delict of injury *beyond its traditional limits* in this area". Emphasis added. This comment of Sachs J on the inappropriateness of a duplication of remedies in two different branches of law must be understood within its proper context. He was considering remedies linked to a constitutional right legislatively given effect to and weighed against a common law traditional remedial approach. In the public employment context the scenario is different. Two constitutional rights are at play, and Sachs J has declared himself in support of hybridity where fundamental rights can be interdependently applied to maximise justice. See *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC). This constitutional/common law remedial duplication that Sachs J seeks to avoid in *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) BCLR 300 (CC) at paras 99 and 100 must also allow for the fact that a remedial overlap is not always excluded, but rather dependent on the circumstances of the case. If the common law addresses an aspect not addressed by a fundamental right then overlap is still allowable and practical in the pursuit of justice. In *Fedlife Assurance Ltd v Wolfaardt* 2001 (12) BLLR 1301 (SCA) at par 15, Nugent AJA emphasised that "there can be no suggestion that the constitutional dispensation deprived employees of the common-law right to enforce the terms of a fixed-term contract of employment". The side-by-side remedial application of common law and constitutionally informed

In *Steenkamp NO v Provincial Tender Board, Eastern Cape*,[1806] the Constitutional Court clearly indicated that relief must fit the claim. For example, an applicant cannot claim an administrative law remedy for a delictual cause of action.[1807] Stacey therefore argues that, "[i]f any act can be shown to be a public-law wrong, then public-law remedies must be available to correct the consequences of the act".[1808] This understanding is reconcilable with the idea that more than one cause of action can flow from a single employment context. A proper reading of s 157 of the LRA[1809] shows that the High Court retains its traditional jurisdiction to decide constitutional and contractual matters in an employment context. An applicant can therefore have two causes of action; one based on s 23 and another on s 33, with the option of approaching the Labour Court to adjudicate the former and the High Court to decide on the latter. The two causes of action attract the remedies appropriate to each. It will bring about an injustice to say that, regardless of the presence of public power that attract public law remedies, an applicant is not entitled to such remedies as he or she already has access to remedies for a s 23 LRA based infringement. It would go against the spirit of the Constitution if the one right (and associated cause of action and remedy) were allowed to exclude the applicability of another. The phantom fear of forum-shopping (as Stacey appropriately describes it) is in itself not enough to deny parallel causes of action and the parallel remedies linked thereto.[1810]

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remedies have been rejected by the Constitutional Court in so far as it undermines a uniform and singular legal system based on the supreme Constitution due to a difference in conceptual basis. See Stacey 2008 (125) *SALJ* 307 at 325; *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the RSA* 2000 (3) BCLR 118 (CC) at par 44.

[1806] 2007 (3) BCLR 300 (CC).

[1807] See Stacey 2008 (125) *SALJ* 307 at 322.

[1808] Stacey 2008 (125) *SALJ* 307 at 322.

[1809] See Chapter Nine, parts 2 1 2, 2 1 3 and 3 3.

[1810] Stacey 2008 (125) *SALJ* 307 at 326 explains: "What these arguments fail to recognize, though, is that drawing away from the development of parallel streams of jurisprudence is motivated by *a need to preserve conceptual integrity within a single branch of law* – and within a single forum. The *Pharmaceutical Manufactures* approach denies the concurrent availability of common-law and constitutional remedies ... But the approach certainly does not go so far as to deny the concurrent availability of administrative-law remedies and contract-law remedies, for example. The approach is premised on the fact that *the protections of administrative justice and fair labour practices derive from the*

6 GENUINE INTERDEPENDENCE

As emphasised by Froneman J the *Giyose*-judgment, compartmentalisation as outlined in the preceding discussion transgresses into an unjustified judicial denial of the normative link between labour and administrative law.[1811]

Judicial acceptance of the doctrine of normative interdependence, reconcilable with the Constitution,[1812] has the inherent potential to promote jurisprudential continuity in the pursuit of justice, due to the variable nature of concepts such as reasonableness and fairness.[1813] The context of every case, not the sphere of law that traditionally claims regulative dominance, determines the meaning of those variable concepts.[1814]

Constitution ... There is no constitutional reason to flee the phantom of forum-shopping." Emphasis added.

[1811] See *MEC, Department of Roads and Transport, Eastern Cape v Giyose* 2008 (5) BLLR 472 (E) at par 26.

[1812] See Chapter Seven.

[1813] Within the relationship between labour and administrative rights, jurisprudence clearly identifies the norm of fairness as the primary (particularly relevant) hybrid concept. The concept of fairness is not only closely associated with the idea of constitutional justice, but also relates to considerations of reasonableness and lawfulness as constitutionally endorsed by the rule of law (in general) and the principle of legality (in particular). It is informative that Didcott J in the *Sibiya*-judgment based the evaluation of a *lawful* exercise of power on considerations of *fairness*. This illustrates the presence of contextual normative interdependence pre-dating the Constitution. This interdependent perspective of the scope and nature of the concept of lawfulness is now again emphasised by its place in the Constitution, as explained by Devenish, Govender and Hulme *Administrative Law and Justice* 5.: "The right to lawful administrative action ... elevated to the status of a fundamental right ... [i]n many cases ... will result in a *synthesis*". Emphasis added. See De Ville 2004 (20) *SAJHR* 577 at 595; Grogan 1991 (108) *SALJ* 599. Didcott J's reasoning nevertheless indicates that even though fairness and lawfulness are not synonyms and one can arguably be present in the absence of the other, the one can also inform the presence of the other. Even though not expressly acknowledged in pre-constitutional cases such as the *Zenzile*- and *Sibiya*-judgments, the idea of interdependence was nevertheless present.

[1814] Cf De Ville 2004 (20) *SAJHR* 577 at 595 – 596.

In *PSA obo Williams v Department of Correctional Services*,[1815] Commissioner Newall took into consideration the objects of the LRA *and* the normative values of the Constitution in evaluating the failure by the National Commissioner of Correctional Services to provide reasons for a decision not to appoint the employee as assistant director at the prison.[1816] Consideration was accordingly given to the interdependence of the various dimensions of procedural fairness:[1817] dignity,[1818] democratic

[1815] 1999 (20) ILJ 1146 (CCMA). The union referred a dispute to the CCMA alleging that the National Commissioner of Correctional Services' failure to appoint Mr Williams as Assistant Police Director amounted to an unfair labour practice. Mr Williams was one of three short-listed candidates. The names were submitted for selection in terms of standard procedure. The National Commissioner did not provide reasons for his decision and was ordered to submit written reasons for his selection.

[1816] In *PSA obo Williams v Department of Correctional Services* 1999 (20) ILJ 1146 (CCMA) at 1147, the oversight amounted to a failure to "meet the requirements of transparent, accountable and coherent government".

[1817] All these dimensions relate to a single normative principle, but each has its own contributory element developmentally rooted in another area of the law. The unification of these dimensions results in the protection and promotion of procedural fairness as envisaged by the spirit of the Constitution.

[1818] Collins *Justice in Dismissal* 106 explains that respect for dignity through the procedural element of fairness calls for the observance of "the rules of natural justice or due process before any deprivation of liberty or property, or any denial of some important legitimate expectation, for the sake of demonstrating respect for the individual affected by the decision". This dimension of procedural fairness gives expression to the constitutional value of dignity that underlies both the rights to fair labour practices and just administrative action. The dignity dimension of procedural fairness alone is not sufficient for comprehensive protection. If not allowed to adapt to the context of every case it "lacks the diversity and flexibility to provide the basis for a satisfactory interpretation of the principle" of fairness, as the idea of due process as traditionally developed tends to imply a degree of formality. In *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 42, Skweyiya J emphasised the interdependent dignity dimension by restating that the "LRA includes the principles of natural justice". The judge further emphasised: "By doing so, the LRA guarantees that an employee will be protected by the rules of natural justice and that the procedural fairness requirements will satisfy the *audi alteram partem* principle and the rule against bias. If the process does not, the employee will be able to challenge her or his dismissal, and will be able to do so under the provisions and structures of the LRA. Similarly, an employee is protected from arbitrary and irrational decisions, through substantive fairness requirements and a right not to be subjected to unfair labour practices." The labour law framework in the LRA therefore acknowledges normative interdependence with administrative law. See Chapter Six.

participation[1819] and efficiency.[1820] This inherent interdependence is necessary, as the procedure by which the fairness of any conduct is assessed must be viewed "as a series of interactive stages".[1821]

In the *Simelela*-judgment, the Labour Court relied on the democratic participatory dimension of procedural fairness in finding that "[a] decision to transfer an employee without prior consultation amounts to an unfair labour practice".[1822] In *Transnet Ltd v Chirwa*,[1823] Conradie JA revealed that the LRA emphasises certain dimensions of procedural fairness (particularly participation and effectiveness), but does not necessarily or explicitly place the traditional natural justice dignity element (as developed in the pre-constitutional public employment cases) at the centre of the

[1819] According to Collins *Justice in Dismissal* 108 the democratic participation dimension ensures that procedural fairness "maximizes the opportunity for consultation and expression of differing opinions before a decision is reached" to ensure that "those likely to be affected by a decision [is afforded] an equal chance to have their views considered". This is the underlying rational for the principle of audi alteram partem as traditionally associated with administrative law. See Chapter Six.

[1820] In upholding the idea of efficiency, Collins *Justice in Dismissal* 110 – 111 explains the principle of procedural fairness to "be designed to ensure so far as possible that the decision is based on the best information available at reasonable cost concerning the facts and the likely consequences", as it calls for relevant factors to be considered and irrelevant factors to be ignored. Collins emphasises the presence of an "underlying moral principle [of general welfare], here supporting procedures required by efficiency". This form of procedural fairness is generally associated with labour law. See Chapter Six.

[1821] Collins *Justice in Dismissal* 104.

[1822] *Simelela v Member of the Executive Council for Education, Province of the Eastern Cape* 2001 (9) BLLR 1085 (LC) at par 57. The judge emphasised the dignity dimension of procedural fairness through application of the principles of natural justice generally associated with administrative law type cases. In casu, Francis AJ linked the democratic participation dimension to the dignity dimension, illustrating that various perspectives of procedural fairness can indeed be relied upon in a supplementary manner regardless of whether the concept (absent specific context) is recognised by various branches of law. The contextualised perspective of the concept in one branch of the law can be drawn into the contextual analysis of the concept within another branch of the law. This exercise merely renders the promotion of fairness more just and grants a multi-dimensional contextual meaning to the concept of fairness. See *Simelela v Member of the Executive Council for Education, Province of the Eastern Cape* 2001 (9) BLLR 1085 (LC) at par 59.

[1823] 2007 (1) BLLR 10 (SCA).

pursuit of justice in the workplace.[1824] The Constitutional Court has at times indicated that a co-operative approach to and application of the dimensions of procedural fairness in pursuit of a comprehensive promotion of justice does not imply that the administrative dimension will undermine the labour dimension.[1825] Jurisprudence has also revealed that substantive fairness in labour law and reasonableness in administrative law presents no logical threat of normative conflict.[1826] It is also evident from the Supreme Court of Appeal *Chirwa*-judgment and *Giyose*-judgment of Froneman J that the first steps have been taken to the development of an understanding of reasonableness and substantive fairness with co-operative potential. Conradie JA explained that an evaluation of unreasonableness in an administrative law context justifies an exceptional (rather than traditional) review of the substance of the affected person's case.[1827] In similar fashion, Froneman J in the *Giyose*-judgment found that the decision to transfer a public employee called for the consideration of both procedural fairness and substantive rationality.[1828] In the older Labour Appeal Court decision of *Carephone (Pty) Ltd v*

[1824] The traditional dimension of procedural fairness is the primary focus in PAJA's pursuit of fairness, which lays down the procedural elements for a lawful and fair administrative decision. See Conradie JA in *Transnet Ltd v Chirwa* 2007 (1) BLLR 10 (SCA) at par 28. Section 3 of PAJA (although recognising the flexible nature of the norm) reminds of the traditional due process dimension of procedural fairness in that it lays down certain minimum core elements to be adhered to in every instance for a decision to be procedurally fair.

[1825] See *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 140, where O'Regan J explained that the dimension of efficiency would not be prejudiced by allowing consideration of the traditional dimension associated with s 33, as "no further delay will be caused by that [additional level of] scrutiny".

[1826] See Chapters Five and Nine.

[1827] See *Transnet Ltd v Chirwa* 2007 (1) BLLR 10 (SCA) at par 31. The Constitutional Court in the *Chirwa*-judgment, referred to the Supreme Court of Appeal judgment of Conradie JA with approval.

[1828] See *MEC, Department of Roads and Transport, Eastern Cape v Giyose* 2008 (5) BLLR 472 (E) at par 1. From a labour law perspective, substantive rationality is linked to substantive fairness, as related to considerations of reasonableness. See Chapter Five for a discussion of the normative interdependence between substantive fairness and reasonableness. In short, it can be concluded that it is possible for specific substantive fairness to be evaluated with due regard to the guidelines of general reasonableness. In an administrative law context, a link exists between rationality and reasonableness. Section 24 of the interim Constitution required rationality in the administrative action, while the final Constitution in s 33 now replaces the term rationality with reasonableness. A legal assumption has developed that the interim

Marcus NO[1829] it was acknowledged that the contemporary perspective of rationality requires a court to make a value judgment as associated with the substantive idea of labour fairness.[1830]

In the *Sidumo*-judgment, Navsa AJ (writing for the majority) found decisions of the CCMA to qualify as administrative action.[1831] The judge however reasoned that the administrative action in question fell outside the direct regulatory scope of PAJA. Navsa AJ interpreted s 33(3) of the Constitution as allowing the LRA, as specialised national legislation protecting and promoting the s 23 constitutional objectives, to also give effect to the s 33(1) right to just administrative action within the functioning of the specialised labour scheme and its dispute resolution mechanism.[1832] The judge showed great insight in explaining that "[n]othing in section 33 of the Constitution precludes specialised legislative regulation of administrative action such as section 145 of the LRA

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understanding of rationality jurisprudence is subsumed in the current idea of reasonableness. This was explained by Chaskalson CJ in *Minister of Health v New Clicks SA (Pty)* 2006 (1) BCLR 1 (CC) at par 108.

[1829] 1998 (11) BLLR 1093 (LAC). The case considered the impact of administrative law rationality on labour law reviews under the interim Constitution. A reading of Chapter Three illustrates that the understanding of reasonableness as found in the final Constitution attracts both considerations of rationality and proportionality, if contextually justified.

[1830] Due deference is owed to the privilege of the employer to determine who works for him and her, as well as the disciplinary manner in which misconduct is addressed. See Chapter Five for a discussion of the proper understanding of deference as respect (as developed in administrative law) in the context of labour law after the Constitutional Court's *Sidumo*-judgment.

[1831] In *POPCRU v Minister of Correctional Services* 2006 (4) BLLR 385 (E) at par 46, Plasket J explained that, as a type of public power, administrative action (whether directly regulated by PAJA or not) is "reviewable for compliance with the founding value of the rule of law, including the principle of legality, entrenched in s 1(c) of the Constitution at the very least". Even if it can be argued that an administrative action is not present in a specific context that affects a public employee, the constitutional values still inform all rights. The umbrella principle of legality therefore informs s 23 with its underlying considerations in the regulation of fairness where public power (even if arguably not of an administrative nature) is present in an employment context.

[1832] See *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 89. Accordingly, CCMA decisions, as administrative actions, must be lawful, reasonable and procedurally fair. See Lange, Rudolph and Wessels 2008 (5) *AJA Newsletter* 1 at 6 – 7.

alongside general legislation such as PAJA".[1833] As a result, it is permissible within the transformative milieu for the LRA to regulate "'administrative action' within the specialised labour law sphere".[1834] Such regulation must occur with due regard to the constitutional principles found in s 33.[1835] This logical approach allows administrative law to contribute its constitutionally developed understanding of reasonableness to the labour law realm, thereby allowing judicial consideration of context-specific reasonableness considerations when interpreting the variable component of fair labour practices.[1836] The Constitutional Court thus acknowledged the potential of labour law to

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[1833] *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 91. The LRA is specialised in giving effect to the constitutional right to fair labour practices. In the majority judgment, Navsa AJ gave sufficient weight to the argument that labour law, in its regulation of public employment, can in part be regarded as specific administrative law, that functions in harmony with the general principles emanating from the s 33 right to just administrative action. Consequently, the Constitutional Court explained that s 145 of the LRA (in identifying the grounds for review) must be read in line with the Constitution and therefore interpreted to give effect to the s 33 right to just administrative action, as "any legislation giving effect to s 33 must comply with its prescripts". Within the context of the case and its specific legal question, Navsa AJ emphasised that there are "causes of action for judicial review of administrative action that do not fall within the scope of PAJA". See *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at paras 91 – 94, specifically par 92 where Navsa AJ quoted *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (7) BCLR 678 (CC) at par 25 per O'Regan J. Navsa AJ concluded that PAJA does not form the exclusive legislative basis for reviews. Cf Lange, Rudolph and Wessels 2008 (5) *AJA Newsletter* 1 at 8. Navsa AJ in *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 105 elucidated: "[S]ection 3 of the LRA provides, *inter alia*, that its provisions must be interpreted in compliance with the Constitution. Section 145 therefore must be read to ensure that administrative action by the CCMA is lawful, reasonable and procedurally fair."

[1834] *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 89. Lange, Rudolph and Wessels 2008 (5) *AJA Newsletter* 1 at 8 – 9 explain that Navsa AJ's reliance on s 145 of the LRA instead of PAJA does not allow litigants to circumvent legislation giving effect to the right to just administrative action in terms of s 33(3). The authors elaborate: "Direct reliance on section 33 of the Constitution is not countenanced by Navsa AJ's approach since section 145 of the LRA is determined to be, alongside PAJA, national legislation that gives effect to the right to lawful, reasonableness and procedurally fair administrative action."

[1835] See *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 89.

[1836] See *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 89 per Navsa AJ, *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (7) BCLR 678 (CC) at par 25 per O'Regan J

contextually address employment disputes through labour principles "suffused by the constitutional standard of reasonableness"[1837] as broadly outlined in O'Regan J's *Bato Star*-test.[1838] Navsa AJ explained that the application of this reasonable equilibrium evaluation in such a manner "will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative justice which is lawful, reasonable and procedurally fair.[1839] In addition, Navsa AJ noted that the current labour law rationality perspective takes its cue from the Industrial Court's administrative action approach.[1840] In the contemporary context, the "Labour Appeal Court describes this approach as one of 'substantive reality', likening it to administrative law concepts such as reasonableness, rationality and proportionality".[1841]

In the same case, Sachs J insightfully commented that the norms of reasonableness and fairness are not easily separated, as "it is difficult to see how a reasonable commissioner can act unfairly, or a fair commissioner can function unreasonably".[1842] Sachs J explained that, while "the very notion of a *fair* labour practice requires that fairness be the touchstone throughout"[1843] it must be observed that "the values of fair dealing that underlie section 33 of the Constitution must be respected"[1844] within the s 145 LRA context of the review of procedural misconduct.[1845] Consequently, as a clear definition of the flexible norm of fairness eludes the judiciary, it cannot unequivocally be declared that fairness in a labour context excludes reasonableness considerations as

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[1837] *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 110.

[1838] See *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 110. See Chapter Five, part 4, for a detailed discussion of the *Bato Star*-test.

[1839] See *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 110.

[1840] See *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 38.

[1841] *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 39. Footnotes omitted.

[1842] *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 146. Allan (as referred to by Chaskalson 1989 (5) *SAJHR* 293 at 297) insightfully declares: "All law must postulate some kind of common denominator of just instinct in the community. There is no meaning in any legal system unless this foundation exists. Infinite though the variations of subjective opinion may be, it needs no subtle dialectic to demonstrate that there is in man an elementary perception of justice as a form of right and good, which no law dare flagrantly transgress."

[1843] *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BCLR 1097 at par 145. Emphasis added.

[1844] *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BCLR 1097 at par 158.

[1845] See *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BCLR 1097 at par 158.

generally associated with the right to just administrative action.[1846] The highlighted cases indicate that the judiciary to some degree has recognised this fact in the embrace of genuine interdependent reasoning at times.

However, genuine interdependent reasoning has not yet completely infiltrated the judiciary's constitutional understanding in employment disputes. Although five of the judges in *Sidumo v Rustenburg Platinum Mines Ltd*[1847] held that s 33 of the Constitution found application in the absence of PAJA, four of the judges unfortunately reasoned that neither s 33 nor PAJA found application in the case.[1848] In his minority judgment, Ngcobo J held that review of labour decisions must be understood in a restrictive manner.[1849] Ngcobo J reasoned that the focus must fall on the scope and meaning of gross irregularity,[1850] and incorporated the concept of fairness into that meaning.[1851] In

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[1846] General fairness inevitably includes considerations of reasonableness. See Chapters Two, Three and Five. In *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BCLR 1097 at par 172, Ngcobo J also (albeit unintentionally) illustrated that the pursuit of fairness has a similar dimension to its mirror image in administrative law, in that "fairness to both the workers and their employers means the absence of bias in favour of either". The absence of bias in decisions affecting the rights and interests of individuals is a crucial element of the pursuit of justice and fairness in administrative law traditionally and contemporarily. This truth underlies both labour and administrative law. Ngcobo J however disagreed with Navsa AJ and argued that the CCMA performs judicial functions. See *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BCLR 1097 (CC) at par 215.

[1847] 2007 (12) BLLR 1097 (CC).

[1848] See Lange, Rudolph and Wessels 2008 (5) *AJA Newsletter* 1 at 7.

[1849] This perspective of Ngcobo J is unfortunate, as Brassey et al *The New Labour Law* 61.9 explain that such a restrictive interpretation does not embrace the beneficial objective of the LRA: "The proper approach is to seek out the 'true intention of the legislature as expressed in the Act'. When there is doubt – as there often will be because of the open texture of the definition, the court should, it is submitted, prefer a liberal to a restrictive construction, because this is a provision with a beneficial object." See Marais *Onbillike Arbeidspratyke* 23.

[1850] In interpreting the meaning of the concept, Ngcobo J took into consideration the judgment of *Ellis v Morgan* 1909 TS 576 at 581 where it was stated that "an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trail, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined".

[1851] Lange, Rudolph and Wessels 2008 (5) *AJA Newsletter* 1 at 10. In *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BCLR 1097 at par 268, Ngcobo J explained his reasoning: "[W]here a commissioner

requiring a degree of fairness that is manifestly unfair to form the basis for a review, Ngcobo J adopted an understanding of gross irregularity that reminds of the pre-constitutional understanding of symptomatic unreasonableness.[1852] Lange, Rudolph and Wessels accordingly comment that Ngcobo J, although declining to view CCMA decisions as administrative action, nevertheless merges the framework of the administrative law understanding of symptomatic reasonableness with his understanding of fairness as the basis for the meaning of gross irregularity.[1853]

The reasoning of the Constitutional Court, whether read from the majority or minority perspective, implies that the requirement of reasonableness (as administrative law's answer to substantive fairness) to some extent supplements labour law understanding of fairness, because of the transformative Constitution. This is logical, as both reasonableness and fairness are flexible contextually informed concepts that incorporate "*boni mores* and policy considerations"[1854] in the value judgment it requires of the courts.

If the Constitutional Court in its *Sidumo*-judgment ruled that the s 33 idea of reasonableness can, circumstances permitting, supplement the s 23 idea of fairness within the context labour practices, what (if anything) does the court's *Chiwa*-judgment contribute to the genuine promotion of this constitutionally based normative interdependence?

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fails to have regard to material facts, the arbitration proceedings cannot, in principle, be said to be fair because the commissioner fails to perform his or her mandate ... This constitutes a gross irregularity in the conduct of the arbitration proceedings, as contemplated in section 145(2)(a)(ii) of the LRA."

[1852] See Lange, Rudolph and Wessels 2008 (5) *AJA Newsletter* 1 at 10.

[1853] See Lange, Rudolph and Wessels 2008 (5) *AJA Newsletter* 1 at 11. All the judges therefore agreed that the decisions of the CCMA (whether administrative action or not, whether subject to PAJA or not) can, to some degree, be reviewed on the ground of reasonableness. See Lange, Rudolph and Wessels 2008 (5) *AJA Newsletter* 1 at 7. The same argument can be carried over to situations where the State is party to a dispute in the capacity of employer: the decisions of an organ of state (whether administrative action or not, whether subject to PAJA or not) can, to some degree, be reviewed on the ground of reasonableness.

[1854] *NUM v Vaal Reefs Exploration and Mining Co Ltd* 1987 (8) ILJ 776 (IC) at 779. See also Marais *Onbillike Arbeidspratyke* 27.

In its *Chirwa*-judgment, the Constitutional Court, confronted with the jurisdictional conundrum that so frequently overshadows the constitutional interdependence that underscores labour and administrative law norms, was granted an opportunity to unequivocally state the law. Unfortunately, the court presented more questions than answers.[1855] Skewyiya J for example reasoned that, although the judiciary should be careful not to limit the existing constitutional rights of a litigant, "it is unsatisfactory that the High Court should be approached to decide review applications in terms of PAJA where the LRA already regulates the same issue to be reviewed".[1856] Such reasoning appears to ignore the genuine interdependence logic of the Constitutional Court's own earlier *Sidumo*-judgment.

Even if it is accepted that the Labour Court has jurisdiction there is no constitutional basis for that fact to deter the Labour Court from considering the right to just administrative action in giving effect to the Constitution in the manner presented in the *Sidumo*-judgment. Acknowledging the normative interdependence between the rights to fair labour practices and just administrative action does not hinder employees from pursuing their cause of action "through the mechanisms established by the LRA".[1857] In fact, the pursuit of justice within labour law through the LRA allows for such normative interdependence.[1858]

[1855] In his majority judgment, Skweyiya J set out the order of the court. His judgment was supported by seven of the judges. In agreeing with Skweyiya J, Ngcobo J identified two further issues on which Skweyiya J did not focus and rendered a judgment supported by 6 judges (but not by Skweyiya J). Langa CJ wrote a minority judgment supported by Mokgoro and O'Regan JJ.

[1856] *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 40.

[1857] *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 41 per Skweyiya J.

[1858] The reasoning of Skweyiya J in *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 42 is informative: "The LRA includes the principles of natural justice. The dual fairness requirement is one example; a dismissal needs to be substantively and procedurally fair. By doing so, the LRA guarantees that an employee will be protected by the rules of natural justice and that the procedural fairness requirements will satisfy the *audi alteram partem* principle and the rule against bias. If the process does not, the employee will be able to challenge her of his dismissal, and will be able to do so under the provisions and structures of the LRA. Similarly, an employee is protected from arbitrary and irrational decisions, through substantive fairness requirements and a right not to be subjected to unfair labour practices."

Developing the understanding of variable concepts such as fairness on a continual basis and with due regard to changing context is a judicial duty. The LRA gives expression to this judicial duty in declaring that the "LAC and the Labour Court ... are charged with the responsibility for overseeing the ongoing interpretation and application of the LRA and the *development of labour relations policy and precedent*".[1859] The Constitutional Court described this responsibility as "the objective to develop a coherent and evolving jurisprudence in labour and employment relations".[1860] The judicial evolution of labour jurisprudence must be coherent and compatible with the object, spirit and purport of the final Constitution. In developing a genuine interdependent understanding of substantive fairness in labour law and reasonableness in administrative law against the backdrop of the Constitution, it is imperative that the judiciary take note of the fact that the constitutional understanding of reasonableness attracts both rationality and proportionality considerations at varying degrees.[1861] When the duty to develop labour law within a constitutional context is then taken into consideration, it becomes clear that substantive fairness and reasonableness reveal no logical threat of normative conflict.

This understanding of normative interdependence must not be overshadowed by jurisdictional considerations.[1862] In setting out the jurisdiction of the Labour Court in relation to the High Court, s 157(2) of the LRA indicates that the doctrine of interdependence is an important consideration in the adjudication of labour disputes

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[1859] *NEHAWU v UCT* 2003 (2) BCLR 154 (CC) at par 30. Emphasis added.

[1860] *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 118 per Ngcobo J.

[1861] This administrative law understanding of reasonableness as requiring both rationality and proportionality was not yet available to the Labour Appeal Court in their reliance on that norm in *Carephone (Pty) Ltd v Marcus NO* 1998 (11) BLLR 1093 (LAC).

[1862] This was unfortunately evident from the reasoning of Ngcobo J in *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 80. Skweyiya J was however content with merely considering the submitted jurisdictional argument, Ngcobo J identified two further issues, namely the scope of s 157(1) and (2) and the characterisation of a dismissal as an administrative action. Ngcobo J stated that "[t]hese two issues have given rise to complex *jurisdictional problems* for both the High Court and the Labour Court". As such, the majority was not dealing with the normative relationship between labour and administrative law, but condemning genuine interdependence by limiting the jurisdictional scope of the forums that may be called upon to give full expression to all relevant constitutional rights.

after jurisdiction has properly been established.[1863] Section 157(2)(b) reveals that the legislator foresaw that situations may arise in the public sector where administrative action can manifest itself as an employment decision. Such a reality implies that administrative law considerations will be drawn into an employment law evaluation of fairness at the point of intersection between labour and administrative law.

In summary, the principles on which labour and administrative law are respectively based are not in conflict.[1864] The principle of fairness, as found in a labour law context, acknowledges that the context in which a decision is made determines the dimension of fairness required for a just decision.[1865] In *NUMSA v Vetsak Co-operative Ltd*,[1866] the Labour Appeal Court explained that fairness, in a labour context, requires "a balanced and equitable assessment"[1867] of the interests involved.[1868] This indicates that substantive fairness in labour law is compatible with proportionality considerations. Such proportionality considerations are similarly found in administrative law reasonableness, as articulated by the Constitutional Court in the *Bato Star*-judgment.[1869] Fairness must be determined in the circumstances of every case, as it is "a combination of findings of fact and opinions".[1870] If this is contextually done, in public employment, the presence of public power carries the potential to draw reasonableness considerations into the fairness assessment as one of a range of contextual factors relevant to the decision.[1871] If properly embraced by the judiciary, the content of

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[1863] The section unequivocally states that labour courts have the same jurisdictional power to consider the violations of any fundamental right (not merely the right to fair labour practices in isolation) in the context of labour relations.

[1864] Fairness (whether procedural or substantively reasonable), to some degree embraced by both labour and administrative law, is of a contextually variable nature. Consequently, the contextual application of the concept of fairness inherently avoids a conflict in circumstances where both the right to fair labour practices and the right to administrative action are in play.

[1865] Sossin 2002 (27) *Queen's LJ* 809 at 822.

[1866] 1991 (12) ILJ 564 (LAC).

[1867] *NUMSA v Vetsak Co-operative Ltd* 1991 (12) ILJ 564 (LAC) at 589.

[1868] See Chapter Two, parts 3 1 and 3 2.

[1869] 2004 (7) BCLR 687 (CC). See also Chapter Five, part 4.

[1870] *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BCLR 1097 (CC) at par 63. See Chapter Two.

[1871] Cf *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (7) BCLR 678 (CC) at par 45 per O'Regan J.

reasonableness, as developed in administrative law, balances the uncertainty in contexts where employment decisions, clothed in administrative action, are present.[1872] The interdependent nature of rights in the Bill of Rights sees to it that fairness does not become just an empty word on paper.[1873] A genuine constitutional interdependent understanding of fairness infuses the labour law protection and promotion of fair labour practices in specific contexts, and holds the potential to unravel the contemporary conundrum of the rights-relationship between labour and administrative law.

7 CONCLUSION

The preceding analysis illustrates that the judiciary's attempt at giving practical effect to its constitutional duty in the public employment context has been less than successful when denying genuine normative interdependence. The search for simplistic legal certainty has in fact complicated the interdependent relationship between ss 23 and 33 and the associated legislation.

In seeking clarity in the confusion, Van Eck and Jordaan-Parkin explain that the LRA (as the primary source of regulatory labour legislation) "directs *fairness* in the employer-employee context",[1874] while the PAJA, in codifying jurisprudentially identified grounds for judicial review, "steers *due process* and *rationality* in the public service".[1875] What this illustrates is that the LRA and PAJA may be contextually drawn to public

[1872] With regard to the danger of nursing uncertainty within the legal system, Lewis 2003 (120) *SALJ* 330 at 345 – 346 significantly notes: "There is no necessary connection between a fairness or reasonableness test and uncertainty. As Jansen JA [in his dissenting judgment in *Bank of Lisbon and South African Ltd v De Ornelas* 1988 (3) SA 580 (A)] has pointed out, the principle of certainty is not absolute, but must be balanced ... Thus, perfect certainty is not only an impossible but an undesirable ideal. What is necessary is a sufficient degree of certainty. A fairness test does not preclude this level of certainty. There are a number of reasons for this: guidelines, precedent and absolute prohibitions."

[1873] See Cheadle, Davis and Haysom *South African Constitutional Law* 18–14(2).

[1874] Van Eck and Jordaan-Parkin 2006 (27) *ILJ* 1987. Emphasis added.

[1875] Van Eck and Jordaan-Parkin 2006 (27) *ILJ* 1987. Emphasis added. It must be kept in mind that PAJA was not specifically created with the aim of protecting public employees from abuse of public power. It has a more general aim: it seeks to protect the public in general from the abuse of public power where they are party to an administrative law relationship. The LRA also aims to protect against abuse of power, but aims that protection specifically at the parties to employment relationships.

employment disputes from different legal corners. When the complexity of the relationship between labour and administrative law is viewed from a normative angle, the contextual overlap becomes more simplistic. From this perspective, the debate regarding the relationship between labour and administrative law appears frivolous. This apparent theoretical clarity has generally gone unnoticed (being obscured by the arguments discussed in this chapter), but the following point may be made.

Firstly, the continued legal value of the *Zenzile*-judgment in the current context lies in its understanding of public power, as well as administrative law's role in protecting the individual against, and society's interest in, the particular exercise of power. The underlying general principle of the judgment relating to public power remains authoritative. Its authoritative quality is found in the fact that it does not undermine the regulatory role of constitutionally entrenched labour rights,[1876] while still supporting the underlying equity objective of the right to just administrative action in the restraint of public power.[1877]

[1876] Consequently, the line of Labour Court judgments (such as the *SAPU*- and *Haschke*-judgments) unfortunately ascribed a narrow reading to the *Zenzile*-judgment and assumed that the judgment "has no principled basis but was motivated purely by expediency". See *POPCRU v Minister of Correctional Services* 2006 (4) BLLR 385 (E) at par 59. As far as those judgments regard the right to fair labour practices as trumping the right to just administrative action, they ignore the value based, interdependent normative spirit of the Constitution. It is this misinterpretation that allowed for the development of a line of Labour Court cases that denied that one employment related decision or act could attract the regulation of both labour and administrative law, as the judges refused to recognize the presence of a normative overlap and interdependence. Such formalistic reasoning is irreconcilable with the purport of the Constitution. As Plasket J in *POPCRU v Minister of Correctional Services* 2006 (4) BLLR 385 (E) at paras 59 and 60 correctly summarised: "It is not based on principle but rather on a view that labour law would be better off without any overlap with administrative law ... [and] represent a parsimonious approach to fundamental rights and an austere formalism."

[1877] This perspective is shared by Plasket J in *POPCRU v Minister of Correctional Services* 2006 (4) BLLR 385 (E) at par at 55: "I am, in any event, bound by – and, for what it is worth, agree with – *the more general proposition* for which *Zenzile* is authority, namely that the decision of a public authority to dismiss and employee is an exercise of public power." Emphasis added. The consequence of the general *Zenzile*-principle is that any exercise of public power must be both lawful and reasonable. See *POPCRU v Minister of Correctional Services* 2006 (4) BLLR 385 (E) at paras 56 and 57 where Plasket J emphasised that the general "principle has been applied to every type of administrative activity over the years, whether it involved the administration's 'powers of intervention, powers of compulsion, powers of

Secondly, post-constitutional jurisprudence (some unintentionally) reveals that the norms of labour and administrative law overlap. Section 33 by no means alters the normative basis of s 23 and the LRA. An interpretation to the contrary would remove its own normative basis. Section 33 merely reinforces and extends the s 23 protection of the LRA where public power is present.[1878] This is in fact necessary if one considers that labour law, and the LRA specifically, is silent on the regulation of *public* power, although reference is made to it in s 157(2) where the focus falls on State as employer (albeit from a jurisdictional perspective). Section 33 of the Constitution (in indirectly giving effect to the general *Zenzile*-principle) addresses this shortcoming.[1879]

Thirdly, separatism undermines the comprehensive recognition of both labour and administrative law's reconcilable purposes. This denial is based on the traditional compartmentalisation associated with the outdated public/private divide. It undermines proper consideration of the normative interdependence endorsed by the Constitution. This unfortunate perspective has spurred on a jurisdictional debate based on the (mis)interpretation of s 157 of the LRA.

Fourthly, the LRA allows for both exclusive (s 157(1)) and concurrent (s 157(2)) jurisdiction. In an effort to properly interpret s 157, some judges attempted to separate normative considerations (such as lawfulness and fairness) in an attempt to interpret most public employment disputes as falling within the exclusive jurisdiction of the Labour Court. This line of thinking led to the judiciary confusing jurisdictional challenges with findings on the substantive merits of disputes. In its *Fredericks*-judgment, the Constitutional Court took the first step in addressing the interpretive questions

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inspection, powers of decision' or any other powers and functions that the administration may exercise or perform".

[1878] See for example the High Court judgment in *NAPTOSA v Minister of Education, Western Cape Government* 2001 (4) BCLR 388 (C) at 395 for reasoning justifying the idea that PAJA (in giving effect to administrative law, and specifically s 33 of the Constitution) can be constitutionally challenged.

[1879] This is apparent from the statement of the Labour Court in *Simelela v Member of the Executive Council for Education, Province of the Eastern Cape* 2001 (9) BLLR 1085 (LC) at par 39: "The Constitution affords everyone 'the right to administrative action that is lawful reasonable and procedurally fair'. This means that every *exercise of public power* must, in order to be constitutional, be mandated by law, be *performed in good faith by a decision-maker who has not misconstrued his or her powers, be rational, and be conducted with due regard to the rules of natural justice*." Emphasis added.

underlying s 157 of the LRA, by finding that the section must be read as an extension of the Labour Court's jurisdiction and not as a limitation of the High Court's traditional jurisdiction. The clarity of this judgment has been undermined by the Constitutional Court's own *Chirwa*-judgment. The court reasoned that the policy underlying the history and structure of the LRA dictates against the High Court exercising jurisdiction in employment matters where specialised procedures exist. The court interpreted the claim in casu as LRA based, although it was not so pleaded. With this judgment, the Constitutional Court endorsed a narrow reading of s 157(2). It appears that the *Chirwa*-majority refused to acknowledge that labour law has evolved to a relative and not an absolute autonomous character under the influence of the Constitution.

Fifthly, unfortunately, those labour jurists in favour of maintaining absolute separatism treat administrative law as a legal leper. Yet, jurists have no problem in reading the Public Service Act (Proc 103 of 1994) as extending the LRA where it is silent on certain issues,[1880] such as transfer in the public interest.[1881] It is baffling that some labour commentators, in this constitutional era, argue for the exclusion of the normative considerations that underlie the administrative action evaluation. This is illogical as the normative considerations merely bring an extra dimension to the fairness analysis required by labour law generally, without taking anything away from it. The reasoning of Froneman J in the *Giyose*-judgment and Navsa AJ in the *Sidumo*-judgment is therefore inspirational, as both justices embraced the idea that general and specialised legislation can be interpreted and applied in an interdependent manner that gives comprehensive expression to contextually applicable fundamental rights. Such an approach also allows for the promotion of O'Regan J's perspective that the judiciary should give proper consideration to the relevant concepts in the substantive context of the case, rather

[1880] See for example the reasoning of the Labour Court in *PSA of SA v Premier of Gauteng* 1999 (20) ILJ 2106 (LC) at paras 2 and 4 for a clear illustration that more than one statute can find application in one set of employment circumstances.

[1881] See for example the *Nxele*-judgment, where the Labour Court explained that the LRA does not regulate the transfer of employees, except indirectly in the context of unfair labour practices (as a disciplinary measure short of dismissal). However, the Public Service Act 103(P) of 1994 deals with transfers in ss 14 and 15 and allows for transfers "when in the public interest". Legislative interdependence is therefore permissible and necessary in the labour sphere for pragmatic reasons.

than the time consuming undertaking to classify a decision as either labour or administrative in nature.[1882]

Sixthly, arguments denying employees a choice in cause of action and remedy, fail to give proper effect to the comprehensive contextual recognition of all fundamental rights. Prior to the *Chirwa*-judgment, both the Supreme Court of Appeal and the Constitutional Court gave recognition to the choice-idea in the employment context. The judiciary at that stage endorsed the idea of more rather than less legal protection. With the *Chirwa*-ruling came a turn, when Ngcobo J in his majority judgment reasoned that public employees should not be granted a choice as to cause of action. Ngcobo J reasoned that such a choice was not justified, as public employees should not be treated differently than private employees. This argument is unfortunate as it ignores the fact that the constitutional value of equality acknowledges that a difference in treatment can be acceptable if contextually justifiable.[1883] This denial of contextual reality also allows for judicial manipulation of the cause of action, to avoid substantive consideration of the merits of a dispute.

Lastly, prior to the Constitutional Court's *Chirwa*-ruling in which the Court undermined its own understanding of interdependence, the doctrine was gaining support in the lower courts. In *Transnet Ltd v Chirwa*,[1884] Mthiyane JA showed interdependent insight in reasoning that s 23 (in elevating labour rights to fundamental rights) "imports into the employment contract a reciprocal duty to act fairly, [but] does not deprive the employment contract of its legal effect".[1885] If Mthiyane JA could accept the infusion of fairness, then the mere fact that the LRA now includes public sector employees cannot by itself counter the integration of the administrative law dimension of fairness (as constitutionally endorsed by s 33) into the employment relationship.

This perspective aligns with the recent line of Supreme Court of Appeal decisions following the confusing two-majority Constitutional Court *Chirwa*-judgment. The Constitutional Court's lack of uniformity in its perspective of the constitutional

[1882] See *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 137.

[1883] Cf *NCGLE v Minister of Justice* 1998 (12) BCLR 1517 (CC) at par 126 per Sachs J.

[1884] 2007 (1) BLLR 10 (SCA).

[1885] *Transnet Ltd v Chirwa* 2007 (1) BLLR 10 (SCA) at par 15.

relationship between administrative and labour law has caused conflicting perspectives emerging in the lower courts. Most of these arguments are jurisdictional in nature and based on unsound propositions that undermine proper considerations of the substantive merits of cases. In recent cases, the Supreme Court of Appeal has attempted to provide clarity as to the ratio of the Constitutional Court in the *Chirwa*-judgment. Great strides in judicial clarity by the Supreme Court of Appeal has unfortunately again been undermined by the Constitutional Court's failure in *Gcaba v Minister for Safety and Security*[1886] to properly address the complexity flowing from its own line of judgments. This attempt at clarity will be analysed in Chapter Nine from both the perspective of the Supreme Court of Appeal and the Constitutional Court.

[1886] 2009 (12) BLLR 1145 (CC).

CHAPTER NINE

JUDICIAL DEVELOPMENTS SINCE *CHIRWA V TRANSNET LTD*

1 INTRODUCTION

Chirwa v Transnet Ltd[1887] can best be described as anticlimactic when viewed against the background of the judicial turmoil that preceded it.[1888] The legal community (or at least administrative and labour law specialists) eagerly awaited this judgment and the clarity it was expected to bring to the debate about the relationship between labour and administrative law. If anything, the *Chirwa*-judgment united the champions of administrative and labour law, as well as the lower courts,[1889] in their quest to determine what the Constitutional Court actually decided.[1890] The aim of this chapter is to evaluate the response of the Supreme Court of Appeal and the Constitutional Court to the uncertainty that surrounds the *Chirwa*-judgment.[1891]

In the absence of a clear distinction between binding dicta and obiter policy comments in the *Chirwa*-judgment, judgments of the High Court and Labour Court in the immediate wake of the Chirwa – judgment showed a focus on clarity and a search for

[1887] *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC)

[1888] Chapter Eight seeks to reflect the underlying debate and related arguments at the centre of this jurisdictional turmoil.

[1889] In *Makambi v MEC, Department of Education, Eastern Cape* 2008 (8) BLLR 711 (SCA) at par 23, Nugent JA commented on the impact of the *Chirwa*-judgment (a judgment penned by the highest court on constitutional matters) and noted that even in the aftermath of that judgment judicial objections "have shown remarkable resilience".

[1890] See Cheadle 2009 (30) *ILJ* 741, Grogan 2009 25(3) *Employment LJ* (Electronic Version), Ngcukaitobi 2008 (29) *ILJ* 841 and Stacey 2008 (125) *SALJ* 307.

[1891] It is submitted that a formalistic perspective of specificity (Chapter Seven, part 2 3) as the basis for the separation of labour and administrative law (Chapter Eight, part 3) appears to have informed the *Chirwa*-reasoning of Skweyiya and Ngcobo JJ, culminating in a somewhat confusing jurisdictional finding based on the court's interpretation of s 157(2) of the LRA. The majority in that case argued that the apparent concurrent jurisdiction provided for by s 157(2) has the potential to frustrate the objectives of the LRA and undermine the advancement of coherent labour jurisprudence. See the discussion in Chapter Eight, part 4. See also Editor 2009 *Employment LJ* 25(3) (Electronic Version).

a legal rationale in that judgment.[1892] A number of these judgments have revealed that the *Chirwa*-judgment can be interpreted in more than one way. In the *Nakin*-judgment, Froneman J declared himself unable to identify the *Chirwa*-ratio and commented that the *Chirwa*-reasoning of Skweyiya and Ngcobo JJ contrasted with that of O'Regan J in the *Fredericks*-judgment.[1893] Froneman J found himself in the position of having a choice between two authoritative Constitutional Court judgments.[1894] In cases such as *Tsika v Buffalo City Municipality*[1895] and *Mogothle v Premier of the North West*

[1892] Although the post-*Chirwa* cases differ factually from each other (as well as from the *Chirwa*-facts itself), all these cases involved disputes regarding employment decisions with two common denominators: firstly, an argument presented on behalf of the employer that the High Court lacked jurisdiction; secondly, reliance placed on the *Chirwa*-judgment in support of that argument. See Editor 2009 *Employment LJ* 25(3) (Electronic Version).

[1893] In the *Nakin*-judgment, Froneman J observed that prior to the *Chirwa*-judgment concurrent jurisdiction in employment matters (with a contractual or fundamental right dimension) was assumed and later confirmed by the highest courts in the *Fedlife*- and *Fredericks*-judgments of the Supreme Court of Appeal and Constitutional Court respectively. For a discussion of the two-majority *Chirwa*-perspective, see Chapter Eight. The *Fredericks*-jurisdictional perspective is outlined in Chapter Eight, part 4.

[1894] Froneman J reasoned that it would be inappropriate for lower courts to assume that one judgment of the highest court overrules a previous judgment of that court, if this was not explicitly stated. The judge ultimately chose to follow the *Fredericks*-perspective of concurrent jurisdiction. He commented that the development of coherent labour jurisprudence would not be at risk, as the focus should not fall on the forum, but on the fact that all courts must give expression to fundamental rights.

[1895] 2009 (3) BLLR 272 (E). It was reasoned that the *Chirwa*-judgment rested on only two findings: first, that the dispute in that case fell within the ambit of s 157(1) of the LRA (ie within the exclusive jurisdiction of the Labour Court); secondly, that the decision to dismiss did not amount to an administrative action. Grogan AJ explained that it was the latter of the two findings that divided the Constitutional Court. In considering the exclusive jurisdiction bestowed on the Labour Court in terms of s 157(1) to decide all matters under the LRA as well as any matter in any other law on which it is called to decide, Grogan AJ noted that only the common law and the BCEA can conceivably qualify as "other law" bestowing exclusive jurisdiction on the Labour Court. However, in *Tsika v Buffalo City Municipality* 2009 (3) BLLR 272 (E) at 273, Grogan AJ reasoned that the BCEA empowers the Labour Court to decide any matter concerning a contract of employment in terms of section 77(3), which determination may include an order for specific performance, and award of damages and an award for compensation. According to the judgment in *Tsika v Buffalo City Municipality* 2009 (3) BLLR 272 (E) at 274, the reasoning of the *Chirwa*-majority "provides authority too tenuous to depart from the plain meaning of section 77(3), which gives the Labour Court concurrent jurisdiction with the civil courts 'to hear and determine any matter concerning

Province[1896] the High and Labour Court respectively gave a narrow reading to the *Chirwa*-judgment, which can be described as an attempt to limit the damaging effect of the ambiguous *Chirwa*-ruling. These cases distinguished between two types of overlap for purposes of jurisdiction (namely contract/labour law cases and the *Chirwa*-type administrative/labour law cases) and allowed for concurrent jurisdiction where contract and labour legislation overlap. In contrast, the Labour Court in *Mohlaka v Minister of Finance*[1897] identified a uniform approach to overlapping rights in the *Chirwa*-ruling (whatever the type of overlap) and adopted the view that concurrent jurisdiction threatens the development of coherent labour jurisprudence.[1898] A fourth example of post-*Chirwa* jurisprudence, and perhaps the most extreme leap of *Chirwa*-faith, is found in the reasoning of the Labour Court in *Booysen v SAP*.[1899] In that case the Labour Court stated that "if there is no right to fair administrative action separate from the right

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a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract'".

[1896] 2009 (4) BLLR 331 (LC). The court summarised its understanding of the *Chirwa*-judgment: "Narrowly construed, the judgment dealt only with whether the High Court had jurisdiction to entertain claims by dismissed public servants. At a more general level, the *Chirwa* judgment suggests that all employment-related disputes involving allegations of unfair conduct by employers should be decided in the dispute resolution forums established under the Labour Relations Act 66 of 1996 ('the LRA'). The latter reading would mean that, in the light of *Chirwa*, any remedy established by the LRA must be pursued to the exclusion of any right that may previously have existed. However, although the *Chirwa* judgment constitutes an obvious endorsement of the mechanisms, institutions and remedies created by the LRA, the judgment did not expressly exclude the right of employees to pursue contractual claims either in the Labour Court by virtue of the provisions of the Basic Conditions of Employment Act 75 of 1997 ('the BCEA') or in civil court with the requisite jurisdiction."

[1897] 2009 (4) BLLR 348 (LC).

[1898] The dispute concerned the decision of a CCMA commissioner not to condone the late dispute referral. The applicant partly argued that the commissioner omitted to give reasons for her decision. The respondent argued in limine that the applicant could have requested reasons in terms of PAJA, but in the absence of such a request rendered the application premature. In this judgment, Pillay J vigorously defended the scope of labour law and the jurisdiction of labour tribunals. Cf *PSA obo Haschke v MEC for Agriculture* 2004 (8) BLLR 822 (LC), an earlier judgment of Pillay J characterised by separatist-type reasoning. See Chapter Eight, part 3.

[1899] 2008 (10) BLLR 928 (LC).

to fair labour practices, there can be no 'alleged or threatened violation' of the right to fair administrative action – a requisite for jurisdiction under section 157(2)".[1900]

However, the purpose of this chapter is not to debate all the arguments that have emerged from the judgments of the High Court and Labour Court. The chapter rather focuses on an evaluation of the post-*Chirwa* response of the Supreme Court of Appeal and the Constitutional Court.

The focus firstly falls on the approach of the Supreme Court of Appeal (part 2), with specific consideration of the approach developed by Nugent JA in *Makambi v MEC, Department of Education, Eastern Cape*[1901] and *Makhanya v University of Zululand*.[1902] In considering these judgments, the three unsound jurisdictional propositions identified by Nugent JA as the arguments on which the judiciary often places reliance to justify their various approaches to the controversial relationship between labour and administrative law will be outlined (part 2 1 1).[1903] Following this, consideration will be given to the approach of the Supreme Court of Appeal to s 157 of the LRA, an approach that aligns with the idea of interdependence (parts 2 1 2 and 2 1 3). The Supreme Court of Appeal's reading of the *Chirwa*-judgment (as mainly articulated by Nugent JA) will be highlighted against this background (part 2 1 4). More recent Supreme Court of Appeal cases, building on the approach developed by Nugent JA, will be considered in part 2 2, specifically *Kriel v Legal Aid Board*[1904] and *Ntshangase v MEC for Finance: KwaZulu Natal*.[1905]

[1900] *Booysen v SAP* 2008 (10) BLLR 928 (LC) at par 31. It is submitted that the Labour Court with this statement indirectly recognised the fact that the legislator foresaw the possibility of administrative action considerations being present in the context of an employment dispute where the State acts as employer. If this is so, then judicial attempts to interpret almost all public employment decisions as not constituting an administrative action amount to a manipulation of legislative intent. The reasoning of the Labour Court, unfortunately gives the impression that the court confused its judicial duty to determine jurisdiction with the duty to determine whether a claim is good or bad in law. See part 2 1 1 1 for Nugent JA's criticism of this perspective. See also Grogan 2009 25(3) *Employment LJ* (Electronic Version).

[1901] 2008 (8) BLLR 711 (SCA).

[1902] 2009 (8) BLLR 721 (SCA).

[1903] See also the various judicial opinions reflected in Chapter Eight.

[1904] 2009 (9) BLLR 854 (SCA).

[1905] 2009 (12) BLLR 1170 (SCA).

The perspective of the Supreme Court of Appeal will be weighed up against the recent Constitutional Court decision in *Gcaba v Minister for Safety and Security*,[1906] starting with a brief synopsis of the *Gcaba*-case (part 3 1). This will be followed by an analysis of the *Gcaba*-judgment, with due regard to the constitutional and legislative context within which the decision was handed down (part 3 2). In light of the *Gcaba*-ruling, the importance of a proper judicial approach to the character of a claim and the Constitutional Court's interpretation of s 157 (part 3 3) will be considered. It will be illustrated that the Constitutional Court appears to place reliance on one of the unsound jurisdictional principles identified by the Supreme Court of Appeal (part 3 4). It will furthermore be shown that, although the Constitutional Court proclaims support for the three constitutional principles identified and discussed in Chapter Seven, namely flexibility, interdependence, and specificity (part 3 5), the Court appears to elevate the specificity principle to an absolute formalistic (rather than relative) principle.[1907] It will also be shown that, in its search for reasonable predictability in public employment dispute resolution, the Constitutional Court has now created the impression that the determination of the presence or otherwise of administrative action (as precondition for the application of administrative law) can be formulated as a general rule (part 3 6). The possible impact of the *Gcaba*-ratio on the reasoning of the lower courts will also be considered (part 3 7).

In the final instance (part 4), this chapter will illustrate that the Constitutional Court has yet to provide a clear purposive interpretation for its perspective of the rights-based interaction between labour and administrative law.

2 SUPREME COURT OF APPEAL PERSPECTIVE

Post-*Chirwa*, the Supreme Court of Appeal has taken on a central role in addressing the uncertainty that underlies the debate about the rights-based relationship between administrative and labour law. The court's attempts are reflected in the judgments in

[1906] 2009 (12) BLLR 1145 (CC).

[1907] It appears as if the *Gcaba*-judgment interprets the specificity principle as having the power to check or limit the considerations of flexibility and interdependence. See Chapter Seven, part 2 3.

Makambi v MEC, Department of Education, Eastern Cape,[1908] *Makhanya v University of Zululand*,[1909] *Kriel v Legal Aid Board*[1910] and *Ntshangase v MEC for Finance: KwaZulu Natal*.[1911] The well-informed reasoning of Nugent JA is primarily reflected in the first two judgments. The reasoning of Nugent JA in turn influenced the reasoning of Mhlanthla JA, Leach AJA and Bosielo AJA in the latter two judgments. As such, the perspective of Nugent JA (as reflected in the *Makambi*- and *Makhanya*-judgments and supported in the *Kriel*- and *Ntshangase*-rulings) will form the central focus of the discussion of the endeavours of the Supreme Court of Appeal to attain clarity about the interaction between labour and administrative law after *Chirwa*.[1912]

[1908] 2008 (8) BLLR 711 (SCA). The appellant was employed on a temporary contract at the Kubusie State School. In March 2004, she was informed of her transfer to the Tyilekanie Primary School until further notice. In June 2004, she was notified that the post allocation at Kubusie State had been revised. She was "declared as in addition" and informed that a position at Tyilekanie Primary would open in six months and that she would be considered for the post. Without notice payment of her emoluments and benefits were suspended in August 2004. At that time the principle, vice-principle and secretary of the Kubusie State officially requested the department to amend the nature of her appointment from temporary to permanent. In October 2004, the request was denied. She approached the High Court with an urgent application for the review of the decision to stop her salary and the declaration regarding her status as educator.

[1909] 2009 (8) BLLR 721 (SCA). The university terminated Mr Makyanya's employment contract. He pursued a claim for the infringement of his LRA right in the CCMA and failed. He thereafter pursued a claim for the enforcement of his employment contract in the High Court. This case granted Nugent JA an opportunity to expand on his opinion of the Constitutional Court's confusing two-majority ruling. According to Nugent JA, this case was "not materially different to Chirwa". See *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 5.

[1910] 2009 (9) BLLR 854 (SCA). This case concerned the dismissal of an attorney from his employment at the Legal Aid Board. He approached the High Court seeking review, correction and the setting aside of the decision to dismiss him.

[1911] 2009 (12) BLLR 1170 (SCA). The appellant was a director in the provincial Department of Education. He was found guilty on several charges of misconduct and received a final warning. The responsible Member of the Executive Council did not agree with the penalty and launched review proceedings in the Labour Court, but the application was dismissed. On appeal, the Labour Appeal Court replaced the final warning with a sanction of summary dismissal. See *MEC for Finance, KwaZulu-Natal & another v Dorkin NO* [2008] 6 BLLR 540 (LAC). The appellant appealed to the Supreme Court of Appeal.

[1912] This will in turn inform the evaluation of the Constitutional Court's post-*Chirwa* approach.

2 1 The Logic of *Makambi* and *Makhanya*

In similar fashion to that of Froneman J in the *Nakin*-judgment, Nugent JA in the *Makambi*-ruling[1913] declared that he was unable to detect a clear legal (as opposed to policy-based) ratio in the Constitutional Court's *Chirwa*-reasoning.[1914] In his *Chirwa*-evaluation, Nugent JA identified that much of the controversy surrounds the judicial practice associated with three unsound jurisdictional propositions, as well as the jurisdictional finding in the *Chirwa*-majority. In this regard, it is helpful to evaluate Nugent JA's *Makambi*- and *Makyanya*-judgments together.

2 1 1 The Three Unsound Jurisdictional Propositions

In search of post-*Chirwa* clarity, Nugent JA restated the legal fact that a jurisdictional challenge calls for a factual enquiry.[1915] The judge identified a judicial tendency to answer jurisdictional issues with reference to one of three unsound propositions, namely:

1. "The court has no jurisdiction because the claim is a bad claim."[1916]
2. "A high court that has jurisdiction to consider a claim for the enforcement of a right may thwart the assertion of that right by declining to exercise its jurisdiction."[1917]
3. "The claim that is before the court is not what it purports to be, but is instead a claim for enforcement of an LRA right."[1918]

Nugent JA's reasoning in labelling these propositions as 'unsound' calls for further consideration. Each of the mentioned propositions will be discussed individually.

[1913] Nugent JA concurred with the judgment of Farlam JA, but opted to set out his reasons separately to prevent his concurrence from being misunderstood. See *Makambi v MEC, Department of Education, Eastern Cape* 2008 (8) BLLR 711 (SCA) at paras 16, 21 and 24.

[1914] See *Makambi v MEC, Department of Education, Eastern Cape* 2008 (8) BLLR 711 (SCA) at par 21.

[1915] See *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 29.

[1916] *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 51.

[1917] *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 58.

[1918] *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 66.

2 1 1 1 The First Unsound Proposition

With regard to the first unsound proposition, Nugent JA pointed out that it requires similar exercise of judicial power to dismiss a claim (for reasons other than jurisdiction) than to uphold a claim.[1919] Nugent JA accordingly stated that the first proposition offends the rule of logic, as "the power of a court to answer a question (the question whether a claim is good or bad) cannot be dependent upon the answer to the question".[1920] In so reasoning, Nugent JA aligned himself with the Appellate Division judgment in *Lillicrap, Wassenaar & Partners v Pilkington Brothers (SA) (Pty) Ltd.*[1921] Nugent JA therefore stated that any reason that would prevent a court from exercising jurisdiction based on an argument that a claim is bad in law would stifle legal progress:

> [I]f courts were precluded from considering claims that are bad in law there would be no scope for the recognition of new rights and the development of the law. The very progress of the law is dependent upon courts having the power to consider claims that have not been encountered before. A court cannot shy away from exercising its power to consider a claim on account of the fact that it considers that *the recognition of the claim might have undesirable consequences*. Its proper course in a case like that is to exercise its power to consider the claim but to decline to recognise the rights that are asserted and to dismiss the claim as being bad in law.[1922]

In considering this argument, it is important to contextualise and distinguish the practice of the CCMA and bargaining councils to first hear the merits of a claim to inform a jurisdictional decision. This approach developed for pragmatic reasons in reaction to the

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[1919] See *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 52.

[1920] *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 54. This point of logic cannot be over emphasised. In so reasoning, Nugent JA placed reliance on the minority judgment of Langa CJ in *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 155, in which it was argued that the substantive merits of a claim cannot inform a decision as to whether a court has jurisdiction to hear the claim.

[1921] [1985] 1 All SA 347 (A). In that case, the Appellate Division acknowledged that (regardless of the prospect of success) a plaintiff is entitled to ask a court to exercise its power to rule on the merits of the claim as formulated. See *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 43.

[1922] *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 57. Emphasis added. The emphasised section aligns with the policy consideration on which Skweyiya and Ngcobo JJ based their *Chirwa*-reasoning.

"one-stop shop dispute resolution structure".[1923] As explained in the *Sidumo*-judgment, forums of this nature are not comparable to traditional styled courts. Accordingly, the idea that a court must first determine that it has jurisdiction before ruling on the merits only applies to the High Court, the Labour Court (as a court of similar status) and those courts superior to it in status.

2 1 1 2 The Second Unsound Proposition

The second unsound proposition identified by Nugent JA relates to the choice-approach, namely that a court may choose not to exercise its jurisdiction.[1924] Nugent JA acknowledged that it is logical to reason that an employee who has *one claim* must necessarily choose which forum to approach for its enforcement, if more than one forum can exercise jurisdiction.[1925] However, the judge argued that the situation is somewhat different when an employee has *more than one claim* based on the same set of facts: Forcing a choice would undermine the general aim of the Constitution to extend maximum protection to its beneficiaries and deny "the holder a forum in which to assert [it]".[1926] In accord with the reasoning of Nugent JA, a forced choice, through a denial of jurisdiction, negates one right in favour of another.[1927]

Consequently, the same-protection or adequate-protection argument fails when tested against Nugent JA's logic, as the judiciary will act contrary to the interest of justice if it accepts that the assertion of one right can cause the denial of another, absent any normative conflict in the rights-relationship that could justify limitation. Judicial adoption of this understanding of Nugent JA as a legal truth will nullify the popular "law-ousting-law" argument.[1928] It is submitted, in agreement with Nugent JA, that it is not enough to merely hold that the right to fair labour practices present public servants with a "right

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[1923] *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 54 per Skweyiya J.

[1924] See the discussion in Chapter Eight.

[1925] See *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 61.

[1926] *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 63. See also *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 62.

[1927] See *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 61.

[1928] See Stacey 2008 (125) *SALJ* 307 at 323; *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 65; Chapter Eight, part 3 4.

that is just as good"[1929] as the right to just administrative action.[1930] Nugent JA's perspective endorses logical reasoning that, although the *Chirwa*-majority emphasised that "[o]ne of the manifest objects of the LRA is … to subject all employees, whether in the public sector or the private sector, to its provisions",[1931] the legislature did not make the inclusion of public sector employees subject to the forfeiture of their contextually justified constitutional right to just administrative action.[1932]

2 1 1 3 The Third Unsound Proposition

The third unsound proposition identified by Nugent JA is a "defence [that] has been mounted by Halton Cheadle".[1933] In his reading of the *Chirwa*-judgment, Cheadle regards the majority, among other things, as having decided "as a matter of constitutional interpretation to limit the scope of the right to administrative action so as to exclude labour practices".[1934] It is submitted that in doing so Cheadle places the primary focus on the policy considerations underlying the LRA and not on the constitutional framework to which its application must adhere.[1935] In support of the *Chirwa*-majority, Cheadle finds justification for this approach in the argument that the conduct of Transnet did not constitute an administrative action[1936] and that the

[1929] *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 65.

[1930] See *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 65.

[1931] *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 102.

[1932] See *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 69.

[1933] Cheadle 2009 (30) *ILJ* 741 as referred to by Nugent JA in *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 66.

[1934] Cheadle 2009 (30) *ILJ* 741 at 754, as quoted by Nugent JA in *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 67.

[1935] This approach mirrors that of Ngcobo J in his *Chirwa*-reasoning, Cf *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 68.

[1936] See *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 67. It must be kept in mind that the presence of administrative action should be determined on a case-by-case basis. The judicial development of a rule that holds that a labour practice cannot amount to an administrative action in a context where there is no normative conflict, reveals the (re)emergence of formalistic reasoning.

Constitutional Court characterised the claim of Ms Chirwa as one that should rather have been presented in LRA terms.[1937]

In the *Makhanya*-judgment, Nugent JA admitted that the identification of the issue calling for adjudication is a necessary first step in establishing whether the court has jurisdiction to decide a case.[1938] The judge acknowledged that to do this, the court must determine the nature of the asserted right in every case.[1939] However, in the *Makambi*-judgment, Nugent JA warned that this exercise must be approached with caution, as "things cannot be made to be what they are not merely by calling them something else and that applies as much to legal claims as to other things".[1940] Accordingly, if an employee for example expresses reliance on the constitutional right to just administrative action, Nugent JA's reasoning logically places it within the ordinary jurisdiction of the high court.[1941]

At no stage did Nugent JA proclaim this to be an easy legal exercise. In his *Makhanya*-reasoning Nugent JA admitted that while the asserted right may be easily identifiable in one instance, it may in other instances have to be inferred from the facts and the relief claimed.[1942] However, the reasoning of Nugent JA leads one to conclude that, although certainty is a judicial goal, simplicity in pursuit of legal certainty should not be sought at the cost of justice for the beneficiaries of constitutional rights. The claim presented by a public servant approaching the court must be approached as a matter of fact, as it is presented to the court.[1943] Nugent JA in fact emphasised that a court is not at liberty to

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[1937] This reading of Cheadle 2009 (30) *ILJ* 741 at 754 is supported by Nugent JA in *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 70: "What he says, as I understand it, is that the majority regarded the claim that was before it as a claim for the enforcement of LRA rights (enforceable only in a Labour Forum) and not as a claim to enforce a constitutional right."

[1938] See *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 29.

[1939] *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 30.

[1940] *Makambi v MEC, Department of Education, Eastern Cape* 2008 (8) BLLR 711 (SCA) at par 32. See *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 29.

[1941] See *Makambi v MEC, Department of Education, Eastern Cape* 2008 (8) BLLR 711 (SCA) at par 30.

[1942] See *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 31.

[1943] See *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 71.

change an employee's claim to mirror its (policy) preferences to avoid complexity or establish jurisdiction.[1944] Language should not be abused in such a manner.[1945]

However, Nugent JA pointed out that the identification of the relevant issue, and the underlying nature thereof is unfortunately "done under the guise of what is called 'characterising' the claim".[1946] When a court properly characterises a claim, an attempt is made to describe the distinctive nature and character of the claim.[1947] Nugent JA reasoned that this exercise must not be allowed to morph into a judicial attempt to "convert the claim into another kind",[1948] as this would amount to abuse of judicial discretion, and would deny a claimant the opportunity to assert his/her rights.[1949]

2 1 2 Interpreting Section 157

The wording of s 157 of the LRA has been central to the confusion that underlies the relationship between the rights to fair labour practices and just administrative action.[1950] The nature of and relationship between the s 157(1) exclusive Labour Court jurisdiction and the s 157(2) concurrent High Court jurisdiction has not been consistently interpreted. Nugent JA described the *Chirwa*-ruling as questionable, due to the reliance placed on policy considerations to determine the legislative intent behind s 157 of the LRA.[1951] If this approach was indeed a true reflection of the actual scope of s 157(2), the Constitutional Court would not have had cause to call for legislative intervention, as

[1944] See *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 72.

[1945] See *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 72.

[1946] *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 72.

[1947] See *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 72.

[1948] *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 72.

[1949] See *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 72.

[1950] See Chapter Eight, part 4.

[1951] In *Makambi v MEC Department of Education, Eastern Cape* 2008 (8) BLLR 711 (SCA) at par 37, Nugent JA explained that the Constitutional Court in the *Chirwa*-case held the legislative intent to be the limitation of employees to only pursue "complaints arising from their employment … through the mechanisms of the LRA". Nugent JA explained that to obtain this objective the Constitutional Court "decided that the high courts must not exercise their ordinary jurisdiction in such cases". Cf *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 40.

it could merely have stated that the policy perspective was a reflection of the law.[1952] Nugent JA therefore did not regard the Supreme Court of Appeal as bound to adopt the *Chirwa*-perspective in the absence of such legislative endorsement.[1953]

Nugent JA further commented that Ngcobo J's *Chirwa*-understanding of the inclusion of the word 'concurrent' in s 157(2) as an unfortunate legislative error was based on the misconception "that section 157(2) of the LRA ... [has somehow] divested the High Courts of their ordinary power to consider claims to enforce a constitutional right arising from employment".[1954] In acknowledging the fact that the inclusion of two forms of jurisdiction within the two subsections of s 157 was a legislative choice,[1955] Nugent JA declared there to be "no room for ambiguity, and the word 'concurrent' … [not unfortunate but rather] superfluous",[1956] as any other reading would render the whole of s 157(2) superfluous.[1957] Nugent JA accordingly reasoned that s 157(2) of the LRA merely bestows additional "jurisdiction upon the Labour Court",[1958] equivalent to that of the High Court as far as disputes that attract constitutional rights are concerned.

2 1 3 The Two Truths Underlying the Correct Interpretation of Section 157

In attempting to gain some clarity – from s 157 specifically and the LRA in general – Nugent JA identified two basic propositions in the *Makambi*- and *Makhanya*-judgments. The focus of the *first* proposition falls on the rights that employees can claim and acceptance of the fact that, although employees have LRA rights,[1959] they "also have other rights, in common with other people generally, arising from general law".[1960] According to Nugent JA, these other rights can be based on "the right that everyone has

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[1952] See *Makambi v MEC Department of Education, Eastern Cape* 2008 (8) BLLR 711 (SCA) at par 38. In *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 71, Skweyiya J made an appeal for legislative review of s 157(2).

[1953] See *Makambi v MEC Department of Education, Eastern Cape* 2008 (8) BLLR 711 (SCA) at par 39.

[1954] *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 14.

[1955] See *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 14.

[1956] *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 17.

[1957] See *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 17.

[1958] *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 16.

[1959] See *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 11.

[1960] *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 11. This reality allows for and necessitates genuine recognition of the doctrine of interdependence. See Chapter Seven, part 2 2.

... to insist upon performance of a contract ... [or] the right that everyone has ... to just administrative action".[1961] More than one claim can legitimately "arise when an employee's contract is terminated".[1962] In acknowledging that employees can claim rights that do not amount to typical LRA rights, as claimed by Nugent JA, it is important to understand that both ss 23 and 33 rights emanate firstly from the Constitution and secondly from legislation.[1963] This sensible understanding of the claim-potential of public employment aligns with the fact that the law is seamless and allows for interdependence.[1964] This understanding supports Nugent JA's *second proposition*, which, in turn, is based on three interrelated propositions, namely:

1. LRA rights are only enforceable in labour forums (CCMA or the Labour Court) in terms of s 157(1) of the LRA.[1965]
2. Common law contractual claims are enforceable in both the Labour Court and the High Court in terms of s 77 of the BCEA and s 169(b) of the Constitution respectively.[1966]
3. Constitutional rights are similarly enforceable in both the Labour Court and the High Court in terms of s 157(2) of the LRA and s 169(b)(ii) of the Constitution respectively.[1967]

[1961] *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 11. Although the interdependence debate does not only involve labour and administrative law, but also labour and contractual law, the latter relationship is not the focus of this study and comment on it will only be made in as far as it contributes to an understanding of the nature of the relationship between labour and administrative law.

[1962] *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 12. This is not a novel idea. The Appellate Division in *Lillicrap, Wassenaar & Partners v Pilkington Brothers (SA) (Pty) Ltd* [1985] 1 All SA 347 (A) already confirmed that the same set of facts can give rise to more than on right and more than one claim. See *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at paras 41 – 43.

[1963] It must be kept in mind that the LRA rights are first and foremost constitutional rights and must not be erroneously viewed as mere legislative creations.

[1964] See *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 8.

[1965] See *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 13.

[1966] See *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 13.

[1967] See *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 13.

From this it may be deduced that a litigant who relies on a LRA right can approach the Labour Court while also relying on common law and constitutional rights claims, as the Labour Court has jurisdiction to enforce all three claim-types outlined in the second proposition (provided, of course, the Labour Court and not the CCMA or a bargaining council has jurisdiction to enforce the LRA right). However, if a litigant chooses not to rely on the LRA, but merely on common law and constitutional claims and wishes to approach the High Court, the judiciary should not (re)characterise the claim as LRA-based to oust the High Court's jurisdiction. Nugent's second proposition emphasises that a litigant theoretically has the option of approaching the Labour Court with an LRA based-claim, while approaching the High Court for consideration of constitutional and/or common law based claim(s), all emanating from the same set of circumstances.[1968]

In light of this understanding, it becomes clear that the jurisdictional turf-war should not bar litigants from approaching the Labour Court to also protect constitutional rights other than s 23, if threatened or infringed upon by an employment decision. The two propositions ultimately illustrate that the nature of the rights upon which an employee relies in his or her claim indicates whether a court has jurisdiction.[1969]

2 1 4 Supreme Court of Appeal's Reading of *Chirwa*

Ultimately, Nugent JA concluded that the findings in the two *Chirwa*-majorities were "mutually destructive".[1970] The judge held the *Chirwa*-judgment to be based on "one or

[1968] It is submitted, that this jurisdictional option, although theoretically possible, falls under the policy concerns the Constitutional Court relied upon in the *Chirwa*-judgment, as it would prevent a single court from logically dealing with the events and claims as appropriate in the context of every case. Although such a split in jurisdiction is not desirable, it is for the legislator to address.

[1969] See *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 21. Before setting off on his own evaluation based on this confusion, Nugent JA in *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 18 provided a summary of his understanding of the three jurisdictional points to be found in the *Chirwa*-judgment: Firstly, "[t]he Labour Forums have exclusive power to enforce LRA rights (to the exclusion of the High Courts)", secondly, "[t]he High Court and the Labour Court both have the power to enforce common law contractual rights", and thirdly "[t]he High Court and the Labour Court both have the power to enforce constitutional rights so far as their infringement arises from employment". See Chapter Eight, part 4.

[1970] *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 82.

other of the three unsound propositions".[1971] Regardless of the fact that the Constitutional Court found that the dismissal in that case did not amount to administrative action, Nugent JA held that "*Chirwa*, like all the cases that preceded it, was not about jurisdiction at all ... [but rather] about whether there was a good cause of action".[1972] It is therefore submitted that the root of the post-*Chirwa* legal uncertainty is in fact the judicial trend to confuse jurisdictional challenges with the substantive arguments that underlie a fair labour practice/administrative action evaluation.[1973]

2 2 The Evolving Perspective in *Kriel* and *Ntshangase*

In the recent *Kriel*-judgment, the Supreme Court of Appeal differentiated between the consideration of jurisdiction and the evaluation of a cause of action.[1974] This judgment represents a step in the right direction, as Mhlanthla JA and Leach AJA looked past the superficial jurisdictional debate.[1975] It was emphasised that the question of jurisdiction is a separate consideration not to be simultaneously evaluated with the substantive merits of the cause of action.[1976] It was reasoned that once a court has found that it lacks jurisdiction to hear a matter, that ought to be "the end of the matter … [as] by its own finding on that issue it … [lacks the] power to rule on the merits".[1977] The judges declared that the issue in casu was not one of jurisdiction, but called on the court to

[1971] *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 90.

[1972] *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 93.

[1973] See *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 93.

[1974] In its *Kriel*-judgment, the Supreme Court of Appeal only considered the presence or absence of PAJA defined administrative action, as that is how the appellant pleaded it. The court set out to consider the nature of the decision within these parameters. Mhlanthla JA and Leach AJA found that the decision of an organ of state to dismiss a public servant did not constitute an administrative act due to the presence of contractual power. See *Kriel v Legal Aid Board* 2009 (9) BLLR 854 (SCA) at par 2.

[1975] See Chapter Eight, part 4.

[1976] Following the *Makhanya*-reasoning, the court did not regard the jurisdictional finding in the *Chirwa*-judgment to be the ratio in that case and concluded that the High Court had jurisdiction to consider the *Kriel*-claim.

[1977] *Kriel v Legal Aid Board* 2009 (9) BLLR 854 (SCA) at par 9.

consider "whether the dismissal of the appellant constituted 'administrative action' as envisaged by PAJA".[1978]

Although there is no clear recipe for action of an administrative nature, indicators can be found in the meaning attributed to the s 33 constitutional understanding of an administrative action, as it is the point of origin for PAJA.[1979] In terms of the s 33 approach adopted by the higher courts, it must be identified on a case-by-case basis whether the exercise of public power can be described as having an administrative nature.[1980]

[1978] *Kriel v Legal Aid Board* 2009 (9) BLLR 854 (SCA) at par 2. Apart from the jurisdictional clarification, the Supreme Court of Appeal's reading in *Kriel v Legal Aid Board* [2009] 4 All SA 314 (SCA) at par 8 of the *Sidumo*-judgment, as a finding "that the CCMA arbitration proceedings did not constitute administrative action", is unfortunate. In his minority judgment in *Sidumo v Rustenburg Platinum Mines* 2007 (12) BLLR 1097 (CC) at par 162, Ngcobo J specifically explained that Navsa AJ held that "that *the conduct of Commission for Conciliation, Mediation and Arbitration ("CCMA") arbitration proceedings constitutes administrative action within the meaning of section 33 of the Constitution*." Ngcobo J also noted that Navsa AJ found that PAJA "does not apply to reviews under section 145(2) of the LRA ... [as] the ambit of the grounds of review under section 145(2) … must be informed by section 33", suffusing s 145(2) of the LRA with "the constitutional standard of reasonableness which is implicit in the requirement of reasonable administrative action in section 33." Emphasis added. Although the Constitutional Court in the *Sidumo*-case declared that PAJA did not find direct application, Navsa AJ relied on the *Bato Star*-judgment of O'Regan J to interpret reasonableness in the LRA review context. The latter case however considered the PAJA approach to s 33 of the Constitution in formulating the general contextually adaptable guidelines of a reasonableness evaluation. Navsa AJ therefore allowed indirect reliance of PAJA in the interpretation of s 33, so as to use that section (as PAJA interpreted) to interpret the LRA and its promotion of the s 23 right to fair labour practices. This perspective gives recognition to the LRA as specialised legislation to be given preference when functioning in a context that also attracts general legislation, such as PAJA. There is therefore a difference in finding that an administrative action is absent and declaring that PAJA does not directly regulate an administrative action because of it being displaced (in the absence of normative conflict) by specialised legislation, such as the LRA. In the latter instance s 33 considerations (as expressed in PAJA) informs the context-specific interpretation and application of the LRA in its regulation of an administrative-action-cum-labour-practice.

[1979] See *Greys Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (10) BCLR 931 (SCA) at par 22.

[1980] It must be kept in mind that an administrative action is merely a specific form or type of public power. See *Greys Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (10) BCLR 931 (SCA) at par 24. A series of considerations was identified by the full court in *President of the RSA v SARFU* 2000 (1) SA 1

The case-by-case approach to the determination of the presence or otherwise of administrative action endorsed by the Constitutional Court is not reconcilable with the development of a blanket rule that regards an employment decision as never amounting to an administrative action. Such a conflicting perspective denies the proper contextual evaluation of the nature and subject of (public) power in every individual case.[1981] The judiciary should, for example, not assume that the presence of contractual considerations exclude the possibility of public power considerations infiltrating the

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(CC) at par 143 to determine under which public form the nature of a power falls: "The source of the power, though not necessarily decisive, is a relevant factor. So, too, is the nature of the power, its subject-matter, whether it involves the exercise of a public duty, and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is." In his minority judgment in *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 186, Langa CJ identified the following supplementary factors: "(a) the relationship of coercion or power that the actor has in its capacity as a public institution; (b) the impact of the decision on the public; (c) the source of the power; and (d) whether there is a need for the decision to be exercised in the public interest." In identifying the *SARFU*-considerations, the Constitutional Court declared that the focus of the evaluation should fall on the function, not the functionary. Public function considerations are "important consideration[s] in the determination of exactly *what* public law regulation applies", seeing that state action undeniably carries a public character. Keeping in mind that constitutional law is part of public law, it is logical to deduce that the rights enshrined in the Bill of Rights (including the right to fair labour practices) carry a public law character. This perspective aligns with the Constitutional Court declaration in *Pharmaceutical Manufacturers Association of SA In Re: Ex Parte Application of the President of the RSA* 2000 (3) BCLR 241 (CC) at par 30 that there is only one legal system, with the Constitution as the supreme source. See De Smith, Woolf and Jowell *Judicial Review* 167; *Mittalsteel South Africa Ltd v Hlatshwayo* [2007] 1 All SA 1 (SCA). South African courts unfortunately appear to still presume and assume a lot and investigate very little when it comes to identifying the type of public power in terms of the function performed in a specific public employment context.

[1981] Any general perspective developed by the judiciary should not be read as an absolute formalistic rule. However, there can be an assumption that employment decisions generally do not amount to administrative action, with the possibility of exceptions being identified on a case-by-case basis. Cf Craig in Corder and Maluwa *Administrative Justice* 28. It is submitted, that the formalistic type of judicial reasoning that should be ignored is best illustrated by the judgment in *SAPU v National Commissioner of the South African Police* 2006 (1) BLLR 42 (LC) paras 51 – 53. See also the opposite approach in *POPCRU v Minister of Correctional Services* 2006 (4) BLLR 385 (E) at paras 53 – 54 (with reference to *Mustapha v Receiver of Revenue, Lichtenburg* 1958 (3) SA 343 (A). Cf Craig in Corder and Maluwa *Administrative Justice* 27; *Logbro Properties CC v Bedderson NO* [2003] 1 All SA 424 (SCA).

traditional private law realm in a public employment context. Although the State's capacity to enter into contractually based relationships is primarily drawn from legislation,[1982] its power to act with such legal personality is sourced in and underpinned by the Constitution itself.[1983] This understanding underlies the High Court's judgment in *Kate v MEC for the Department of Welfare, Eastern Cape*,[1984] where it was explained that the "State and its organs have no power outside that granted to it by the Constitution or by legislation complying with the Constitution".[1985] The public power element can therefore not be ignored simply because a decision is being taken in an employment context.

Furthermore, it must be said that it is logically unsound for the judiciary to reason that the public power that was granted to appoint a public employee does not carry over to the decision to terminate employment. Even if one attempts to find the source of State power to act in legislation, that power ought to not necessarily be drawn directly from a

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[1982] See Quinot (LLD US 2007) 69.

[1983] See Burns and Beukes *Administrative Law* 73 – 74; Quinot (LLD US 2007) 103 – 104. See also *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (10) BCLR 931 (SCA) at par 20.

[1984] 2005 (1) SA 141 (E).

[1985] *Kate v MEC for the Department of Welfare, Eastern Cape* 2005 (1) SA 141 (E) at par 21. See Quinot (LLD US 2007) 104 fn 159. Quinot (LLD US 2007) 110 points out that, although the Constitution as source mandates the functions of the State, these functions are wide in ambit, leaving it open to the State to determine the method or specific action by which the functions are to be executed. Although Quinot draws this conclusion in reviewing the commercial capacity of the State to enter into tender agreements, it is submitted that the same basic reasoning holds true for the general array of State functions constitutionally ordained, as the source of the State's capacity to play its role in a democratic society is "ultimately found in the Constitution". The Constitutional Court in *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) at paras 20 – 21 embraced a similar perspective: "[W]hen a tender board procures goods and services on behalf of government it wields *power derived first from the Constitution itself and next from legislation in pursuit of constitutional goal* ... when a tender board evaluates and awards a tender, it acts within the domain of administrative law. Its decision in awarding or refusing a tender constitutes administrative action ... because the decision is taken by an organ of State which wields public power or performs a public function in terms of the Constitution or legislation and the decision materially and directly affects the legal interests or rights of tenderers concerned". Emphasis added.

statute. It can flow indirectly from a statute, as pointed out by Schreiner JA in his minority judgment in *Mustapha v Receiver, Lichtenburgh*.[1986]

It appears that the Supreme Court of Appeal, in *Ntshangase v MEC for Finance: KwaZulu Natal,*[1987] attempted to address the issue of the presence or otherwise of administrative action in that case with reasoning in line with the *Mustapha*-judgment. In this case, which concerned an attempt by a State department to review its own disciplinary process, the Supreme Court of Appeal started with an analysis of the status of the employer in the sector-specific context of the case. It found the employer to be an organ of state as defined in s 239 of the Constitution. The court also stated that the employer, as an organ of state, exercised "public power in terms of the public interest in terms of legislation".[1988]

It is interesting to note that Bosielo AJA, by contextualising the evaluation of the employment decision, justified the consideration and use of administrative law concepts on the basis that the applicable collective agreement was not comparable to a contract

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[1986] 1958 (3) SA 343 (A) at 347 and 350. Quinot (LLD US 2007) 154 – 155 in commenting on the judgment explains: "[W]here an agreement is *made* in terms of statutory powers, any 'further powers' exercised in *implementation* (including termination) of the contract are also subject to statutory regulation. The important point ... is that the original source of the power to enter into the contract also has a determinative impact on any further powers flowing from or created by an exercise of that original power. Simply put, this means that, once the origin of a contract can be traced to a statutory source, action taken in terms of that contract cannot be divorced from the statutory source and will, like the conclusion of an agreement, be subject to public law regulation due to the public source of the power thus exercised." Alder 1993 (13) *Legal Studies* 183 at 188 also reasons that "[a]ll legal power ultimately derives from 'public law' sources, so that, for example the enforcement of a contract by an individual could be regarded as an exercise of power delegated by the state". See also Quinot (LLD US 2007) 169 fn 200.

[1987] 2009 (12) BLLR 1170 (SCA).

[1988] See *Ntshangase v MEC for Finance: KwaZulu Natal* 2009 (12) BLLR 1170 (SCA) at par 12. On the facts of the case, the court deduced: "Undoubtedly, when the second respondent appointed Dorkin [as chairperson] to preside over the appellant's disciplinary hearing, it did so in its capacity as the State. It follows, in my view, that Dorkin's action complained of herein which essentially is that of the second respondent qualifies as administrative action. That being so, such action has to be lawful, reasonable and procedurally fair as contemplated by s 33(1) of the Constitution."

but rather constituted "a piece of subordinate, domestic legislation".[1989] As the chairperson of the disciplinary enquiry was appointed in terms of the PSCBC Resolution 2 of 1999 (regulating discipline in the public sector), it was concluded that the disciplinary hearing qualified "as public power or public function performed in terms of [the] Resolution".[1990] The logic of the court's reasoning is reconcilable with that found in the now approved minority of Schreiner JA in the *Mustapha*-judgment.[1991]

In its *Ntshangase*-judgment, the Supreme Court of Appeal then moved on to decide whether the review should fall under PAJA or s 158(1)(h) of the LRA.[1992] Bosielo AJA found himself in agreement with the reasoning of the Labour Appeal Court, that "if the conduct of compulsory arbitrations relating to dismissal disputes under the Act constitutes administrative action [as was found in the *Sidumo*-judgment], then the conduct of disciplinary hearings in the workplace where the employer is the State constitutes, without any doubt, administrative action … [which] is required to be lawful, reasonable and procedurally fair."[1993] If then shown to be unreasonable, the action of the State would be reviewable in terms of section 158(1)(h) of the LRA.[1994]

[1989] *S v Prefabricated Housing Corporation (Pty) Ltd* 1974 (1) SA 535 (A) at 540 as quoted in *Ntshangase v MEC for Finance: KwaZulu Natal* 2009 (12) BLLR 1170 (SCA) at par 13.

[1990] *Ntshangase v MEC for Finance: KwaZulu Natal* 2009 (12) BLLR 1170 (SCA) at par 14.

[1991] In *Logbro Properties CC v Bedderson NO* [2003] 1 All SA 424 (SCA), Cameron JA referred to the minority *Mustapha*-judgment of Schreiner JA with approval. It is submitted, that the reasoning could have been simplified to reflect that found in the *Kate*-judgment.

[1992] See *Ntshangase v MEC for Finance: KwaZulu Natal* 2009 (12) BLLR 1170 (SCA) at par 14. Section 158(1)(h) determines that the Labour Court may "review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law".

[1993] Zondo JP's Labour Appeal Court judgment from which Mr Ntshangase appealed, as quoted in *Ntshangase v MEC for Finance: KwaZulu Natal* 2009 (12) BLLR 1170 (SCA) at par 16.

[1994] See *Ntshangase v MEC for Finance: KwaZulu Natal* 2009 (12) BLLR 1170 (SCA) at par 16. Bosielo AJA continued with consideration of the issue of locus standi in *Ntshangase v MEC for Finance: KwaZulu Natal* 2009 (12) BLLR 1170 (SCA) at paras 17 – 18: "Undoubtedly the second respondent has an interest in ensuring that fair labour practices are upheld in its employment relationships. The same holds true for its employees. All actions and/or decisions taken pursuant to the employment relationship between the second respondent and its employees must be fair and must account for all the relevant facts put before the presiding officer. Where such an act or decision fails to take account of all relevant facts and is manifestly unfair to the employer, he/she is entitled to take such decision on review. Moreover, the

The *Ntshangase*-judgment shows signs of a Supreme Court of Appeal movement towards an interdependent approach to the administrative/labour law relationship: acknowledging the presence of an administrative decision, as well as the relevance of s 33 constitutional considerations relating to just administrative action, within the context of an employment relationship that justifies a review in terms of s 158(1)(h) of the LRA before in a specialised labour forum. It is submitted that the court in the *Ntshangase*-judgment gave practical recognition to the *Makambi*- and *Makhanya*-reasoning of Nugent JA, by embracing the understanding that "the law is a seamless web of rights and obligations that impact upon one another across those fields.[1995] In part 3 below, this understanding of the Supreme Court of Appeal is contrasted with the recent *Gcaba*-judgment[1996] of the Constitutional Court.

3 THE CONSTITUTIONAL COURT'S ATTEMPT AT REDEMPTION

In the *Gcaba*-ruling, the Constitutional Court attempted to address the "complexity and confusion"[1997] that resulted from the judiciary's struggle to reconcile the seemingly contradictory *Fredericks*- and *Chirwa*-judgments.[1998]

The *Gcaba*-case concerned a grievance lodged by a station commissioner of the SAPS against a decision not to appoint him (although short-listed) when his position was

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second respondent has a duty to ensure an accountable Public Administration in accordance with ss 195 and 197 of the Constitution. I therefore find that the second respondent had the necessary *locus standi* to take Dorkin's action on review to the Labour Court."

[1995] *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 8.

[1996] 2009 (12) BLLR 1145 (CC).

[1997] *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 2.

[1998] The court in *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 2 chose to place the blame at the door of the "legislature, courts, legal representatives and academics" for repressing the "clarity and guidance" of the Constitutional Court's jurisprudence. A reading of the case however creates the impression that the Constitutional Court in casu downplayed its role in the creation of the complexity, and rather saw the lower courts as the judicial culprits. In *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 42, the differing opinions found in the reasoning of the 'other' courts attempting to discern "whether *Chirwa* 'overruled' *Fredericks*" were illustrated with reference to the *Makambi*-attempt "to formulate the precise circumstances under which each precedent is to be followed". In the *Gcaba*-judgment, the court also described the *POPCRU*-perspective (of constitutional rights as complementary and mutually reinforcing in nature) as robust.

upgraded. The applicant chose to phrase his claim with specific reference to the right to just administrative action. The applicant claimed that that right had been infringed upon due to the procedural unfairness (as he was not given the opportunity to state his case) and unreasonableness (as no reasons were proffered and the decision was irrational) of the decision not to appoint him.[1999] The claim of the applicant presented the court with an opportunity to provide "a definitive pronouncement"[2000] on the post-*Chirwa* issues that tormented the lower courts.

In the *Gcaba*-judgment, the Constitutional Court readily acknowledged that it was called upon to decide a constitutional matter that concerned the interplay between administrative and labour law principles and by implication the LRA and PAJA. Although the dispute between the parties was moot when it reached the court, the Constitutional Court decided, in the interests of justice, to consider the associated jurisdictional issues. It is unfortunate that our highest court downplayed the relationship between labour and administrative law to a mere jurisdictional question.[2001] The Constitutional Court's approach to the relationship between labour and administrative law in the *Gcaba*-judgment will be outlined and evaluated in the discussion to follow.[2002]

3 1 Brief Synopsis of *Gcaba*

The Constitutional Court held that it was called upon to decide two issues:

(1) whether the decision not to promote the applicant constituted an administrative action; and
(2) whether the High Court was correct in holding that it lacked the jurisdiction to decide the matter.

In attempting to address these issues, the court (through Van der Westhuizen J) acknowledged that conflicting schools of thought emerged after the *Fredericks*- and *Chirwa*-judgments, with some courts allowing concurrent jurisdiction between the

[1999] See *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 45.

[2000] *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 18.

[2001] See Chapter Eight, part 4.

[2002] As the judgment itself is confusing, and contains ambiguous statements, the development of contradictory post-*Gcaba* interpretations in the lower courts remain a possibility.

Labour and High Courts where labour disputes are concerned, while others concluded that the Labour Court has exclusive jurisdiction over all labour matters emanating from public employment relationships. In addressing this conflict, the Constitutional Court emphasised that one set of facts can give rise to more than one cause of action and that human rights are interdependent and indivisible in nature. The court also acknowledged a need for specificity and specialisation in the provision of legislative rules emanating from specific rights,[2003] and also emphasised the importance of adherence to the doctrine of precedent. With all these underlying principles in mind, the court declared that the *Gcaba*-case aligned with the *Chirwa*-case as both applicants' complaints could be considered typical labour matters concerning the right to fair labour practices. The court concluded that Mr Gcaba would have failed with his application in the High Court, especially as it held that labour related decisions in the public employment context generally do not amount to administrative action.

In the *Gcaba*-judgment, the court furthermore aligned itself with the reasoning of Skweyiya and Ngcobo JJ in the *Chirwa*-case, by emphasising that the LRA created a specific adjudicatory structure for labour issues and by accepting a broad reading of s 157(1) of the LRA (on which s 157(2) must not be allowed to encroach). In conclusion, the court declared that, as far as conflict continues to exist between its previous judgments (i.e. between the *Fredericks*- and *Chirwa*-judgments), the most recent (i.e. *Gcaba*-judgment) must be regarded as the relevant authority.

3 2 The Constitutional and Legislative Framework

The interpretative explanation provided by the court for its understanding of the Constitution and applicable legislative instruments is not immediately clear. As point of departure and by attempting to address the constitutional matter before the court, the court re-emphasised that the Constitution, as the supreme law, protects the basic rights of individuals.[2004] With this, the court created the expectation that the pursuant

[2003] See Chapter Seven for a discussion of the doctrine of interdependence and the idea of specificity.

[2004] The court stated that the interplay between administrative and labour law in the public employment context qualifies as a constitutional matter, seeing as the constitutional roots of the LRA and PAJA, namely ss 23 and 33, influence the interpretation of these two instruments. See *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at paras 1 and 17.

evaluation would involve a genuine consideration of the interdependent spirit, object and purport of the Constitution.[2005] Unfortunately, the reasoning of the court only hints at it. The court merely acknowledged that the entrenchment of s 23 in the Bill of Rights, along with the promulgation of its effecting LRA, was primarily an attempt to pursue the constitutional protection of the right to fair labour practices,[2006] while s 33 was primarily aimed at the protection of everyone's right to just administrative action given effect to by PAJA as the national legislation called for in s 33(3).[2007]

In considering the s 33(3) constitutional obligation to enact legislation that gives effect to the right to just administrative action, the Constitutional Court did not expressly distance itself from the majority *Sidumo*-perspective that s 33 does not preclude the regulation of administrative action by means of specialised legislation, such as the LRA.[2008] Although the reasoning of the court (absent any apparent conflict) must be read along with this *Sidumo*-understanding, the court unfortunately did not make explicit mention of the *Sidumo*-perspective, leaving the specialised-general functioning relationship between the LRA and PAJA in place.[2009] With this superficial overview of the constitutional-legislative basis of the relationship between labour and administrative law, the Constitutional Court in the *Gcaba*-case simply added to (instead of eliminated) the post-*Chirwa* complexity. If the court took the time to expand on its understanding of the relationship between the specialised LRA and general PAJA (building on the *Sidumo*-groundwork), it could have eliminated a lot of the legal uncertainty, thereby preventing possible post-*Gcaba* interpretative manipulation of that judgment.[2010]

[2005] The Constitutional Court has previously endorsed this approach. See Chapter Seven.

[2006] See *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 10.

[2007] See *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 11.

[2008] See *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 91 – 92. The reasoning of the court, so reflected, implies that the existence of administrative action in an employment context is not impossible. Cf part 3 7.

[2009] See part 3 6 4 for a discussion of the doctrine of precedent.

[2010] In *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 37, Van der Westhuizen J did however make reference to the *Chirwa*-perspective of Ngcobo J, namely that specialised legislation enacted to give effect to a constitutional right cannot be bypassed with direct reliance on that right, without challenging the constitutionality of the legislation. This principle, in the absence of a statement to the contrary, must be understood against the *Sidumo*-perspective that general

3 3 The Character of the Claim and the Section 157 Confusion[2011]

To interpret the scope of s 157 of the LRA, Van der Westhuizen J delved into the opposing perspectives of the *Fredericks*- and *Chirwa*-judgments and the manner in which the character of the claims in those cases were interpreted.

As is evident from the *Fredericks*/*Chirwa*-confusion, the Constitutional Court's jurisprudence is not clear on what the scope of an employment issue or dispute is for purposes of determination of the exclusive/concurrent jurisdictions provided for by s 157. This confusion infiltrated the *Gcaba*-judgment in the court's attempt to distinguish between the *Fredericks*- and *Chirwa*-judgments without expressly overruling either one. Van der Westhuizen J reasoned (with reliance on Skweyiya J's understanding in the *Chirwa*-case), that "*Fredericks* was never a labour case *or* a case where direct reliance was placed on the LRA".[2012] The *Fredericks*-judgment was explained to be a case that "turned on the proper interpretation of section 157 of the LRA and section 169 of the Constitution".[2013] Nevertheless, the "non"-labour nature of the *Fredericks*-case (confirmed in the *Gcaba*-judgment to have been concerned with the interpretation of the LRA, the statutory core of labour law) was declared to have moved the claim in that case out of the exclusive jurisdiction of the Labour Court "and placed it within the concurrent jurisdiction of the Labour Court and the High Court".[2014] The *Gcaba*-

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legislation (and the right to which it gives effect) can be used as an interpretative source for specialised legislation (and the right that it seeks to promote). See also the holistic interpretative approach endorsed by the Constitutional Court in *S v Zuma* 1995 (4) BCLR 401 (CC).

[2011] See Chapter Eight, part 4 for a discussion of the jurisdictional-argument in the administrative-labour law relationship debate.

[2012] *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 28. Emphasis added.

[2013] *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 23. The judge explained that, as the claim in the *Fredericks*-case was formulated as a constitutional matter relating to the infringement of ss 9 and 33 of the Constitution, the High Court was found to have jurisdiction, based on s 169 of the Constitution. In *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 28, it was held that "*Fredericks* was never a labour case or a case where direct reliance was placed on the LRA" so the court "left open the question whether a dispute arising out of the interpretation or application of a collective agreement can also give rise to a constitutional complaint as envisaged in section 157(2) of the LRA". See also Chapter Eight, part 4; *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at paras 23 and 24.

[2014] *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 30.

interpretation of the *Fredericks*-judgment leaves one somewhat perplexed as to the logic behind this contradiction: a non-labour-case with a non-LRA-based-claim, dealing with s 157 LRA interpretation, with the court ultimately ruling that the non-labour-case fell within the concurrent jurisdiction of the High Court and Labour Court (with the latter being a court statutorily designed to only deal with labour cases).[2015]

The next step for the court in the *Gcaba*-case was to declare (drawing on the merit-based jurisdictional approach of Skweyiya J in his *Chirwa*-judgment) that the choice of "the applicants in *Fredericks* not to rely on the provisions of the LRA removed their claim from the purview of labour law",[2016] while the applicant in the *Chirwa*-case framed her claim "in terms that sought to impugn a failure to properly apply sections of the LRA".[2017] The *Chirwa*-claim, so understood, allowed Skweyiya J (in his *Chirwa*-majority) to distinguish it from the Constitutional Court's *Fredericks*-reasoning. Accordingly, the *Chirwa*-claim was construed as based on an employment contract (a labour matter), and not approached as worded by the applicant.[2018] In *Gcaba*, Van der Westhuizen J

[2015] It is still possible to reason that the *Fredericks*-judgment did not concern an LRA-based claim, but it appears a bit of a stretch to argue (in the employment context of that dispute) that it was not at some level describable as a labour case.

[2016] *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 30.

[2017] *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 31. With regard to *Chirwa*-judgment, Van der Westhuizen J in *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 26 stated that it was a case where the applicant "claimed that she had two causes of action available to her, one under the LRA and the other flowing from the Bill of Rights and PAJA".

[2018] See *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at paras 28 and 31. According to Ngcobo J in *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 124, the Constitutional Courts was allowed to (re)characterised Ms Chirwa's claim, based on the fact that "[w]hat is, in essence, a labour dispute as envisaged in the LRA should not be labelled a violation of a constitutional right in the Bill of Rights simply because the issue raised could also support a conclusion that the conduct of the employer amounts to a violation of a right entrenched in the Constitution". Yet the legislature allows for such a possibility in the scope of the concurrent jurisdiction found in s 157(2) of the LRA. It appears as if Ngcobo J in his majority *Chirwa*-judgment recognised that other rights could be violated by a public sector employer's conduct, but reasoned that it should rather be viewed as a labour dispute if the essence of the conduct so allows. If mere preference, then why acknowledge the Labour Court's extended jurisdiction over matters that implicate constitutional rights (s 157(2)), if only LRA matters and rights should in essence be addressed. The LRA aims to give effect to s 23. The s 157(1) exclusive jurisdiction can cover the Labour Court demanded protection, as s 23 is the reason for the LRA's existence. If all s 23 issues

did not express any concern with this (re)characterisation of Ms Chirwa's claim. This silent acceptance in *Gcaba* of the majority's 'identification' of Ms Chirwa's claim is confusing, especially because the court in *Gcaba* also aligned itself with the minority reasoning of Langa CJ in *Chirwa,*- which criticised the judicial trend to (re)characterise claims and held that a litigant's claim should be approached as it is pleaded.[2019] The apparent acceptance in the *Gcaba*-judgment of two mutually destructive approaches in the *Chirwa*-case does not assist in providing legal clarity. In the absence of proper explanation, the *Gcaba*-judgment creates the impression that "divergent schools of jurisprudence"[2020] developed because the *Fredericks*–claim was adjudicated as it was pleaded, while the *Chirwa*–claim was adjudicated as it was (re)characterised. This leaves the Constitutional Court's *Gcaba*-judgment open to criticism when viewed against the third unsound proposition identified by Nugent JA (in the Supreme Court of Appeal),[2021] as it is not the task of the judiciary to tell the applicant what he or she ought to have claimed, in the absence of ambiguity.

The *Gcaba*-judgment further expanded on Ngcobo J's finding in the *Chirwa*-judgment that s 157(2) of the LRA should be narrowly interpreted, as the LRA is aimed at addressing problems associated with "multiplicity of laws, as well as overlapping jurisdictions".[2022] The court accordingly reasoned that the "application of section 157(2) must be confined to those instances, *if any*, where a party relies directly on the

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lead to the Labour Court for consideration (as it cannot be bypassed according to the Constitutional Court in *SANDU v Minister of Defence* 2007 (9) BLLR 785 (CC)), then the s 157(2) constitutional rights reference must allow for consideration of other constitutional rights, in addition to s 23 which is already covered by the LRA matters.

[2019] In his minority judgment in *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at paras 157 – 159, Langa CJ emphasised that Ms Chirwa's case had to be evaluated as it was pleaded, as a claim based on the right to just administrative action as given effect to by PAJA. Langa CJ did not regard it as appropriate to (re)characterised Ms Chirwa's claim in the same manner as the majority.

[2020] *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 39.

[2021] See part 2 1 3.

[2022] *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 35. The court did not give any express consideration to the *Sidumo*-finding that the LRA as specialised legislation displaces the general PAJA approach in regulating administrative action in an employment context. This understanding cancels out the "multiplicity of laws" problem.

provisions of the Bill of Rights".[2023] Van der Westhuizen J thus read Ngcobo J's *Chirwa*-judgment in a manner that interpreted s 157(2) of the LRA into a no-meaning zone for normal labour disputes,[2024] regardless of the fact that the *Fredericks*-judgment confirmed that the Labour Court does not hold the monopoly on all employment disputes.[2025] Van der Westhuizen J did not comment on the express choice of the legislature to use the word 'concurrent', or the legislative choice to omit any reference to the direct application, qualification or limitation mentioned in the *Gcaba*-judgment. Van der Westhuizen J merely endorsed the *Chirwa*-majority's understanding of exclusive jurisdiction that "[l]abour issues are to be dealt with in specialised fora ... [as it is the] purpose of the LRA ... to create a system under which all labour disputes can be resolved".[2026] The apparent support in the *Gcaba*-case for the policy-laden reasoning of the *Chirwa*-majority, leaves one somewhat perplexed, considering that Van der Westhuizen J in his *Gcaba*-ruling emphasised "that labour disputes that raise a constitutional issue are justifiable in the High Court".[2027]

Ultimately, the Constitutional Court's interpretation of s 157(2) of the LRA in *Gcaba* amounted to nothing more than a mere restatement of the words of that section in the

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[2023] *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 36. Emphasis added.

[2024] See *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 32. It appears that Ngcobo J's *Chirwa*-efforts at reconciliation came down to giving a s 157(1) LRA policy meaning to the reading of s 157(2). The idea of exclusive and concurrent jurisdiction is irreconcilable in character, the jurisdictional equivalent of oil and water. The purpose behind exclusive and concurrent jurisdiction cannot be harmonised without forfeiting the essence of the one in exchange for the other. The legislative reference to the concurrent dimension of jurisdiction is not unfortunate, as the *Makhanya*-reasoning of Nugent JA confirmed, but rather a legislative choice that must be properly interpreted and not manipulated under the pretext of purposive interpretation.

[2025] The Constitutional Court has already proclaimed that direct reliance on a provision in the Bill of Rights is not allowed where legislation is in place to regulate that provision, except when a provision is relied upon to hold the legislation (or a section thereof) unconstitutional.

[2026] *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 28. Footnotes omitted. The s 191 LRA regulation of unfair dismissals was held to qualify as a matter for which the Labour Court has exclusive jurisdiction. See *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 29. However, even if the High Court cannot exercise jurisdiction in, for example, s 191 LRA matters, the exclusivity associated with it cannot oust the other legitimate rights that flow from the same set of employment facts.

[2027] See *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 33.

LRA, without any clarity-promoting conclusion. In doing so, the court conceded that concurrent jurisdiction is reserved for "any dispute over the constitutionality of any exercise or *administrative act* or conduct by the *state in its capacity as employer*".[2028] It is submitted, that an administrative act can only be present if public power is exercised by the State while acting as employer. If an administrative act can be exercised by the State in its capacity as employer (as implied by the wording of s 157(2)) that in turn indicates that the State in its capacity as employer acts with public power. It appears that the Constitutional Court must, at some level, have been open to this possibility, as it stated that s 157(2) of the LRA is not aimed at restricting the High Court's already existing jurisdiction.[2029] Therefore, the LRA must not be read as intending "to destroy causes of action or remedies".[2030]

In the court's interpretative endeavours, it appears that Van der Westhuizen J attempted to emphasise two points. *Firstly*, Labour Courts can address constitutional issues that arise from an employment context.[2031] *Secondly*, these issues include "disputes concerning the alleged violation of *any rights entrenched in the Bill of Rights* which arise from employment and labour relations".[2032] However, in admitting that any right in the Bill of Rights can potentially find application in a public sector employment context, the court perhaps unwittingly acknowledged that the right to just administrative action (as a right entrenched in the Bill of Rights) also carries such a potential.

Ultimately, the *Gcaba*-judgment reverted back to old habit in relying on substantive reasoning to form the basis for a case-specific jurisdictional finding by the ruling that the "applicant's complaint was essentially rooted in the LRA, as it was based on conduct of an employer towards an employee which may have violated the right to fair labour practices ... was not based on administrative action ... [and] should have been adjudicated by the Labour Court".[2033]

[2028] *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 71. Emphasis added.

[2029] See *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 73.

[2030] *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 73.

[2031] See *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 71.

[2032] *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 71. Emphasis added.

[2033] *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 76.

3 4 Apparent Reversion to the First Unsound Jurisdictional Principle[2034]

In interpreting s 157 of the LRA, Van der Westhuizen J looked to the Skweyiya J *Chirwa*-finding that "addressed the question whether public sector employment contracts are subject to administrative law, on a jurisdictional basis",[2035] and emphasised that labour issues should be resolved in specialised fora in light of the purpose of the LRA.

However, in the *Makhanya*-case, Nugent JA explained that it is unsound (as a principle of logic) for a court to base the presence or absence of its jurisdictional power on a finding as to the presence or absence of an administrative action.[2036] In the *Gcaba*-judgment, Van der Westhuizen J nevertheless found that the claim presented to the court by Mr Gcaba was bad in law and held that to indicate that the High Court lacked jurisdiction.[2037] In other words, the court evaluated the presence or absence of an administrative action, and used that decision (which concerns the merits of the case) to inform the decision as to which lower court should have jurisdiction.[2038] This goes against a recognised (and Constitutional Court approved) principle of logic, as Van der Westhuizen J (in dealing with the merits of the case, before addressing the issue of jurisdiction) created the impression that the court again based a jurisdictional finding on a finding as to the presence or absence of an administrative action.

[2034] See part 2 1 1 1.

[2035] *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 28. Consequently, the Skweyiya J *Chirwa*-majority must not be read as a finding on the merits of that case.

[2036] See *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 51. See also *Fraser v ABSA Bank* 2007 (3) BCLR 219 (CC) at par 40; *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 155 per Langa CJ.

[2037] With his claim of procedural unfairness, the applicant placed primary reliance on the right to just administrative action and secondary reliance on the right to fair labour practices. See *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 75.

[2038] The administrative action evaluation was therefore undertaken, before a finding was made as to whether the High Court could exercise jurisdiction. In *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 69, the court went as far as to declare its support for the *Chirwa*-perspective, in stating that the "consequence of the finding that the conduct … is not administrative action will substantively reduce the problems associated with parallel systems of law, duplicate jurisdiction and forum shopping".

Clarity and certainty for the practice in lower courts could easily have resulted from the *Gcaba*-judgment, had the Constitutional Court followed a similar approach as that expected of the lower courts.[2039] In doing so, the court could have led by example and limited the possible misinterpretation by lower courts looking for a way around the *Gcaba*-finding.

3 5 The General Principles underlying the Constitutional Court's Complexity

In attempting to present the legal community with some clarity, the Constitutional Court in the *Gcaba*-case outlined four principles identified from previous decisions, which principles ostensibly informed and directed its reasoning.

3 5 1 The First Principle: Condemning Formalism[2040]

The first principle rejects formalism in calling on the judiciary to avoid rigid compartmentalisation.[2041] In the *Gcaba*-judgment, Van der Westhuizen J admitted that although one decision may potentially violate more than one constitutional right (which would give rise to more than one cause of action that each could be pursued in different fora),[2042] it is also true that "[a]reas of law are labelled or named [only] for purposes of systematic understanding and not necessarily on the basis of fundamental reasons for a separation".[2043]

3 5 2 The Second Principle: Endorsing Interdependence[2044]

Complementary to the first, the second principle embraces the "intrinsically interdependent, indivisible and inseparable"[2045] character of human rights. The court

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[2039] An evaluation of the substantive merits of a dispute can only be made on a case-by-case basis (generalisation is therefore dangerous). See *President of the RSA v SARFU* 2000 (1) SA 1 (CC) at par 143. The required evaluation on the merits can only take place once a court has ruled on jurisdiction. The lower courts (whether the High or Labour Court) will in every case first have to evaluate the jurisdictional fact.

[2040] See Chapter Seven, part 2 1.

[2041] See *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 53.

[2042] See *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 53.

[2043] *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 53.

[2044] See Chapter Seven, part 2 2.

[2045] *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 54.

found this principle to be supported by the "constitutional and legal order … [as] one coherent system for the protection of rights and the resolution of disputes".[2046] Related to this, is the understanding "that legislation must not be interpreted to exclude or unduly limit remedies for the enforcement of constitutional rights".[2047] With this endorsement of the doctrine of interdependence, the court appeared to have accepted the perspective that beneficiaries of constitutional rights are entitled to comprehensive protection without undue limitation.

3 5 3 The Third Principle: Reverting to Specificity[2048]

The third principle unfortunately appears to contradict the first and the second principle, by reverting to traditional formalistic reasoning.[2049] The third principle acknowledges the idea of separatism as a necessity in giving effect to the rights enshrined in the Bill of Rights. The court declared "that the Constitution recognises the need for specificity and specialisation in a modern and complex society under the rule of law".[2050] Van der Westhuizen J justified the endorsement of separatism by stating that the Constitution itself mandates the enactment of regulatory legislation.[2051]

Rules and structures can however not be allowed to ignore the variable character of norms and function in isolation with a disregard for genuine interdependence (in the absence of normative conflict), otherwise specificity takes on a formalistic character

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[2046] *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 54. This argument aligns with that of Sachs J in *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 50.

[2047] *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 55.

[2048] See Chapter Seven, part 2 3.

[2049] It is noteworthy that the Constitutional Court declared this to be a "principle or *policy* consideration", reminding of the much criticised *Chirwa*-policy-approach. See *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 56. Emphasis added.

[2050] *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 56.

[2051] In *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 56, Van der Westhuizen J reasoned: "The legislature is sometimes specifically mandated to create detailed legislation for a particular area, like equality [PEPUDA], just administrative action (PAJA) and labour relations (LRA). Once a set of carefully-crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is *preferable* to use that particular system." Emphasis added. The Constitutional Court recognised the fact that preference (in theory) plays a role, but in practice appears to interpret this as a directive and not a choice.

irreconcilable with the spirit of the Constitution.[2052] The Constitutional Court did not expressly declare which form of separatism (absolute or relative) it was endorsing as the third principle. It is an intrinsic contradiction to acknowledge that fundamental rights are inseparable, while allowing the constitutionally mandated legislation that gives effect to those rights to function in a divisible manner. As a result, absent clarification in the *Gcaba*-judgment, the support for specificity proffered as justification for the court's *Chirwa*- and *Gcaba*-findings, gives the impression that absolute formalism is acceptable.[2053] Absent an express declaration in favour of a relative approach to specificity, the *Gcaba*-ruling creates the opportunity for lower courts to favour extreme specificity that would see the third principle suppress the first and second.[2054]

The Constitutional Court did however note that its support for specificity (as the third principle) is based on the desire to avoid the development of "a dual system of law".[2055] It is submitted that if genuine consideration is given to the second principle (if all rights and effecting legislation are interpreted and applied with due regard to the interdependent nature of the Constitution) and if specificity is not allowed to suppress the variable value system of the Constitution, then the development of a dual system of law can be averted. After all, the idea of interdependence is aimed at evading the development of a dual system of law, by embracing the Constitution as the supreme law.[2056] A dual system of law will only be problematic if compartmentalised interpretation and application of fundamental rights (and associated legislation) is endorsed by allowing absolute formalistic (instead of relative) specificity. As the Constitutional Court declared itself against formalistic separatism, in the same manner it rejected the formalistic influence by accepting the first two principles, the logical

[2052] See Chapter Seven, part 2 3.

[2053] See the discussion of the idea of specificity in Chapter Seven, part 2 3.

[2054] Such an understanding renders the Constitution a mere pipe dream and empowers legislation to undermine the Constitution in the name of the false 'constitutional' principle of specificity.

[2055] *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 56.

[2056] For comment on the single system brought about by the Constitution see *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the RSA* 2000 (3) BCLR 241 (CC).

deduction would be that the third principle was formulated in support of relative constitutional specificity.[2057]

3 5 4 The Fourth Principle: Doctrine of Precedent

The Constitutional Court also relied on the doctrine of precedent to attempt to reconcile its reasoning in the *Fredericks*- and *Chirwa*-judgments. The court considered the meaning of the Latin maxim, stare decisis et non quieta movere:[2058] "[I]t means that in the interests of *certainty*, *equality before the law* and the *satisfaction of legitimate expectations*, a court is bound by the previous decisions of a higher court and by its own previous decisions in similar matters".[2059] The court made reference to *Robin Consolidated Industries Ltd v Commissioner for Inland Revenue*[2060] and *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996*[2061] where the Supreme Court of Appeal and the Constitutional Court respectively acknowledged that a deviation from previous decisions will only be justifiable if the court clearly erred in its previous judgment, "or where the point was not argued or where the issue is in

[2057] Furthermore, while recognising the Constitutional Court's argument in *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 57 (that "forum shopping is not desirable"), it is submitted that litigants will not be forced to revert to forum shopping for the full protection of all their rights if the judiciary cultivates a culture of genuine interdependent protection of human rights. Even if the different forums adjudicated claims based on the same set of facts, the reasoning of the High and the Labour Courts should be reconcilable, regardless of which forum is approached to adjudicate the matter. This would allow (in fact demand) specialised labour fora to have due regard to all relevant rights in giving full circumstantial effect to the right to fair labour practices. This altered judicial culture can also infiltrate the context specific discretion of the labour fora when identifying an appropriate remedy. Forcing a litigant to base a cause of action on a specific right uninformed and detached from its constitutional support system, will bring about a mistrust in the applicable court's capacity to see to it that justice is done to the full extent of the law.

[2058] This phrase translate as, "to stand by decisions and not to disturb settled matters". See *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 58.

[2059] *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 58. The emphasised section highlights the three components by which previous judgments retain their authoritative status.

[2060] 1997 (3) SA 654 (SCA) at 666.

[2061] 1997 (1) BCLR 1 (CC) at par 8.

some legitimate manner distinguishable".[2062] The Constitutional Court did not venture into a discussion of post-*Chirwa* judgments to evaluate the influence of the Constitutional Court's two majorities in *Chirwa* in view of this understanding of the doctrine of precedent. Van der Westhuizen J merely set out the Constitutional Court's own reasoning, creating the impression of an unbalanced, incomplete evaluation. The Constitutional Court chose to not expressly give full consideration to the arguments and criticism lodged in the lower courts and the Supreme Court of Appeal against its apparently conflicting judgments in *Fredericks* and *Chirwa*. Although constitutional justice may have been done, the court's silence undermines the appearance of constitutional justice being done.[2063]

Furthermore, sight must not be lost of the fact that certainty is but one element of the Latin maxim that underlies the fourth principle. The Constitutional Court cannot be faulted for theoretically acknowledging the other three constitutional principles in an attempt to provide clarity post-*Chirwa* in support of the legal ideal of reasonable predictability (which amounts to the rationale for judicial reliance on the doctrine of precedent). However, no court must lose sight of the fact that it has to abide with mere reasonableness and not precise predictability. The carefully crafted general rules that the court desires through specificity and predictability cannot be viewed as cast in stone, due to the variable nature of the norms that underlie the rules of justice. The variable normative system within which the Constitution, its ensuing rights and effecting legislation function, demand proper consideration of fair and equal treatment as required by the rule of law. This demands more than mere formalistic sameness. The constitutionally recognised value of equality (as associated with the variable concept of fairness) requires its scope to be contextually determined through case-by-case consideration.

It is therefore, in the absence of further explanation, a paradox that the Constitutional Court acknowledged that interference in set precedent is justified "when this Court's

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[2062] *Daniels v Campbell NO* 2004 (7) BCLR 735 (CC) at par 95 per Moseneke J. See also *Van der Walt v Metcash* 2002 (5) BCLR 454 (CC) at par 39; *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at paras 59 – 61.

[2063] Jurisprudential silence as to the court's underlying reasoning allows for formalistic interpretation to undermine the truth underlying a just decision.

earlier decisions have given rise to controversy or uncertainty, leading to conflicting decisions in the lower courts",[2064] when in fact it is the controversy and uncertainty underlying its previous *Chirwa*-judgment (reflected in the post-*Chirwa* rulings of the lower courts) that brought the *Gcaba*–case to the court. If fairness and optimal (equal access) protection of fundamental rights do not qualify as a "coherent and compelling reason"[2065] for deviation from a controversial Constitutional Court ruling, then it is difficult to discern what does.

3 6 General Presumption of the Absence of Administrative Action

The attempt at the promotion of legal certainty in the *Gcaba*-judgment did not end with the Constitutional Court's paradoxical approach to its quest for certainty through the identification of the four general constitutional principles discussed above. The Constitutional Court also addressed the presence or absence of administrative action on the facts of the case in an attempt to answer the jurisdictional question.[2066] In the absence of an in-depth analysis of recent Supreme Court of Appeal judgments,[2067] the Constitutional Court stated:[2068]

> *Generally, employment and labour relationship issues do not amount to administrative action within the meaning of PAJA* ... 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. In this regard the reasoning of Murphy AJ in *SAPU* is persuasive ... [T]he Constitution regulates, the employment relationship expressly in section 23 …[2069]

[2064] *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 62.

[2065] *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 62.

[2066] See part 3 4.

[2067] See the preceding discussion in section 2 of this chapter.

[2068] See *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at paras 72 – 76. Cf the *Makambi* and *Makhanya*-judgments in part 2 1 1; *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 155 per Langa CJ.

[2069] *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at paras 64 – 65. Emphasis added. Footnotes omitted. For criticism on the reasoning of Murphy AJ in *SAPU v National Commissioner of the Police Service* 2006 (1) BLLR 42 (LC) see Chapter Eight, part 3.

With this statement, the Constitutional Court formulated a general presumption that employment decisions cannot constitute administrative action. However, in the absence of an express acknowledgment that this general assumption allows of case specific exceptions, the court created the opportunity for formalistic reasoning to once again infiltrate the rights-relationship between labour and administrative law in the public employment context. In fact, the Constitutional Court has on numerous occasions emphasised that the presence or absence of an administrative action must be determined on a case-by-case basis, as the concept of public power is as elusive as a precise content description of the fairness component of fair labour practices. The Constitutional Court, for some reason, omitted to expressly factor this legal reality into its general presumption.

For some inexplicable reason the Constitutional Court also chose to place reliance on a controversial case (the *SAPU*-judgment) to justify the formulation of this general presumption. In an attempt to bolster the authority of Murphy AJ's *SAPU*-reasoning, the Constitutional Court commented that the distinction between the applicability of ss 23 and 33 of the Constitution "does not mean that employees have no protection".[2070] However, as Nugent JA so adequately explained in the *Makhanya*-judgment, the constitutional argument must not merely focus on the provision of some protection, but on comprehensive protection to which all beneficiaries of rights contained within the Bill of Rights are fundamentally contextually entitled.[2071] The Constitutional Court did not give express or comprehensive consideration to this argument of the Supreme Court of Appeal (as articulated by Nugent JA). In failing to do so, the court appears to have lost sight of the fact that *SAPU*-type cases based their formalistic distinction between labour and administrative law on the contractual element of the employment relationship (as regulated by s 23) in an attempt to justify the presence of private power (or, conversely, the absence of public power). Furthermore, the Constitutional Court

[2070] *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 65.

[2071] See *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 69. This sentiment was also emphasised in the judgment of *POPCRU v Minister of Correctional Service* 2006 (4) BLLR 385 (E) at paras 58 – 61, a case that the Supreme Court of Appeal and the Constitutional Court in the *Chirwa*-saga regarded as the opposing view to that of Murphy AJ in the *SAPU*-judgment. See also Van der Walt 2008 (1) *CCR* 77 at 111.

contradicted the rationale underlying the 'authoritative' *SAPU*-case, by admitting that "[s]ection 23 is an express constitutional recognition of the special status of employment relationships and the need for legal regulation *outside of the law of contract*".[2072]

In an apparent last effort to eliminate any applicability of administrative law, the court in the *Gcaba*-judgment elaborated on its opinion that the conduct of the State as employer has "no direct implication or consequence for other citizens",[2073] while only in passing admitting that "[t]he situation might be different where, for example, the appointment or dismissal of the National Commissioner of the SAPS is at stake".[2074] At the same time, however, this exception was linked to the fact that that "decision [is] taken by the President as the head of the executive",[2075] which Van der Westhuizen J recognised as "of huge public import".[2076]

It is submitted, that this argument cannot stand. The exception is far too narrow. In the same way that the demographics and size of the population that the public service serves "impacts on the beliefs and attitudes"[2077] of public employees, the beliefs and attitudes of public servants impact on the population they serve in the exercise of their functions.[2078] This belief-system is now encapsulated in the Batho Pele Principles that reveal the public service's vision as "we belong, we care, we serve". The Batho Pele Principles act as the guideline for all public servants in the performance of their duties.[2079] One of the transformative priorities associated with the Batho Pele Principles, in support of better service to the public, is the renewed focus on the employment conditions and labour relations of employees in the public sector.[2080] Emery and

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[2072] *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 65. Emphasis added.

[2073] *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 64.

[2074] *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 64 fn.

[2075] *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 64 fn.

[2076] *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 64 fn.

[2077] Glor 2001 (67) *Int Rev Admin Sc* 525 at 527.

[2078] See Glor 2001 (67) *Int Rev Admin Sc* 525 at 527.

[2079] In a sense, it can be reasoned that the Batho Pele Principles are part and parcel of the terms and conditions of public employee's employment agreements.

[2080] *Batho Pele: People First* http://www.kznhealth.gov.za/bathopele.htm (2009/10/08). NEHAWU has also put forward the argument that there is a link between poor public service delivery and public service wage disputes. See http://www.nehawu.org.za (2009/10/08). Cf the Conflict in Interest and Post-

Giauque also emphasise that the importance of the public service's impact on society must not be underestimated, as it works both ways:[2081] What affects the public servant affects the public and vice versa. The ethos or spirit of the public service clearly contradicts the Constitutional Court's opinion that the conduct of the State as employer has no general direct impact on the citizens that the public service is called upon to serve.[2082]

> [C]ivil service employees are quicker to defend the general interest and service to the community. Moreover, the public interest, the general interest, form part of the values with which employees in the civil service readily identify ... *The public ethos is therefore not merely rhetoric used deliberately by civil servants to protect themselves against attacks on their conditions of employment and their jobs.* On the contrary, it would seem that these values form the heart of the professional identity of a majority of them.[2083]

A causal link is clearly identifiable. If the State as employer makes an employment decision that adversely affects public servants, it inevitably impacts on the quality of service offered to the citizens. The causal link that informs the required general direct impact is all the more relevant in the case of front-line public servants that deal directly with the public on a day-to-day basis. The stronger the causal link the weaker the Constitutional Court's generalisation becomes. In the *Chirwa*-judgment, the link can be described as a weak one, because Ms Chirwa was an administrative officer that did not deal directly with the public on a day-to-day basis.[2084] In contrast, the public servant that approached the Constitutional Court in the *Gcaba*-case, Mr Gcaba, came to the court as a prospective station commissioner in the SAPS. A person in this position undeniably deals with the public as a front-line public servant. The capacity of such an official to fulfil his public service obligation to the community is important. If a decision of the State

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employment Code for the Canadian Public Service that echo the spirit of Batho Pele in the South African public service. See Glor 2001 (67) *Int Rev Admin Sc* 525 at 536.

[2081] See Emery and Giauque 2005 (71) *Int Rev Admin Sc* 639 at 650.

[2082] See Emery and Giauque 2005 (71) *Int Rev Admin Sc* 639 at 650.

[2083] Emery and Giauque 2005 (71) *Int Rev Admin Sc* 639 at 651. Emphasis added.

[2084] Her work could not be said to impact on the public directly, but rather on her fellow public servants in her role as a human resources manager.

as employer affects the fulfilment of that obligation, the employment decision can be said to directly impact on the citizens. The conclusion to be drawn from this analysis is that the presence or absence of a direct impact on the citizens cannot be generalised into one standard formalistic answer, but depends on the circumstances of every case.

3 7 The *Gcaba*-ratio: In Theory and Practice

With the *Gcaba*-judgment the Constitutional Court did accept that s 157 of the LRA must not be interpreted to imply that "only the Labour Court should deal with disputes arising out of employment relations", where other remedies exist. At the same time, it seems clear from the judgment that an employee like Mr Gcaba could be denied the opportunity to pursue his expressly pleaded administrative law cause of action in the High Court, even though the Constitutional Court also accepted that the substantive merits of a case should not determine jurisdiction.[2085]

From these apparent contradictions, it is difficult to distinguish a jurisdictional ratio from the judgment.[2086] *In theory*, nothing is taken away from the High Court's traditional jurisdiction. The Labour Court's jurisdiction is merely extended with the 157(2) LRA concurrent jurisdiction. Although an employee is forced to pursue LRA based claims in labour fora, it is open to an employee to pursue an employment context claim informed by a constitutional right, such as the right to just administrative action, in either the High Court or the Labour Court, in situations where the State acts as employer. This, according to the Constitutional Court, is the theory that gives expression to the intention of the legislature and the LRA. *In practice*, the court illustrated that if an employee brings a claim based on the right to just administrative action, as indeed Mr Gcaba did, it will be 'properly' interpreted by the court to be a claim to assert a LRA right. Consequently, regardless of what an employee claims, the court will indicate to the employee that he or she in fact (albeit unknowingly) intended to claim a LRA right for which only the Labour Court has jurisdiction. Smit comments that this specific component of the *Gcaba*-judgment not only "is a perfect example of how imperfect contextual and purposive reasoning may be where there is more than one plausible and

[2085] See *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 75.

[2086] 2009 (12) BLLR 1145 (CC).

compelling interpretation",[2087] but also that the Constitutional Court is unwilling to look past its previous questionable judgments, specifically the ghost of *Chirwa*. Generalisations, as found in the *Gcaba*-judgment, come dangerously close to (re)embracing formalistic reasoning.

4 CONCLUSION

The Constitutional Court's "clarity and guidance" and value of its *Gcaba*-judgment as precedent leaves one in agreement with the colloquial description of De Vos[2088] , that the judgment cannot be described as anything but paradoxically "weird".[2089] This is apparent from the Constitutional Court's own concluding remarks:

> As stated earlier, this Court's decision in *Chirwa* has been interpreted to have 'overruled' its previous decision in *Fredericks*, but also as not to have done so. This term was not used in *Chirwa*, however. The distinction between the two cases was pointed out, as indicated earlier. In this judgment the relevant factual and procedural similarities and differences between *Fredericks, Chirwa* and *Gcaba* are highlighted. To the extent that this judgment may be interpreted to differ from *Fredericks* or *Chirwa*, it is the most recent authority.[2090]

It remains to be seen whether this intrinsically confusing attempt at clarification by the Constitutional Court once again leaves the lower courts perplexed as to the actual binding ratio to be discerned from the *Gcaba*-judgment.

4 1 Piercing the Purposive Interpretation Veil

What has become evident from an evaluation of the Constitutional Court's recent labour law judgments is that the court does not expressly deny the idea of interdependence it has previously endorsed. However, the Constitutional Court relies on purposive

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[2087] Smit 2010 (1) *TSAR* 1 at 35.

[2088] See De Vos *Constitutional Court tries to fix its own balls-up* http://constitutionallyspeaking.co.za/ (20/10/2009).

[2089] See De Vos *Constitutional Court tries to fix its own balls-up.*

[2090] *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 77.

interpretation to justify compartmentalisation of the ss 23 and 33 constitutional considerations and undermines the genuine normative interdependence of these rights. Unfortunately, what the court declares to be purposive interpretation is a half-truth, with the other half being the reversion to formalistic tendencies with no true consideration of the perspective recently reflected in the judgments of the Supreme Court of Appeal. As a result, reliance on purposive interpretation has become a tool for the judicial avoidance of investigative legal evaluation, rather than a method of interpretative enlightenment.

In *Attorney-General Canada v Hallett & Carey Ltd*,[2091] it was appropriately noted that "there is no better way of approaching the interpretation of … [an] Act than to endeavour to appreciate the general object that it serves and to give its words their natural meaning in light of that object".[2092] If purposive interpretation is properly applied, the objective can be properly realised.[2093] Purposive interpretation plays an important role in determining the meaning behind the words of an Act in light of its object.[2094] As an interpreter, a judge must discover why an Act was passed before even looking at the words.[2095]

As explained, the LRA was passed to give effect to constitutionally recognised labour rights, with the constitutional element as *the* central consideration. The labour rights found therein are to be interpreted to fit into their constitutional milieu, which results in an obligation to read the object of the LRA (in giving effect to the labour rights) within that constitutional milieu. This is the *true* intent, meaning and spirit of the LRA. Consequently, purposive interpretation, if properly approached, focuses on the truth and

[2091] [1952] AC 427.

[2092] *Attorney-General Canada v Hallett & Carey Ltd* [1952] AC 427 at 440.

[2093] Ironically, it is the objective of both the LRA and PAJA to give effect to the Constitution, yet the interpretation of these instruments are continually manipulated to subvert the interdependent sprit of the Constitution.

[2094] See Graham *Statutory Interpretation: Theory and Practice* 22.

[2095] See Graham *Statutory Interpretation: Theory and Practice* 22.

not on easily manipulated isolated policies as has been the recent trend (one example of which is the *Chirwa*-judgment of Ngcobo J).[2096]

Within the search for the realizable goal, it is necessary to consider the proper relationship "we create between the intention of the text's author and the 'intention' of the legal system".[2097] Barak explains that purposive consideration can only carry proper interpretative value if constitutional principles ("democracy, separation of powers, rule of law, and the role of a judge in a democracy")[2098] are kept in mind.[2099] The relevance of constitutional considerations in the proper exercise of purposive interpretation indicates that mere consideration of the policy issues identified by the LRA-negotiators in isolation does not qualify as an acceptable purposive interpretation.[2100] When judges declare that they rely on purposive interpretation to justify their reliance on policy considerations without proper consideration of all constitutional influences, their interpretation cannot withstand legal scrutiny. It merely amounts to a judge presenting his or her own opinion of what the intention, meaning and spirit of an Act should be, in contrast to what it is in reality or what it is constitutionally required to be.

If a judge applies his or her mind, proper purposive interpretative consideration of "the purpose at the core of the text"[2101] requires constitutionally informed consideration of "the values, goals, interests, policies, and aims"[2102] of the text from the perspective of

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[2096] It is submitted, that Ngcobo J in his *Chirwa*-majority lost sight of the fact that the core of an interpretative study is answering the ultimate question: What is the constitutional goal? Cf Barak *Purposive Interpretation in the Law* 88.

[2097] Barak *Purposive Interpretation in the Law* 88.

[2098] Barak *Purposive Interpretation in the Law* 88.

[2099] Barak *Purposive Interpretation in the Law* 88 adds that "[p]urposive interpretation uses this set of considerations – which shapes a legal text's purpose – to solve the fundamental problems of legal interpretation".

[2100] As the constitutional considerations are informed by the normative value system that underlies it, the purpose of the text amounts to contextual normative conceptualisation. See Barak *Purposive Interpretation in the Law* 89.

[2101] Barak *Purposive Interpretation in the Law* 106.

[2102] Barak *Purposive Interpretation in the Law* 106.

the author of the Act *and* the interpreter of the Act *in the proper contemporary context*.[2103]

While the author formulates the text, the interpreter formulates the purpose.[2104] In considering genuine purposive interpretation, Barak explains that the purpose of a norm (as an abstract concept) has both a subjective and objective purpose:

> The subjective purpose constitutes the values, goals, interests, policies, aims, and function that the text's author sought to actualize ... It is the subjective intent of the author, operating at different levels of abstraction. An interpreter learns the intent through the language of the text as a whole and the circumstances external to it, like the history of its creation ... The objective purpose constitutes the values, goals, interests, policies, aims, and function that the text should actualize in a democracy.[2105]

Barak notes that the objective purpose operates on four levels:

1. Lower level: "what the specific author would have wanted to carry out had he or she thought about it".[2106]
2. Intermediate level: "what the reasonable author would have wanted to carry out".[2107]
3. High level: "depends on the type of legal arrangement in question and its characteristics".[2108]
4. Supreme level: "actualizes the fundamental values of the legal system".[2109]

With regard to the subjective/objective distinction, Barak also states that the subjective element reflects "the intention of the text's author"[2110] and the "historical-subjective

[2103] See Barak *Purposive Interpretation in the Law* 106.

[2104] See Barak *Purposive Interpretation in the Law* 90.

[2105] Barak *Purposive Interpretation in the Law* 90.

[2106] Barak *Purposive Interpretation in the Law* 90.

[2107] Barak *Purposive Interpretation in the Law* 90.

[2108] Barak *Purposive Interpretation in the Law* 90.

[2109] Barak *Purposive Interpretation in the Law* 90.

[2110] Barak *Purposive Interpretation in the Law* 91.

intention"[2111] as "a fact established in the past".[2112] On the other hand, the objective element represents "the intention of a reasonable author [otherwise known as the presiding judge] and the fundamental values of the legal system [found in the Constitution as the supreme law]",[2113] while also reflecting "a social-objective intention"[2114] and constituting "a legal norm that reflects the present."[2115]

The interpreter's present day reflection of the legal norms must not stagnate at the determination of the author's intention, but must objectively evaluate the current day "'intention' or the will of the system".[2116] The current day intention of the system is found in the normatively informed constitutional system. This must form the basis of the interpreting judge's objective purposive analyses.

It is submitted, that a proper interpretative approach was lacking in the Constitutional Court's recent labour/administrative law judgments. It is therefore predicted that the *Gcaba*-judgment will see jurists finding creative means around the Constitutional Court's forced reasoning and rather echo the *Makambi*-sentiment of Nugent JA that, "[n]otwithstanding close and repeated study of the ... judgment ... I regret that I have not been able to discover a legal basis for the finding that the high court has no jurisdiction over a claim of that kind".[2117]

This unfortunate state of affairs emphasises that the judiciary has not heeded Sachs J's call for the development of "an appropriate analytical methodology"[2118] to value-based interdependence of fundamental rights in the public employment context. In conclusion to this thesis, Chapter Ten will illustrate, against the background of preceding chapters, that the development of a constitutionally endorsed analytical approach to the

[2111] Barak *Purposive Interpretation in the Law* 91.

[2112] Barak *Purposive Interpretation in the Law* 91.

[2113] Barak *Purposive Interpretation in the Law* 91.

[2114] Barak *Purposive Interpretation in the Law* 91.

[2115] Barak *Purposive Interpretation in the Law* 91.

[2116] Barak *Purposive Interpretation in the Law* 91.

[2117] *Makambi v MEC Department of Education, Eastern Cape* 2008 (8) BLLR 711 (SCA) at par 34. Although this sentiment was based on an evaluation of the two-majority *Chirwa*-judgment, the same holds true of the *Gcaba*-judgment in that the Constitutional Court did not expressly distance itself from the forced 'purpose' interpretation (based primarily on isolated policy considerations) in the *Chirwa*-judgment.

[2118] *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 151.

relationship between labour and administrative law is not complicated (merely multidimensional), but requires the judiciary to remain true to the duties imposed on them by the Constitution.

CHAPTER TEN

CONCLUSION: AN APPROPRIATE ANALYTICAL METHODOLOGY[2119] TO THE RELATIONSHIP BETWEEN LABOUR AND ADMINISTRATIVE LAW

1 INTRODUCTION

An overlap between administrative and labour law considerations is evident in public employment cases. The fact that the judiciary has been unable to develop a unified approach to this overlap (as reflected in Chapters Eight and Nine) already illustrates that the rights-based relationship between labour and administrative law is complex and multi-dimensional. In an attempt to simplify the understanding of and approach to the relationship in question, this study has presented the various dimensions of this overlap in three stages.

Firstly, the character of labour law (Chapter Two), administrative law (Chapter Three) and the public service (Chapter Four) were considered and explained. What is clear from this discussion is that the normative framework that developed to support both labour and administrative law share characteristics and rely strongly on flexible equity-based principles. As reflected in Chapter Four, the fact that the relationship between the State and its employees is of both an administrative and employment nature does not bestow on public employees a status different to their private sector counterparts.[2120] There exists no difference between public and private sector employees fundamental

[2119] This title is inspired by the call of Sachs J in *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 151 for the development of "an appropriate analytical methodology" for the recognition of the interdependence of fundamental rights and the values that inform these rights.

[2120] The reason for this being that labour law focuses on the restraint of managerial power abuse, while administrative law looks to restrain the abuse of public power. It is not the status of the employee, but rather the status of the State as regulator obligated to carry out its responsibilities with due regard to the public interest that brings to the scene the public power element. The subtle differentiation between the public and private employees, due to the presence of public power, does not justify the superficial idea that private and public employment should formally be kept separate. See Seidman-Makgetla 2000 (17) *Indicator SA* 18 at 22. See also Grogan *Dismissal, Discrimination and Unfair Labour Practices* 24.

enough to justify separate regulation of public servants.[2121] Neither the status of public sector employees, nor the actual relationship between State and public servant justifies a difference in approach.[2122] The extension of the principle of fair labour practices to everyone allows for equal access to the right to fair labour practices as entrenched by the Constitution and endorsed by the LRA; but that equal idea of fairness does not necessarily imply sameness of treatment.

Secondly, at a deeper level, the study explored the interaction between the characteristics identified in the first stage of the study, by juxtaposing the values underlying labour and administrative law. For the reasons expressed in those chapters, this was done by analysing the substantive (Chapter Five) and procedural (Chapter Six) dimensions of fairness. The following broad principles were identified:

1. The context of every case informs the content of the shared variable principles associated with labour and administrative law, which are reasonableness (as it relates to substantive fairness) and procedural fairness.
2. The overlap between labour and administrative law shows a shared duty to act fairly.
3. Although the equity guidelines associated with labour law, in contrast to administrative law, is more defined and specialised, general reasonableness guidelines originating in administrative law can contextually inform the labour law understanding of specific substantive fairness.
4. A shared procedural fairness rationale supports the relationship between labour and administrative law, as both spheres of law developed the audi alteram

[2121] See Seidman-Makgetla 2000 (17) *Indicator SA* 18 – 21. See also Grogan *Dismissal, Discrimination and Unfair Labour Practices* 24. Within the realm of labour law, the interests of employees in the public sector are of equal status to that of private sector employees. The presence of public power merely incorporates the fact that an organ of state must always take into account the public interest when exercising public power in taking of decisions, even if that decision is employment related.

[2122] The public employment relationship is akin to that of a private employment relationship. Although these two spheres are not precise mirror images of one another, the basic features that labour legislation regulates are in essence the same. Labour law is based on the idea of contextual flexibility. No two private sector employers' relationships are ever the same, as people (each with their unique set of circumstances) are the variables in the employment relationship.

partem rule to embrace ideas of transparency and dialogue, with due regard to the flexible constitutional perspective of fairness.

Thirdly, the constitutional principles that support and impact on the rights-based relationship were identified (Chapter Seven) and evaluated against the arguments that underlie the judicial debate about the proper constitutional understanding of the relationship between ss 23 and 33 of the Constitution (Chapters Eight and Nine).

The challenge that remains is to merge these three stages in a synthesised manner that reveals an appropriate way forward, which, at a minimum, embraces the interdependent character of the Constitution.

As point of departure, and in realising that constitutional justice in pursuit of fairness is adaptable to the variable elements of every case, it becomes apparent that mutual support by no means requires administrative law to undermine labour law.[2123] The Constitution blurred, if not obliterated, the dividing line between public and private law in the employment context.[2124] The values shared by all fundamental rights fuse ss 23 and 33 and give effect to the transformative objective of the Constitution. This is no cause for legal caution:[2125]

> Seepage should be understood not as a form of analytical blurring to be avoided, but rather as a desirable mechanism for ensuring that constitutional interests, in appropriate cases, are properly protected, and constitutional justice fully achieved. And hybridity should be recognised for what it is, the co-existence and interpenetration of more than one guaranteed right in a particular factual and legal situation. Instead of seeking to put asunder what

[2123] Rawls 1985 (14) *Phil & Publ Aff* 223 at 246 – 247 supports the idea that overlapping normative considerations underlying constitutional rights. See also Stacey 2007 (22) *SAPL* 79 at 84; Currie 1999 (15) *SAJHR* 138 at 145. It was, for example, noted in *PSA obo Botes v Department of Justice* 2000 (21) ILJ 690 (CCMA) at 649 and 698, that *unlawful* administrative action cannot be linked to *unfair* labour practices is a myth, as "the duty to act fairly is superimposed on the duty to act lawfully". See also *Hlope v Minister of Safety and Security* 2006 (3) BLLR 287 (LC) at par 11 with reference to *Simelela v Member of the Executive Council for Education, Province of the Eastern Cape* 2001 (9) BLLR 1085 (LC). See also Chapters Five and Six.

[2124] See *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 151 per Sachs J.

[2125] *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 151.

> human affairs naturally and inevitably join together, *we should, in these circumstances, develop an appropriate analytical methodology that eschews formal pigeon-holing and relies more on integrated reasoning*.[2126]

As mentioned, the research in the preceding chapters serves as the basis for the search for an appropriate methodology, and firstly illustrates (in part 2 1) that a formalistic judicial denial of the contextual presence of public power in the form of administrative action is not the solution. Furthermore, this denial is at the root of the judicial failure to give contextual expression to the spirit and purport of the Constitution in public employment disputes (this is discussed in part 2 2). Finally, it shall be argued that a constitutionally inspired shift in judicial attitude is required for interdependence to be properly recognised in the relationship between the rights to fair labour practices and just administrative action, to avoid undue confusion and complexity (this issue is raised and discussed part 2 3).

2 AN APPROPRIATE ANALYTICAL METHODOLOGY[2127]

2 1 Employment Decisions as Administrative Action[2128]

An approach that disregards administrative law in the public employment context disregards the proper consideration of important values brought to the fore through the identification of administrative action. As far as administrative law is concerned, the approach of the judiciary is that PAJA is the primary pathway for the review of administrative action.[2129] However, a proper understanding of s 33 of the Constitution and the relationship between general and specific administrative law[2130] reveals that

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[2126] *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 151. Emphasis added.

[2127] As already mentioned, Sachs J in *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 151 expressed the need for the development of an analytical methodology.

[2128] See Chapters Two and Three for a discussion of the elements that underlie the power relationship of both an employment and administrative law relationship.

[2129] See Hoexter 2006 *Acta Juridica* 303 at 308.

[2130] The Constitutional Court in *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 91 per Navsa AJ (with reference to *Minister of Health v New Clicks SA (Pty)* 2006 (1) BCLR 1 (CC) at par 95) was open to the fact that s 33(3) merely calls for national legislation (not necessarily just PAJA) to

decisions of an administrative nature can affect "[m]any different types of interests".[2131] Some of these interests are covered by the protective scope of specialised legislation, such as the LRA. Although the Constitutional Court in the *Chirwa*- and *Gcaba*-judgments attempted to indentify and isolate the impact of administrative law on the public employment relationship,[2132] Head observes that no formalistic answer can be penned that will dictate the role of administrative law in every instance.[2133]

To be able to determine the presence or absence of an administrative action, a proper understanding of how s 33 of the Constitution approaches the concept is required.[2134] Any finding about the presence or absence of administrative action must be preceded by a consideration of the presence or absence of public power. An administrative action is a form of public power.[2135]

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regulate the right to just administrative action. The court appears to have been open to the reality that different dimensions of administrative law (general and specific) exist in practice.

[2131] Head *Administrative Law: Context and Critique* 14.

[2132] See Chapter Eight, part 3 and Chapter Nine, part 3.

[2133] See Head *Administrative Law: Context and Critique* 14. The weight ascribed to political, economic and social considerations differ from case to case.

[2134] See Hoexter 2006 *Acta Juridica* 303 at 306 – 307; *Van Zyl v NNP* 2003 (19) BCLR 1167 (C) at par 88. This knowledge must go deeper than the mere general wording of the definition found in PAJA, which is often quoted in labour cases as singular justification for the absence of administrative law considerations in public employment disputes.

[2135] Public power has a broader scope and should not be regarded as dependent on administrative action. As such, the definition of administrative action requires the presence of public power. It is important to note that, even if action taken by an organ of state does not qualify as an administrative action, the Constitution still requires public power to conform to the principle of legality. The decisions of public bodies are therefore always subject to the values of the Constitution associated with administrative law. See Burns and Beukes *Administrative Law* 138 – 139; *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1096 (CC) at paras 137 – 138. Consider also the Constitutional Court's reliance on the principle of legality in *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council* 1998 (12) BCLR 1458 (CC) and *President of the RSA v SARFU* 2000 (1) SA 1 (CC), but specifically *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (3) BCLR 241 (CC) at paras 19, 33 and 41. See also Hoexter 2006 *Acta Juridica* 303 at 305 – 306; *Fetsha v Member of the Executive Council responsible for Education (Eastern Cape)* [2006] 3 All SA 542 (Ck). See also De Smith, Woolf and Jowell *Judicial Review* 173.

2 1 1 Public Power Dimension

In *SARFU v President of the RSA*,[2136] the Constitutional Court, in discussing the distinction between different forms of public power, identified various factors to be considered in identifying those different forms of public power.[2137] When determining whether a specific exercise of public power qualifies as administrative action on a case-by-case basis, "the subject matter of a power is … relevant to determine whether the exercise of the power constitutes administrative action for the purposes of section 33".[2138] The Constitutional Court however emphasised that while different forms of public power exist,[2139] a definition of public power and function remains elusive.[2140]

When approached from a broader constitutional perspective, the point of departure is that "[t]he individual as the possessor of natural rights … exercises his free will to create the state to which he delegates the overall responsibility of ensuring the survival and

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[2136] 2000 (1) SA 1 (CC).

[2137] In *President of the RSA v SARFU* 2000 (1) SA 1 (CC) at par 143, the Constitutional Court clearly emphasised power as a crucial element in the character of administrative action.

[2138] *President of the RSA v SARFU* 2000 (1) SA 1 (CC) at par 143. Footnotes omitted. The court emphasised that this exercise calls on the judiciary to draw difficult boundaries.

[2139] A public power/function has two components: public and power or function. It is the former of the two components that appear to be the trickiest, as it is usually linked to public interest. In *President of the President of the RSA v SARFU* 2000 (1) SA 1 (CC) at par 175, in considering s 1 of the Commissions Act 8 of 1947, the Constitutional Court regarded "the term 'public' as qualifying 'public concern'". Malherbe 2001 (1) *TSAR* 1 at 8 comments: "[P]ower refers to the capacity to act coercively or to enforce rules of law; and a function is an act performed in the exercise of a power." See also Spigelman *Foundations of Administrative Law* Paper delivered at the 1998 SPANN Oration (with reference to *Council of Civil Service Unions v Minister for the Civil Service* [1984] All ER 953)

[2140] The Constitution itself grants no clarity as to the meaning. See Ka Mdumbe 2005 (20) *SAPL* 1 at 17; Stacey 2007 (22) *SAPL* 79; s (1)(c) of the Constitution; *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the RSA* 2000 (3) BCLR 241 (CC) at par 20; *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 186 per Langa CJ. See also Chapter Nine, part 2 2.

goodwill of all who enter the free community".[2141] This is the natural function of the State, as created by the people for the people to exercise public power.[2142]

The Constitution holds the exercise of power and the performance of functions by organs of state (as defined in s 239) subject "to standards such as accountability, transparency, the Bill of Rights and values governing the public administration"[2143] found in s 195.[2144] The concepts of public power and public function must be determined within this framework,[2145] as "the exercise of all public power must be consistent with the supremacy of the Constitution and the rule of law".[2146]

Craig explains that the question as to the meaning of public power continues to exist, as the pattern of South Africa's government changes within the State and "our perspective of the dividing line between public and private law"[2147] shifts. Within this changing reality, two approaches have developed to the existence of public power as prerequisite for the existence of administrative action: the institutional approach and the functional approach.[2148] The relationship between these two approaches has been labelled the source/function divide due to the close link it reveals to the orthodox public/private divide.[2149]

[2141] Ncube in Corder and Maluwa *Administrative Justice* 78. See the theories of Hobbes, Locke and Rousseau in this regard. Cf Van Eck and Jordaan-Parkin 2006 (27) *ILJ* 1997.

[2142] Devenish, Govender and Hulme *Administrative Law and Justice* 82 explain that organs of state "are vested with public law power". Ncube in Corder and Maluwa *Administrative Justice* 78 adds that public power must be "exercised for the common good and not capriciously and arbitrarily". In this context, "the term public power … is used to encompass all authority exercisable by public institutions and/or individuals in the process of state administration".

[2143] Ka Mdumbe 2005 (20) *SAPL* 1 at 17.

[2144] See Chapter Four, part 3 2 2.

[2145] See Ka Mdumbe 2005 (20) *SAPL* 1 at 17.

[2146] Stacey 2007 (22) SAPL 79. See s 1(c) of the Constitution; *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the RSA* 2000 (3) BCLR 241 (CC) at par 20.

[2147] Craig in Corder and Maluwa *Administrative Justice* 25. The fact that a question is posed must not mislead the reader into thinking that an answer obviously follows. English 1999 (62) *MLR* 474 explains that "the answer to that question, like most solutions to the public/private dilemma, is a fudge."

[2148] See Craig in Corder and Maluwa *Administrative Justice* 25.

[2149] See English 1999 (62) *MLR* 474.

2 1 1 1 Source of the Power

When going in search of the source of power (as an indication that the power is public), the judiciary must properly consider its impact.[2150] However, no matter how one aims to portray the capacity of the State, logic and reality dictates that it cannot be depicted as "analogous or sufficiently similar to a natural person",[2151] as "even the most banal activities of government [contextually] differ fundamentally from those of private individuals".[2152]

Apart from the State's persona partly being ascribed to the presence of public interest in its actions, it is also based on the Constitution.[2153] The judiciary should be open to the fact that the maturity of administrative law under the influence of the Constitution has

[2150] Courts should not be sidetracked by the existence of an employment contract in its evaluation of the source of the action or decision by the State. Under the influence of orthodox idea of a private/public divide, the presence of public power is traditionally identified primarily with reference to the public source. Craig in Corder and Maluwa *Administrative Justice* 25 – 27 notes that the traditional approach places its focus on categories of institutions that are presumed to exercise public power by placing the emphasis on "the source of the authority's power". Cf Bamforth 1999 (62) *MLR* 476 at 479. In *Mbayeka v MEC for Welfare, Eastern Cape* 2001 (4) BCLR 374 (Tk) at par 29, the High Court was requested to declare a suspension from duty without emoluments unjust. It found that the MEC's failure to adhere to the audi alteram partem rule prior to suspension to constitute an unconstitutional administrative action. The reason being that the power exercised was public as it was obtained from the Public Service Act 103(P) of 1994. However, the Supreme Court of Appeal in *Logbro Properties CC v Bedderson NO* [2003] 1 All SA 424 (SCA) at paras 11 and 13 per Cameron JA (distinguishing *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC* 2001 (10) BCLR 1026 (SCA)) held that the statutory source and the exercise of public power should be linked through the element "of superiority or authority by virtue of its being a public authority".

[2151] Harris 1992 (108) *LQR* 626 at 635 – 636. See Quinot (LLD US 2007) 103.

[2152] Breitenbach 1994 (5) *Stell LR* 276 at 282. See Chapter Four; Baxter *Administrative Law* 396; Quinot (LLD US 2007) 103.

[2153] See Chapter Nine, part 2 2; *Mustapha v Receiver, Lichtenburgh* 1958 (3) SA 343 (A) at 347 and 350 per Schreiner JA; *Kate v MEC for the Department of Welfare, Eastern Cape* 2005 (1) SA 141 (E) at par 21; *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (10) BCLR 931 (SCA) at par 20; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) at paras 20 – 21; Alder 1993 (13) *Legal Studies* 183 at 188; Quinot (LLD US 2007) 69, 103, 104, 105, 110, 154 and 155.

led to a level of generality in the determination of the source of the power.[2154] In *Masetla v President of the RSA*,[2155] the High Court specifically stated that "the power to appoint will, in the absence of any specific provision to the contrary, include the power to dismiss".[2156] The judiciary should not give in to the temptation to manipulate the source requirement to justify the outcome it desires in a specific case.[2157] The desire to protect the jurisdictional sanctity of the Labour Court must not promote the detrimental manipulation of the substantive legal arguments and rights of employees.[2158]

For that reason, identification of the formalistic source-based trap (albeit in the public/private power debate) is important.[2159] The current perspective is that the source of the power is not necessarily central to determining whether power is public. The focus has moved to the nature of the function, rather than the functionary.[2160]

2 1 1 2 Function Not Functionary

With reference to the English case of *R v Panel on Takeovers and Mergers ex parte Datafin*,[2161] Craig states that "[t]he difficulties of a formalistic test have inclined the

[2154] See Quinot (LLD US 2007) 166 – 170. This is evident in the reasoning of judges in an array of recent judgments, namely *Metro Inspection Services (Western Cape) CC v Cape Metropolitan Council* 1999 (4) SA 1184 (C) at 1195, *IMATU v MEC: Environmental Affairs, Developmental Social Welfare and Health, Northern Cape Province* 1999 (4) SA 267 (NC) at 286 and *Masetla v President of the RSA* 2007 JOL 19069 (T).

[2155] 2007 JOL 19069 (T).

[2156] *Masetla v President of the RSA* 2007 JOL 19069 (T). See also Quinot (LLD US 2007) 167 fn 195. Cf *Transnet Ltd v Chirwa* 2007 (1) BLLR 10 (SCA) at par 52 per Cameron JA.

[2157] Examples of such manipulation (or misunderstanding) is evident in the reasoning in *SAPU v National Commissioner of the Police Service* 2006 (1) BLLR 42 (LC) per Murphy AJ, *Transnet Ltd v Chirwa* 2007 (1) BLLR 10 (SCA) per Mthiyana JA and *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) per Ngcobo J. See also Quinot (LLD US 2007) at 168.

[2158] See Pretorius 2002 (119) *SALJ* 374 at 385. Cf Quinot (LLD US 2007) 169.

[2159] The public source of the power is not a conclusive factor, but merely a factor. See *R v Panel on Takeovers and Mergers, ex parte Datafin plc* [1987] 1 QB 815 at 838 (per Donaldson MR), 847 – 848 (per Lloyd LJ), 849 (per Nicholls LJ); *President of the RSA v SARFU* 2000 (1) SA 1 (CC) at par 143.

[2160] See Devenish, Govender and Hulme *Administrative Law and Justice* 150.

[2161] [1987] QB 815.

courts towards a more open-textured criterion which requires them to consider the *nature of the power* wielded by the particular body".[2162]

Jurisprudence appears to reflect acceptance of a shift in perspective from a source-based to performance-based approach to determination of the existence of public power.[2163] Pretorius reasons that "[i]f the objective is to protect the individual against the unfair exercise of governmental power, it should not matter whether the power is derived from statute or contract".[2164] In *Transnet Ltd v Chirwa*,[2165] Mthiyana JA, in finding the function performed by Transnet (as an organ of state) to fall outside the direct scope of PAJA,[2166] emphasised the approach laid down in the *SARFU*-judgment

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[2162] Craig in Corder and Maluwa *Administrative Justice* 28. Emphasis added. Cf Wade and Forsyth *Administrative Law* 480. Lord Lloyd in *R v Panel on Takeovers and Mergers ex parte Datafin* [1987] QB 815 at 846 – 869 further explained with reference to the reasoning of Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935: "If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review … But in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power."

[2163] See Ka Mdumbe 2005 (20) *SAPL* 1 at 13. The judicial perspective shifted with judgments such as *Administrator, Transvaal v Zenzile* 1991 (1) SA 21 (A) at 34 – 36, where Hoexter JA regarded the regulation of the power by the source of the power as of lesser importance in comparison to the factors such as the "essential nature" of the power exercised. See also Quinot (LLD 2007 US) 158 – 159. In *Langeni v Minister of Health and Welfare* 1988 (9) ILJ 389 (W) and *Mokoena v Administrator, Transvaal* 1988 (4) SA 912 (W), Goldstone J considered the impact of the action (with due regard to the specific right) to be a relevant consideration in the determination of the presence of public power in the form of administrative action, in contrast to the broader perspective embraced by Hoexter JA in *Administrator, Transvaal v Sibiya* 1992 (4) SA 532 (A). See Quinot (LLD 2007 US) 227 – 228. Within the context of disciplinary action taken against public employees the impact focus has generally fallen on the punitive character of the action taken. See for example *Administrator, Transvaal v Zenzile* 1991 (1) SA 21 (A) at 30 and 35; *Monckton v British South Africa Co* 1920 AD 324 at 330. See also Quinot (LLD 2007 US) 229. The impact consideration is also evident in the understanding of the action component of administrative action expressed by Nugent JA in *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (10) BCLR 931 (SCA) at paras 23 – 24.

[2164] Pretorius 2002 (119) *SALJ* 374 at 384 fn 57.

[2165] 2007 (1) BLLR 10 (SCA).

[2166] See Quinot (LLD 2007 US) 165. Consider the description of organ of state in s 239 of the Constitution.

of the Constitutional Court, namely that the focus should fall on the function, not the functionary.[2167] Phrased differently, it is character of the power exercised, not the character of the authority, that matters.[2168]

The existence of a link between power and function/character forms an important component in the identification of administrative action. As a definition of public power or public function is elusive, and jurisprudence mainly identifies what does not qualify as administrative action in contrast to what does, one must consider the proximity between the nature of the action and the public purpose thereof.[2169]

2 1 1 3 Public Interest

According to Devenish, Govender and Hulme, "the purpose behind administrative action … is the public interest",[2170] as general public functions are regarded "as those functions aimed at the public interest".[2171] The duty to act in the public interest rests on the State in the exercise of its functions, "or at the very least that the purpose of all administrative action is in general the advancement of public interests".[2172]

[2167] See *President of the RSA v SARFU* 2000 (1) SA 1 (CC) at paras 141 and 143. See also *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (2) BCLR 176 (SCA); Quinot (LLD 2007 US) 213.

[2168] See Wade and Forsyth *Administrative Law* 480. See also Currie and Klaaren *Benchbook* 39; Govender in Corder and Van der Vijver *Realising Administrative Justice* 55.

[2169] The indirect or direct, or internal or external purpose of the State action therefore begs consideration in the determination of public power as administrative action. The shift of focus to function is not unique to South African jurisprudence, as America, New Zealand, India and the United Kingdom have accepted this approach. However, these countries embrace different perspectives of this approach. American jurisprudence construes the concept of public function restrictively, while the other countries interpret it generously. See Ka Mdumbe 2005 (20) *SAPL* 1 at 17; Quinot (LLD 2007 US) 221. Due to its English roots, South African jurisprudence is more inclined to embrace a generous interpretation. Cf De Smith, Woolf and Jowell *Judicial Review* 168 – 169.

[2170] Devenish, Govender and Hulme *Administrative Law and Justice* 10.

[2171] Quinot (LLD US 2007) 207. See also Baxter *Administrative Law* 90; Burns and Beukes *Administrative Law* 191; Devenish, Govender and Hulme *Administrative Law and Justice* 74 fn 64. Quinot (LLD 2007 US) 203 observes that South African academic commentators appear to be in consensus as to the duty to act in the public interests.

[2172] Quinot (LLD 2007 US) 203. See *POPCRU v Minister of Correctional Services* 2006 (4) BLLR 385 (E) at par 53 per Plasket J. In *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 191, Langa CJ commented that the facts in the *POPCRU*-case pointed to the "'pre-eminence of the public interest' in the

As illustrated by the minority *Chirwa*-judgment of Langa CJ, there should be an evaluation of the weight ascribed to the public interest in any given situation. The facts of every case must be scrutinised for the presence or absence of strengthening factors.[2173] Such factors are "intimately linked to the impact a decision has on the public".[2174] Public power is therefore at play where the public interest is of paramount importance.[2175]

However, logic dictates that "it is arguable that the state must *always* act in the public interest".[2176] In fact, authors such as Baxter point out that there is a duty on public authorities to act in the public interest in *all* instances.[2177]

2 1 2 Broad Perspective

It is clear that South African jurists do not embrace a uniform approach to the determination of the presence of public power (as prerequisite to a possible finding that

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proper administration of prisons". See also *Bullock NO v Provincial Govt, North West Province* [2004] 2 All SA 249 (SCA).

[2173] See *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 191.

[2174] *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at paras 193 – 194. Because the absence of such strengthening factors cannot be guaranteed in public employment labour disputes, Langa CJ emphasised that his "reasoning does not entail that dismissals of public employees will never constitute 'administrative action' under PAJA". Cf *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at fn 107 per Van der Westhuizen J. The *Gcaba*-judgment leaves open the possibility of formalism seeping through the judicial cracks. See Chapter Nine, part 3 6.

[2175] See *Dawnlaan Beleggings (Edms) Bpk v JSE* 1983 (3) SA 344 (W).

[2176] Quinot (LLD US 2007) 203. Emphasis added. In dealing with a labour dispute involving correctional officers, Plasket J in *POPCRU v Minister of Correctional Services* 2006 (4) BLLR 385 (E) at par 53 attempted to link the "elusive concept of public power" not to the public interest in general, but to specific situations where only two or so members of the public stands to be affected by the exercise of public power. See also *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at fn 107.

[2177] See Baxter *Administrative Law* 100. See also Boulle, Harris and Hoexter *Constitutional and Administrative Law* 300; Quinot (LLD US 2007) 203. In light of this, the judgment of Murphy AJ in *SAPU v National Commissioner of the South African Police* 2006 (1) BLLR 42 (LC) at par 52 comes across as questionable in placing reliance on the absence of public interest to find that there was no exercise of public power to inform distinction between tenders and employment as explanation. See Chapter Eight, part 3. Cf *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services* 2006 (10) BLLR 960 (LC) at par 59; *Mbayeka v MEC for Welfare, Eastern Cape* 2001 (4) BCLR 374 (Tk); *Hlope v Minister of Safety and Security* 2006 (3) BLLR 297 (LC).

there exists administrative action).[2178] The Constitutional Court has declared its focus to fall on the nature of the function,[2179] a visible shift from formalism to flexibility within the institutional approach.[2180] However, labels given to different approaches are merely informative.[2181] Labels are descriptive conclusions about the content of the power and "cannot guide our reasoning in advance".[2182] Contextual factors should influence the reasoning.[2183] According to Craig, the functional approach complements the institutional approach in that it requires scrutiny of the effect of attributing the labels 'public' or 'private' to a power.[2184]

This perspective is not a novel one. In *R v Panel on Takeovers and Mergers ex parte Datafin*,[2185] it was noted that the only essential element of public power can be described as the public element and this can take on various forms.[2186] Although some factors have been identified in jurisprudence, these factors have crystallised within specific contexts. The presence of all the identified factors cannot be required in every set of facts.[2187] As a result, one factor cannot carry the potential to exclude another.[2188] Context remains determinative. This amounts to a broad-based functional approach[2189] to the determination of public power, to which courts revert when they acknowledge that "it is not always clear what criteria are relevant".[2190]

The identification of a causal link between the nature of the action and the public power exercised can be of assistance in determining the presence or absence of

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[2178] See Hoexter *Administrative Law* 194.

[2179] See *President of the RSA v SARFU* 2000 (1) SA 1 (CC) at par 143.

[2180] See Craig in Corder and Maluwa *Administrative Justice* 27 – 28.

[2181] See Craig in Corder and Maluwa *Administrative Justice* 28.

[2182] Craig in Corder and Maluwa *Administrative Justice* 28.

[2183] See Craig in Corder and Maluwa *Administrative Justice* 28.

[2184] See Bamforth 1999 (62) *MLR* 476 at 480; Craig in Corder and Maluwa *Administrative Justice* 32.

[2185] [1987] 1 QB 815.

[2186] See *R v Panel on Takeovers and Mergers ex parte Datafin* [1987] 1 QB 815 at 838.

[2187] See De Smith, Woolf and Jowell *Judicial Review* 169.

[2188] See De Smith, Woolf and Jowell *Judicial Review* 169.

[2189] As termed by De Smith, Woolf and Jowell *Judicial Review* 169.

[2190] *R v Panel on Takeovers and Mergers ex parte Datafin* [1987] 1 QB 815 at 838. This is reflected in the minority judgment of Langa in *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 186.

administrative action. As explained by Woolf CJ in *Poplar Housing and Regeneration Community Association Ltd v Donoghue*,[2191] one can find different meanings for the concept public power in different contexts.[2192] As "the decision is very much one of fact and degree",[2193] this approach assists with the testing of factors relied upon to determine the type of public power to be regulated.[2194] The more public power factors are present within the context of an administrative objective, the more likely the public power is to be identified as administrative action.[2195] This flexible approach to the determination of the type of public power also addresses the warning articulated by O'Regan J the *Sidumo*-judgment,[2196] namely that an attempt to draw the line between

[2191] [2001] 4 All ER 604.

[2192] See *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] 4 All ER 604 par 68.

[2193] *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] 4 All ER 604 par 66. Quinot (LLD 2007 US) 221 explains that the importance of this causal link is not yet widely acknowledged in South African law. An adaptation of Woolf LCJ's approach can however be detected in the sine quo non test formulated by Pretorius 2002 (119) *SALJ* 347 at 396 for the determination whether public power is present in action taken by the State. Arguably, such a determination is unnecessary, as the State cannot act in the absence of public power. See part 3 1 1 3. What is possible is that the type of public power exercised may differ from case to case. Corder 1998 (14) *SAJHR* 38 at 47 similarly states that the action of an "employee of a government department at any level, no matter how significant in its impact" is public. The question is not whether the action is of a public nature, but whether the public action is of an administrative nature. For administrative action to be present, the administrative nature of the action must accordingly be incidental to the public power exercised, through the culmination of the objective sought, the exercise of statutory power, the advancement of the public interest etc. In similar fashion, Corder 1998 (14) *SAJHR* 38 at 47 argues that the focus of administrative action in the constitutional context falls "on such action which is 'admittedly public', such as that of an employee of government department". It requires collaboration between labour and administrative law to protect the rights and interest of public employees comprehensively when such action is directed at them.

[2194] In *President of the RSA v SARFU* 2000 (1) SA 1 (CC) at par 143, the court alluded to some form of causal consideration by considering "*how closely it is related* on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is". Emphasis added.

[2195] See the factors identified in *President of the RSA v SARFU* 2000 (1) SA 1 (CC) at par 143. Within the context in which PAJA refers to the presence of public power, the questions does not fall on the presence or absence of public power in action taken by the State, but on the presence or absence of the species of public power, termed administrative action.

[2196] 2007 (12) BLLR 1096 (CC).

administrative action and other forms of decisions will "lead us directly to the arid classification of our old administrative law ... [with the result that we should] prefer an approach to the question based on a substantive understanding of section 33 ... [as that section] should be understood as one of the key constitutional provisions giving life to the constitutional values ... found in section 1 of our Constitution".[2197]

2 2 Transforming the Judicial Approach to the Operational Dimension[2198]

The debate concerning the relationship between labour and administrative law has predominantly focussed on the jurisdiction of the Labour and High Courts. The debate has revealed itself as a turf-war rather than a proper consideration of the substantive arguments. It is possible to avoid the associated controversy if the judiciary approaches the jurisdictional problem that prevents proper recognition of the normative interdependence with the proper constitutional attitude. Regrettably, a formalistic approach to adjudication sees the judiciary exercising their power in a formal, technical or mechanistic manner that undermines substantive reasoning.[2199] The three-stage discussion in preceding chapters revealed the need for a change in judicial attitude, specifically with regard to jurisdiction, cause of action and interdependence (as it relates to equity-based principles). From this realisation, it is clear that the appropriate analytical methodology is rooted in a *Sidumo*-inspired operational solution.

2 2 1 The Required Judicial Attitude

If practical effect is to be given to the doctrine of interdependence, the judiciary must embrace a deliberative duty as a constitutional imperative. A transformative understanding of administrative justice calls on the judiciary to discard all narrow restrictions.[2200]

[2197] *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1096 (CC) at paras 137 – 138.

[2198] See Chapters Eight and Nine.

[2199] See Hoexter 2008 (24) *SAJHR* 281 at 287.

[2200] The *Chirwa*- and *Gcaba*-judgments (and alike cases), when narrowly construed to isolate labour rights from constitutionalised administrative law considerations, gravely reduce the constitutionally required accountability for the exercise of public power. Cf Head *Administrative Law: Context and Critique* 27 – 30*; Griffith University v Tang* (2005) 221 CLR 99 at paras 99 – 100 per Kirby J (dissenting judgment).

In his philosophy of the law, Rawls views courts as deliberative and exemplary institutions.[2201] Aristotle's reasoning also reveals that the aim of deliberation emphasises the necessity of critical evaluation and susceptibility to change in goals and preferences.[2202] Sadurski takes the deliberative component of the judiciary's primary task a step further in reasoning that deliberation "entails being open to reasons – that is, being willing to alter your preferences, beliefs or actions if convincing reasons are offered to do so – and being willing to base attempts to persuade others on giving reasons rather than threatening coercion or duplicity".[2203]

In embracing this deliberative element the judiciary must have due regard to what Webber describes as "the importance of dialogue over rights".[2204] Webber emphasises three specific approaches to rights-protection, namely by implication, limitation or statute.[2205] The *implied approach* is present in court rulings that hold one constitutional provision to be implicitly guaranteed by the judicial recognition of another provision.[2206] In contrast, the *limitation approach* sees "the entrenchment of a bill of rights in the constitution, backed by judicial review, but subject to express derogation by legislative action".[2207] As there is no conflicting normative element in the relationship between the rights to fair labour practices and just administrative action,[2208] the one cannot be a reasonable and justifiable limitation of the other in terms of s 36 of the Constitution.[2209]

[2201] See Rawls *Political Liberalism*, as referred to by Sadurski *Constitutional Justice, East and West* 22.

[2202] See Sadurski *Constitutional Justice, East and West* 23.

[2203] Sadurski *Constitutional Justice, East and West* 23. See Chapter Nine, part 3 6 4; Scott 1999 (1) *ESR Review* 4 at 6.

[2204] Webber as quoted in Sadurski *Constitutional Justice, East and West* 62.

[2205] Only the first two forms are relevant for the present discussion. Rights-protection by statute does not find application in the South African context, but is better suited to the English system that has a Human Rights Act in the absence of a Constitution.

[2206] See Webber in Sadurski *Constitutional Justice, East and West* 62.

[2207] Webber in Sadurski *Constitutional Justice, East and West* 62. Footnotes omitted.

[2208] See Chapters Five, Six and Seven.

[2209] The judiciary, in interpreting the Constitution and the legislation that gives effect thereto, is tasked with balancing and resolving conflicts between competing rights. As the discussion in Chapters Two, Three, Five and Six illustrates, there is no clash between the norms and social goals of the specific right to fair labour practices and the general right to just administrative action. Limitation is only required when rights are regarded as *competing*. The absence of conflict renders the limitation consideration

The implied approach is to be favoured, firstly because the spirit of the Constitution lends itself to permeability and, secondly, because general administrative law allows for the functioning of specific areas, such as labour law, within its ambit of application. Such an approach also gives expression to the fact that judges are duty-bound to promote and protect the values and rights of the Constitution.[2210] Klare accordingly argues for a judicial mind-shift away from formalistic reasoning in favour of deliberative substantive reflection.[2211]

2 2 2 Jurisdiction, Cause of Action and Interdependence

The judiciary must tread carefully when interpreting the cause of action with which a litigant approaches the court. While judges should not attempt to (re)characterise the claim of a litigant to read as they would have preferred, they must also not underestimate their role in the identification of the issue that underlies the cause of action as presented by the parties to the employment dispute.[2212] A proper balance is

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unnecessary in within scope of this study. See Woolman et al *CLOSA* 11–16 and 11–33 (1st ed). Cf *S v Makwanyane* 1995 (6) BCLR 665 (CC) at paras 10 and 95 per Chaskalson P; *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) at 607.

[2210] See Woolman et al *CLOSA* 11–16 (1st ed). Emphasis added. Moseneke 2002 (18) *SAJHR* 309 at 314 accordingly explains that judges are tasked with transformative adjudication, which renders them obligated to uphold and advance the transformative design of the Constitution. Hoexter 2008 (24) *SAJHR* 281 at 286 explains that transformative adjudication is "a natural adjunct to transformative constitutionalism: it is what judges *must* do in order to achieve the aims of transformative constitutionalism". Emphasis added. This obligation can only be met if the judiciary embraces a deliberative approach and actively engages with the text and spirit of the Constitution. Only when the judiciary embraces this approach will proper recognition be given to the central features of transformative constitutionalism as identified by Liebenberg 2005 (20) *SAPL* 155 at 161, namely substantive equality, social justice, a human rights conscious private law sphere in promotion of a culture of justification through association with the public law sphere. See Hoexter 2008 (24) *SAJHR* 281 at 286 – 287. A deliberative approach to transformative adjudication therefore calls for "substantive adjudication", endorsed by Langa 2006 (17) *Stell LR* 351 at 357, as "a commitment to … examining the underlying principles that inform laws themselves and judicial reaction to those laws."

[2211] See Klare 1998 (14) *SAJHR* 146 at 156.

[2212] See Chapter Nine, part 2 1 1 3.

crucial, as "the court's view as to what is fair in the circumstances is the essential determinant in deciding the ultimate question".[2213]

One solution is to follow an approach analogous to the international law, rule of connexity. The international law rule of connexity, the jurisdictional alter ego of the doctrine of interdependence,[2214] allows for two causes of action, which on the surface appear to be different in form but in reality are similar in substance, to be judicially deliberated under the procedural ambit of one of the two potentially relevant instruments.[2215] The rule of connexity gives expression to the essential elements of any legal system, namely stability and justice, as these two elements propagate against piece-meal litigation.[2216]

International law, in dealing with the competing jurisdictions of international courts has seen the pragmatic development of the rule of connexity "which authorizes a court to join related claims to one set of proceedings".[2217] The rule of connexity has also been

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[2213] *Media Workers Association of South Africa v Press Corporation of South Africa Ltd ("Perskor")* 1992 (13) ILJ 1391 (A) at 1400. See *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 63; *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 72.

[2214] As the doctrine of interdependence was first developed and adopted in human rights jurisprudence through the perspective of the international law relationship between the provisions of the ICCPR and the ICESCR, operational guidance can be found in that legal realm. Scott and Alston 2000 (16) *SAJHR* 206 at 212 emphasise the informative potential of international law, as endorsed by the Constitution, specifically in ss 39 and 233. See Chapter Seven, part 2 2.

[2215] Jurists must keep in mind that reliance on procedure must reflect the substantive aspects of the law and not vice versa. Cf Biehler *Procedures in International Law* 7. It must be noted that international law refers to conventions and covenants as instruments. While these can be described as akin to statutes as, this difference in terminology exists because, in the absence of a central legislative body, international law cannot be regarded as generating legislative but merely consensus based documents.

[2216] See Shany *The Competing Jurisdictions of International Courts and Tribunals* 27. In *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza* 2001 (10) BCLR 1039 (A) at par 22, it was explained (with reference *Roberts Construction Co Ltd v Willcox Bros (Pty) Ltd* [1962] 4 All SA 295 (A) at 301 per Steyn CJ) that "the common law doctrine of cohesion of a cause of action (contentia causae)" propagates "that where one court has jurisdiction over a part of a cause, considerations of convenience, justice and good sense justify its exercising jurisdiction over the whole cause". The doctrine of cohesion is arguably the common law alter ego of the rule of connexity.

[2217] Shany *The Competing Jurisdictions of International Courts and Tribunals* 26. Footnotes omitted.

referred to as the 'same issues' test.[2218] If two claims or causes of action can be regarded as based on the same issues, the test allows it to be addressed within the context of one instrument and one jurisdictional context. 'Same issues' will be present if a similar object and similar ground can be identified within the two causes of action.[2219] Shany comments that "[p]erhaps a clearer description is that the 'same issues' test is met if the competing claims address the same fact pattern ... and the same legal claims".[2220] Due to the fact that the values and norms that underlie human rights are flexible in nature, international courts and tribunals have illustrated a similar degree of flexibility in the application of the 'same issues' test in requiring that the claims be essentially (and not necessarily precisely) the same.[2221] In the absence of a "material difference in the substantive scope"[2222] of the norms and rights underlying the two mechanisms giving expression thereto, essential and sufficient similarity can be said to be present. In the presence of substantive similarity, claims cannot properly be regarded as competing.[2223]

In the same manner as "the right to fair labour practices is not the only constitutional right protected by the implied term of trust and confidence",[2224] it is also not the only right protected by the implied duty to act fairly.[2225] While the rights to dignity and freedom and security of person also embrace the idea of trust and confidence, the right to administrative justice similarly incorporates the duty to act fairly.[2226] It is only when these rights and their overlapping norms are interpreted in a manner that undermines the constitutionally endorsed doctrine of interdependence that we run the risk of creating "a confused 'patchwork' jurisprudence"[2227] by ignoring that there is "only one

[2218] See Shany *The Competing Jurisdictions of International Courts and Tribunals* 26.

[2219] See Shany *The Competing Jurisdictions of International Courts and Tribunals* 25.

[2220] Shany *The Competing Jurisdictions of International Courts and Tribunals* 26.

[2221] See Shany *The Competing Jurisdictions of International Courts and Tribunals* 26.

[2222] Shany *The Competing Jurisdictions of International Courts and Tribunals* 27.

[2223] See Shany *The Competing Jurisdictions of International Courts and Tribunals* 27.

[2224] Bosch 2006 (27) *ILJ* 28 at 31.

[2225] See Chapter Six, part 2.

[2226] Cf Bosch 2006 (27) *ILJ* 28 at 31.

[2227] Bosch 2006 (27) *ILJ* 28.

system of law grounded in the Constitution".[2228] The grundnorm of both South African administrative and labour law is now rooted in the supreme values and rights of the Constitution.[2229] An essential and sufficient similarity is undeniably present in the relationship between labour and administrative law.

As to the choice of the legal instrument, logic dictates that the more specific or applicable of the two instruments in the context of the dispute will be the more relevant and appropriate to give expression to interdependent fundamental rights. This in turn allows for legal certainty, as the procedures will be clear and unambiguous.[2230] Such clarity allows judicial consideration of substantive aspects once jurisdiction is established.[2231]

What the rule of connexity (as analogous to the doctrine of interdependence) also shows is that the judiciary must be open to the fact that the manner in which the employment dispute is pleaded and contextually supported merely influences the point of intersection between the Constitution and the LRA.[2232] For the judiciary to give effect to the aims of the Constitution and the labour rights enshrined therein, sight must not be lost of the fact that "labour rights fall under the broad family of socio-economic rights".[2233] This allows different situations to arise where more than one right can be relevant in one set of facts. The Constitutional Court has on numerous occasions acknowledged the interrelated relationship between the substantive socio-economic rights and the right to administrative justice that assists in giving practical effect thereto. This constitutional reality calls for a mind shift in labour law dispute resolution. The

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[2228] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (7) BCLR 678 (CC) at par 22 per O'Regan J. See also *Pharmaceutical Manufacturers Association of SA: In re Ex parte application of the President of the RSA* 2000 (3) BCLR 241 (CC) at par 30.

[2229] Cf Du Toit 2008 (125) *SALJ* 95 at 124.

[2230] Cf Biehler *Procedures in International Law* 7.

[2231] Cf Biehler *Procedures in International Law* 7. Biehler *Procedures in International Law* 9 explains that procedural rules "provide a limiting framework for the [judiciary's] application of all substantive law" as far as it relates to the remedies and powers of the courts. See *Boys v Chaplin* [1971] AC 356 at 394.

[2232] Cf *Jonker v Okhajlamba Municipality* 2005 (6) BLLR 564 (LC) at paras 23 – 27. See Chapter Eight, part 4 and Chapter Nine, parts 2 1 and 3 4.

[2233] *Jonker v Okhajlamba Municipality* 2005 (6) BLLR 564 (LC) at par 27.

judiciary, although "straight-jacketed into responding to disputes"[2234] as pleaded, can give practical effect to the aims of the Constitution by acknowledging that labour law calls for a polycentric approach (in this way also giving expression to the analogous idea of connexity).[2235] Linear, one-dimensional reasoning can no longer be sustained in the transformative exercise that is constitutionalised labour law.[2236] A proper understanding of the analogous idea of connexity provides clarity about the necessity and proper functioning of the concurrent jurisdiction provided for in s 157(2) of the LRA, in situations where the doctrine of interdependence finds application.

2 2 3 Jurisdiction and Fairness

Equity principles (such as reasonableness and fairness) are part of the principles of substantive justice. Thus viewed, there is no place for formalism to create an operational problem between labour and administrative law.[2237] Justice as fairness, as understood by Rawls,[2238] Bentham[2239] and Hart,[2240] sees the substantive principles as not directly relating to the rules by which they are manifested.[2241] Put differently, rules relating to jurisdiction and specific courts (as found in s 157 of the LRA) should not direct the relevance of substantive equitable principles.

Equity forms the essence of the power entrusted to the Labour Court.[2242] Equitable principles in turn require the Labour Court to have "regard to *all the exigencies of the*

[2234] *Jonker v Okhajlamba Municipality* 2005 (6) BLLR 564 (LC) at par 27.

[2235] Cf *Jonker v Okhajlamba Municipality* 2005 (6) BLLR 564 (LC) at par 27.

[2236] Cf *Jonker v Okhajlamba Municipality* 2005 (6) BLLR 564 (LC) at par 27.

[2237] Macdonald 1980 (25) *McGill LJ* 520 at 521 – 522 explains that it is imperative that fairness be understood as a concept "independent of any classification of function exercise". Recognition of constitutional fairness as the equity link in the right to just administrative action and fair labour practices requires "a fundamental reorientation in the law". Mullan 1975 (25) *Univ Toronto LJ* 281 at 315 accordingly explains that a fundamental reorientation of the judiciary's perspective requires acknowledgment of the fact that, if fairness is properly developed, it will lead to a simplification of the law.

[2238] *A Theory of Justice* 13.

[2239] *An Introduction to the Principles of Morals and Legislation* 34.

[2240] *The Concept of Law* 156.

[2241] See Macdonald 1980 (25) *McGill LJ* 520 at 538.

[2242] Equity jurisdiction is characterised by equity considerations, which calls on the Labour Court to apply equitable principles.

case"[2243] in their application.[2244] The application of equitable principles through equity jurisdiction "leaves great discretion to the judges".[2245] It would be unjust for the Labour Court to deny parties over which it has jurisdiction *in personam* the full equity to which they are entitled. This is especially true if such denial is based merely on the reason that another branch of the law may find application to the merits of a case, "as *equity is understood as an overriding set of judicial principles* ... which should be always applied by the court".[2246] It is inequitable to read s 157(2) of the LRA in any manner that limits the full protection of the law as endorsed by the Constitution.[2247] In fact, the mitigation of the severity of the law is the primary task of equity considerations.[2248] If the focus is placed on the judiciary's shared equity task instead of its pursuit of jurisdictional exclusivity, then it is "easy to see them as intertwined whenever jurisdiction is exercised by a court whose laws, *lex fori* ... [reflects] equitable principles".[2249]

2 2 4 A *Sidumo*-Inspired Operational Solution

In the *Sidumo*-judgment, the Constitutional Court implicitly embraced the judiciary's deliberative duty through reasoning that reminds of the logic that underlies the doctrine of interdependence (and the rule of connexity), in a manner that gives expression to the equitable principles endorsed by the Constitution. Unfortunately, the *Sidumo*-logic is

[2243] Biehler *Procedures in International Law* 19. Emphasis added. Footnotes omitted.

[2244] Although stated in a contract law and fiduciary obligation context, the argument of Mason P in *Kavalee v Burbridge* [1998] NSWSC 111 nevertheless holds true when considering the equitable functional basis of the Labour Court: "Anyone cognisant with the history of equity in our legal system would see no difficulty with such a concept in principle." See Biehler *Procedures in International Law* 18. Cf *Baschet v London Illustrated Standard Co* [1900] 1 Ch 73; *Lett v Lett* [1906] 1 IR 618 (CA); *Warner Bros Pictures Inc v Nelson* [1937] 1 KB 209; *Boys v Chaplin* [1971] AC 356.

[2245] Biehler *Procedures in International Law* 19. Footnotes omitted.

[2246] Biehler *Procedures in International Law* 19. Emphasis added. Footnotes omitted.

[2247] Ngcobo J's *Chirwa*-opinion may therefore be good policy from a legislative perspective, but amounts to bad law from a constitutional equity perspective.

[2248] See Biehler *Procedures in International Law* 17.

[2249] Biehler *Procedures in International Law* 17. Footnotes omitted.

undermined by the confusion that surrounds the *Chirwa*-judgment.[2250] This confusion has obtained a new dimension with the recent Constitutional Court *Gcaba*-decision.[2251]

2 2 4 1 Interpretative Context

The character of the Constitution and the type of value-based interpretation that it attracts inform the context in which fundamental rights function, as well as the scope the judiciary owes such rights in the promotion and protection thereof.[2252] The judiciary is required to have regard not only to the domain of the right at issue (for example employment or administrative), but also to the ambit of the right (for example specific or general).[2253] The interpretation of one right to the exclusion of another in the absence of

[2250] See Chapters Eights and Nine. The academic impact of the Constitutional Court's confusing stance is illustrated in the recent academic contributions of Cheadle 2009 (30) *ILJ* 741, Ngcukaitobi 2008 (29) *ILJ* 841 and Stacey 2008 (125) *SALJ* 307. The post-*Chirwa* jurisprudence indicates that the Constitutional Court has not contributed to the ideal of legal certainty, but did unify the judiciary in its quest to find meaning in that uncertainty. See for example *Nakin v MEC, Department of Education Cape Province* 2008 (5) BLLR 489 (Ck), *Makambi v MEC, Department of Education, Eastern Cape* 2008 (8) BLLR 711 (SCA), *Booysen v SAP* 2008 (10) BLLR 928 (LC), *Tsika v Buffalo City Municipality* 2009 (3) BLLR 272 (E), *Mohlaka v Minister of Finance* 2009 (4) BLLR 348 (LC) and *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA). See also Grogan 2009 25(3) *Employment LJ* (Electronic Version).

[2251] See Chapter Nine. In the *Sidumo*-judgment, the majority propagated the interdependence of fundamental rights in line with the courts earlier judgments. See the discussion in Chapter Seven. In the *Chirwa*-case, the Constitutional Court attempted to provide clarity on the relationship between labour and administrative law at the expense of its own precedent (without express rejection thereof), as it endorsed "strict compartmentalisation of fundamental rights and … the pre-eminence of one right to the exclusion of the other". As indicated by the tone of this statement, Langa CJ in his minority *Chirwa*-judgment did not share this perspective. See *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at paras 167 and 176. See also Hoexter 2008 (1) *CCR* 209 at 210 and 228. In the *Gcaba*-case, the Constitutional Court professed itself in support of the doctrine of interdependence and stressed that "rigid compartmentalisation should be avoided". Unfortunately, the *Gcaba*-finding on the facts of the case did not reflect a genuine application of the doctrine of interdependence. See *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at paras 53 – 56. When considering the proper constitutional approach to the relationship between labour and administrative law the reasoning that mirrors that of the Constitutional Court in the *Sidumo*-judgment is to be preferred.

[2252] See Woolman et al *CLOSA* 11–23 (1st ed); *S v Makwanyane* 1995 (6) BCLR 665 (CC) at par 303.

[2253] Section 39 of the Constitution directs all courts to have regard to the spirit, purport and object of the Bill of Rights when interpreting the law. See Woolman et al *CLOSA* 11–9 and 11–32 (1st ed); *S v Makwanyane* 1995 (5) BCLR 665 (CC) at par 325.

normative conflict is suspicious, because the normative value system of the Constitution dictates against such an approach and "the rights enshrined in ... [the Bill of Rights] give expression to the most profound commitments of our society".[2254] It is undeniable that the right to fair labour practices is a beacon for vulnerable employees.[2255] In giving effect to this right, the LRA affords protection to vulnerable employees.[2256] Labour legislation, such as the LRA, should be interpreted to grant protection to the contextually identified vulnerable employees.[2257]

The judiciary's favourite catchphrase in this respect is 'purposive interpretation'.[2258] However, it is unacceptable to tag interpretation as purposive in order to justify policy findings, as purposive interpretation has its own rules and presumptions that cannot be set aside for reasons of personal preference.[2259] Even if an applicant does not

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[2254] Woolman et al *CLOSA* 11–32 (1st ed). See the preferred interpretative approach of Navsa AJ in *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 89. Cf *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 139 per Ngcobo J.

[2255] See Partington and Van der Walt 2008 *Obiter* 209 at 218.

[2256] The Constitutional Court in *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 72 elaborated that "[t]heir vulnerability flows from the inequality that characterises employment in modern developing economies".

[2257] The vulnerability of every employee in a specific employment relationship involved in a specific dispute must be determined within the job or sector-specific context of that specific relationship and dispute. See Chapter Four, part 3.

[2258] The Constitutional Court embraced the purposive approach, properly understood, in the judgment of *S v Zuma* 1995 (4) BCLR 401 (CC) at par 15. Scott and Alston 2000 (16) *SAJHR* 206 at 218 indicate that the philosophy that underlies purposive interpretation is the effective protection of fundamental rights. As such, purposive interpretation calls into play certain presumptions: "Notable are the presumptions that interpretations should be: *'generous' rather than 'legalistic'*; aimed not just at being consistent with the purpose of the right in question but at 'fulfilling' that purpose; and directed at *'securing … the full benefit' of the Bill of Rights' protection*". Emphasis added. The majority of the Constitutional Court in *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at paras 41, 47, 104 and 112 did not give express recognition to the technique and considerations that underlies a true purposive approach. In the absence thereof, one is left with the impression that reliance was placed on apparent purposive interpretation to justify the limitation and separation of fundamental rights from a policy perspective. See Chapter Nine, part 4.

[2259] See the discussion in Chapter Nine, part 4. With regard to criticism on the reliance of policy-considerations for the interpretation of statutory provisions, see the minority judgment of Langa CJ in *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 174. See also *Makambi v MEC, Department of*

specifically place reliance on a fundamental right (for example s 33), s 39(3) of the Constitution entails that the underlying values and principles can still have important adjudicatory implications.[2260] This is in line with the reasoning of the Constitutional Court in *S v Zuma*,[2261] namely that the Bill of Rights must be interpreted in a manner "suitable to give to individuals *the full measure of the fundamental rights* and freedoms referred to".[2262] What the 'full measure' amounts to must be contextually determined on a case-by-case basis.[2263] In attempting to do so, constitutional jurisprudence has acknowledged the likeness between the value-based approach and purposive interpretation.[2264]

When interpreting the purpose of the protection afforded by the right to fair labour practices, the judiciary must not overshoot this purpose to such an extent that it isolates the right and the individuals that stand to benefit, from the full protective spirit of the Bill of Rights.[2265] Unfortunately, it appears as if the judiciary is losing sight of the true purposive focus, as the policy-laden approach identifiable in the apparently purposive interpretation of Ngcobo J's *Chirwa*-judgment comes dangerously close to confusing general policies with constitutional values.[2266] In striving for harmonious interpretation of

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Education, Eastern Cape 2008 (8) BLLR 711 (SCA) at paras 37 – 39; *Tsika v Buffalo City Municipality* 2009 (3) BLLR 272 (E) at par 53; *Modutle v Municipal Manager: Sol Plaatjie Municipality* [2009] ZANCHC 6 at par 38.

[2260] See Woolman et al *CLOSA* 11–9 (1st ed).

[2261] 1995 (4) BCLR 401 (CC).

[2262] *S v Zuma* 1995 (4) BCLR 401 (CC) at par 14 quoting *Minister of Home Affairs v Fisher* [1980] AC 319 at 328. Emphasis added. See Woolman et al *CLOSA* 11–10 (1st ed). See also *Minister of Home Affairs v Fisher* [1980] AC 319, cited with approval in the *Zuma*-judgment.

[2263] See Woolman et al *CLOSA* 11–12 (1st ed).

[2264] See Scott and Alston 2000 (16) *SAJHR* 206 at 218; Woolman et al *CLOSA* 11–25 (1st ed); *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321.

[2265] The Constitutional Court in *S v Zuma* 1995 (4) BCLR 401 (CC) at paras 17 and 18 explained that the judiciary must be cautious not to get caught up in deviation, but limit itself to mere interpretation. See the discussion pertaining to purposive interpretation in Chapter Nine, part 4.

[2266] In *Makambi v MEC, Department of Education, Eastern Cape* 2008 (8) BLLR 711 (SCA) at par 37, Nugent JA (after consideration of the *Fredericks*- and *Chirwa*-judgments) observed that "a fair reading of the two judgments makes it clear that the majority was of the view that the objective of the Act was both to encompass employees in the public service and also to be exhaustive of *their* rights arising from *their*

s 23 and the LRA, judicial interpretation of the LRA remains conditional on the proper purposive understanding of the constitutional values.[2267]

2 2 4 2 Relevant Rights

When considering the applicability of fundamental rights, it must be kept in mind that "[a] first and quite distinctive structural feature of South Africa's Bill of Rights is the non-hierarchical approach it takes to received categories of human rights".[2268]

The *Sidumo*-judgment recognised that "[e]mployees are entitled to assert their rights".[2269] It was held to be a general misconception that ss 23 and 33 of the Constitution are "exclusive and have to be dealt with in sealed compartments".[2270] The Constitutional Court revealed itself open to the idea that "these rights in part overlap and are interconnected".[2271] This understanding of fundamental rights can be linked to the Constitutional Court's understanding in *S v Makwanyane*,[2272] that an associated right can be relied upon to grant meaning to a particular right.[2273]

In so far as the *Chirwa*-majorities can be read as sanctioning compartmentalisation of the rights to fair labour practices (s 23) and just administrative action (s 33), it stands in

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employment, notwithstanding that the Legislature had expressed itself to the contrary in section 157(2)". Emphasis added.

[2267] See Woolman et al *CLOSA* 11–31 (1st ed); *Du Plessis v De Klerk* 1996 (3) BCLR 658 (CC) at par 75 per Mohamed J. Cf Partington and Van der Walt 2008 *Obiter* 209 at 229.

[2268] Scott and Alston 2000 (16) *SAJHR* 206 at 214.

[2269] *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 77 per Navsa AJ. Not merely one right, but all relevant rights.

[2270] *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 112 per Navsa AJ. In *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 8, Nugent JA explained that law in general should not be compartmentalised.

[2271] *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 112 per Navsa AJ. See also the judgments of O'Regan and Sachs JJ in that case. In *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 89, the majority illustrated a willingness to rely on s 33 of the Constitution for the interpretation of s 145 of the LRA, thereby indicating the practical application of the theoretical doctrine of interdependence. This stands in contrast to the *Chirwa*-reasoning of Ngcobo J.

[2272] 1995 (6) BCLR 665 (CC).

[2273] See *S v Makwanyane* 1995 (6) BCLR 665 (CC) at paras 10 and 95; Woolman et al *CLOSA* 11–33 (1st ed). A similar sentiment is revealed in the judgment of Nugent JA in *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 46.

contrast to the often repeated perspective of constitutional interdependence propagated by the Constitutional Court.[2274] The inherent danger of such an approach is explained by the comment of Scott and Alston on the proper application of purposive interpretation:

> Whereas an each-provision-in-isolation approach can easily result in rights (and thus people) falling through the constitutional cracks in an unprincipled way, a holistic approach to contextual interpretation is more likely to take seriously the interpretative presumptions associated … with the purposive approach.[2275]

The interdependence between ss 23 and 33 was emphasised in the *Sidumo*-case, specifically in the judgments of O'Regan and Sachs JJ. In the *Chirwa*-case, the Constitutional Court did not explicitly reject its previous understanding of the holistic and interdependent interpretation of the provisions of the Bill of Rights.[2276] It is respectfully submitted that jurists and academics, such as Cheadle, do not embrace genuine interdependence and purposive interpretation, when adopting the *Chirwa*-perspective that "the Constitution must be interpreted to draw a distinction between the constitutional rights to fair administrative action and to fair labour practices and between the laws giving effect to each".[2277] Cheadle concludes that, "*as a matter of constitutional scope*, the right to fair administrative action in s 33 of the Constitution does not apply to administrative decisions concerning employment and labour relations because those relations are comprehensively dealt with under s 23".[2278] An evaluation of the rights

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[2274] Stacey 2008 (125) *SALJ* 307 at 330 comments that the absurdity of the two-majority *Chirwa*-perspective "will continue to stymie lower courts and perpetuate confusion until the impossible situation that the majority … decision has created is acknowledged and corrected". This was not done by the Constitutional Court in the recent *Gcaba*-judgment. The court merely attempted to interpret its way around the *Chirwa*-confusion, without overruling the two-majority *Chirwa*-judgment.

[2275] Scott and Alston 2000 (16) *SAJHR* 206 at 218. See Chapter Nine, part 4.

[2276] See Chapter Seven.

[2277] Cheadle 2009 (30) *ILJ* 741.

[2278] Cheadle 2009 (30) *ILJ* 741. Emphasis added. Cheadle's understanding of the constitutional approach to the determination of "the constitutional scope" is unfortunate as he chooses to disregard the predominant constitutional jurisprudence prior to the *Chirwa*-judgment and seeks to determine the interpretative intention of the Constitution as it relates to the Bill of Rights in isolation. Cheadle 2009 (30)

enshrined in the Constitution in such a manner leads to the resurrection of conceptual formalism that undermines the spirit and purport of the Constitution.

It is unfortunate that the High Court in *De Villiers v Minister of Education, Western Cape Province*[2279] opted to build on the restrictive approach embraced by Cheadle. With reference to the author, the court held that "[w]here rights share the same values as fairness does in the right of equality, a right to fair labour practices and fair administrative action, the courts have to locate the primary constitutional breach in the more specific right as was the case in the majority judgment in *Chirwa*".[2280]

This point of view is salvageable from an organic interdependence perspective if one accepts that the (primary) right to fair labour practices can be informed, contextually and interpretively, by another (secondary) constitutional right, such as the right to just administrative action. Furthermore, although it is possible, and from an operational perspective desirable, to accept that PAJA should not be regarded as the primary regulatory mechanism where employment disputes arise in the public sector, the *Sidumo*-judgment illustrated that it is possible for s 33 constitutional concepts, such as reasonableness, to find application and influence the fairness requirement that qualifies labour practices.[2281] It is possible for the LRA to regulate employment disputes in the

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ILJ 741 at 747 merely focuses on one Constitutional Court judgment – *Dawood v Minister of Home Affairs* 2000 (8) BCLR 837 (CC) – to argue that it is justifiable to reason that fundamental rights are separable. This argument is furthermore based on the court's mere mention that primary rights were contextually identifiable. However, the Constitutional Court also acknowledged that the secondary right (such as the right to dignity) could inform the existence of a specific or contextually primary right due to shared foundational values. Cf the Constitutional Courts' acceptance of context and value based interdependence in *Minister of Finance v Van Heerden* 2004 (12) BLLR 1181 (CC) at paras 135 – 140.

[2279] 2009 (2) SA 619 (C).

[2280] *De Villiers v Minister of Education, Western Cape Province* 2009 (2) SA 619 (C) at par 16. As far as this judgment can be read as forcing a protection-choice between rights respectively associated with primary and secondary constitutional breaches, it is questionable.

[2281] Hoexter 2008 (1) *CCR* 209 at 213 correctly explains that the reasoning of the majority in the *Sidumo*-case is an improvement on the inconclusive approach to the administrative action issue in *Minister of Health v New Clicks SA (Pty)* 2006 (1) BCLR 1 (CC), but views it also as "evidence of the intrinsic difficulty of deciding what is and what is not administrative action". Hoexter notes that the difficulty of evaluating the presence or absence of administrative action on a case-by-case basis "exists even when, as here, the Court is relying on the general conception of administrative action developed judicially under

public sector if it is contextually interpreted to allow s 33 developed influences in the interpretation of fair labour practices (as protected by s 23), as the LRA was not specifically designed to regulate public power infused employment relationships. Froneman J emphasised the value of this perspective in the *Nakin*-judgment,[2282] by stating that "the substantive coherence and development of employment law can only *gain* from insights derived initially from administrative law concerns".[2283]

In addition, Cheadle himself admits that the Constitutional Court's *Chirwa*-judgment results from "the manner in which the constitutional issues are identified in the judgment".[2284] With regard to the possible permeable interpretation of rights, one is faced with a controversial judgment on the one hand and a range of unambiguous and reconcilable judgments on the other.[2285] Legal logic dictates that a range of coherent judgments concerning the normative value-based understanding of fundamental rights is to be preferred to one apparently rogue reading of a contentious perspective, all from the same court.

The idea that two different constitutional rights may form the basis of the same issues is not unknown to labour law, as the Labour Court has noted that even where the same cause of action may be found in a discrimination dispute and an unfair dismissal dispute, the applicable remedies are still found in separate pieces of legislation.[2286] Any other understanding would prevent the judiciary from considering "all relevant aspects

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section 33 rather than the more nit-picking definition in the PAJA". Even though this exercise is no easy task, Hoexter proclaims that the Constitutional Court got it right in the *Sidumo*-judgment.

[2282] 2008 (5) BLLR 489 (Ck).

[2283] *Nakin v MEC, Department of Education, Eastern Cape Province* 2008 (5) BLLR 489 (Ck) at par 39. Emphasis added.

[2284] Cheadle 2009 (30) *ILJ* 741 at 742.

[2285] The Constitutional Court's position is clearly illustrated in *Ferreira v Levin NO* 1996 (1) BCLR 1 (CC), *Bernstein v Bester NO* 1996 (4) BCLR 449 (CC), *NCGLE v Minister of Justice* 1998 (12) BCLR 1517 (CC), *Mistry v Interim National Medical and Dental Council of SA* 1998 (4) SA 1127 (CC), *Government of the RSA v Grootboom* 2000 (11) BCLR 1169 (CC) and *Khosa v Minister of Social Development* 2004 (6) BCLR 569 (CC) and *Minister of Health v New Clicks SA (Pty)* 2006 (1) BCLR 1 (CC). See Chapter Seven.

[2286] See *Ditsamai v Gauteng Shared Services Centre* 2009 (5) BLLR 456 (LC), as referred to in Grogan 2009 25(3) *Employment LJ* (Electronic Version).

of the particular"[2287] dispute. The implication of this statement in the context of the *Ditsamai*-case is that the right to fair labour practices and the right to equality can give rise to the same cause of action. As is the case with the LRA and PAJA, the LRA and the EEA provide different remedies. With regard to the legislative relationship between the LRA and PAJA, the Constitutional Court can at least be said to exude a clear perspective that the specialised LRA is to remain the regulatory force, even if the State acts as employer.[2288]

2 2 4 3 Relevant Legislation and Forum

The approach that underlies the relationship between the relevant rights influences the identification of the relevant legislation and the forum in which an infringement of the relevant rights can be adjudicated.

In *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA*,[2289] the Supreme Court of Appeal reasoned, contrary to the rules of interpretation and logic, as embraced by the Constitution Court's *Sidumo*–judgment, that the general regulations of PAJA supersede the specific provisions of the LRA. Although the Constitutional Court has admitted that PAJA was enacted in response to the constitutional obligation for legislation to "cover the field"[2290] of administrative action, this provision must be regarded in the proper holistic context of the Constitution and the relationship between general and specific administrative law.

In the *Sidumo*-judgment, the Constitutional Court properly considered the different general and specific dimensions of administrative law. The court concluded that, although PAJA codifies the common law elements of administrative law, it could not be regarded as the exclusive legislative basis for the regulation of s 33 of the Constitution.

[2287] Grogan *Dismissal, Discrimination and Unfair Labour Practices* 47. See also the minority judgment (which concurred with the majority on the jurisdictional issue) in *Department of Justice v CCMA* 2004 (25) ILJ 248 (LAC).

[2288] See *Chirwa v Transnet Ltd* 2008 (2) BCLR 97 (CC) at paras 102 and 175. See also *Nonzamo Cleaning Services Cooperative v Appie* 2008 (9) BLLR 901 (Ck) at paras 18 – 29.

[2289] 2006 (11) BLLR 1021 (SCA).

[2290] *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 43. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (7) BCLR 678 (CC).

It was confirmed that this function could contextually be performed by specialised national legislation like the LRA.[2291]

Consequently, the argument that an employee must base his claim on PAJA if a court finds that the disciplinary action of the employer constitutes an administrative action cannot hold legal ground.[2292] Using s 33 as an interpretative tool and supplementary right in the application of specific s 23 provisions found in the LRA still allows public employees the opportunity to ensure the protection of their right to just administrative action through its co-operation with their right to fair labour practices.

In the *Sidumo*-case, Navsa AJ identified three areas of conflict between the LRA and PAJA, namely time-scale issues in relation to reviews, jurisdiction (with specific consideration of s 157 of the LRA) and the available remedies. Nothing in the legislative conflict affects the substance of the right to just administrative action as enshrined in the Constitution. The reasoning that PAJA need not find direct application for the protection of s 33 (if specific legislation can perform the same function) eliminates all superficial conflict and allows substantive considerations to remain relevant. There is no legal (as opposed to policy) reason why the jurisdictional reasoning, as found in the *Chirwa*-case, cannot fit within the *Sidumo*-understanding of the LRA, as specialised legislation that

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[2291] See *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at paras 91 and 92. Section 210 of the LRA (which stipulates that "[i]f any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law, save the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail") carries the interpretative potential to give expression to this perspective. See *Nonzamo Cleaning Services Coorperative v Appie* 2008 (9) BLLR 901 (Ck) at par 23. The general ambit of PAJA should therefore not be read as ousting the specialised functioning of the LRA. (In the absence of specialised legislation, PAJA would be the obvious first port of call.) Reasoning of this nature is in line with the judgment of the Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (7) BCLR 678 (CC) at par 25, where it was held that the "cause of action for the judicial review of administrative action now *ordinarily* arises from PAJA". The court regarded PAJA as the ordinary route but not the exclusive one as it declared that it was not in the necessary in the *Bato Star*-case "to consider ... causes of action for judicial review of administrative action that do not fall within the scope of the PAJA". Emphasis added. Cf Van Eck 2008 *Obiter* 339 at 347.

[2292] Cf Vettori 2008 (71) *THRHR* 240 at 252.

"gives effect to the right to fair labour practices"[2293] and that must be read in a manner that complies with the prescripts of s 33 of the Constitution.[2294]

A logical approach of this nature is possible, as s 157(2) of the LRA allows administrative action based employment decision affecting public employees to be considered within the realm of the Labour Court, without taking anything away from the traditional protection of the High Court. The Labour Court is in essence an equity court that must consider *all* relevant contextual considerations in pursuit of fair labour practices.[2295] The Labour Court cannot ignore the right to just administrative action and the jurisdictional power that it brings in the form of s 157(2), merely because it feels more comfortable with the familiar application of the LRA provisions exclusively associated with s 23 of the Constitution. The extension of the High Court's constitutional jurisdiction to the Labour Court by means of s 157(2) of the LRA in fact endorses the interdependence of s 23 with other constitutional rights in scenarios where the State as employer exercises public power.[2296]

3 SUMMARY

It is not denied that both labour and administrative law demand recognition of their autonomy. The bases of their autonomy or traditional sui generis nature now reside in constitutional rights.[2297] The character of the associated autonomy has changed from

[2293] *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 94.

[2294] See *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at paras 89 and 91. See also *De Beer NO v North-Central Local Council and South-Central Local Council (Umhlatuzana Civic Association Intervening)* 2001 (11) BCLR 1109 (CC) at par 24 per Yacoob J. Cf Partington and Van der Walt 2008 *Obiter* 209 at 231.

[2295] See also *Makhanya v University of Zululand* 2009 (8) BLLR 721 (SCA) at par 46.

[2296] In terms the concurrent jurisdiction s 157(2) of the LRA therefore bestows on the Labour Court jurisdiction to comprehensively deal with such cases, while taking nothing away from the High Court in the exercise of its power in such circumstances. The Constitutional Court admitted as much in *Gcaba v Minister for Safety and Security* 2009 (12) BLLR 1145 (CC) at par 24. The constitutional jurisdiction bestowed on the High Court also in turn calls on that court to recognise the interdependence between ss 23 and 33 in scenarios where the State as employer exercises its public power and adversely affects the rights and interests of public employees, if such an employee chooses to approach the High Court.

[2297] In *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 150, Sachs J elucidated: "The Bill of Rights does specifically identify a number of rights for special constitutional

absolute to relative.[2298] Section 33 of the Constitution provides a contextual boundary for labour law, while s 23 in turn acts as the contextual boundary for administrative law, as the relative autonomy of both cannot be allowed to undermine the interests of the parties to the public sector administrative-employment relationship, which the Constitution is called upon to protect.[2299] The constitutional protection found in ss 23 and 33 must be conceived as a means of structuring the relationship between these two rights.[2300]

The doctrine of interdependence allows constitutional rights to merge in cases where there is no normative conflict. The normative interdependence between labour and administrative law pre-dates the Constitution, although courts tend to ignore that fact in

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protection. Each is independently delineated, reflecting historical experience pointing to the need to be on guard in areas of special potential vulnerability and abuse. Each has produced an outgrowth of specialist legal learning. Yet enumerating themes for dedicated attention does not presuppose or permit detaching the listed rights from the foundational values that nurture them. Nor does it justify severing the listed rights from the foundational values that nurture them. Nor does it justify severing the rights from the underlying values that give substance and texture to the Constitution as a whole. On the contrary, in a value-based constitutional democracy with a normative structure that is seamless, organic and ever-evolving, the manner in which claims to constitutional justice are typified and dealt with should always be integrated with the context of the setting, interests and values involved." One should here again be aware of the fact that constitutional justice is flexible in that it is the heart of the living instrument that we call the Constitution. Constitutional justice therefore calls for judicial consideration of contexts, interests and values.

[2298] As Nedelsky 1993 (1) *Rev of Const Studies* 1 at 7 rightly explains, "[r]ights define boundaries ... and it is those boundaries, enforced by the law, that ensure individual freedom and autonomy".

[2299] As Nedelsky 1993 (1) *Rev of Const Studies* 1 at 13 appropriately elucidates, "rights are not primarily about things, but about people's relation to each other". A rights-based approach, underlying the Constitution, acknowledges this traditional protective function of rights. Furthermore, the idea of 'relationship' works against the abstract idea of rights in their functioning, as "there is no free standing human nature comprehensible in abstraction from all relationship from which one could derive a theory of rights". See Nedelsky 1993 (1) *Rev of Const Studies* 1 at 18 fn 20.

[2300] Nedelsky 1993 (1) *Rev of Const Studies* 1 at 8 argues that rights should be conceived as relationships.

an attempt to compartmentalise the rights to fair labour practices and just administrative action.[2301]

The idea that two different areas of law can come together in one set of circumstances is not a new one. In his minority *Mustapha*-judgment, Schreiner JA recognised that contractual stipulations (traditionally regarded as private law regulated) could be exercised by a state official with public power.[2302] The consequence of this is that contractual aspects were not disregarded, but supplemented by public law regulation of public power (in the interest of justice) to prevent any arbitrary action that could otherwise be taken in the context of the contract. The same argument applies to current law when evaluating the relationship between labour and administrative law. The common conceptual trilogy of lawfulness, reasonableness and procedural fairness allows for interdependence. That interdependence, in turn, allows labour and administrative law to supplement one another where the singular application of either undermines certain aspects of the pursuit of constitutional justice.[2303]

[2301] Pre-constitutional interdependence is evident in the *Zenzile*-judgment, where it was emphasised that the principles of natural justice collectively form a golden thread that runs through the law in pursuit of fairness. See Chapter Eight, parts 2 2 and 3 1; Devenish, Govender and Hulme *Administrative Law and Justice* 23. Although read as attempts to circumvent the exclusion of public employees from the framework of labour law out of necessity, pre-constitutional judgments are camouflaged examples of hybridity. In *Minister of Finance v Van Heerden* 2004 (12) BLLR 1181 (CC) at par 140, Sachs J expressed the view that different formal articulations may be based on the same basic constitutional rationale. Southwood J expressed a similar view within a public employment context in *Nell v Minister of Justice and Constitutional Development* 2006 (7) BLLR 716 (T) at par 19 in declaring that "it is wrong to characterise a matter as a labour dispute or as an administrative law dispute and then decide that the dispute must be decided in accordance with the relevant body of law".

[2302] The minority judgment of Schreiner JA is post-constitutionally regarded as the correct approach. The majority judgment in *Mustapha v Receiver of Revenue in Lichtenburg* 1958 (3) SA 343 (A) was overruled in *Logbro Properties CC v Bedderson NO* [2003] 1 All SA 424 (SCA), where the court held the minority judgment to be the correct one. See *POPCRU v Minister of Correctional Services* 2006 (4) BLLR 385 (E).

[2303] Also important is the fact that the broad content of constitutional justice itself requires consideration of three elements: context, interests and values. See the judgment of Sachs J in *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at paras 150 and 151. The presence of more than one right calling for protection and promotion in a specific set of circumstances does not create tension. In *NCGLE v Minister of Justice* 1998 (12) BCLR 1517 (CC) at par 114, Sachs J declared that "a single situation can give rise to multiple, overlapping and mutually reinforcing violations of constitutional rights".

The recognition of normative interdependence between labour and administrative rights in theory counters this archaic problem. In practice, the judiciary must now determine how to apply this theoretical cure to the formalistic problem. As explained by Froneman J in the *Giyose*-judgment, the judiciary must clarify the issues in every case, without undermining the character of the issues with impressive (although logically flawed) interpretative footwork.[2304] This will require the judiciary to step out of their formalistic comfort-zone and give genuine expression to their constitutional duty to protect and promote the rights enshrined in the Bill of Rights. If the true (not (re)characterised) issue relates to the exercise of both managerial and public power in a public employment context, both labour and administrative law will require judicial consideration.[2305] Such a judicial mind-shift will result in the avoidance of the "parsimonious approach of austere formalism that is at odds with a proper approach to fundamental rights".[2306]

This realisation holds true as the impact of a public employment decision on public employees as a group "is of such a nature that a number of different protected rights are simultaneously infringed". Sachs J further emphasised that, in such circumstances, "it would be as artificial in law as it would be in life to treat the categories [of rights] as alternative rather than interactive". The focus should fall on the fact that all rights must be read in conformity with the supreme Constitution. The judicial tendency to read-in superficial tension in the public employment relationship, by reverting to archaic formalistic perspectives, is not in accord with the spirit of the Constitution to which courts are duty-bound to give expression, directly or indirectly, in every case.

[2304] See *MEC, Department of Roads and Transport, Eastern Cape v Giyose* 2008 (5) BLLR 472 (E) at par 19.

[2305] In *MEC, Department of Roads and Transport, Eastern Cape v Giyose* 2008 (5) BLLR 472 (E) at par 19, Froneman J summarised the possible situations: "[I]f the real dispute transcends or goes beyond mere employment issues, the applicant of the right to just administrative action might come to the fore; if the dispute does not reach that far, the focus on just administrative action becomes unnecessary without detracting in any way from its full application and importance as a fundamental right." Yet it is not for the courts to deny an applicant the opportunity to justify the applicability of the right to just administrative action if he or she so pleads it.

[2306] *MEC, Department of Roads and Transport, Eastern Cape v Giyose* 2008 (5) BLLR 472 (E) at par 19, with reference to *POPCRU v Minister of Correctional Services* 2006 (4) BLLR 385 (E). A jurisdictional perspective aimed at isolating certain legal considerations, attempts to reserve labour evaluation that attracts s 23 constitutional considerations to the Labour Court, and bans the High Court's jurisdiction and the s 33 associated administrative law considerations. This results in a denial of the "mutability of basic values", such as fairness, based on jurisdictional arguments and ultimately amounts to a constitutional

It is crucial that both labour and administrative law academics and practitioners recognise that the relationship between labour and administrative law, with its fairness roots, is but two sides of the same coin[2307] – the coin being the Constitution. Constitutional fairness informs the standard of fairness required by both ss 23 and 33.[2308] The broad concept of constitutional fairness encompasses reflection of both a substantive and procedural nature, as well as considerations of lawfulness and reasonableness.

The outcome generated by the relationship of the rights to fair labour practices and just administrative action must be consistent with the values of the Constitution.[2309] Just as rights form the boundary for contextually overlapping areas of law, the Constitution forms the boundary for the overlapping rights. In view of that, the Constitution must structure the reality of the relationship between rights.[2310] When specialised legislation is viewed against general legislation, and both are informed by the supreme Constitution, conflict fades away as perspective shifts.

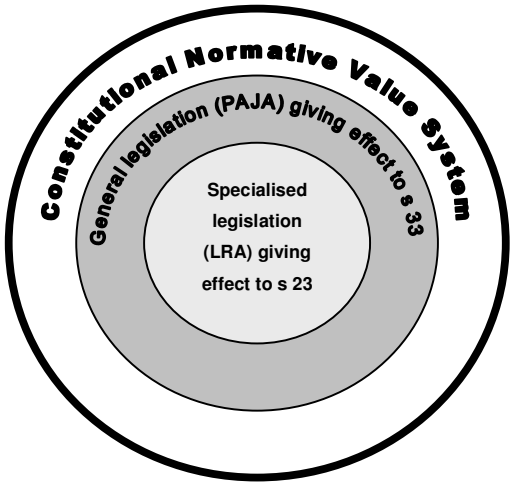

Illustration 4: The Constitutional Dimensions

injustice. If such jurisdictional reasoning is allowed to continue, legal substance will once again be suppressed by form. See Nedelsky 1993 (1) *Rev of Const Studies* 1 at 4. Botha 2003 (1) *TSAR* 20 at 21 rightly notes that "[t]he Constitution … represents a fundamental break with the assumption that it is … acceptable to erect legal walls of separation to prevent challenges".

[2307] Consequently, regardless of whether jurists call it labour fairness or administrative fairness, it remains in essence a consideration of fairness.

[2308] Consequently, the LRA and PAJA pursue rights-based constitutional fairness.

[2309] See Nedelsky 1993 (1) *Rev of Const Studies* 1 at 9.

[2310] See Nedelsky 1993 (1) *Rev of Const Studies* 1 at 14.

If genuine sector-specific contextual consideration is given to the normative interdependence of ss 23 and 33, the fact that both the Labour Court and the High Court can arguably (in terms of s 157(2) of the LRA) concurrently protect the rights of a public sector employee (if justified on the facts) will prevent the development of a dual system of law. The court must accept that there is only one system of law based on the Constitution and that the jurisdictional functioning of the courts must reveal a spirit of co-operation. Any minor inconsistency in the Labour Court and the High Court's respective approaches is comparable to, for example, the judgments of the Western Cape High Court and the Eastern Cape High Court with similar facts but different opinions as to the merits of the case. A difference of opinion is inevitably present in the judgments of the various divisions of the High Court.[2311] The argument that the concurrent jurisdiction between the Labour Court and High Court will lead to the development of such a dual legal system is illogical. As long as the judiciary exercises their duties with proper regard to the spirit and purport of the Constitution, any errors in legal reasoning can be addressed by an appeal court higher up in the hierarchy, as normally happens in any legal system. No dual system of law will develop if courts respect the interdependence of the rights in the Bill of Rights, acknowledge that no set rules for the variable norms of fairness and reasonableness can be pre-determined and take on a collaborative deliberative attitude instead of a defensive jurisdictional one. This is possible, because the judiciary, first of all, agree that s 23 protections of both private and public sector employees are enforced through the provisions of the LRA. The judiciary also agree that employees are obliged to approach the Labour Court for LRA based claims.[2312] All that remains is for the judiciary (including the Constitutional Court itself) to give proper recognition to the interdependent spirit of the Constitution, as recognised in the *Sidumo*-judgment when considering the scope of the concurrent jurisdiction endorsed by s 157(2) of LRA.

Consequently, the legal reality should echo the constitutional *Sidumo*-reasoning of Sachs J, that the "relationship between the separately protected rights should ... be

[2311] This reality was emphasised by Langa CJ in *Chirwa v Transnet Ltd* 2008 (2) BLLR 97 (CC) at par 178.

[2312] See s 157(1) of the LRA.

regarded as osmotic rather than hermetic."[2313] When the focus shifts to a rights-relationship, based on constitutional justice, then the attention automatically turns to contextual considerations[2314] in which the variable nature of the administrative law trilogy obtains appropriate recognition without causing uncertainty due to unrestrained flexibility. In conclusion, a rights-relationship calls for consideration of constitutional values, which in turn calls for the acknowledgment "that how we articulate and foster those values varies tremendously over time and place".[2315]

[2313] *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (12) BLLR 1097 (CC) at par 151.

[2314] See Nedelsky 1993 (1) *Rev of Const Studies* 1 at 9.

[2315] Nedelsky 1993 (1) *Rev of Const Studies* 1 at 10. See *Minister of Finance v Van Heerden* 2004 (12) BLLR 1181 (CC) at par 140 per Sachs J.

BIBLIOGRAPHY

1 Articles and Books

Ackermann LWA "The Legal Nature of the South African Constitutional Revolution" 2004 *New Zealand Law Review* 633

Adair B & Albertyn S "Collective Bargaining in the South African Public Sector – the emergence of sector based bargaining" 2000 (21) *Industrial Law Journal* 813

Adams GW *Mediating Justice: Legal Dispute Negotiations* (2003) CCH Canadian Ltd

Adelman S "Accountability and Administrative Law in South Africa's Transition to Democracy" 1994 (21) *Journal of Law and Society* 317

Airo-Farulla G "Rationality and Judicial Review of Administrative Action" 2000 (24) *Melbourne University Law Review* 543

Albertyn CJ "Law Unto Itself? The Industrial Court and Supreme Court Decisions" 1988 (9) *Industrial Law Journal* 543

Alder J "Hunting the Chimera – The End of O'Reilly v Mackman?" 1993 (13) *Legal Studies* 183

Alexy R *A Theory of Constitutional Rights* (2002) Oxford University Press

Allan TRS *Constitutional Justice* (2003) Oxford University Press

Alston P "Out of the Abyss" 1987 (9) *Human Rights Quarterly* 332

Anderman SD Labour Law: Management Decisions and Workers' Rights (1992) LexisNexis Butterworths

Anon "Developments in the Law: Public Employment" 1984 (97) *Harvard Law Review* 1611

Anon "Industrial Democracy" 1977 (26) *The International and Comparative Law Quarterly* 230

Anon "Prelude to Change Industrial Relations Reform in South Africa" 1992 (13) *Industrial Law Journal* 739

Anon "Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking" 1981 (94) *Harvard Law Review* 1871

Anon "Substantive Due Process: The Extent of Public Employees' Protection from Arbitrary Dismissal" 1974 (122) *University of Pennsylvanaia Law Review* 1647

Anon "Staking lei tot 'n chaos in hospital" Die Burger 2 May 1990

Anon "Staking by Kaapse hospitale kritiek" Die Burger 10 March 1990

Aram JD & Salipante PE "An Evaluation of Organizational Due Process in the Resolution of Employee/Employer Conflict" 1981 (6) *The Academy of Management Review* 197

Argyriades D "Values for Public Service: Lessons Learned from Recent Trends and the Millennium Summit" 2003 (69) *International Review of Administrative Sciences* 521

Argyriades D "Values for Public Service: Lessons Learned from Recent Trends and the Millennium Summit" 2003 (69) *International Review of Administrative Sciences* 521

Arrigo G & Casale G *Glossary of Labour Law and Industrial Relations* (2005) International Labour Organisation

Arthurs HW "Jonah and the Whale: The Appearance, Disappearance, and Reappearance of Administrative Law" 1980 (30) *University of Toronto Law Journal* 225

Arthurs HW "Labour Law without the State?" 1996 (46) *University of Toronto Law Journal* 1

Arup C *Labour Law and Labour Market Regulation* (2006) The Federation Press

Asimow M "Administrative Law under South Africa's Interim Constitution" 1996 (44) *American Journal of Comparative Law* 393

Asimow M "Towards a South African Administrative Justice Act" 1997 (3) *Michigan Journal of Race and Law* 1

Atiyah PS & Summers RS *Form and Substance in Anglo-American Law* (1991) Oxford University Press

Bach S *Public Service Employment Relations in Europe: Transformation, Modernization or Inertia?* (1999) Routledge

Bailey SH *Cases, Materials and Commentary on Administrative Law* (2005) Sweet & Maxwell

Bamforth N & Leyland P *Public Law in a Multi-layered Constitution* (2003) Hart Publishing

Bamforth N "*Administrative Justice in Southern Africa* by Corder H and Maluwa T" 1999 (62) *Modern Law Review* 474

Bamforth N "*The Province of Administrative Law* by Michael Taggart" 1999 (62) *Modern Law Review* 476

Barak A *Purposive Interpretation in Law* (2005) Princeton University Press

Barak A *The Judge in a Democracy* (2006) Princeton University Press

Barnard C, Deakin SF, Hepple BA, Morris GS *The Future of Labour Law* (2004) Hart Publishing

Barnett H *Constitutional and Administrative Law* (2002) Cavendish Publishing

Barnett H *Constitutional and Administrative Law* (2004) Routledge Cavendish

Bar-Niv ZH, Gladstone A, Aaron B, Weiss M, Verdier J, Charlton W & Sigeman T *International Labour Reports* (2000) Martinus Nijhoff Publishers

Barrie GN "Legitimate Expectation and the Appeal Court – Where Does the Concept Come From?" 1991 (1) *Tydskrif vir Suid-Afrikaanse Reg* 169

Barry DD & Whitcomb HR *The Legal Foundations of Public Administration* (2005) Rowman & Littlefield

Basson A & Strydom E "The Labour Relations Act 66 of 1995: the Resolution of Disputes About Alleged Unfair Dismissals" 1996 (8) *South African Mercantile Law Journal* 1

Basson AC, Christianson MA, Garbers C, le Roux PAK, Mischke C & Strydom EML *Essential Labour Law: Volume One Individual Labour Law* (2002) Labour Law Publications

Basson AC, Christianson MA, Garbers C, Le Roux PAK, Mischke C & Strydom EML *Essential Labour Law* (2005) Labour Law Publications

Baxter L "Rule-making and Policy Formulation in South African Administrative-law Reform" 1993 *Acta Juridica* 176

Baxter L *Administrative Law* (1984) Juta & Co Ltd

Baxter LG "Fairness and Natural Justice in English and South African Law" 1979 (96) *South African Law Journal* 607

Beatty D "Constitutional Labour Rights: Pros and Cons" 1993 (14) *Industrial Law Journal* 1

Beatty DM *Putting the Charter to Work: Designing a Constitutional Labour Code* (1987) McGill-Queen's Press

Beaumont PB *Public Sector Industrial Relations* (1992) Routledge

Bechmann J & Prinsloo J "Imagined power and abuse of administrative power in education in South Africa" 2006 (3) *Tydskrif vir Suid-Afrikaanse Reg* 483

Beckett J & Koenig HO *Public Administration of Law* (2005) M.E. Sharpe

Beinart B "Administrative Law" 1948 (11) *Tydskrif vir Hedendaags Romeins Hollandse Reg* 204

Beinart B "The legal relationship between the government and its employees" 1955 *Butterworth South African Law Review* 21

Bendix S *The Basics of Labour Relations* (2000) Juta & Co Ltd

Benedek W, Feyter K & Marrella F *Economic Globalisation and Human Rights* (2007) Cambridge University Press

Benjamin P "Braamfontein Versus Bloemfontein: The SCA and Constitutional Court's Approaches to Labour Law" 2009 (30) *Industrial Law Journal* 757

Benjamin P "Condoning the Unprocedural Retrenchment: The Rise of the 'No Difference' Principle" 1992 (13) *Industrial Law Journal* 279

Bentham J *An Introduction to the Principles of Morals and Legislation* (2000) Batoche Books

Berryman JB *Remedies: Cases and Materials* (2006) Emond Montgomery Publications

Beukes M "Administrative action affecting the public: section 4 of the Promotion of Administrative Justice Act 3 of 2000 and the regulations made in terms of section 10 of the Act" 2003 (18) *South African Public Law* 289

Biagi M, Blanpain R & Weiss M *Changing Industrial Relations and Modernisation* (2003) Kluwer Law International

Biehler G Procedures in International Law (2008) Springer

Bishop W "A Theory of Administrative Law" 1990 (19) *Journal of Legal Studies* 489

Black J "Proceduralizing Regulation: Part I" 2000 (20) *Oxford Journal of Legal Studies* 597

Blair L "The Civil Servant: A Status Relationship?" 1958 (21) *Modern Law Review* 265

Blanpain R & Ameglio EJ *The Actors of Collective Bargaining: A World Report* (2004) Kluwer Law International

Blanpain R & Araki T & Ouchi S *Labour Law in Motion* (2005) Kluwer Law International

Blanpain R & Baker J *Comparative Labour Law and Industrial Relations in Industrialized Market Economics* (2004) Kluwer Law International

Blanpain R & Colucci M *The Globalization of Labour Standards* (2004) Kluwer Law International

Blanpain R & Pennings F *Flexibilisation and Modernisation of the Turkish Labour Market* (2006) Kluwer Law International

Blanpain R *Labour Law, Human Rights and Social Justice* (2001) Kluwer Law International

Blanpain R, Araki T & Ouchi S *Labour Law in Motion* (2005) Kluwer Law International

Blenk W (ed) *European Labour Courts: Industrial Action and Procedural Aspects* (1993) International Labour Organisation

Blom-Cooper LJ, Drewry G & Blake C *Law and the Spirit of the Inquiry* (1999) Martinus Nijhoff Publishers

Bosch C "Bent out of shape?: critically assessing the application of the right to fair labour practices in developing South African labour law" 2008 (3) *Stellenbosch Law Review* 374

Bosch C "The Implied Term of Trust and Confidence in South African Labour Law" 2006 (27) *Industrial Law Journal* 28

Botha H "Metaphoric reasoning and transformative constitutionalism (part 1)" 2002 (4) *Tydskrif vir Suid-Afrikaanse Reg* 612

Botha H "Metaphoric reasoning and transformative constitutionalism (part 2)" 2003 (1) *Tydskrif vir Suid-Afrikaanse Reg* 20

Botha N & Mischke C "A New Labour Dispensation for South Africa" 1997 (41) *Journal of African Law* 134

Boulle LJ "Administrative justice and public participation in American and South African law" 1986 (2) *Tydskrif vir Suid-Afrikaanse Reg* 136

Boulle LJ "ADR Application in Administrative Law" 1993 *Acta Juridica* 138

Boulle LJ, Harris and Hoexter C *Constitutional and Administrative Law* (1989) Juta & Co Ltd

Bowman M "Judicial Review of Administrative Action in the 1980s Problems and Prospects" 1986 (5) *Auckland University Law Review* 361

Boyer BB "Alternatives to Administrative Trail-type Hearings for Resolving Complex Scientific, Economic and Social Issues" 1972 (71) *Michigan Law Review* 111

Brand D & Heyns CH *Socio-economic Rights in South Africa* (2005) Pretoria University Law Press

Brand D "Administrative Law" 2006 (3) *Juta's Quarterly Review* (Electronic Version)

Brassey MSM "Labour Relations under the New Constitution" 1994 (10) *South African Journal on Human Rights* 179

Brassey MSM "Specific Performance – A New State for Labour's Lost Love" 1981 (2) *Industrial Law Journal* 57

Brassey MSM "'The Common Law Right to a Hearing Before Dismissal" 1993 (9) *South African Journal on Human Rights* 177

Brassey MSM "The Contractual Right to Work" 1982 (3) *Industrial Law Journal* 247

Brassey MSM "The Dismissal of Strikers" 1990 (11) *Industrial Law Journal* 213

Brassey MSM "The Nature of Employment" 1990 (11) *Industrial Law Journal* 889

Brassey MSM "The New Industrial Court" 1980 (1) *Industrial Law Journal* 75

Brassey MSM *Employment and Labour Law: Volume One* (1998) Juta & Co Ltd

Brassey MSM, Cameron E, Cheadle MH & Olivier MP *The New Labour Law: Strikes, Dismissals and the Unfair Labour Practices in South African Law* (1987) Juta & Co Ltd

Bray E & Beckmann J "The employment relationship of the public-school educator: A constitutional and legislative overview" 2001 (19) *Perspectives in Education* 109

Breitenbach A "The Sources of Administrative Power: The Impact of the 1993 Constitution on the Issues Raised by *Dilokong Chrome Mines (Edms) Bpk v Direkteur-Generaal, Departement van Handel en Nywerheid* 1992 4 SA 1 (A)" 1994 (5) *Stellenbosch Law Review* 187

Brooks B "The Reform of Labour Laws: An International Comparison" 2006 (29) *University of New South Wales Law Journal* 22

Brown HC "Human Nature and the State" 1916 (26) *International Journal of Ethics* 177

Buckley FH *Just Exchange: A Theory of Contract* (2005) Routledge

Budlender G "Law and Lawfulness in South Africa" 1988 (4) *South African Journal on Human Rights* 139

Burns Y & Beukes M *Administrative Law under the 1996 Constitution* (2006) LexisNexis Butterworths

Burns Y (original text by Wiechers M) "Administrative Law" *Law of South Africa* Volume 1 (2003) LexisNexis Butterworths

Burns Y "A rights-based philosophy of administrative law and a culture of justification" 2002 (17) *South African Public Law* 279

Cahn EN "Justice, Power and Law" 1946 (55) *Yale Law Journal* 336

Cameron E "The Right to a Hearing before Dismissal – Part 1" 1984 (7) *Industrial Law Journal* 183

Cameron E "The Right to a Hearing Before Dismissal – Problems and Puzzles" 1988 (9) *Industrial Law Journal* 147

Campbell E "Termination of Appointments to Public Offices" 1996 (24) *Federal Law Review* 1

Campbell J "Legitimate Expectations: Developments at Home and Abroad" 2004 (121) *South African Law Journal* 538

Campbell J "Legitimate Expectations: The Potential and Limits of Substantive Protection in South Africa" 2003 (120) *South African Law Journal* 292

Campbell T, Goldsworthy JD & Stone ASA *Protecting rights without a Bill of Rights: Institutional performance and reform in Australia* (2003) Ashgate Publishing Ltd

Cane P "Imagining Public Law" 2006 (31) *Australian Journal of Legal Philosophy* 153

Cane P *Administrative Law* (2004) Oxford University Press

Carney T, Ramia G & Yeatman A *Contractualism and Citizenship* (2001) The Federation Press

Carpenter G & Bewkes M "The Path to Constitutional Democracy in South Africa: An Update" 1992 (36) *Journal of African Law* 168

Carty H "*State as Employer Labour Law in the Public Service* by Fredman SS and Morris GS" 1991 *Public Law* 145

Case MA "Atlanta's Apples: The Values of Multiplicity" 2000 (19) *Quarterly Law Review* 243

Cassim N "Unfair Dismissal" 1984 (5) *Industrial Law Journal* 275

Chalmers D & Tomkins A *European Union Public Law: Text and Materials* (2007) Cambridge University Press

Chamberlain NW "The Union Challenge to Management Control" 1963 (16) *Industrial and Labor Relations Review* 184

Chanock M *The Making of South African Legal Culture* (2001) Cambridge University Press

Charlesworth H *The Fluid State: International Law and National Legal Systems* (2005) The Federation Press

Chaskalson A "Law in a Changing Society — The Past Ten Years: A Balance Sheet and Some Indicators for the Future" 1989 (5) *South African Journal on Human Rights* 293

Cheadle D, Davis D & Haysom N (eds) *Fundamental Rights in the Constitution* (1997) Juta & Co Ltd

Cheadle D, Davis D & Haysom N (eds) *South African Constitutional Law: The Bill of Rights* (2004) LexisNexis Butterworths

Cheadle H & Davis D "The Application of the 1996 Constitution in the Private Sphere" 1997 (13) *South African Journal on Human Rights* 44

Cheadle H "Deconstructing *Chirwa v Transnet*" 2009 (30) *Industrial Law Journal* 741

Cheadle H "Regulated Flexibility Revisiting the LRA and the BCEA" 2006 (27) *Industrial Law Journal* 663

Chicktay MA "An Unfair Labour Practice Jurisprudence Pertaining to Benefits? A Critical Analysis of *Protekon Ltd v CCMA*" 2007 (19) *South African Mercantile Law Journal* 108

Chodosh H *Global Justice Reform: A Comparative Methodology* (2005) New York University Press

Chongwe RMA "Limitations on the principles of natural justice: an African perspective" 1989 (15) *Commonwealth Law Bulletin* 620

Chrenychenko OO *Fundamental Rights, Contract Law and the Protection of the Weaker Policy* (2007) Sellier

Clark D "Managerialism, Administrative Justice and Public Service Reform in Britain" 1999 (65) *International Review of Administrative Sciences* 473

Cockrell A "'Can You Paradigm?' – Another Perspective on the Public Law/Private Law Divide" 1993 *Acta Juridica* 227

Cockrell A "Rainbow Jurisprudence" 1996 (12) *South African Journal on Human Rights* 1

Cockrell A "The South African Bill of Rights and the 'Duck/Rabbit'" 1997 (60) *Modern Law Review* 513

Cohen T "Procedurally fair dismissals: losing the plot?" 2005 (17) *South African Mercantile Law Journal* 32

Cohen T "Termination of Employment Contracts by Operation of Law – Bypassing the Unfair Dismissal Provisions of the Labour Relations Act" 2006 (1) *Stellenbosch Law Review* 87

Cohen T "The 'Reasonable Employer' Test – Creeping in Through the Back Door?" 2003 (15) *South African Mercantile Law Journal* 192

Cohen T "Understanding fair labour practices — NEWU v CCMA" 2004 (20) *South African Journal on Human Rights* 482

Cohen T "When Common Law and Labour Law Collide – Some Problems Arising out of the Termination of Fixed-term Contracts" 2007 (19) *South African Mercantile Law Journal* 26

Collins H "Dismissal and Public Law Remedies" 1984 (13) *Industrial Law Journal* 174

Collins H "Market Power, Bureaucratic Power, and the Contract of Employment" 1986 (15) *Industrial Law Journal (UK)* 1

Collins H *Justice in Dismissal* (1992) Oxford University Press

Conaghan J, Fischl RM, Klare K *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (2004) Oxford University Press

Condé V *A Handbook of International Human Rights* (1999) University of Nebraska Press

Cooper C "Right to Fair Labour Practices" 2005 (26) *Comparative Labour Law and Policy Journal* 199

Corder H & Maluwa T (eds) *Administrative Justice in Southern Africa* (1998) University of Cape Town

Corder H & Van der Vijver L (eds) *Realising Administrative Justice* (2002) Siber Ink

Corder H "Administrative Justice in the Final Constitution" 1997 (13) *South African Journal on Human Rights* 28

Corder H "Administrative Justice: A Cornerstone of South Africa's. Democracy" 1998 (14) *South African Journal on Human Rights* 38

Corder H "Crowbars and Cobwebs: Executive Autocracy and the Law in South Africa" 1989 (5) *South African Journal on Human Rights* 1

Corder H "Introduction: Administrative Law Reform" 1993 *Acta Juridica* 1

Corder H "Without Deference, With Respect: A Response to Justice O'Regan" 2004 (121) *South African Law Journal* 438

Corwin ES "The Constitution as Instrument and as Symbol" 1936 (30) *American Political Science Review* 1071

Council of Europe *The Status of Public Officials in Europe* (1999) Council of Europe

Countouris N *The Changing Law of Employment Relationship* (2007) Ashgate Publishing

Cover RM "Dispute Resolution: A Foreword" 1979 (88) *Yale Law Journal* 910

Cox PN "An Interpretation and (Partial) Defense of Legal Formalism" 2003 (36) *Industrial Law Review* 57

Craig JDR & Lynk M *Globalization and the Future of Labour Law* (2006) Cambridge University Press

Craig P "The Common Law, Shared Power and Judicial Review" 2004 (24) *Oxford Journal of Legal Studies* 237

Craig PP *Administrative Law* (1994) Sweet & Maxwell

Currie I & De Waal J *Bill of Rights Handbook* (2005) Juta & Co Ltd

Currie I & De Waal J *The New Constitutional and Administrative Law: Volume One Constitutional Law* (2001) Juta & Co Ltd

Currie I & Klaaren J *The Promotion of Administrative Justice Act Benchbook* (2001) Siber Ink

Currie I "Judicious Avoidance" 1999 (15) *South African Journal on Human Rights* 138

Curtin DM & Nollkaemper PA *Netherlands Yearbook of International Law* (2008) Cambridge University Press

Dator JA, Pratt R & Seo Y *Fairness, Globalization, and Public Institutions* (2006) University of Hawaii Press

David MW *The Oxford Companion to Law* (1980) Clarendon Press

Davies ACL *Accountability: A Public Law Analysis of Government by Contract* (2001) Oxford University Press

Davies ACL *Perspectives on Labour Law* (2004) Cambridge University Press

Davies DM "To Defer and then When? Administrative Law and Constitutional Democracy" 2006 *Acta Juridica* 23

Davies P & Freedland M "The Impact of Public Law on Labour Law, 1972–1997" 1997 (26) *Industrial Law Journal (UK)* 311

Davies P & Freedland M *Kahn-Freund's Labour and the Law* (1983) Stevens & Sons

Davies R "Contracting Out and the Retention of Employment Model in the National Health Service" 2004 (33) *Industrial Law Journal (UK)* 95

Davis DM & Corder H "A Long March ---- Administrative Law in the Appellate Division" 1988 (4) *South African Journal on Human Rights* 281

Davis DM "Introduction: Administrative Law Reform" 1993 *Acta Juridica* 1

Davis DM "The Juridification of Industrial Relations on South Africa – or Mike Tyson v Johannes Voet" 1991 (12) *Industrial Law Journal* 1181

Davis DM "To defer and then when? Administrative law and constitutional democracy: the constitutional context" 2006 *Acta Juridica* 23

Davis DM "Voluntarism and South African Labour Law – are the Queensbury Rules an Anachronism?" 1990 *Acta Juridica* 45

Davis DM, Cheadle H & Haysom N *Fundamental Rights in the Constitution: Commentary and Cases* (1997) Juta & Co Ltd

Davis H *Human Rights and Civil Liberties* (2003) Willan Publishing

De Cruz P *Comparative Law in a Changing World* (1999) Routdlegde

De Foucauld JB "Post-industrial society and economic security" 1996 (135) *International Labour Review* 675

De Kock A "Three Commissions" 1980 (1) *Industrial Law Journal* 26

De Smith SA, Woolf L & Jowell J *Judicial Review of Administrative Action* (1995) Sweet & Maxwell

De Ville J "Deference and Différance: Judicial Review and the Perfect Gift" 2006 (2) *Potchefstroom Electronic Law Journal* 14/48

De Ville J "Deference as Respect and Deference as Sacrifice: A Reading of *Bato Star Fishing v Minister of Environmental Affairs*" 2004 (20) *South African Journal on Human Rights* 577

De Ville J "The Right to Administrative Justice: An Examination of Section 24 of the Interim Constitution" 1995 (11) *South African Journal on Human Rights* 264

De Ville J *Judicial Review of Administrative Action in South Africa* (2003) LexisNexis Butterworths

De Vos P "Grootboom, the Right of Access to Housing and Substantive Equality as Contextual Fairness" 2001 (17) *South African Journal on Human Rights* 258

De Waal J, Currie I & Erasmus G *Bill of Rights Handbook* (2001) Juta & Co Ltd

Deakin S & Morris GS *Labour Law* (2005) Hart Publishing

Dean WHB "Our Administrative Law: A Dismal Science" 1986 (2) *South African Journal on Human Rights* 164

Deery S & Mitchell R *Employment Relations* (1999) The Federation Press

Dekker AH "When Good Appointments Go Bad: A Discussion of *Van Deventer and Venture SA Ltd*" 2007 (19) *South African Mercantile Law Journal* 372

Devenish G "South Africa from pre-colonial times to democracy: a constitutional and jurisprudential odyssey" 2005 (3) *Tydskrif vir Suid-Afrikaanse Reg* 547

Devenish G "The interim constitution and administrative justice in South Africa" 1996 (3) *Tydskrif vir Suid-Afrikaanse Reg* 458

Devenish G "The rule of law revisited with special reference to South Africa and Zimbabwe" 2004 (4) *Tydskrif vir Suid-Afrikaanse Reg* 675

Devenish GE *A Commentary on the South African Bill of Rights* (1999) LexisNexis Butterworths

Devenish GE, Govender K & Hulme D *Administrative Law and Justice in South Africa* (2001) LexisNexis Butterworths

Dicey AV *Introduction to the Study of the Law of the Constitution* (1982) Liberty Fund

Dicker LP & Devenish GE (original text bt De Jager T) "Public Service" *Law of South Africa* Volume 21 (2000) LexisNexis Butterworths

Dijk P, Hoof GJH & Heringa AW *Theory and Practice of the European Convention on Human Rights* (1998) Kluwer International Law

Dixon M & McCorquodale R *Cases and Materials on International Law* (2003) Oxford University Press

Doeker-Mach G, Ziegert KA & Tay AE *Law and Legal Culture in Comparative Perspective* (2004) Franz Steiner Verlag

Domat J *The Civil Law in its Natural Order: Together with the Public Law* (2008) The Lawbook Exchange Ltd

Dotson A "A General Theory of Public Employment" 1956 (16) *Public Administration Review* 197

Douglas JM & College B "State Civil Service and Collective Bargaining: Systems in Conflict" 1992 (52) *Public Administration Review* 162

Dowdall H "The Word 'State'" 1923 (39) *Law Quarterly Review* 98

Driver S & Plasket C "Administrative Law" 2003 *Annual Survey of South African Law* 69

Drzemczewski A "The sui generis nature of the European Convention on Human Rights" 1980 (29) *International and Comparative Law Quarterly* 57

Du Plessis LM & Corder H *Understanding South Africa's Transitional Bill of Rights* (1994) Juta & Co

Du Plessis LM *Bill of Rights Compendium* (2002) LexisNexis Butterworths

Du Plessis LM *Inleiding tot die Reg* (1999) Juta & Co Ltd

Du Plessis M & Penfold G "Bill of Rights Jurisprudence" 2005 *Annual Survey of South African Law* 27

Du Toit D "Democratising the Employment Relationship" 1993 (4) *Stellenbosch Law Review* 325

Du Toit D "Oil on Troubled Waters? The Slippery Interface between the Contract of Employment and the Statutory Labour Law" 2008 (125) *South African Law Journal* 95

Du Toit D "What is the Future of Collective Bargaining (and Labour Law) in South Africa?" 2007 (28) *Industrial Law Journal* 1405

Du Toit D, Bosch D, Woolfrey D, Godfrey SD, Cooper C, Giles G, Bosch C & Rossouw J *Labour Relations Law: A Comprehensive Guide* (2007) LexisNexis Butterworths

Du Toit D, Cohen T, Everett W, Fouche M, Giles G, Godfrey S, Steenkamp A, Taylor M, Van Staaden P *Labour Law through the Cases* (2009) LexisNexis Butterworths

Du Toit D, Woolfrey D, Murphy J, Godfrey S, Bocsh D & Christie S *The Labour Relations Act of 1995* (1996) LexisNexis Butterworths

Dugger CE "Rights Waiting for Change: Socio-Economic Rights in the New South Africa" 2007 (19) *Florida Journal of International Law* 195

Dumbutshena E "The Rule of Law in a Constitutional Democracy with Particular Reference to the Zimbabwean Experience" 1989 (5) *South African Journal on Human Rights* 311

Dunlop G "The Ideological Crusade of Van Niekerk SM" 1994 (6) *South African Mercantile Law Journal* 236

Dworkin RD *Law's Empire* (1986) Harvard University Press

Dyzenhaus D & Fox-Decent E "Rethinking the Process/Substance. Distinction: Baker v Canada" 2001 (51) *University of Toronto Law Journal* 193

Dyzenhaus D "Constituting the Rule of Law: Fundamental Values in Administrative Law" 2002 (27) *Queen's Law Journal* 445

Dyzenhaus D "Hermann Heller and the Legitimacy of Legality" 1996 (16) *Oxford Journal of Legal Studies* 641

Dyzenhaus D "Law as Justification: Etienne Mureinik's Conception of Legal Culture" 1998 (14) *South African Journal on Human Rights* 11

Dyzenhaus D "Positivism's Stagnant Research Programme" 2000 (20) *Oxford Journal of Legal Studies* 703

Dyzenhaus D "The Logic of the Rule of Law" 2005 (55) *University of Toronto Law Journal* 691

Dyzenhaus D *Hard* Cases *in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (1991) Clarendon Press

Dyzenhaus D *The Unity of Public Law* (2004) Hart Publishing

Dyzenhaus D, Hunt and Taggart "The Principle of Legality in. Administrative Law: Internationalisation as Constitutionalisation"" 2001 (1) *Oxford University Commonwealth Law Journal* 5

Editor "Amendment Needed" 2008 24(1) *Employment Law Journal* (LexisNexis Butterworths Electronic Version)

Editor "Case Roundup: Impliedly Overruled" 2008 24(5) *Employment Law Journal* (LexisNexis Butterworths Electronic Version)

Editor "Chirwa and the BCEA: Jurisdiction in contractual matters" 2009 25(3) *Employment Law Journal* (LexisNexis Butterworths Electronic Version)

Editor "Civil versus labour courts" 2005 21(3) *Employment Law Journal* (LexisNexis Butterworths Electronic Version)

Editor "Enter the PAJA" 2004 20(5) *Employment Law Journal* (LexisNexis Butterworths Electronic Version)

Editor "Fairness is the Issue" 2009 25(1) *Employment Law Journal* (LexisNexis Butterworths Electronic Version)

Editor "Groping for a Reasonable Standard" 2008 24(6) *Employment Law Journal* (LexisNexis Butterworths Electronic Version)

Editor "Losing Sight" 2008 24(2) *Employment Law Journal* (LexisNexis Butterworths Electronic Version)

Editor "Surfing the LRA: Dispute-settlement procedures under the new Act" 1997 13(1) *Employment Law Journal* (LexisNexis Butterworths Electronic Version)

Editor "The jurisdictional maze" 2006 22(2) *Employment Law Journal* (LexisNexis Butterworths Electronic Version)

Editor "The LRA versus the Constitution" 2008 24(4) *Employment Law Journal* (LexisNexis Butterworths Electronic Version)

Editor "Time for a redraft" 2007 23(1) *Employment Law Journal* (LexisNexis Butterworths Electronic Version)

Editor "Tough Choice" 2009 25(3) *Employment Law Journal* (LexisNexis Butterworths Electronic Version)

Eisenberg MA "Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller" 1978 (92) *Harvard Law Review* 410

Ellias P "Fairness in Unfair Dismissal: Trends and Tensions" 1981 (10) *Industrial Law Journal (UK)* 201

Ellias P "Unravelling the Concept of Dismissal I" 1978 (7) *Industrial Law Journal* 16

Ellias P "Unravelling the Concept of Dismissal II" 1978 (7) *Industrial Law Journal* 100

Elliot ED "The Dis-Integration of Administrative Law: A Comment on Shapiro" 1983 (92) *Yale Law Journal* 1523

Elliot M *The Constitutional Foundations of Judicial Review* (2001) Hart Publishing

Ellis E *The Principle of Proportionality in the Laws of Europe* (1999) Hart Publishing

Ellis-Jones I *Essential Administrative Law* (2001) Routledge

Ellis-Jones I *Essential Administrative Law* (2003) Routledge Cavendish

Elster J & Slagstad R (eds) *Constitutionalism and Democracy* (1988) Cambridge University Press

Emery Y & Giauque D "Employment in the Public and Private Sectors: Towards a Confusing Hybridization Process" 2005 (71) *International Review of Administrative Sciences* 639

English R "*Administrative Justice in Southern Africa* by Hugh Corder; Tiyanjana Maluwa" 1999 (62) *Modern Law Review* 474

Enright C *Federal Administrative Law* (2001) The Federation Press

Epp CR *The Rights Revolution* (1998) University of Chicago Press

Erickson CL & Kuruvilla S "Industrial Relations System Transformation" 1998 (52) *Industrial and Labor Relations Review* 3

Evans JM "The Duty to Act Fairly" 1973 (36) *Modern Law Review* 93

Fallon HR "'The Rule of Law' As a Concept in Constitutional Discourse" 1997 (97) *Columbia Law Review* 1

Farina CR "Administrative Law as Regulation: The Paradox of Attempting to Control and to Inspire the Use of Public Power" 2004 (19) *South African Public Law* 489

Felix S "'Engaging Unreasonableness and Proportionality as Standards of Review in England, India and Sri Lanka" 2006 *Acta Juridica* 95

Fenwick H & Phillipson G *Constitutional and Administrative Law* (2003) Cavendish Publishing Ltd

Ferreira-Snyman MP "Demokrasie en die openbare administrasie" 2005 (45) *Tydskrif vir Geesteswetenskappe* 79

Feys T "Labour Standards in Southern Africa in the Context of Globilazation: The Need for a Common Approach" 1999 (20) *Industrial Law Journal* 1445

Finnemore M & Van Rensburg R *Contemporary Labour Relations* (2002) LexisNexis Butterworths

Fishkin JS *The Dialogue of Justice: Toward a Self-reflective Society* (1992) Yale University Press

Fiss O "The Death of the Law" 1986 (72) *Cornell Law Review* 1

Fiss O *The law as it could be* (2003) New York University Press

Flanders A *Management and Unions: The Theory and Reform of Industrial Relations* (1970) Faber and Faber

Flemming G "Administrative Review and the 'Normative' Goal – Is Anybody Out There?" 2000 (28) *Federal Law Review* 61

Forbes JRS *Justice in Tribunals* (2006) The Federation Press

Forcese C *Public Law: Cases, Materials, and Commentary* (2006) Emond Montgomery Publications

Ford KE, Notestine KE & Hill RN *Fundamentals of Employment Law* (2000) American Bar Association

Forrest H "Political Values in Individual Employment Law" 1980 (43) *Modern Law Review* 361

Forsyth C "A Harbinger of a Renaissance in Administrative Law" 1990 (107) *South African Law Journal* 387

Forsyth C "Speaking Truth Unto Power: The Reform of Administrative Law" 1994 (111) *South African Law Reform* 408

Forsyth C *Judicial Review and the Constitution* (2000) Hart Publishing

Frant H "Rules and Governance in the Public Sector: The Case of Civil Service" 1993 (37) *American Journal of Political Science* 990

Frederickson HG "Understanding Attitudes Toward Public Employment" 1967 (27) *Public Administration Review* 411

Fredman S *Discrimination and Human Rights* (2001) Oxford University Press

Fredman SS & Lee S "Natural Justice for Employees: The Unacceptable Faith of Proceduralism" 1986 (15) *Industrial Law Journal (UK)* 15

Fredman SS & Morris GS "Public or Private? State Employees and Judicial Review" 1991 (107) *Law Quarterly Review* 298

Fredman SS & Morris GS "The Cost of Exclusivity: Public and Private Re-examined" 1994 *Public Law* 69

Fredman SS & Morris GS "The State as Employer: Is it Unique?" 1990 (19) *Industrial Law Journal (UK)* 142

Fredman SS & Morris GS *State as Employer: Labour Law in the Public Service* (1991) Maxwell Publishing Ltd

Fredman SS "Human Rights Transformed Positive Duties and Positive Rights" 2006 *Public Law* 498

Fredman SS "Natural Justice for Employees: The Unacceptable Faith of Proceduralism" 1986 (15) *Industrial Law Journal (UK)* 15

Freedland M "Contracting the Employment of Civil Services – A Transparent Exercise" 1995 *Public Law* 224

Freedland M "Government by Contract and Public Law" 1994 *Public Law* 86

Freedland Mr & Sciarra S *Public Service and Citizenship in European Law: Public and Labour Law Perspective* (1998) Oxford University Press

Freeman MDA *Current Legal Problems 1995* (1995) Oxford University Press

Friendly H "New Trends in Administrative Law" 1974 (3) *Maryland Bar Journal* 6

Froneman J "Legal Reasoning and Legal Culture: Our 'Vision' of Law" 2005 (16) *Stellenbosch Law Review* 3

Fudge J & Tucker E *Labour Before the Law* (2004) University of Toronto Press

Fuller LL *The Morality of Law* (1964) Yale University Press

Galligan DJ *Discretionary Powers* (1990) Oxford University Press

Galligan DJ *Due Process and Fair Procedures: A Study of Administrative Procedures* (1996)

Ganz G "Public Law Principles Applicable to Dismissal from Employment" 1967 (30) *Modern Law Review* 288

Gearty CA *Principles of Human Rights Adjudication* (2004) Oxford University Press

Ginsburg T & Chen H *Administrative Law and Governance in Asia: Comparative Perspectives* (2009) Routledge

Glimore G *The Ages of American Law* (1977) Yale University Press

Glor E "Codes of Conduct and Generations of Public Servants" 2001 (67) *International Review of Administrative Sciences* 525

Goodnow FJ *Comparative Administrative Law* (2008) Bibliobazaar

Graham JG *Employee Relations* (2002) CIPD Publishing

Graham RN *Statutory Interpretation: Theory and Practice* (2001) Edmond Montgomery Publication

Grant B *Administrative Law Through the Cases* (1998) Juta & Co Ltd

Grey JH "Can Fairness be Effective" 1982 (27) *McGill Law Journal* 360

Grogan J & Myburg A "Cracking the Code – The Code of Good Practice: Dismissal" 1997 14(4) *Employment Law Journal* (LexisNexis Butterworths Electronic Version)

Grogan J "Back to basics: The SCA revisits review" 2006 22(6) *Employment Law Journal* (LexisNexis Butterworths Electronic Version)

Grogan J "Contract v Administrative Law: Dismissals in the Public Sector" 1991 (108) *South African Law Journal* 237

Grogan J "Dismissal of Public-sector Employees: The Final Piece of the Puzzle?" 1993 (110) *South African Law Journal* 422

Grogan J "Dismissals in the Public Sector: The Triumph of Audi?" 1991 (108) *South Africa Law Journal* 599

Grogan J "Does *Fedlife* still stand? Choosing between Contract and the LRA" 2008 24(2) *Employment Law Journal* (LexisNexis Butterworths Electronic Version)

Grogan J "Hung court: The PAJA v the LRA" 2007 23(1) *Employment Law Journal* (LexisNexis Butterworths Electronic Version)

Grogan J "In the shadow of *Sidumo*" 2008 24(6) *Employment Law Journal* (LexisNexis Butterworths Electronic Version)

Grogan J "Labour Law" 2005 *Annual Survey of South African Law* 585

Grogan J "Natural Justice and Employment Contracts: A Rearguard Action" 1992 (109) *South African Law Journal* 186

Grogan J "Pandora's Box" 2009 25(6) *Employment Law Journal* (LexisNexis Butterworths Electronic Version)

Grogan J "Permissible in Law? 2009 25(6) *Employment Law Journal* (LexisNexis Butterworths Electronic Version)

Grogan J "Re-interpreting *Chirwa*" 2009 25(5) *Employment Law Journal* (LexisNexis Butterworths Electronic Version)

Grogan J "Right to be heard – again? Audi in the strike context" 2007 23(2) *Employment Law Journal* (LexisNexis Butterworths Electronic Version)

Grogan J "Schizophrenic Courts: Does *Fredericks* hold, or *Chirwa*?" 2008 24(4) *Employment Law Journal* (LexisNexis Butterworths Electronic Version)

Grogan J "Strike Dismissals in the Public Sector" 1991 (12) *Industrial Law Journal* 1

Grogan J "Supreme Law: Public Servants read their rights" 2008 24(1) *Employment Law Journal* (LexisNexis Butterworths Electronic Version)

Grogan J "The reason why: Unravelling dismissal disputes" 2007 23(4) *Employment Law Journal* (LexisNexis Butterworths Electronic Version)

Grogan J "Unfair Dismissal of 'Contractual' Public Sector Employees" 1990 (11) *Industrial Law Journal* 655

Grogan J "Watered down: Eroding procedural unfairness" 2007 23(1) *Employment Law Journal* (LexisNexis Butterworths Electronic Version)

Grogan J "Which court when – and why? Jurisdiction over employment disputes" 2001 17(6) *Employment Law Journal* (LexisNexis Butterworths Electronic Version)

Grogan J "Which Law, When and Why? (Part 1)" 2006 22(2) *Employment Law Journal* (LexisNexis Butterworths Electronic Version)

Grogan J "Which Law, When and Why? (Part 2)" 2006 22(3) *Employment Law Journal* (LexisNexis Butterworths Electronic Version)

Grogan J *Dismissal, Discrimination and Unfair Labour Practices* (2007) Juta & Co Ltd

Grogan J *Riekert's Basic Employment Law* (1993) Juta & Co Ltd

Grogan J *Workplace Law* (2001) Juta & Co Ltd

Grote R "Procedural Deficiencies in Administrative Law: A Comparative Analysis" 2002 (18) *South African Journal on Human Rights* 475

Groves M & Lee HP *Australian Administrative Law: Fundamentals, Principles and Doctrines* (2007) Cambridge University Press

Hahlo HR & Kahn E *The South African Legal System and its Background* (1968) Juta & Co Ltd

Hahlo HR & Kahn E *The Union of South Africa: The Development of it Laws and Constitution* (1960) Stevens & Sons

Hall M & Clark J "The Cinderella Directive? Employee Rights to Information about Conditions Applicable to their Contract or Employment Relationship" 1992 (21) *Industrial Law Journal (UK)* 106

Halliday S *Judicial Review and Compliance with Administrative Law* (2004) Hart Publishing

Harlow C & Rawlings R *Law and Administrative Law* (1997) LexisNexis Butterworths

Harlow C & Rawlings R *Law and Administrative Law* (2006) LexisNexis Butterworths

Harlow C "Law and Public Administration: Convergence and Symbiosis" 2005 (71) *International Review of Administrative Sciences* 279

Harris BV "The 'Third Source' of Authority for Government Action" 1992 (108) *Law Quarterly Review* 626

Harris M & Partington M *Administrative Justice in the 21st Century* (1999) Hart Publishing

Hart HLA *The Concept of Law* (1961) Claredon Press

Hatchard J "The Constitution of the Republic of South Africa" 1994 (38) *Journal of African Law* 70

Hawke N & Parpworth N *Introduction to Administrative Law* (1996) Cavendish Publishing Ltd

Hawkesworth ME & Kogan M *Encyclopedia of Government and Politics* (1992) Routledge

Hawthorne L "Abuse of a Right to Dismiss not Contrary to Good Faith" 2005 (17) *South African Mercantile Law Journal* 214

Hayson N & Plasket C "The War Against Law: Judicial Activism and the Appellate Division" 1988 (4) *South African Journal on Human Rights* 303

Head M *Administrative Law: Context and Critique* (2008) The Federation Press

Hegel GWF (translated by Dyde SW) *Philosophy of Right* (2001) Batoche Books

Heintzman R & Marson B "People, Service and Trust: Is there a public sector service value chain?" 2005 (71) *International Review of Administrative Sciences* 549

Henderson JH "The Curative Powers of the Constitution: Constitutionality and the New Ultra Vires Doctrine in the Justification and Explanation of Judicial Review of Administrative Action" 1998 (115) *South African Law Journal* 346

Hepple B "Can Collective Labour Law Transplants Work? The South African Example" 1999 (20) *Industrial Law Journal* 9

Hepple B "Restructuring Employment Rights" 1986 (15) *Industrial Law Journal (UK)* 69

Hepple B "The Future of Labour Law" 1995 (24) *Industrial Law Journal (UK)* 303

Hepple BA *Social and Labour Rights in a Global Context: International and Comparative Perspective* (2002) Cambridge University Press

Herling D & Lyon A *Briefcase on Constitutionalism and Administrative Law* (2004) Routledge

Hersch J "Fair Play at Work – The Common-law Right of Public Employees to a Hearing Prior to Retrenchment" 1993 (14) *Industrial Law Journal* 1131

Hlophe JM "A Response to Justice O'Regan" 2004 (121) *South African Law Journal* 445

Hlophe JM "Legitimate Expectation and Natural Justice: English, Australian and South African Law" 1987 (104) *South African Law Journal* 165

Hlophe JM "The Doctrine of Legitimate Expectation and the Appellate Division" 1990 (107) *South African Law Journal* 197

Hock C "Covenants In Restraint Of Trade: Do They Survive The Unlawful And Unfair Termination Of Employment By The Employer" 2003 (24) *Industrial Law Journal* 1231

Hoexter C "'Administrative Action' in the Courts" 2006 *Acta Juridica* 303

Hoexter C "Administrative Justice and Dishonesty" 1994 (111) *South African Law Journal* 700

Hoexter C "Clearing the Intersection? Administrative Law and Labour Law in the Constitutional Court" 2008 (1) *Constitutional Court Review* 209

Hoexter C "Contracts in Administrative Law: Life after Formalism" 2004 (121) *South African Law Journal* 595

Hoexter C "Judicial Policy Revisited: Transformative Adjudication in Administrative Law" 2008 (24) *South African Journal on Human Rights* 281

Hoexter C "The Future of Judicial Review in South African Administrative Law" 2000 (117) *South African Law Journal* 484

Hoexter C "The Principle of Legality in South African Administrative Law" 2004 (4) *Macquarie Law Journal* 165

Hoexter C *Administrative Law in South Africa* (2007) Juta & Co Ltd

Hoexter C with Lyster R & Currie I (ed) *The New Constitutional and Administrative Law: Volume Two Administrative Law* (2002) Juta & Co Ltd

Hole J *Lectures on Social Science and the Organization of Labour* (1851) John Chapman

Holland TE *Elements of Jurisprudence* (1916) Clarendon Press

Holthouse HJ & Penington H *A New Law Dictionary* (1999) The Lawbook Exchange Ltd

Homans GC "Social behavior as exchange" 1958 (63) *American Journal of Sociology* 597

Hoppit J "Counting the industrial revolution" 1990 (43) *Economic History Review* 173

Hornbeck JA "On Fair Employment Practice" 1973 (33) *Public Administration Review* 460

Howard C "Observations: Conceptualism, Law and Lawyers" 1965 (44) *Texas Law Review* 35

Hudson A *Towards a Just Society* (1999) Continuum International Publication Groups

Hughes OE *Public Management and Administration* (2003) Palgrave Macmillan

Hund J "Scepticism About Human Rights in South Africa" 1989 (5) *South African Journal on Human Rights* 26

Hunt A "A Theory of Critical Legal Studies" 1986 (6) *Oxford Journal of Legal Studies* 1

Hunter R & Keyes M *Changing Law: Rights, Regulations and Reconciliation* (2005) Ashgate Publishing Ltd

Huscroft & Taggart M *Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan* (2006) University of Toronto Press

Hutchinson AC & Petter A "Private Rights/Public Wrongs: The Liberal Lie of the Charter" 1989 (38) *University of Toronto Law Journal* 278

Hutchinson AC "Mice under a Chair: Democracy, Courts and the Administrative State" 1990 (40) *University of Toronto Law Review* 374

Hutchinson W "Is the Labour Appeal Court Succeeding in its Endeavours to Create Certainty in Our Jurisprudence?" 2001 (22) *Industrial Law Journal* 2223

Iacovino L *Recordkeeping, Ethics and Law* (2006) Springer

Ikhariale MA "The Doctrine of Legitimate Expectations: Prospects and Problems in Constitutional Litigation in South Africa" 2001 (45) *Journal of African Law* 1

Jabbari D "Critical Theory in Administrative Law" 1994 (14) *Oxford Journal of Legal Studies* 189

Jacob R "Exceptions to Procedural Fairness at Dismissal: Developments in English Law" 1988 (9) *Industrial Law Journal* 16

Jacobs ATJM *Labour Law in the Netherlands* (2004) Kluwer Law International

Jacobs SH *Regulatory Reform in the Netherlands* (1999) OECD Publishing

Janis MW, Kay RS, Bradley AW *European Human Rights Law: Text and Materials* (2008)

Jayakumar NK *Administrative Law* (2005) Prentice Hall

Jones RA "The Changing Structure of Industrial Relations in South Africa" 1985 (6) *Managerial and Decision Economics* 217

Jordaan B "Managerial Prerogative and Industrial Democracy" 1991 (11) *Industrial Law Journal* 1

Jordaan B "The Law of Contract and the Individual Employment Relationship" 1990 *Acta Juridica* 73

Joubert WA (ed) *Law of South Africa: Encyclopaedia* (1991 –) LexisNexis Butterworths

Jowell J & Oliver D (eds) *New Directions in Judicial Review* (1988) Stevens & Sons

Jowell J "The Democratic Necessity of Administrative Justice" 2006 *Acta Juridica* 13

Jowell J "To defer and when? Administrative Law and Constitutional Democracy" 2006 *Acta Juridica* 13

Jowell JL & Oliver D *The Changing Constitution* (2007) Oxford University Press

Ka Mdumbe F "The meaning of 'organ of state' in the South African Constitution" 2005 (20) *South African Public Law* 1

Kahn P *Picketing: Industrial Disputes, Tactics and the Law* (1983) Routledge

Kahn P, Lewis Nm, Livock R & Wiles P *Picketing: Industrial Disputes, Tactics and the Law* (1983) Routledge

Kahn-Freund O "A Note on Status and Contract in British Labour Law" 1967 (30) *Modern Law Review* 635

Kahn-Freund O *Labour and the Law* (1972) Stevens & Sons

Kaufman BE *Government Regulation of the Employment Relationship* (1997) Cornell University Press

Kennedy WPM & Schlosberg HJ *The Law and Custom of the South African Constitution* (1935) Stevens & Sons

Keppler V "Meer as 2600 oor staking ontplooi" Die Burger 9 June 2009

Kernaghan K "Encouraging 'Rightdoing' and Discouraging Wrongdoing: A Public Service Charter and Disclosure Legislation" 2008 (2) *Public Service and Transparency* 73

King NJ "Reasonableness Review after *Brooker*" 2007 (43) *Houston Law Review* 325

Kinley D *Human Rights in Australian Law* (1998) The Federation Press

Klaaren J (ed) *A Delicate Balance the Place of the Judiciary in a Constitutional Democracy* (2006) Siber Ink

Klaaren J "An audit of administrative action and the South African statute book: Research methods and conceptual issues" 2004 (19) *South African Public Law* 532

Klaaren J "Beyond *Administrator, Transvaal v Traub*: Legitimate Expectation in South African Administrative Law" 1990 (22) *Columbia Human Rights Law Review* 149

Klaaren J "Redlight, Greenlight" 1999 (15) *South African Journal on Human Rights* 209

Klaaren J "Three Waves of Administrative Justice in South Africa" 2006 *Acta Juridica* 370

Klaaren JE "Beyond *Administrator, Transvaal v. Traub*: Legitimate Expectations for South African Administrative Law" 1990 (22) *Columbia Human Rights Law Review* 172

Klare K "Legal Culture and Transformative Constitutionalism" 1998 (14) *South African Journal on Human Rights* 146

Klare K "Legal Subsidiarity and Constitutional Rights: A Reply to AJ van der Walt" 2008 (1) *Constitutional Court Review* 129.

Klare K "The Future of South African Labour Law: Some Questions from the Past and from Afar" 1997 (18) *Industrial Law Journal* 588

Klare K "Workplace Democracy and Market Reconstruction: An Agenda for Legal Reform" 1988 (38) *Catholic University Law Review* 28

Künnecke M *Tradition and Change in Administrative Law* (2007) Springer

Landman AA "Fair Labour Practices – The Wiehahn Legacy" 2004 (25) *Industrial Law Journal* 805

Landman AA "Freedom of Association in South African Labour Law" 1990 *Acta Juridica* 89

Landman AA "What Role for Justice in a World Class Labour Relations System?" 2001 *South African Journal of Labour Relations* 70

Landy FJ & Salas E *Employment Discrimination Litigation* (2005) John Wiley & Sons

Langa P "Transformative Constitutionalism" 2006 (17) *Stellenbosch Law Review* 351

Lange C, Rudolph T & Wessels J "Case Law: The Promotion of Administrative Justice Act 3 of 2000" 2004 (2) *Administrative Justice Act Newsletter* 1

Lange C, Rudolph T & Wessels J "Case Law: The Promotion of Administrative Justice Act 3 of 2000" 2008 (5) *Administrative Justice Act Newsletter* 1

Lauren PG *The Evolution of International Human Rights* (2003) University of Pennsylvania Press

Lauterpacht E *International Law Reports* (1982) Cambridge University Press

Laws J "Public Law and Employment Law: Abuse of Power" 1997 *Public Law* 455

Le Roux P "Substantive Competence of Industrial Courts" 1987 (8) *Industrial Law Journal* 183

Le Roux PAK & Van Niekerk A *The South African Law of Unfair Dismissal* (1994) Juta & Co Ltd

Le Roux R "The Anatomy of a Benefit: A Labyrinthine Enquiry" 2006 (27) *Industrial Law Journal* 53

Le Roux R "The Impact of the 2002 Amendments on Residual Unfair Labour Practices" 2002 (23) *Industrial Law Journal* 1699

Le Sueur A, Herberg JW & English R *Principles of Public Law* (1999) Cavendish Publishing

Leckey R *Contextual Subjects: Family, State and Relational Theory* (2008) University of Toronto Press

Lee RH "The Role of the Private Sector as a Catalyst for Change in South Africa" 1983 (82) *African Affairs* 461

Lee YS *Public Personnel Administration and Constitutional Values* (1992) Quorum

Leigh I & Lustgarten L "Employment, Justice and Detente: The Reform of Vetting" 1991 (54) *Modern Law Review* 613

Leigh I *Law, Politics, and Local Democracy* (2000) Oxford University Press

Lewis J "Fairness in South African Contract Law" 2003 (120) *South African Law Journal* 330

Lewis L & Sargeant M *Essentials of Employment Law* (2004) CIPD Publishing

Lewis ND *Law & Governance* (2001) Routledge

Leyland P & Woods T *Administrative Law* (1999) Blackstone Press Ltd

Leyland P, Woods T & Harden J *Administrative Law* (1997) Blackstone Press Ltd

Liebenberg S & Goldblatt B "The Interrelationship between Equality and Socio-Economic Rights under South Africa's Transformative Constitution" 2007 (23) *South African Journal on Human Rights* 335

Liebenberg S "Needs, Rights and Transformation: Adjudicating Social Rights" 2005 (20) *South African Public Law* 155

Limbach J "The concept of the Supremacy of the Constitution" 2001 (64) *Modern Law Review* 1

Lipset SM "The Social Requisite of Democracy Revisited: 1993 Presidential Address" 1994 (59) *American Sociological Review* 1

Llewellyn KN *The Common Law Tradition, Deciding Appeals* (1973) Little Brown

Longley D & James R *Administrative Justice: Central Issues in UK and European Administrative Law* (1999) Routledge

Lorch RS *Democratic Process and Administrative Law* (1980) Wayne State University Press

Lourie A "Administrative Law in South Africa*"* 1927 (44) *South African Law Journal* 10

Lovell T (ed) *(Mis)recognition, Social Inequality and Social Justice* (2008) Routledge

Lubbers JS *Developments in Administrative Law and Regulatory Practice* (1999) American Bar Association

Lyster R, Clarke S & Swiss S *Handbook of Public Interest Law* (1993) Legal Resource Centre

Macdonald RA "Judicial Review and Procedural Fairness in Administrative Law: I" 1980 (25) *McGill Law Journal* 520

Macfarlane J *Dispute Resolution: Readings and Case Studies* (2003) Emond Montgomery Publications Ltd

Mahomed I "Disciplining Administrative Power – Some South African Prospects, Impediments and Needs" 1989 (5) *South African Journal on Human Rights* 345

Maihofer W & Sprenger G *Law and the States in Modern Times* (1989) Fraz Steine Verlag

Maitland FW *Constitutional History of England* (2001) The Lawbook Exchange

Malan JJ "Democratic legislation and administrative action in view of recent case law" 2007 (22) *South African Public Law* 61

Malanczuk P *Akehurst's Modern Introduction to International Law* (1997) Routledge

Malherbe R "Privatisation and the Constitution: some explanatory observations" 2001 (1) *Tydskrif vir Suid-Afrikaanse Reg* 1

Manamela E "Consult your employees fairly" 2006 (14) *Juta Business Law* 27

Manamela TE "The Duty on the Employer to Consult prior to Dismissal for Reasons Based in Operational Requirements: Section 189 of the Labour Relations Act 66 of 1995 under the Spotlight" 2000 (12) *South African Mercantile Law Journal* 154

Mancini F *Democracy and Constitutionalism in the European Union* (2000) Routledge

Mandela N "The continuing struggle for social justice" 1994 (15) *Industrial Law Journal* 732

Mandelbrote HJ "The Royal Prerogative in the Union" 1936 (53) *South African Law Journal* 426

Mansell W & Meteyard B *A Critical Introduction to Law* (2004) Cavendish Publishing

Mapp SC *Human Rights and Social Justice in a Global Perspective* (2007) Oxford University Press

Marais NJ *Onbillike Arbeidspraktyke in die Suid-Afrikaanse Reg* (1989) Juta & Co Ltd

Marx FM "Administrative Ethics and the Rule of Law" 1949 (43) *American Political Science Review* 1119

Maveety N *The Pioneers of Judicial Behavior* (2003) University of Michigan Press

Mayer FC *Multi-Layered and multi-levelled? Public law architectures for the 21st century* (2006) Hart Publishing

McAuslan P "Administrative Law and Administrative Theory: The Dismal Performance of Administrative Lawyers" 1978 (9) *Cambrian Law Review* 40

McAuslan P *Bringing the law back in: Essays in land, law, and development* (2003) Ashgate Publishing Ltdw

McCrudden C "A Common Law of Human Rights?: Transitional Judicial Conversations on Constitutional Rights" 2000 (20) *Oxford Journal of Legal Studies* 499

McLean J "Personality and Public Law Doctrines" 1999 (49) *University of Toronto Law Journal* 123

McLean J "The Crown in Contract and Administrative Law" 2004 (24) *Oxford Journal of Legal Studies* 129

Mensah B *European Human Rights Case Summaries* 1960-2000 (2001) Routledge

Merton M "Stakers vandag afgedank" Die Burger 11 Junie 2007

Meyerson D "The Rule of Law and the Separation of Powers" 2004 (4) *Macquarie Law Journal* 1

Meyerson D *Rights Limited: Freedom of Expression, Religion and the South African Constitution* (1997) Juta & Co Ltd: Kenwyn

Michelman F "Bringing the Law to Life: A Plea for Disenchantment" 1989 (74) *Cornell Law Review* 256

Miller AS "The Elusive Search for Values in Constitutional Interpretation" 1979 (6) *Hastings Constitutional Law Quarterly* 487

Mireku O "Speaking with the Voice of an Oracle and the Administrative Justice Clause: Incompatible Bedfellows?" 1995 (1) *South African Journal on Human Rights* 494

Mischke C "Conflict Colonization – the Juridification of Industrial Action" 1992 (4) *South African Mercantile Law Journal* 157

Moncrieffe J & Eyben R *The Power of Labelling* (2007) Earthscan

Morgan WR & Sawyer J "Equality, equity, and procedural justice in social exchange" 1979 (42) *Social Psychology Quarterly* 71

Morin ML "Labour law and new forms of corporate organization" 2005 (144) *International Labour Review* 5

Morris GS & Fredman SS "Civil Servants: A Contract of Employment" 1988 *Public Law* 58

Morris GS & Fredman SS "Is There a Public/Private Labour Law Divide?" 1993 (14) *Comparative Labour Law Journal* 115

Morris GS & Fredman SS "Judicial Review and Civil Servants Contracts of Employment Declared to Exist" 1991 *Public Law* 485

Morris GS & Fredman SS "The Cost of Exclusivity: Public and Private Re-Examined" 1994 *Public Law* 69

Morris GS "Employment in Public Services: The Case for Special Treatment" 2000 (20) *Oxford Journal of Legal Studies* 167

Morris GS "Fundamental Rights: Exclusion by Agreement?" 2001 (20) *Industrial Law Journal (UK)* 49

Morris GS "Industrial Action in Essential Services: The New Law" 1991 (20) *Industrial Law Journal (UK)* 89

Morris GS "Public Employment and the Human Rights Act 1998" 2001 *Public Law* 442

Morris GS "The Human Rights Act and the Public/Private Divide in Employment Law" 1998 (27) *Industrial Law Journal (UK)* 293

Morton FL *Law, Politics and the Judicial Process in Canada* (2002) University of Calgary Press

Mossholder KW, Bennett N and Martin CL "A multilevel analysis of procedural justice context" 1998 (19) *Journal of Organizational Behavior* 131

Mueller GE "The Hegel Legend of 'Thesis-Antithesis-Synthesis" 1958 (19) *Journal of the History of Ideas* 411

Mulgan R "Outsourcing and Public Service Values: the Australian Experience" 2005 (71) *International Review of Administrative Sciences* 55

Mullan DJ "Fairness: the New Natural Justice" 1975 (25) *University of Toronto Law Journal* 281

Mullan DJ "Natural Justice and Fairness – Substantive as well as Procedural Standards for the Review of Administrative Decision-Making?" 1982 (27) *McGill Law Journal* 250

Mullan DJ "Substantive Fairness Review: Heed the Amber Light!" 1988 (18) *Victoria University Law Review* 293

Mullin DJ *Administrative Law: Cases, Text, and Material* (2003) Emond Montgomery Publications

Mureinik E "A Bridge to Where? Introducing the Interim Bill of Rights? 1994 (10) *South African Journal on Human Rights* 31

Mureinik E "Administrative Law in South Africa" 1986 (103) *South African Law Journal* 615

Mureinik E "Invalid Dismissals: Reinstatement and Other Remedies" 1980 (1) *Industrial Law Journal* 41

Mureinik E "Natural Justice for Students: The Case of the Undisciplined Contract" 1985 (1) *South African Journal on Human Rights* 48

Mureinik E "Pursuing Principle: The Appellate Division and Review Under the State of Emergency" 1989 (5) *South African Law Journal* 60

Mureinik E "Reconsidering Review: Participation and Accountability" 1993 *Acta Juridica* 35

Myburgh AT "*Sidumo v Rustplats*: How the Courts have Dealt with it?" 2009 (30) *Industrial Law Journal* 1

Myburgh J & Van Niekerk A "Dismissal as a Penalty for Misconduct: The Reasonable Employer and Other Approaches" 2000 (21) *Industrial Law Journal* 2145

Neal AC *The Changing Face of European Labour Law and Social Policy* (2004) Kluwer Law International

Nedelsky J "Reconceiving Rights as Relationships" 1993 (1) *Review of Constitutional Studies* 1

Neethling T "The development of normative theory in International Relations" 2004 69(1) *Koers* 1

Ngalwana V "The Supreme Court of Appeal is not the Apex Court in all Non-constitutional Appeals" 2006 (27) *Industrial Law Journal* 2000

Ngcukaitobi T & Brickhill J "A Difficult Boundary: Public Sector Employment and Administrative Law" 2007 (28) *Industrial Law Journal* 769

Ngcukaitobi T "Adjudicating Transformation in the Labour Courts – An Edifice on the Rise?" 2007 (28) *Industrial Law Journal* 1436

Ngcukaitobi T "Direct Application of the Constitution in the Labour Court: A Note on *Piliso v Old Mutual Co (Pty) Ltd & Others* (2007) 28 ILJ 897 (LC)" 2007 (28) *Industrial Law Journal* 2178

Ngcukaitobi T "Life After Chirwa: Is There Scope for Harmony Between Public Sector Labour Law and Administrative Law? 2008 (29) *Industrial Law Journal* 841

Ngwena C "Interpreting Aspects of the Intersection Between Disability, Discrimination Between Disability: Lessons for the Employment Equity Act from Comparative Law – Part II Reasonable Accommodation" 2005 (3) *Stellenbosch Law Review* 534

Nolan DR *The Australasian Labour Law Reforms* (1998) The Federation Press

Norton D "What is (and what isn't) a 'constitutional matter' in the context of labour law?" 2009 (30) *Industrial Law Journal* 772

O'Byrne SK "Public Power and Private Obligation: An Analysis of the Government Contract" 1992 (14) *Dalhousie Law Journal* 485

O'Regan C "1979–1997 Reflecting on 18 Years of Labour Law in South Africa" 1997 (18) *Industrial Law Journal* 889

O'Regan C "Breaking Ground: Some Thoughts on the Seismic Shift in our Administrative Law" 2004 (121) *South African Law Journal* 424

O'Regan C "Rules for Rule-Making: Administrative Law and Subordinate Legislation" 1993 *Acta Juridica* 157

Olivier D *Common Values and the Public-Private Divide* (1999) Cambridge University Press

Olivier MP "Labour Relations Legislation for the Public Service: An International and Comparative Perspective" 1993 (14) *Industrial Law Journal* 1371

Olivier MP "Public Sector Employment Law: Recent Case Law Developments in South Africa" 1994 (9) *South African Public Law* 50

Olowu B "Redesigning African Civil Service Reform" 1999 (37) *Journal of Modern African Studies* 1

Oosthuizen M "Unfair Dismissals – Individual Cases" 1990 (1) *South African Human Rights Year Bulletin* 356

Organisation for Economic Co-operation & Development *The State of the Public Service* (2008) OECD

Orrie G "An unfair labour practice'" 1994 (2) *Juta's Business Law* 141

Papadimitriou KD "The Managerial Prerogative and the Right and Duty to Collective Bargaining in Greece" 2009 (30) *Comp. Labour Law and Policy Journal* 273

Partington J & Van der Walt A "Re(viewing) the Constitutional Court's decision in Sidumo" 2008 *Obiter* 209

Peerenboom RP *Asian Discourses of Rule of Law* (2004) Routlege

Peerenboom RP *China's Long March Towards Rule of Law* (2002) Cambridge University Press

Penning P "Explaining Variations in Public Employment" 1999 (40) *International Journal of Comparative Sociology* 332

Perritt HH *Employee Dismissal: Law and Practice* (1999) John Wiley & Sons

Perritt HH *Employee Dismissal: Law and Practice* (2006) Aspen Publishers

Pfaff R & Schneider H "The Promotion of Administrative Justice Act from a German Perspective" 2001 (17) *South African Journal on Human Rights* 59

Phillipson G *Text, Cases & Materials on Public Law & Human Rights* (2003) Cavendish Publishing

Pillay A "Reviewing Reasonableness: An Appropriate Standard for Evaluating State Action and Inaction" 2005 (122) *South African Law Journal* 413

Pillay D "PAJA v Labour Law" 2005 (20) *South African Public Law* 413

Pitt G "Justice in Dismissal: A Reply to Hugh Collins" 1993 (22) *Industrial Law Journal (UK)* 251

Plasket C & Khoza F "The Fundamental Right to Reason for Administrative Action: Moletsane v The Premier of the Free State (1996) 17 ILJ 251 (O)" 2001 (22) *Industrial Law Journal* 52

Plasket C "Rattling the Chains of Sibanyoni's Ghost: Contract and Natural Justice Revisited in the Ciskei High Court" 1999 (20) *Industrial Law Journal* 2228

Playforth J "The Veil of Vagueness: Reasonableness Review in *Rita v United States* 127 S.Ct. 2456 (2007)" 2008 (31) *Harvard Journal of Law and Public Policy* 841

Plewman RP "General Principles Governing Employment in the Public Service" 1955 (72) *South African Law Journal* 70

Pohlman HL *Justice Oliver Wendell Holmes: Free Speech and the Living Constitution* (1993) New York University Press

Pollard D, Parpworth N & Hughes D *Constitutional and Administrative Law: Text with Materials* (2007) Oxford University Press

Poole T "Judicial Review and Public Employment: Decision-Making on the Public-Private Divide" 2000 (29) *Industrial Law Journal (UK)* 61

Poole T "Legitimacy, Rights and Judicial Review" 2005 (25) *Oxford Journal of Legal Studies* 697

Poolman T *Principles of Unfair Labour Practice* (1985) Juta & Co Ltd

Posel D "Whiteness and Power in the South African Civil Service: Paradoxes of the Apartheid State" 1999 (25) *Journal of Southern African Studies* 99

Pound R "How far are we from attaining a new measure of values in Twentieth-Century juristic thought?" 1936 (42) *West Virginia Law Quarterly* 1935

Pound R *Administrative Law: It's Growth, Procedure and Significance* (1981) University of Pittsburgh Press

Pretorius DM "Ten Years After Traub: The Doctrine of Legitimate Expectation in South African Administrative Law" 2000 (117) *South African Law Journal* 520

Pretorius DM "The Defence of the Realm: Contract and Natural Justice" 2002 (119) *South African Law Journal* 374

Pretorius DM "The Wisdom of Solomon: The Obligation to Exhaust Domestic Remedies in South African Administrative Law" 1999 (116) *South African Law Journal* 113

Pretorius PJ & Pitman DJM "Good Cause for Dismissal: The Unprotected Employee and Unfair. Dismissal" 1990 *Acta Juridica* 133

Pretorius PJ "Legal Representation in the Industrial Court" 1986 (7) *Industrial Law Journal* 18

Prettyman EB "The Nature of Administrative Law" 1958 (44) *Virginia Law Review* 685

Quevedo SM "Formalist and Instrumentalist Legal Reasoning and Legal Theory" 1985 (73) *California Law Review* 119

Quinot G "An Administrative Law Perspective on "Bad Building" Evictions in the Johannesburg Inner City" 2007 (8) *Economic and Social Rights Review* 25

Quinot G "Labour Law and Administrative Law: Uneasy Bed-Fellows?" 2000 *Responsa Meridiana* 16

Quinot G "Substantive Legitimate Expectations in South African and European Administrative Law" 2004 (5) *German Law Journal* 65

Quinot G "The developing doctrine of substantive protection of legitimate expectation in South African administrative law" 2004 (19) *South African Public Law* 543

Rabin J, Hildreth WB, Miller G *Handbook of Public Administration* (2006) Marcel Dekker

Rautenbach C *General Provisions of the South African Bill of Rights* (1995) LexisNexis Butterworths

Rawls J "Justice as fairness: Political not metaphysical" 1985 (14) *Philosophy & Public Affairs* 223

Rawls J *A Theory of Justice* (1971) Harvard University Press

Rawls J *Political Liberalism* (1993) Columbia University Press

Raz J "One of the Nature of Rights" 1984 (93) *Mind* 194

Raz J "The Rule of Law and its Virtue" 1977 (93) *Law Quarterly Review* 195

Règibald G "Correctness, Reasonableness and Proportionality: A New Standard of Judicial Review" 2005 (31) *Manitoba Law Journal* 239

Richardson EC *Administrative Law and Procedure* (1995) Cengage Learning

Rideout RW "The Contract of Employment" 1966 (19) *Current Legal Problems* 111

Rideout RW with Dyson JC *Rideout's Principles of Labour Law* Sweet & Maxwell (1983)

Riley J *Employee Protection at Common Law* (2005) The Federation Press

Roberts M "Public Law Representations and Substantive Legitimate Expectations" 2001 (64) *Modern Law Review* 112

Robertson D "Thick Constitutional Readings: When Classic Distinctions are Irrelevant" 2007 (35) *Georgia Journal of International and Comparative Law* 277

Rodgers WH "The Natural Law of Administrative Law" 1983 (48) *Missouri Law Review* 101

Roederer C & Moellendorf D *Jurisprudence* (2004) Juta & Co Ltd

Roos J "Labour Law in South Africa 1976–1986: The Birth of a Legal Discipline" 1987 *Acta Juridica* 94

Rosenbloom DH & O'Leary R *Public Administration and Law* (1997) CRC Press

Rubin N "International Labour Law and the Law of the New South Africa" 1998 (115) *South African Law Journal* 685

Ruffert M *The Transformation of Administrative Law in Europe* (2007) Sellier

Rumble WE "American Legal Realism and the Reduction of Uncertainty" 1964 (13) *Journal of Public Law* 45

Rycroft A & Jordaan B *A Guide to South African Labour Law* (1992) Juta & Co Ltd

Rycroft A "Between Employment and Dismissal: The Disciplinary Procedure" 1985 (6) *Industrial Law Journal* 405

Rycroft A "Corporate Restructuring and 'Applying for Your Own Job'" 2002 (23) *Industrial Law Journal* 678

Rycroft A "Is There Still a Right to Employment on Notice Without Reasons?" 1989 (106) *South African Law Journal* 270

Rycroft A "The Duty to Bargain in Good Faith" 1988 (9) *Industrial Law Journal* 202

Sadurski W *Constitutional Justice, East and West* (2002) Springer

Sampforth CJG, Preston N & Bois C *Public Sector Ethics: Finding and Implementing Values* (1998) Routledge

Saunders C & Le Roy K *The Rule of Law* (2003) The Federation Press

Schmidt F "On Social Contracts in the Making of Labour Law" 1974 (3) *Industrial Law Journal (UK)* 69

Schubert G "The Rhetoric of Constitutional Change" 1967 (16) *Journal of Public Law* 16

Schwarze J *European Administrative Law* (1992) Sweet & Maxwell

Sciarra S *Labour Law in the Courts: National Judges and the European Court of Justice* (2001) Hart Publishing

Scott C & Alston P "Adjudicating Constitutional Priorities in a Transnational Context" 2000 (16) *South African Journal on Human Rights* 206

Scott C "Social Rights: Towards a Principled, Pragmatic Judicial Role" 1999 (1) *Economic and Social Rights Review* 4

Scott C "The Interdependence and Permeability of Human Rights Norms Towards a Partial Fusion of the International Covenants on Human Rights" 1989 (27) *Osgoode Hall Law Journal* 769

Seccombe M *Integration through Law* (1986) Walter de Gruyter

Seddon N "The Interaction of Contract and Executive Power" 2003 (31) *Federal Law Review* 541

Sedley S "Public Law and Contractual Employment" 1994 (23) *Industrial Law Journal (UK)* 201

Seidman-Makgetla N "A New Labour Policy for the Public Service" 2000 (17) *Indicator South Africa* 18

Servais JM *International Labour Law* (2005) Kluwer Law International

Shakespeare W *Romeo and Juliet* (2001) Classic Books Company

Shany Y The Competing Jurisdictions of International Courts and Tribunals (2003) Oxford University Press

Shapiro I, Skowronek & Galvin D *Rethinking Political Institutions: the Art of the State* (2006) New York University Press

Shapiro M *Courts: A Comparative and Political Analysis* (1986) University of Chicago Press

Shapiro MM & Sweet AS *On Law, Politics and Judicialization* (2002) Oxford University Press

Sheehan G "Labour Administration: The response to the crisis" 1992 (131) *International Labour Review* 155

Sidiqui AMAH *Labour Administration for Social and Economic Justice* (1989) International Labour Organisation

Singer JW "Legal Realism Now" 1988 (76) *California Law Review* 465

Singh MP *German Administrative Law in Common Law Perspective* (2001) Springer

Sklar RL "Developmental Democracy" 1987 (29) *Comparative Studies in Society and History* 686

Smit N "Should transfer of undertakings be statutory regulated in South Africa?" 2003 (2) *Stellenbocsh Law Review* 205

Smit N "Towards social justice: an elusive and a challenging endeavour" 2010 *Tydskrif vir Suid-Afrikaanse Reg* 1

Smith GA "Public Duty and Private Power in Administrative Law" 1990 (40) *University of Toronto Law Journal* 412

Smith RA & McLaughlin DB "Public Employment: A Neglected Area of Research and Training in Labor Relations" 1962 (16) *Industrial and Labor Relations Review* 30

Solum LB "Natural Justice" 2006 (51) *American Journal of Jurisprudence* 65

Sossin LM "An Intimate Approach to Fairness, Impartiality and Reasonableness in Administrative Law" 2002 (27) *Queen's Law Journal* 809

Spero SD "Collective Bargaining in Public Employment: Form and Scope" 1962 (22) *Public Administration Review* 1

Staats EB "Public Service and the Public Interest" 1988 (48) *Public Administration Review* 601

Stacey R "Administrative Law in Public Sector Employment Relationships" 2008 (125) *South African Law Journal* 307

Stacey R "Democratising review: justifiability as the animating vision of administrative law" 2007 (22) *South African Public Law* 79

Steenkamp A "W[h]ither the Labour Courts? The Superior Courts Bill and the Future of the Labour Courts" 2006 (27) *Industrial Law Journal* 18

Steinberg C "Can Reasonableness Protect the Poor?" 2006 (123) *South African Law Journal* 264

Sterett SM *Creating Constitutionalism? The Politics of Legal Expertise and Administrative Law in England and Wales* (1997) University of Michigan Press

Stewart A & Williams B *Work Choices What the High Court Said* (2007) The Federation Press

Stewart A "The Characteristics of the State as Employer: Implications for Labour Law" 1995 (16) *Industrial Law Journal* 15

Stewart C "Substantive Unfairness: A New Species of Abuse of Power?" 2000 (28) *Federal Law Review* 617

Stiglitz JE & Chatlton AHG *Fair Trade for All: How Trade Can Promote Development* (2005) Oxford University Press

Storey J *The Challenge to Management Control* (1980) Kogan Page Ltd

Strickland DC "State Administrative Law" 1982 (69) *Women Lawyers Journal* 4

Stroink FAM, Linden ECHJ & Van der Linden E *Judicial Lawmaking and Administrative Law* (2005) Intersentia

Strydom EML "The Origin, Nature and Ambit of Employer Prerogative (Part 1)" 1999 (11) *South African Mercantile Law Journal* 40

Strydom EML "The Origin, Nature and Ambit of Employer Prerogative (Part 2)" 1999 (11) *South African Mercantile Law Journal* 311

Stulberg JB "Fairness and Mediation" 1998 (13) *Ohio St Journal on Dispute Resolution* 909

Sturm D "A Prospective View of the Bill of Rights: Towards a New Constitutionalism" 1996–1999 (13) *Journal of Law and Religion* 27

Sullivan ET & Frase RS *Proportionality Principles in American Law* (2008) Oxford University Press

Sullivan KM "The Justice of Rules and Standards 1992 (106) *Harvard Law Review* 22

Supiot A & Meadows P *Beyond Employment* (2001) Oxford University Press

Swaigen J *Administrative Law Principles and Advocacy* (2005) Emond Montgomery Publications

Swanepoel B, Erasmus B, Van Wyk M & Shenk H *South African Human Resource Management: Theory and Practice* (2003) Juta & Co Ltd

Swart GJ "The Constitutional Criteria for Legislative Differentiation in the Economic Sphere – An Appraisal of Judicial Deference towards the Legislature after *Jooste v Score Supermarket Trading* 1999 (11) *South African Mercantile Law Journal* 250

Taggart M (ed) *The Province of Administrative Law* (1997) Hart Publishing

Taitz J "The application of the *audi alteram partem* rule in South African administrative law" 1982 (45) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 254

Takirambudde PN "Protection of Labour Rights in the Age of Democratization and Economic Restructuring in Southern Africa" 1995 (39) *Journal of African Law* 39

Tamanaha BZ "Pragmatism in US Legal Theory: Its Application to Normative Jurisprudence, Sociological Studies, and the Fact-Value Distinction" 1996 (41) *American Journal of Jurisprudence* 315

Tamanha BZ *On the Rule of Law: History, Politics, Theory* (2004) Cambridge University Press

Tamir M "Public Law as a Whole and Normative Duality: Reclaiming Administrative Insight in Enforcement Review" 2006 (12) *Texas Journal on Civil Liberties and Civil Rights* 43

Taruffo M *Abuse of Procedural Rights: Comparative Standards of Procedural Fairness* (1999) Kluwer Law International

Teitel RG *Transitional Justice* (2000) Oxford University Press

Thomas D (ed) *Canada and the United States: Differences that Count* (2000) Broadview Press

Thomas PH "The South African common law into the twenty-first century" 2005 (2) *Tydskrif vir Suid-Afrikaanse Reg* 292

Thomas R *Legitimate Expectations and Proportionality in Administrative Law* (2000) Hart Publishing

Towers B *The Handbook of Employment Relations: Law and Practice* (2004) Kogan Page Publishers

Trebilcock A "Structural Adjustment and Tripartite Consultation" 1996 (9) *International Journal of Public Sector Management* 5

Trebilock A (ed) *European Labour Courts: Remedies and Sanctions in Industrial Action* (1995) International Labour Organisation

Trebilock A *European Labour Courts: Remedies and Sanctions in Industrial Action* (1995) International Labour Organisation

Trudeau G "Changing Employment Relationships and the Unintentional Evolution of Canadian Labour Relations Policy" 2002 (28) *Canadian Public Policy* 149

Unah I *The Courts of International Trade* (1998) University of Michigan Press

United Nations *Multilateral Treaty Framework: An Invitation to Universal Participation* (2003) United Nations Publications

Valerie A & Levi BM *Trust and Governance* (1998) Russell Sage Foundation

Van der Bank L, Engelbrecht AS & Strumpher J "Perceived fairness of disciplinary procedures in the public service sector: an exploratory study: empirical research" 2008 (6) *South African Journal of Human Resource Management* 1

Van der Merwe FJ "Die Reg op die Handhawing van Billike Arbeidspraktyke (en Skakeling tussen Partye in die Diensverhouding) 1988 (9) *Industrial Law Journal* 749

Van der Vyver JD "Die Nywerheidshof" 1981 (2) *Industrial Law Journal* 159

Van der Walt AJ "Normative Pluralism and Anarchy: Reflections of the 2007 Term" 2008 (1) *Constitutional Court Review* 77

Van der Walt J & Botha H "Democracy and Rights in South Africa: Beyond a Constitutional Culture of Justification" 2000 (7) *Constellations* 341

Van Dokkum N "Legal Representation at the CCMA" 2000 (21) *Industrial Law Journal* 836

Van Eck S "Labour Dispute Resolution in the Public Service: The Mystifying Complexity Continues: *Transnet Ltd & others v Chirwa* (2006) 27 ILJ 793 (SCA)" 2007 (28) *Industrial Law Journal* 793

Van Eck S "The Constitutionalisation of Labour Law: No Place for a Superior Labour Appeal Court in Labour Matters (Part 1): Background to South African Labour Courts and the Constitution" 2005 *Obiter* 549

Van Eck S "The Constitutionalisation of Labour Law: No Place for a Superior Labour Appeal Court in Labour Matters (Part 2): Erosian of the Labour Court's Jurisdiction" 2006 *Obiter* 20

Van Eck S "The Right to a Pre-Dismissal Hearing in terms of the Common Law: Are the Civil Courst Misdirected?" 2008 *Obiter* 339

Van Eck S and Jordaan-Parkin R "Administrative, Labour and Constitutional Law – A Jurisdictional Labyrinth" 2006 (27) *Industrial Law Journal* 1987

Van Eck S and Lombard S "Dismissal of executive directors: comparing principles of company law and labour law" 2004 (1) *Tydskrif vir Suid-Afrikaanse Reg* 20

Van Eck S, Boraine A and Steyn L "Fair Labour Practices in South African Insolvency Law" 2004 (121) *South African Law Journal* 902

Van Gramberg B *Managing Workplace Conflict: Alternative Dispute Resolution* (2005) The Federation Press

Van Jaarsveld F "Kollektiewe Sienings oor Kollektiewe Bedinging deur die Konstitusionele Hof" 2008 (71) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 124

Van Jaarsveld MI "Contractual Autonomy, Legislative Intervention and Recruitment in Employment: What Remains?" 2006 (18) *South African Mercantile Law Journal* 356

Van Jaarsveld SR, Fourie JD & Olivier MP "Labour Law" *Law of South Africa* Volume 13(1) (2000) LexisNexis Butterworths

Van Rensburg J "Don't belabour the new administrative justice legislation" 2001 (8) *Juta Business Law* 63

Van Uytrecht P "Conflict, Power, Labour Relations and Labour Law" 1995 (16) *Industrial Law Journal* 29

Van Wyk D "Administrative Justice in *Bernstein v Bester and Nel v Le Roux*" 1997 (13) *South African Journal on Human Rights* 249

Verloren Van Themaat R "*Het Algemeen Nederlands Administratiafreg* by Vegting WG, Samson NV and Alphen aan den Ryn NV" 1956 (19) *Tydskrif vir Heedendaagse Romeins-Hollandse Reg* 160

Vettori S "The disclosure of information in disciplinary enquiries" 2008 (71) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 240

Vettori S *The Employment Contract and the Changed World of Work* (2007) Ashgate Publishing Ltds

Vickers L "Unfair Dismissal and Human Rights" 2004 (33) *Industrial Law Journal* 52

Viljoen H "Nogmaals *Traub*" 1990 (5) *South African Public Law* 277

Vining J *Legal Identity: The Coming of Age of Public Law* (1978) Yale University Press

Wade HWR & Forsyth CF *Administrative Law* (2000) Oxford University Press

Wade HWR *Administrative Law* (1988) Clarendon Press

Waglay B "The Proposed Re-Organization of the Labour Court and the Labour Appeal Court" 2003 (24) *Industrial Law Journal* 1223

Wakwa-Mandlana WM & Plasket C "Administrative Law" 2005 *Annual Survey of South African Law* 104

Wallis MJD "The New LRA – How Decisive is the Break From the Past?" 1997 (18) *Industrial Law Journal* 902

Ward I *The English Constitution: Myths and Realities* (2004) Hart Publishing

Wedderburn KW, Lewis R & Clarke J *Labour Law and Industrial Relations Building on Kahn-Freund* (1989) Claredon Press

Weeramanrty CG, Anghie A & Sturgess G *Legal Visions of the 21st Centuary* (1998) *Kluwer Law International*

Weissbrodt D & De la Vega C *International Human Rights Law: An Introduction* (2007) University of Pennsylvania Press

Wellington HH & Winter RK "The Limits of Collective Bargaining in Public Employment" 1969 (78) *Yale Law Journal* 1107

Wharton JJS *The Law Lexicon, or Dictionary of Jurisprudence* (1848) F.B. Rothman

Whittacker S "Judicial Review in Public Law and in Contract Law: The Example of 'Student Rules'" 2001 (21) *Oxford Journal of Legal Studies* 193

Wiechers M "Administrative Law and the Benefactor State" 1993 *Acta Juridica* 248

Wiechers M "Le Roux v Minister van Bantoe-Administrasie, 1966 (1) S.A. 481 (A)" 1966 (29) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 157

Wiechers M "Que vadis geregtelike hersiening van administratiewe handelinge?" 2005 (3) *Tydskrif vir Suid-Afrikaanse Reg* 469

Wiechers M *Administartiefreg* (1985) LexisNexis Butterworths

Wiehahn NE *Die Volledige Wiehahn Verslag Aantekeninge: Dele 1 – 6 en die Witskrif op Elke Deel* (1982) Lex Patria

Wiel P "Towards Relative Normativity in International Law" 1983 (77) *American Journal of International Law* 413

Wiggan J "Reforming the United Kingdom's public employment and social security agencies" 2007 (73) *International Review of Administrative Sciences* 409

Williams G *Labour Law and the Constitution* (1998) The Federation Press

Williams SG "Indeterminacy and the Rule of Law" 2004 (24) *Oxford Journal of Legal Studies* 539

Wilson A "Contract and Prerogative: A Reconsideration of the Legal Enforcement of Collective Agreements" 1984 (13) *Industrial Law Journal (UK)* 1

Wilson P *Cases and Materials on Constitutional and Administrative Law* (1976) Cambridge University Press

Winslow VS "Disciplining Public Servants: The Exorcism of a Phantom Doctrine?" 1983 (25) *Malaya Law Review* 87

Woodruff CR "Private and Public Employment Contrasted" 1923 (29) *American Journal of Sociology* 208

Woolman S & Bishop M (eds) *Constitutional Conversations* (2008) Pretoria University Law Press

Woolman S, Roux T, Bishop M, Klaaren J, Stein A & Chaskalson M (eds) *Constitutional Law of South Africa* 2nd Edition Juta & Co Ltd

Woolman S, Roux T, Bishop M, Klaaren J, Stein A & Chaskalson M (eds) *Constitutional Law of South Africa* 1st Edition Juta & Co Ltd

Wright M *Labour Law* (1976) MacDonald & Evans

Wynn M "Unfair Dismissal – The Ghost of *Byrne* Resurrected?" 1995 (24) *Industrial Law Journal (UK)* 272

Zajac EE *Political Economy of Fairness* (1996) MIT Press

2 Conference Papers

Chanock M *Legal culture, state making and colonialism* Paper delivered at the Post Graduate Research Seminar: University of Stellenbosch, 4 August 2006

Galligan DJ *Administrative procedures and administrative oversight: their role in promoting public service ethics* Paper delivered at the Multi-country Seminar on Normative and Institutional Structures Supporting Public Service Ethics: Paris, 5 November 1997

Oliver M *Reshaping private and public employment in South Africa: The impact of the Constitution and the Bill of Rights*" Paper delivered at the Public Law Conference: Stellenbosch University – Alexander von Humboldt Foundation, 8 – 10 September 2005

Plasket C *Administrative Action: The Constitution and the Promotion of Administrative Justice Act 3 of 2000* Paper delivered at the Legal Resource Centre seminar on the Promotion of Administrative Justice Act 3 of 2000: Johannesburg, 23 October 2001

Rothman S *The Evolution of Labour Law and Significance of Workchoices* Paper delivered at the 15th Annual Law Conference: Workplace Research Centre and Sydney Law School, The University of Sydney, 10 August 2006

Spigelman JJ *Foundations of Administrative Law* Paper delivered at the 1998 SPANN Oration 7 September 1998

3 Dissertations

Plasket C "The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa" PhD (2002) Rhodes University

Quinot G "Judicial Regulation of State Commercial Activity" LLD (2007) University of Stellenbosch

Strydom EML "Employer Prerogative from a Labour Law Perspective" LLD (1997) University of South Africa

Vettori MS "Alternative means to regulate the employment relationship in the changing world of work" LLD (2005) University of Pretoria

4 International Instruments

1968 Proclamation of Tehran

GA Resolution 32/130

GA Resolution 41/117

International Covenant on Civil and Political Rights

International Covenant on Economic, Social and Cultural Rights

Plenary of the GA (Cassin from France) A/Pv 375 (1952) (France) 514/19

Separation Resolution 543(VI)

Unity Resolution 421(V)

5 Internet Sources

50 Years of the African Charter: A Cause to Celebrate? (by Blake M)
http://www.wwrp.org.za/documents/FCbookwww.pdf
(accessed 2006/03/23)

Batho Pele: People First

http://www.kznhealth.gov.za/bathopele.htm

(accessed 2009/10/08)

Chronology of Apartheid Legislation

http://www.stanford.edu/class/history48q/Documents/EMBARGO/1chap13.htm

(accessed 2006/03/20)

Civil Service Law & Employment Regimes (by Sunnerstrom S, Lalazarian K, Manning N with Parison N & Rinne J)

http://web.worldbank.org/wbsite/external/topics

(accessed 2008/10/31)

Comparative Institutional Diagnosis of Civil Service Systems (by Longo F)

http://www.iadb.org/IDBDocs.cfm

(accessed 2008/10/31)

Comparative Study of Contents of Civil Service Statutes (by Hodges Aeberhard J)

http://www.ilo.org/public/english/dialogue/ifpdial/downloads/gllad/cs.pdf

(accessed 2008/10/31)

Constitutional Court tries to fix its own balls-up (by De Vos P)

http://constitutionallyspeaking.co.za

(accessed 2009/10/20)

Constitutionalism (by Waluchow W)

http://plato.stanford.edu/entries/constitutionalism

(accessed 2008/02/10)

Contemporary Issues in Human Rights (by Türmen R)

http://www.sam.gov.tr/perceptions/Volume2/March-May1997

(accessed 2008/10/15)

Courts and the Rule of Law (by Gleeson M)

http://www.hcourt.gov.au.speeches/cj/cj_ruleoflaw.htm

(accessed 2006/03/03)

Dictionary.com

http://dictionary.reference.com

(accessed 2009/09/09)

Disciplinary Enquiries (by Collier D)

http://www.lexisnexis.co.za/ServicesProducts/presentations/17th/DebbieCollier.doc

Employment Services: Public Employment Services in English-speaking African (by Schulz G and Klemmer B)
http://www.ilo.org/public/english/employment/skills/empserv/publ/schulz.htm
(accessed 2008/10/31)

Foundations of Administrative Law (by Spigelman JJ)
http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/
(accessed 2008/05/16)

Global Administrative Law: The Quest for Principles and Values (by Harlow C)
http://ejil.oxfordjournals.org/cgi/content/abstract/17/1/187
(accessed 2008/07/15)

Implementing Effective Ethics Standards in Government and the Civil Service (by Whitton H)
http://www.oecd.org/dataoecd/62/57/35521740.pdf
(accessed 2008/10/31)

Individualism and Collectivism in Agreement-Making under Australian Labour Law (by Frazer AD)
http://ro.uow.edu.au/lawpapers/7
(accessed 2006/09/25)

Industrial Revolution
http://www.search.eb.com/eb/article-9042370
(accessed 2008/10/18)

Kant's Moral Philosophy (by Johnson R)
http://plato.stanford.edu/entries/kant-moral/
(accessed 2008/02/15)

Labour Law (by Jenks CW and Schregle J)
http://www.search.eb.com/eb/article-12751
(accessed 2008/10/18)

Minimum Standards Directorate Policy Proposals for a New Employment Standards Statute Green Paper (by the Department of Labour)
http://www.info.gov.za/greenpapers/1996/labour.htm
(accessed 2007/05/30)

NEHAWU
http://www.nehawu.org.za
(accessed 2009/10/08)

Political Obligation (by Dagger R)
http://plato.stanford.edu/entries/political-obligation/
(accessed 2008/02/15)

Public Authorities: The Developing Definition (by Carss-Frisk M)
http://www.blackstonechambers.com
(accessed 2008/10/31)

Public Justification (by D'Agostino F)
http://plato.stanford.edu/entries/justification-public/
(accessed 2008/02/15)

Public Sector Governance – Civil Service and Employment Regimes
http://web.worldbank.org
(accessed 2008/10/31)

Public Service: Background – Sectoral Activities
http://www-ilo-mirror.cornell.edu/public/english/dialogue/sector/sectors/pubserv.htm
(accessed 2008/10/31)

Public Service: Employment
http://www-ilo-mirror.cornell.edu/public/english/dialogue/sector/sectors/pubserv/empl.htm
(accessed 2008/10/31)

Public Service: Labour Relations
http://www-ilo-mirror.cornell.edu/public/english/dialogue/sector/sectors/pubserv/rel.htm
(accessed 2008/10/31)

Public Service: Structural Adjustment and Efficiency
http://www-ilo-mirror.cornell.edu/public/english/dialogue/sector/sectors/pubserv/struc.htm
(accessed 2008/10/31)

Reflective Equilibrium (by Daniels N)
http://plato.stanford.edu/entries/relective-equilibrium/
(accessed 2008/02/15)

Report of the First Labour Relations Biennial Conference for the Public Service
http://www.pmg.org.za/docs/2008/comreports/080605pcpservicereport.htm
(accessed 2009/09/09)

Rights (by Wener L)
http://plato.stanford.edu/entries/rights/
(accessed 2008/02/15)

Rule of Law in Bangladesh: An Overview (by Mollah AH)
http://unpan1.un.org/intrados/groups/public/documents/UNPAN/UNPAN012077.pdf
(accessed 2008/06/12)

Social Dialogue

http://www-ilo-mirror.cornell.edu/public/english/dialogue

(accessed 2008/10/31)

Social Dialogue, Labour Law and Labour Administration

http://www.ilo.org/public/english/dialogue/ifpdial/areas/social.htm

(accessed 2008/07/11)

Sunrise or Sunset? Reinventing Administrative Law for the New Millennium (by Masson K)

http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/

(accessed 2008/05/16)

The Jurisprudence of Polycentric Law (by Bell TW)

http://tomwbell.com/writings/JurisPoly.html

(accessed 2008/02/09)

The Nature of Law (by Marmor A)

http://plato.stanford.edu/entries/laphil-nature/

(accessed 2006/07/11)

The Practice of Social Dialogue in the South African Public Service (by Huluman S)

http://www.pscbc.org.za

(accessed 2008/09/07)

The Privatization Quandary (by Verkuil PR)

http://www.cardoza.yu.edu/life/spring2006

(accessed 2006/08/01)

The Riekert Commission: A Black Middle Class in the Making

http://www.anc.org.za/ancdocs/history/congress/sactu/wff3.htm

(accessed 2006/09/16)

The Right to Collective Bargaining in the Public Sector:? (by Ngcukaitobi T)

http://www.lexisnexis.co.za/ServicesProducts/presentations/17th/TembekaNgcukaitobi.doc

(accessed 2008/06/13)

Theories Used in IS Research: Social Exchange Theory (by Devan J)

http://www.istheory.yorku.ca/Socialexchangetheory.htm 2009/04/22

(accessed 2009/07/06)

Working for Freedom

http://www.anc.org.za/ancdocs/history/congress/sactu.wff3.htm

(accessed 2006/09/16)

6 Legislation

6 1 South African

Agricultural Labour Act 147 of 1993

Apprenticeship Act 37 of 1944

Bantu Building Workers Act 27 of 1951

Bantu Labour Relations Act 70 of 1973

Basic Conditions of Employment Act 75 of 1997

Black Labour Relations Act 48 of 1953

Constitution of the Republic of South Africa Act 108 of 1996

Co-operatives Act 91 of 1981

Education Labour Relations Act 146 of 1993

Electrical Wireman and Contractors' Act 20 of 1939

Employment Equity Act 55 of 1998

Factory, Machinery and Building Work Act 22 of 1941

Framework Agreement: Transformative and Restructuring of the Public Service (Utilization of Human Resources) Resolution No 7 of 2002

Government Service Pension Act 32 of 1936

Immigration Act 13 of 2002

Industrial Conciliation Act 11 of 1924

Industrial Conciliation Act 28 of 1956

Labour Relations Act 28 of 1956

Labour Relations Act 66 of 1995

Labour Relations Amendment Act 94 of 1979[2316]

Masters and Servants Act 15 of 1856

Masters and Servants Law 13 of 1880 (T)

Masters and Servants Ordinance 7 of 1904 (O)

Masters, Servants and Apprentices Ordinance 2 of 1850 (N)

[2316] Also referred to as the Industrial Conciliation Amendment Act.

Mines and Works Act 4 of 1926

Mines and Works Act 12 of 1911

Native Administrative Act 38 of 1927

Native Labour (Settlement of Disputes) Act 48 of 1953

Prisons Act 8 of 1959

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

Promotion to Administrative Justice Act 3 of 2000

Protected Disclosure Act 26 of 2000

Public Service Act 103(P) of 1994

Public Service Act 111 of 1984

Public Service Act 27 of 1923

Public Service Amendment Act 30 of 2007

Public Service Labour Relations Act 102 of 1993

Public Service Labour Relations Act 105 of 1994

Railways and Harbours Service Act 28 of 1912

Registration for Employment Act 34 of 1945

Riotous Assemblies Act 17 of 1956

Riotous Assemblies and Criminal Law Amendment Act 27 of 1914

Shop and Offices Act 75 of 1964

Shop and Offices Act 41 of 1939

Skills Development Act 97 of 1998

South African Transport Services Conditions Act 41 of 1988

Training of Artisans Act 38 of 1951

Transvaal Industrial Disputes Prevention Act 20 of 1966

Wage Act 27 of 1925

Wage Act 44 of 1937

Wage Act 5 of 1957

War Measure 145 of 1942

Workmen's Compensation Act 30 of 1941

6 2 United States

Civil Service Reform Act of 1978

Hatch Act of 1939

7 Reports and Memorandums

Botha Commission Report UG 62/1951

Die Verslag van die Kommissie van Ondersoek insake Nywerheidswetgewing UG 62/1951

Explanatory Memorandum to the Labour Relations Bill GG 16259

Meeting Minutes of the Justice and Constitutional Development Portfolio Committee Constitutional Amendment Bills: Hearings (14 September 2001)

Van Reenen Commission Report UG 37/1935

White Paper on the Transformation of the Public Service GG 1459/1997

TABLE OF CASES

1 Australia

Civil Service Association of Western Australia Incorporated v Ministry of Justice [1998] WAIRComm 200

Coutts v The Commonwealth (1985) 157 CLR 91

Fletcher v Nott (1938) 60 CLR 55

Griffith University v Tang (2005) 221 CLR 99

Jarratt v Commissioner of Police for New South Wales (2006) 225 CLR 130

Kavalee v Burbridge [1998] NSWSC 111

Marks v The Commonwealth (1964) 111 CLR 549

Minister of Immigration and Ethnic Affairs v Pochi (1980) 44 FLR 41

2 Canada

Attorney-General for Canada v Hallet & Carey [1952] AC 427 (PC)

Baker v Canada (Minister of Citizenship and Immigration) (1999) 174 DLR (4th) 193 (SCC); [1999] 2 SCR 817

Beams v Colonial Government 1907 (24) SC 675

Canada (Director of Investigation and Research, Competition Act) v Southam Inc [1997] 1 SCR 748

Canadian Union of Public Employees Local 963 v New Brunswick Liquor Corporation [1979] 2 SCR 227

CUPE Local 963 v New Brunswick Liquor Employees (1979) 26 NR 341

Knight v Indian Head of School Division No 19 (1990) 69 DLR (4th) 489 (SCC)

Martineau v Matsqui Institution Disciplinary Board (No 2) [1980] 1 SCR 602

MNR v Coopers and Lybrand [1979] 1 SCR 495

Nicholson v Haldimand-Norfolk Regional Board of Commissioners of Police [1979] 1 SCR 311

Old St Bonifoce Residents Assn v Winnipeg (City) (1991) 75 DLR (4th) 385 (SCC)

R v Big M Drug Mart Ltd (1985) 18 DLR (4th) 321

Re Scott and Rent Review Commission (1977) 81 DLR (3rd) 530 (NSCA)

Re Wilson and Medical Services Commission of British Columbia (1988) (53 DLR (4th) 171 (BCCA)

Reference re Motor Vehicle Act (British Columbia) S 94(2) [1985] 2 SCR 486

Reference re Public Service Employee Relations Act (1987) 38 DLR (4th) 161 (SCC)

Reference re Public Service Employee Relations Act (1988) 53 DLR (4th) 577 (SCC)

Retail, Wholesale & Department Store Union v Dolphin Delivery Ltd 1986 (2) SCR 573

Roncarelli v Duplessis [1959] SCR 121

Singh v Minister of Employment and Immigration 1985 (14) CRR 13 (SCC)

Suresh v Canada (Minister of Citizenship and Immigration) (2002) 208 DLR (4th) 1 (SCC)

3 International/Regional

Golder Case (1975) 1 EHRR 524

National Union of Belgium Police Case (1975) 1 ECRR 578

Tyrer v UK (1978) 2 EHRR 1

4 South Africa

3M SA (Pty) Ltd v SACCAWU 2001 (22) ILJ 1092 (LAC)

A Mauchle (Pty) Ltd t/a Precision Tools v NUMSA 1995 (16) ILJ 349 (LAC)

AAA Investments (Pty) Ltd v Micro Finance Regulatory Council 2006 (11) BCLR 1255 (CC)

Actaris South Africa (Pty) Ltd v Sol Plaatje Municipality and Another [2008] 4 All SA 168 (NC)

Acting Provincial Commissioner, Correctional Services and Others v Matheyse (1) 2002 (23) ILJ 2192 (LAC)

Administrator, Natal v Sibiya 1992 (4) SA 532 (A)

Administrator, Orange Free State v Mokopanele 1990 (3) SA 780 (A)

Administrator, Transvaal and Others v Theletsane and Others 1991 (2) SA 192 (A)

Administrator, Transvaal and Others v Traub and Others 1989 (4) SA 731 (A)

Administrator, Transvaal and Others v Zenzile and Others 1991 (1) SA 21 (A)

Administrator, Transvaal and the First Investment (Pty) Ltd v Johannesburg City Council 1971 (1) SA 56 (A)

Afrox Ltd v Laka 1999 (5) BLLR 467 (LC)

Air Products (Pty) Ltd v CWIU 1998 (1) BLLR 1 (LAC)

Alpha Plant and Services (Pty) Ltd v Simmonds 2001 (3) BLLR 261 (LAC)

Ampofo v Member of the Executive Council for Education, Arts, Culture, Sports and Recreation, Northern Province [2002] 1 All SA 226 (T)

Anglo American Farms t/a Boschendal Restaurant v Komjwayo 1992 (13) ILJ 573 (LAC)

Anning v Colonial Secretary 1931 SR 95

Arries v CCMA and Others 2006 (11) BLLR 1062 (LC)

Associated Institutions Pension Fund v Van Zyl 2005 (2) SA 302 (SCA)

Association of Professional Teachers and Another v Minister of Education and Others 1995 (16) ILJ 1048 (IC)

Atlantis Diesel Engines (Pty) Ltd v NUMSA 1995 (1) BLLR 1 (A)

Attorney-General, Eastern Cape v Blom 1988 (4) SA 645 (A)

Avril Elizabeth Home for the Mentally Handicapped v CCMA 2006 (9) BLLR 833 (LC)

Bank of Lisbon and South African Ltd v De Ornelas 1988 (3) SA 580 (A)

Banks and Another v Coca-Cola SA (A Division of Coca-Cola Africa (Pty) Ltd) 2007 (10) BLLR 929 (LC)

Barkhuizen v Napier 2007 (7) BCLR 691 (CC)

Barlin v Licensing Court for the Cape 1924 AD 472

Bassett v Servistar (Pty) Ltd 1987 (8) ILJ 503 (IC)

Basson t/a Repcomm Community Repeater Services v Post Master-General 1994 (3) SA 224 (SE)

Basson v Provincial Commissioner (Eastern Cape), Department of Correctional Services 2003 (4) BLLR 341 (LC)

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (7) BCLR 678 (CC)

Beams v Colonial Government 1907 (24) SC 675

Behr v Union Government (Minister of Railways) 1925 AD 483

Bel Porto School Governing Body v Premier, Western Cape 2002 (9) BCLR 891 (CC)

Bench v Phalaborwa Transitional Local Council 1997 (9) BLLR 1163 (LC)

Benjamin v UCT 2003 (12) BLLR 1209 (LC)

Benson v SA Mutual Life Assurance Society 1986 (1) SA 776 (AD)

Bernstein and Others v Bester and Others NNO 1996 (4) BCLR 449 (CC)

Binda v Colonial Government 1950 (3) SA 151 (AD)

Black Allied Workers Union and Others v Prestige Hotels CC t/a Bluewaters Hotel 1993 (14) ILJ 963 (LAC)

BMD Knitting Mills (Pty) Ltd v SACTWU 2001 (7) BLLR 705 (LAC)

Boardman Brother (Natal) (Pty) Ltd v CWIU 1998 (19) ILJ 517 (SCA)

Booysen v SAPS and Another 2008 (10) BLLR 928 (LC)

Bosch v THUMB Trading (Pty) Ltd 1986 (7) ILJ 341 (IC)

Botha and Another v Department Education, Arts, Culture and Sport, Northern Province [1999] ZALC 110

Boxer Superstores Mthatha and Another v Mbenya 2007 (8) BLLR 693 (SCA)

Bramdaw v Union Government 1913 NPD 57

Brewer v South African Railways 1934 AD 392

Brisley v Drotsky 2002 (4) SA 1 (SCA)

Broadway Mansions (Pty) Ltd v Pretoria City Council 1955 (1) SA 517 (A)

Broll Property Group (Pty) Ltd v Du Pont and Others 2006 (27) ILJ 269 (LAC)

BTR Dunlop Ltd v National Union of Metalworkers of SA (2) 1989 (10) ILJ 701 (IC)

BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another 1992 (3) SA 673 (A)

Buckas v Ethekwini Municipality and Others 2003 (9) BLLR 858 (LC)

Building Construction & Allied Workers Union and Another v E Rogers & C Buchel and Another CC 1987 (8) ILJ 169 (IC)

Bula v Minister of Education 1992 (4) SA 716 (TkA)

Bullock NO v Provincial Government, North West Province [2004] 2 All SA 249 (SCA)

Buthelezi v Municipal Demarcation Board 2004 (25) ILJ 2317 (LAC)

Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC 2001 (10) BCLR 1026 (SCA)

Cape Town City Council v Masitho 2000 (21) ILJ 1957 (LAC)

Carephone (Pty) Ltd v Marcus NO and Others 1998 (11) BLLR 1093 (LAC)

Carmichele v Minister of Safety and Security 2002 (10) BCLR 1100 (CC)

Carr v Fisons Pharmaceuticals 1994 (7) BLLR 10 (IC)

Cash Paymaster Services (Pty) Ltd v Eastern Cape Province and Others [1997] 4 All SA 363 (Ck)

CEPPWAWU v Metrofile (Pty) Ltd 2004 (2) BLLR 103 (LAC)

Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 1997 (1) BCLR 1 (CC)

Chairman, Board of Tariffs and Trade v Brenco Inc 2001 (4) SA 511 (SCA)

Chamane v The Member of the Executive Council for Transport, Kwazulu-Natal and Others 2000 (10) BLLR 1154 (LC)

Changula v Bell Equipment 1992 (13) ILJ 101 (LAC)

Checkers SA Ltd (South Hills Warehouse) and SACCAWU 1990 (11) ILJ 1357 (ARB)

Chester Wholesale Meats (Pty) Ltd v NIWUSA 2006 (3) BLLR 223 (LAC)

Chetty v Scotts Select A Shoe 1998 (19) ILJ 1465 (LC)

Chirwa v Transnet Ltd 2008 (2) BLLR 97 (CC)

City of Cape Town v Minister of Labour 1949 (2) SA 681 (C)

City of Tshwane Metropolitan Municipality v Engineering Council of SA [2009] ZASCA 151

Claase v Transnet Bpk en 'n Ander [1999] 3 All SA 142 (T)

Clarke v Ninian and Lester (Pty) Ltd 1988 (9) ILJ 651 (IC)

Coca-Cola Bottling East London v CCMA and Others 2003 (2) BLLR 159 (LC)

Collins v Minister of Justice 1915 OPD 73

Colyer v Dräger SA (Pty) Ltd 1997 (2) BLLR 184 (CCMA)

Commissioner for the SAPS v Maimela 2004 (1) BCLR 47 (T)

Communication Workers Union obo Starck and Telkom SA Ltd 2005 (26) ILJ 353 (CCMA)

Commuter Handling Services (Pty) Ltd v Mokoena 2002 (9) BLLR 843 (LC)

Computicket v Marcus NO and Others 1999 (20) ILJ 342 (LC)

Concorde Plastics (Pty) Ltd v NUMSA and Others 1998 (2) BLLR 107 (LAC)

Conjwa and Others v Postmaster General, Transkei and Another 1998 (7) BLLR 718 (Tk)

Contra Ngema v Minister of Justice, KwaZulu 1992 (4) SA 349 (N)

Cornelius and Others v Howden Africa Ltd t/a M & B Pumps 1998 (19) ILJ 921 (CCMA)

Council for Scientific and Industrial Research v Fijen [1996] 2 All SA 379 (A)

Council of Review, South African Defence Force & Others v Mönnig and Others 1992 (3) SA 482 (A)

County Fair Foods (Pty) Ltd v CCMA and Others 1999 (11) BLLR 1117 (LAC)

County Fair v CCMA and Others 1998 (6) BLLR 577 (LC)

Critch v South African Railways and Harbours 1937 NPD 386

Cullen/Distell (Pty) Ltd 2001 (8) BALR 834 (CCMA)

Cuppan v Cape Display Supply Chain Services 1995 (16) ILJ 846 (D)

CWIU and Others v Algorax (Pty) Ltd 2003 (11) BLLR 1081 (LAC)

CWIU v Hoechst (Pty) Ltd 1993 (14) ILJ 471 (IC)

CWIU v Johnson & Johnson (Pty) Ltd 1997 (9) BLLR 1186 (LC)

CWIU v Plascon Decorative (Inland) (Pty) Ltd 1998 (12) BLLR 1191 (LAC)

Dabner v South African Railways and Harbours 1920 AD 583

Daniels v Campbell NO 2004 (7) BCLR 735 (CC)

Davies v Chairman, Committee of the Johannesburg Stock Exchange 1991 (4) SA 43 (W)

Davies v Clean Deale CC 1992 (12) ILJ 1230 (IC)

Dawnlaan Beleggings (Edms) Bpk v JSE 1983 (3) SA 344 (W)

Dawood v Minister of Home Affairs 2000 (8) BCLR 837 (CC)

De Beer NO v North-Central Local Council and South-Central Local Council (Umhlatuzana Civic Association Intervening) 2001 (11) BCLR 1109 (CC)

De Beers Consolidated Mines Ltd v CCMA and Others 2000 (21) ILJ 1051 (LAC)

De Bruin v Sunnyside Locksmith Supplies (Pty) Ltd 1999 (8) BLLR 761 (LC)

De Lange v Smuts NO and Others 1998 (7) BCLR 779 (CC)

De Nysschen v General Public Service Sectoral Bargaining Council and Others 2007 (5) BLLR 461 (LC)

De Villiers v Administrator, Orange Free State 1954 (3) SA 385 (O)

De Villiers v Minister of Education, Western Cape Province and Another 2009 (2) SA 619 (C))

Dendy v University of the Witwatersrand and Others 2005 (5) SA 357 (W)

Denel (Pty) Ltd v Vorster 2004 (25) ILJ 659 (SCA)

Department of Correctional Services v Van Vuuren 1999 (11) BLLR 1132 (LAC)

Department of Justice v CCMA and Others 2001 (11) BLLR 1229 (LC)

Department of Justice v CCMA and Others 2004 (4) BLLR 297 (LAC)

Department of Public Works, Roads and Transport v Motshoso and Others 2005 (10) BLLR 957 (LC)

Dhlamini v Faraday Wholesale Meat Supply 1999 (8) BLLR 771 (LC)

Director of Education v Wilkonson 1930 TPD 471

Ditsamai v Gauteng Shared Services Centre 2009 (5) BLLR 456 (LC)

Dladla and Others v Administrator, Natal and Others 1995 (16) ILJ 1418 (N)

Dladla v Council of Mbombela Local Municipality and Another 2008 (8) BLLR 751 (LC)

Doctors for Life International v The Speakers of the National Assembly and Others 2006 (6) SA 416 (CC)

Du Bois v Stompdrift-Kamanassie Besproeingsraad 2002 (5) SA 186 (C)

Du Bruyn v Nasionale Kommisaris, SAPD and Another 2008 JOL 21890 (T)

Du Plessis v De Klerk 1996 (3) BCLR 658 (CC)

Du Plooy and National Prosecuting Authority 2006 (27) ILJ 409 (BCA)

Du Preez and Another v Truth and Reconciliation Commission 1997 (4) BCLR 531 (A)

Duncan v Minister of Environmental Affairs and Tourism [2010] 2 All SA 472 (SCA)

Dunning v Union Government 1932 NPD 700

Durand v Ellerine Holdings Ltd 1991 ILJ 1076 (IC)

Durban Integrated Municipal Employees Society v Tongaat Town Board 1993 (2) LCD 54 (IC)

Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd 2001 (4) SA 661 (W)

Eddels SA (Pty) Ltd v Sewcharan 2000 (9) BLLR 1038 (LC)

Edwards v EMI South Africa (Pty) Ltd 1996 (5) BLLR 576 (IC)

Ellis v Morgan; Ellis v Desai 1909 TS 576

Engen Petroleum Ltd v CCMA 2007 (8) BLLR 705 (LAC)

Engineering Council of SA and Another v City of Thswane Metropolitan Municipality and Another 2008 (6) BLLR 571 (T)

Enterprise Foods (Pty) Ltd v Allen and Others 2004 (7) BLLR 659 (LAC)

Eskom v Marshall and Others 2003 (1) BLLR 12 (LC)

Eskom v Mokoena 1997 (8) BLLR 965 (LAC)

Evans v Public Service Commission and Minister of Justice 1920 TPD 170

Ex parte Chairperson of the Constitutional Assembly: In re Certified of the Constitution of the RSA 1996 1996 (17) ILJ 821 (CC)

Ex parte Neethling and Others 1951 (4) SA 331 (AD)

Executive Council, Western Cape Legislature v President of the RSA 1995 (10) BCLR 1289 (CC)

FAWU and Another v BB Bread (Pty) Ltd 1987 (8) ILJ 704 (IC)

FAWU and Others v SA Breweries Ltd 2004 (11) BLLR 1093 (LC)

FAWU and Others v Willowton Old and Cake Mills 1990 (11) ILJ 131 (IC)

FAWU obo Sjade v Premier Milling 1997 (18) ILJ 1134 (CCMA)

Fedlife Assurance Ltd v Wolfaardt 2001 (12) BLLR 1301 (SCA)

Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1998 (6) BCLR 671 (SCA)

Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1998 (12) BCLR 1458 (CC)

Fernandez v South African Railways 1926 AD 60

Ferreira v Levin NO; Vryenhoek v Powell NO 1996 (1) BCLR 1 (CC)

Fetsha v Member of the Executive Council responsible for Education (Eastern Cape) [2006] 3 All SA 542 (Ck)

Fidelity Cash Management Services v CCMA and Others 2008 (3) BLLR 197 (LAC)

Food Workers Council of SA v SA Breweries Ltd 1992 (13) *ILJ* 204 (IC)

Foodcorp (Pty) Ltd v Deputy Director General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management 2006 (2) SA 191 (SCA)

Forecourt Express (Pty) Ltd v SA Transport and Allied Workers Union 2006 (27) ILJ 2537 (LAC)

Fose v Minister of Safety and Security 1997 (7) BCLR 851 (CC)

Foster v Chairman, Commission for Administration 1991 (4) SA 403 (C)

Fouldien and Others v House of Trucks (Pty) Ltd 2002 (12) BLLR 1176 (LC)

Foulds v Minister of Home Affairs 1996 (4) SA 137 (W)

Fourie v The Director-General of the North West Province 1997 (3) BLLR 275 (IC)

Fransman / *ALG Boerdery (Pty) Ltd* 2006 (10) BALR 1011 (CCMA)

Fraser v ABSA Bank 2007 (3) BCLR 219 (CC)

Fraser v Children's Court, Pretoria North 1996 (8) BCLR 1085 (T)

Fredericks and Others v MEC for Education and Training, Eastern Cape and Others 2002 (2) BLLR 119 (CC)

Freeman v Union Government (Minister of Finance) 1926 TPD 118

Freeman v Union Government 1926 TPD 638

Fry's Metals (Pty) Ltd v NUMSA 2003 (24) ILJ 133 (LAC)

Fulcrum Engineering v Chauke 1997 (18) ILJ 679 (LAC)

Gamevest (Pty) Ltd v Regional Land Claims Commissioner, Northern Province and Mpumalanga 2002 (12) BCLR 1260 (SCA)

Gauteng Provinsiale Administrasie v Scheepers and Others 2000 (21) ILJ 1305 (LAC)

Gauteng Provinsiale Administrasie v Scheepers and Others 2000 (7) BLLR 756 (LAC)

Gcaba v Minister for Safety and Security 2009 (12) BLLR 1145 (CC)

Gcwensha v CCMA and Others 2006 (3) BLLR 234 (LAC)

General Food Industries Ltd t/a Blue Ribbon Bakeries v FAWU and Others 2004 (9) BLLR 849 (LAC)

General Food Industries Ltd v FAWU 2004 (7) BLLR 667 (LAC)

General Foods Industries Ltd v FAWU 2004 (9) BLLR 849 (LAC)

George v Liberty Life Association of Africa Ltd 1996 (8) BLLR 985 (IC)

George v Western Cape Education Department 1996 (2) BLLR 166 (IC)

Germishuys v Upington Municipality 2001 (3) BLLR 345 (LC)

Gibb v Nedcor Limited 1997 (12) BLLR 1580 (LC)

GIWUSA and Another v VM Construction 1995 (9) BLLR 99 (IC)

Glass v University of Zululand 2006 (4) BALR 388 (CCMA)

Goliath v Medscheme (Pty) Ltd 1996 (5) BLLR 603 (IC)

Gostelow v Datakor Holdings (Pty) Ltd t/a Corporate Copilith 1993 (14) ILJ 171 (IC)

Govender and Another v MA Motala Lads Hostel 1987 (8) ILJ 809 (IC)

Govender v Sasko (Pty) Ltd t/a Richards Bay Bakery 1990 (11) ILJ 1282 (IC)

Government of the RSA and Others v Grootboom and Others 2000 (11) BCLR 1169 (CC)

Gray Security Services (Western Cape) (Pty) Ltd v Cloete NO and Another 2000 (21) ILJ 940 (LC)

Great North Transport v Legodi and Others 2004 (1) BLLR 51 (LC)

Greater Letaba Local Municipality v Mankgabe NO and Others 2008 (3) BLLR 229 (LC)

Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others 2005 (10) BCLR 931 (SCA)

Greyvenstein v Kommisssaris van die SA Inkomste Diens 2005 (26) ILJ 1395 (T)

Grieve v Denel (Pty) Ltd 2003 (4) BLLR 366 (LC)

Grobler v Naspers Beperk and Another 2004 (25) ILJ 439 (C)

Groenewald v Cradock Munisipaliteit 1980 (I) ILJ 269 (E)

Grundling v Beyers 1967 (2) SA 131 (W)

Guranah v South African Weather Services 2004 (4) BALR 454 (CCMA)

Gwala v Director of Education Natal Region 1988 (9) ILJ 789 (N)

Hadebe and Others v Romatex Industrial Ltd 1986 (7) ILJ 726 (IC)

Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee 2002 (23) ILJ 1531 (SCA)

Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee 2000 (4) SA 621 (C)

Harksen v DPP [2002] 1 All SA 284 (C)

Harksen v Lane NO 1997 (11) BCLR 1489 (CC)

Hauptfleisch v Caledon Divisional Council 1963 (4) SA 53 (C)

Hauser v Partnership in Advertising (Pty) Ltd 1994 (11) BLLR 36 (IC)

Hayes and Another v Minister of Finance and Development Planning, Western Cape and Others 2003 (4) SA 598 (C)

Heatherdale Farms (Pty) Ltd and Others v Deputy Minister of Agriculture and Another 1980 (3) SA 476 (T)

Heigers v UPC Retail Services 1998 (1) BLLR 45 (LC)

Helderberg Butcheries (Stellenbosch) (Pty) Ltd v Municipal Valuation Court, Somerset West 1977 (4) SA 99 (C)

Hendricks v Mercantile & General Reinsurance Co of SA Ltd 1994 (15) ILJ 304 (LAC)

Hendry v Adcock Ingram 1998 (19) ILJ 85 (LC)

Henn v Eskom 1996 (6) BLLR 747 (IC)

Hepner v Roodepoort-Maraisburg Town Council 1962 (4) SA 722 (A)

Hira and Another v Booysen and Another 1992 (4) SA 69 (A)

Hlaneki and Others v Commission on Restitution of Land Rights and Others [2006] 1 All SA 633 (LCC)

Hlongwa v Minister of Justice, KwaZulu 1993 (2) SA 269 (D)

Hlope and Others v Minister of Safety and Security and Others 2006 (3) BLLR 297 (LC)

Hoechst (Pty) Ltd v CWIU and Another 1993 (14) ILJ 1449 (LAC)

Hoffman v SAA 2001 (1) SA 1 (CC)

Holgate v Minister of Justice 1995 (16) ILJ 1426 (E)

Holomisa v Argus Newspapers Ltd 1996 (2) SA 488 (W)

HOSPERSA and Another v MEC for Health 2003 (12) BLLR 1242 (LC)

Howell v International Bank of Johannesburg Ltd 1990 (11) ILJ 791 (IC)

Hurley v Minister of Law and Order 1985 (4) SA 709 (D)

ICS Group t/a Dairybelle (Bloemhof) v National Union of Food Beverages Wine Spirits and Allied Workers Unions and others 1998 (19) ILJ (LAC)

IMATU v MEC: Environmental Affairs, Developmental Social Welfare and Health, Northern Cape Province 1999 (4) SA 267 (NC)

IMATU/Greater Pretoria Metropolitan Council 1999 (12) BALR 1459 (IMSSA)

Independent Electoral Commission v Langeberg Municipality 2001 (9) BCLR 833 (CC)

Janse van Rensburg NO v Minister of Trade and Industry NO 2000 (11) BCLR 1235 (CC)

JD Group Ltd v De Beer 1996 (17) ILJ 1103 (LAC)

JDG Trading (Pty) Ltd t/a Price 'n Pride v Brunsdon 2000 (1) BLLR 1 (LAC)

Jeffrey v Persetel (Pty) Ltd 1996 (1) BLLR 67 (IC)

Jele v Premier of the Province of KwaZulu-Natal 2003 (24) ILJ 1392 (LC)

Jenkins v Government of the RSA [1996] 1 All SA 659 (Tk)

Joe Slovo Community, Western Cape v Thubelisha Homes 2009 (9) BCLR 846 (CC)

Johannesburg Municipal Pension Fund v City of Johannesburg 2005 (6) SA 273 (W)

John Wilkinson and Partners (Pty) Ltd v Berea Nursing Home (Pty) Ltd 1996 (1) SA 791 (N)

Johnson & Johnson (Pty) Ltd v CWIU 1998 (12) BLLR 1209 (LAC)

Johnson & Johnson (Pty) Ltd v CWIU 1999 (20) ILJ 89 (LC)

Jonker v Okhahlamba Municipality and Others 2005 (6) BLLR 564 (LC)

Juta v Western Cape Education Department 1997 (7) BLLR 926 (CCMA)

Kampecha v Bite My Sausage CC 1988 (9) ILJ 1077 (IC)

Kantolo v Super Rent (Cape) (Pty) Ltd t/a Connaught Motors and Super Rent Truck Hire 1988 (9) ILJ 123 (IC)

Karras t/a Floraline v SA Scooter and Transport Allied Workers Unions and Others 2001 (1) BLLR 1 (LAC)

Kate v MEC for the Department of Welfare, Eastern Cape 2005 (1) SA 141 (E)

Kaunda v President of the RSA 2005 (4) SA 235 (CC)

Keil v Foodgro (A division of Leisurenet Ltd 1998 (12) BLLR 1228 (LAC)

Kern v Muau 2007 (6) BLLR 566 (LC)

Key Delta v Mariner 1998 (6) BLLR 647 (E)

Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others 2004 (6) BCLR 569 (CC)

King v Beacon Island Hotel 1987 (8) ILJ 485 (IC)

Knoetze v Rustenburg Platinum Mines Ltd 1985 (6) ILJ 450 (IC)

Koka v Director-General: Provincial Administration North West Government 1997 (7) BLLR 874 (LC)

Komane v Fedsure Life 1998 (2) BLLR 215 (CCMA)

Koopman v City of Cape Town 2005 (5) BALR 563 (CCMA)

Korsten v MacSteel (Pty) Ltd and Another 1996 (8) BLLR 1015 (IC)

Kotze v Rebel Discount Liquor Group (Pty) Ltd 2000 (2) BLLR 138 (LAC)

Kriel v Legal Aid Board [2009] 4 All SA 314 (SCA)

Kubheka and Another v Imexrtra (Pty) Ltd 1975 (4) SA 484 (W)

Kukard and Other v Molapo Technology (Pty) Ltd 2006 (4) BLLR 334 (LC)

Lamprecht and Nissan SA (Pty) Ltd v McNeillie 1994 (11) BLLR 1 (AD)

Langeni v Minister of Health and Welfare 1988 (9) ILJ 389 (W)

Langeveldt v Vryburg Transitional Local Council and Others 2001 (5) BLLR 501 (LAC)

Larbi-Odam and Others v Member of the Executive Council for Education and Another [1996] 4 All SA 185 (B)

Laubscher v Native Commissioner, Piet Retief [1958] 2 All SA 58 (A)

Lavoipierre v Union Government 1925 TPD 47

Lawrence v I Kuper and Co (Pty) Ltd t/a Kupers, a Member of INVESTEC 1994 (7) BLLR 85 (IC)

Laws v Rutherford 1924 AD 261

Lebota v Western Areas Gold Mining Co Ltd 1985 (6) ILJ 299 (IC)

Lefu and Others v Western Areas Gold Mining Co Ltd 1985 (6) ILJ 307 (IC)

Legal Aid Board v John NO and Another 1998 (4) BLLR 400 (LC)

Lekhethoa v Director of Education 1947 (2) SA 1171 (T)

Leoni Wiring Systems (East London) v NUMSA 2007 (28) ILJ 642 (LC)

LF Boshoff Investments (Pty) Ltd v Cape Town Municipality 1969 (1) SA 256 (C)

Lillicrap, Wassenaar & Partners v Pilkington Brothers (SA) (Pty) Ltd [1985] 1 All SA 347 (A)

Logbro Properties CC v Bedderson NO [2003] 1 All SA 424 (SCA)

Loggenberg and Another v Area Commissioner, Correctional Services and Others 2008 (3) BLLR 250 (LC)

Long and Another v Chemical Specialist Tvl (Pty) Ltd 1987 (8) ILJ 523 (IC)

Louw v Delta Motor Corporation 1996 (17) ILJ 958 (IC)

Louw v SA Rail Commuter Corporation and Another 2005 (26) ILJ 1960 (W)

Lubbe v Colonial Government 1906 (2) AC 269

Lunt v UCT and Another 1989 (2) SA 438 (C)

M v Buffelsfontein Gold Mining Co Ltd (Beatrix Mines Division) 1988 (9) ILJ 341 (IC)

Mabaso and Others v Universal Product Network (Pty) Ltd 2003 (9) BLLR 871 (LC)

Mabilo v Mpumalanga Provincial Government 1999 (8) BLLR 821 (LC)

Macfie v Union Government 1924 AD 77

Macrae v Director of Education 1922 TPD 487

Madnitsky v Rosenberg 1949 (2) SA 392 (AD)

Maduna v Brollo Africa (Pty) Ltd 1995 (1) BLLR 33 (IC)

Mafongosi and Others v United Democratic Movement and Others [2003] 1 All SA 441 (Tk)

Magidimisi NO v The Premier of the Eastern Cape and Others (Unreported) Case Nr 2180/04

Maharaj v Chairman of the Liquor Board [1996] 2 All SA 185 (N)

Mahlangu v CIM Deltak, Gallant v CIM Deltak 1986 (7) ILJ 346 (IC)

Majola and Others v D & A Timbers (Pty) Ltd 1996 (9) BLLR 1091 (LAC)

Majola v MEC, Department of Public Works, Northern Province and Others 2004 (25) ILJ 131 (LC)

Makambi v MEC, Department of Education, Eastern Cape 2008 (8) BLLR 711 (SCA)

Makhanya v University of Zululand 2009 (8) BLLR 721 (SCA)

Makhasa v Minister of Law and Order Lebowa Government 1988 (3) SA 701 (A)

Makoena v Administrator, Transvaal 1988 (4) SA 912 (W)

Malan v Bulbring NO and Others 2004 (10) BLLR 1010 (LC)

Malapile and Another v Germiston Ceramics and Potteries 1988 (9) ILJ 855 (IC)

Malcolm v Commissioner of Railways 1904 TS 947

Mamabolo v Rustenburg Regional Local Council [2000] 4 All SA 433

MAN Truck and Bus SA (Pty) Ltd and United African Motor and Allied Workers Union 1991 (12) ILJ 181 (ARB)

Manning v Union Government 1923 AD 459

Manyaka v Van de Wetering Engineering (Pty) Ltd 1997 (11) BLLR 1458 (LC)

Maphatane v Shoprite Checkers (Pty) Ltd 1996 (17) ILJ 964 (IC)

Marais v Democratic Alliance 2002 (2) BCLR 171 (C)

Marcus v Minister of Correctional Services and Others 2005 (26) ILJ 75 (SE)

Marievale Consolidated Mines Ltd v President of the Industrial Court 1986 (7) ILJ 152 (T)

Marshall v Union Government 1917 TPD 371

Maseko v Entitlement Experts 1997 (3) BLLR 317 (CCMA)

Masetlha v President of the RSA 2007 JOL 19069 (T)

Masetlha v President of the RSA 2008 (1) BCLR 1 (CC)

Mashegoane and Another v University of the North 1998 (1) BLLR 73 (LC)

Mathebe v Regering van die RSA 1988 (3) SA 667 (A)

MAWU v BTR Sarmcol 1987 (8) ILJ 815 (IC)

MAWU v Transvaal Processed Nuts, Bolts and Rivets (Pty) Ltd 1988 (9) ILJ 129 (IC)

Mayekiso v Minister of Health and Welfare and Others 1988 (9) ILJ 227 (W)

Mazista Tiles (Pty) Ltd v NUM and Others 2005 (3) BLLR 219 (LAC)

Mbayeka and Another v MEC for Welfare, Eastern Cape 2001 (4) BCLR 374 (Tk)

MEC for Public Works, Roads and Transport, Free State and Another v Morning Star Minibus Hiring Services (Pty) Ltd and Others 2003 (4) SA 429 (O)

MEC for Roads and Transport: Limpopo Province v Masete and Others 2008 (11) BLLR 1105 (LC)

MEC for Transport: KwaZulu-Natal and Others v Jele 2004 (12) BLLR 1238 (LAC)

MEC, Department of Roads and Transport, Eastern Cape v Giyose 2008 (5) BLLR 472 (E)

MEC: Department of Finance, Economic Affairs and Tourism, Northern Province v Mahumani 2005 (2) BLLR 173 (SCA)

Media Workers Association of SA and Others v The Press Corporation of SA Ltd ("Perskor") 1992 (13) ILJ 1391 (A)

Mekgeo v Standard Bank of SA 1997 (4) BLLR 445 (CCMA)

Member of the Executive Council for Transport: KwaZulu-Natal and Others v Jele 2004 (12) BLLR 1238 (LAC)

Metal and Allied Workers Union v Transvaal Processed Nuts, Bolts and Rivets (Pty) Ltd 1988 (9) ILJ 129 (IC)

Methvan v Colonial Government 1896 (17) NLR 31

Metro Inspection Services (Western Cape) CC v Cape Metropolitan Council 1999 (4) SA 1184 (CC)

Meyer v Iscor Pension Fund 2003 (5) BLLR 439 (LAC)

Mgijima v Eastern Cape Appropriate Technology Unit 2000 (2) SA 291 (Tk)

Mhlauli v Minister of Department of Home Affairs and Others NNO 1992 (12) ILJ 1146 (SE)

Miksch v Edgards Retail Trading (Pty) Ltd 1995 (1) BLLR 72 (IC)

Mineworkers Union and Solidarity obo Macgregor v SA National Parks 2006 (27) ILJ 818 (LC)

Minister of Correctional Service v Mthembu NO 2006 (27) ILJ 2115 (LC)

Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd 2003 (6) SA 407 (SCA)

Minister of Finance and Another v Van Heerden 2004 (12) BLLR 1181 (CC)

Minister of Health and Another v New Clicks SA (Pty) and Others (Treatment Action Campaign and Innovative Medicines SA as Amici Curiae) 2006 (1) BCLR 1 (CC)

Minister of Health, KwaZulu v Ntozakhe 1993 (1) SA 442 (A)

Minister of Justice and Another v Bosch NO and Others 2006 (27) ILJ 166 (LC)

Minister of Justice and Another v Breytenbach 1942 AD 175

Minister of Justice, Transkei v Geni 1994 (3) SA 28 (TkA)

Minister of Labour v General Public Service Sectoral Bargaining Council and Others 2007 (5) BLLR 467 (LC)

Minister of Safety and Security v Madisha and Others 2009 (1) BLLR 80 (LC)

Minister of Safety and Security v Vilakazi [2000] 3 All SA 206 (A)

MISA / SAMWU obo Members v Madikor Drie (Pty) Ltd 2006 (1) BLLR 12 (LC)

Misra v Telkom 1997 (6) BLLR 794 (CCMA)

Mistry v Interim National Medical and Dental Council of South Africa 1998 (4) SA 1127 (CC)

MITUSA v Transnet (Pty) Ltd 2002 (23) ILJ 2213 (LAC)

Mkumatela v Nelson Mandela Metropolitan Municipality and Another 2008 JOL 21686 (SE)

Mlokoti v Amathole District Municipality and Another 2009 (2) BLLR 168 (E)

Mngomezulu v Khutala Mining Services (Pty) Ltd 1994 (15) ILJ 374 (IC)

Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service 1996 (3) SA 1 (A)

Modise and Others v Steve's Spar Blackheath 2000 (5) BLLR 496 (LAC)

Modutle v Municipal Manager: Sol Plaatjie Municipality [2009] ZANCHC 6

Mogothle v Premier of the North West Province and Another 2009 (4) BLLR 331 (LC)

Mogothle v Premier of the Northwest Province and Others 2009 (4) BLLR 331 (LC)

Mohammed v Minister of Correctional Services and Others 2003 (6) SA 169 (SE)

Mohlaka v Minister of Finance and Others 2009 (4) BLLR 348 (LC)

Mokoena and Others v Administrator of the Transvaal 1988 (9) ILJ 398 (W)

Mokopanele and Others v Administrator, Oranje-Vrystaat 1988 (9) ILJ 779 (O)

Molelane Toyota v CCMA 1999 (6) BLLR 555 (LC)

Moletsane v Premier of the Free State and Another 1995 (9) BCLR 1285 (E)

Monckton v British South Africa Co 1920 AD 324

Mondi Timber Products v Tope 1997 (3) BLLR 263 (LAC)

Moolman v Landbank 1996 (5) 638 (IC)

Môrester Bande (Pty) Ltd v National Union of Metalworkers of SA and Others 1990 (11) ILJ 687 (LAC)

Moropane v Gilbeys Distillers and Vintners (Pty) Ltd and Another 1997 (10) BLLR 1320 (LC)

Moyo v Administrator of the Transvaal 1988 (9) ILJ 372 (W)

Mthembi-Mahanyale v Mail and Guardian Ltd 2004 (6) SA 329 (SCA)

Mthembu and Mahomed Attorneys v CCMA and Others 1998 (2) BLLR 150 (LC)

Muller v Chairman of the Ministers' Council: House of Representatives 1991 (12) ILJ 761 (C)

Murray v Minister of Defence 2006 (8) BLLR 790 (C)

Murray v Minister of Defence 2008 (6) BLLR 513 (SCA)

Mustapha v Receiver of Revenue in Lichtenburg 1958 (3) SA 343 (A)

Myburgh v Danielskuil Munisipaliteit 1985 (3) SA 335 (NC)

Myers v South African Railways and Harbours 1924 AD 85

Mzeku and Others v Volkswagen SA (Pty) Ltd 2001 (8) BLLR 857 (LAC)

NAAWU Union v Pretoria Precision Castings (Pty) Ltd 1985 (6) ILJ 369 (IC)

NAAWU v Borg-Warner SA (Pty) Ltd 1994 (15) ILJ 509 (A)

NAAWU v Pretoria Precision Castings (Pty) Ltd 1985 (6) ILJ 369 (IC)

Naidoo v Lever Ponds 1999 (20) ILJ 1610 (CCMA)

Naidoo v Rudolph Chemicals (Pty) Ltd 2008 (6) BALR 497 (NBCCI)

Nakin v MEC, Department of Education Cape Province and Another 2008 (5) BLLR 489 (Ck)

Nampak Corrugated Wadeville v Khoza 1999 (2) BLLR 1117 (LAC)

Nampak Corrugated Wadeville v Khoza 1999 (20) ILJ 342 (LC)

NAPTOSA v Minister of Education, Western Cape 2001 (4) BCLR 388 (C)

Natal Die Casting Co (Pty) Ltd Ltd v President, Industrial Court & Others 1987 (8) ILJ 245 (D)

National Commissioner of the SA Police Service v Basson and Others 2006 (27) ILJ 614 (LC)

National Commissioner of the SAPS and Another v Cohen NO and Others 2009 (3) BLLR 239 (LC)

National Council of Food and Artificial Workers Union obo Roberts v Ons Handelshuis Koop 1997 (18) ILJ 1176 (CCMA)

National Defence Union v Minister of Defence: In re SA National Defence Union v Minister of Defence [2003] JOL 11263 (T)

Nawa and Another v Department of Trade and Industry 1998 (7) BLLR 701 (LC)

NAWU v Atlantis Diesel Engines (Pty) Ltd 1992 (13) ILJ 405 (IC)

NCBAWU v Masinga and Others 2000 (2) BLLR 171 (LC)

NCGLE and Another v Minister of Justice and Others 1998 (12) BCLR 1517 (CC)

NCGLE v Minister of Justice 1999 (3) BCLR 280 (C)

Nchanaleng v Director of Education (Transvaal) 1954 (1) SA 432 (T)

ND Engineering (Pty) Ltd v Naicker 1996 (4) BLLR 432 (LAC)

Ndindwa v Mnquma Local Municipality [2003] JOL 11026 (Tk)

Ndlela v SA Stevedores Ltd 1992 (13) ILJ 663 (IC)

Ndlovu v CCMA and Others 2000 (12) BLLR 1462 (LC)

Ndlovu v Transnet Ltd t/a Portnet 1997 (7) BLLR 887 (LC)

NDPP v Phillips and others 2002 (4) SA 60 (W)

NEHAWU and Another v SA Institute for Medical Research 1997 (2) BLLR 146 (IC)

NEHAWU and Others v The Agriculture Research Council and Others 2000 (9) BLLR 1081 (LC)

NEHAWU v Medicor (Pty) Ltd t/a Vergelegen Medi-Clinic 2005 (1) BLLR 10 (LC)

NEHAWU v SA Institute for Medical Research 1997 (2) BLLR 146 (IC)

NEHAWU v UCT and Others 2000 (7) BLLR 819 (LC)

NEHAWU v UCT and Others 2003 (2) BCLR 154 (CC)

NEHAWU, Mwule and Others v Director-General of Agriculture and Minister of Agriculture (1993) 4(12) SALLR 33 (IC)

Nell v Minister of Justice and Constitutional Development and Another 2006 (7) BLLR 716 (T)

Netherburn Engineering CC t/a Netherburn Ceramics v Robert Mudua and Others 2003 (12) ILJ 1712 (LC)

Neuwenhuis v Group Five Roads and Others 2000 (12) BLLR 1467 (LC)

NEWU v CCMA and Others 2003 (24) ILJ 2335 (LC)

Ngcobo v KwaZulu-Natal Health Services 1999 (2) BLLR 148 (LC)

Ngqumba v Staatspresident 1988 (4) SA 224 (A)

Ngwenya v Premier of KwaZulu-Natal 2001 (8) BLLR 924 (LC)

Nichabaleng v Director of Education, Transvaal 1954 (1) SA 432 (T)

Nicol NO v Lawrie 1950 (3) SA 151 (A)

Nicol v Minister of Railways and Harbours 1919 (4) NPD 369

NISEC (Edms) Bpk v Western Cape Provincial Tender Board 1997 (3) BCLR 367 (C).

Nkomo and Others v Administrator, Natal and Others 1991 (12) ILJ 521 (N)

Nkomo v Pick 'n Pay Retailers 1989 (10) ILJ 937 (IC)

Noble and Harbour v South African Railways and Harbours 1922 AD 527

Nomala v Permanent Secretary, Department of Welfare 2001 (8) BCLR 844 (E)

Nonzamo Cleaning Services Co-operative v Appie and Others 2008 (9) BLLR 901 (Ck)

Northern Cape Provincial Administration v Hambidge NO and Others 1999 (7) BLLR 698 (LC)

Northwest Township (Pty) Ltd v The Administrator, Transvaal and Another 1976 (4) SA 1 (T)

Nortje v Minister van Korrektiewe Dienste 2001 (3) SA 472 (SCA)

Ntlabezo and Others v MEC for Education, Eastern Cape and Others 2002 (3) BLLR 274 (Tk)

Ntshangase v MEC for Finance: KwaZulu Natal [2009] ZASCA 123

NULAW v Bader Bop (Pty) Ltd 2004 (25) ILJ 1469 (LC)

NUM and Others v East Rand Gold and Uranium Co Ltd 1986 (7) ILJ 739 (IC)

NUM and Others v Free State Consolidated Gold Mines (Operations) Ltd – President Steyn Mine; President Brand Mine; Freddies Mine 1992 (13) ILJ 366 (IC)

NUM and Others v Free State Consolidated Gold Mines (Operations) Ltd 1995 (12) BLLR 8 (A)

NUM and Others v Free State Consolidated Gold Mines (Operations) Ltd – President Steyn Mines; President Brand Mine; Freddies Mine 1992 (13) ILJ 366 (IC)

NUM v Black Mountain Development Corporation 1997 (4) BLLR 685 (AD)

NUM v Buffelsfontein Gold Mining Co Ltd (Beatrix Mines Division 1988 (9) ILJ 341 (IC)

NUM v De Beers Consolidated Mines 2006 (27) ILJ 1909 (LC)

NUM v East Rand Gold and Uranium Co Ltd 1986 (7) ILJ 739 (IC)

NUM v Libanon Gold Mining Co Ltd 1994 (15) ILJ 585 (LAC)

NUM v Vaal Reefs Exploration and Mining Co Ltd 1987 (8) ILJ 776 (IC)

NUMSA and Others v Bader Bop (Pty) Ltd and Another 2003 (2) BLLR 103 (CC)

NUMSA and Others v Dorbyl Ltd and Another 2004 (8) BLLR 914 (LC)

NUMSA and Others v Fibre Flair CC t/a Kango Canopies 1999 (20) ILJ 1859 (LC)

NUMSA and Others v Henred Fruehauf Trailers (Pty) Ltd 1994 (15) ILJ 1257 (A)

NUMSA obo Davids v Bosal Africa (Pty) Ltd 1999 (11) BLLR 11327 (IMSSA)

NUMSA obo Davids v Bosal Africa (Pty) Ltd 1999 (11) BLLR 1327 (IMSSA)

NUMSA obo Swanepoel and Oxyon Services CC 2004 (25) ILJ 1136 (BCA)

NUMSA v Comark Holdings (Pty) Ltd 1997 (18) ILJ 516 (LC)

NUMSA v Henred Fruehauf Trailers (Pty) Ltd 1994 (15) ILJ 1257 (A)

NUMSA v Malcomess Toyota (a division of Malbak Consumer Products (Pty) Ltd) 1999 (20) ILJ 1867 (LC)

NUMSA v Vetsak Co-operative Ltd 1991 (12) ILJ 564 (LAC)

NUMSA v Vetsak Co-operative Ltd and Others 1996 (6) BLLR 679 (A)

NUPSW and Others v Alberton Old Age Home 1990 (11) ILJ 494 (LAC)

NUTESA obo Members v Border Technikon 2005 (12) BALR 1302 (CCMA)

NUTESA v Central University of Technology, Free State 2009 (4) BLLR 369 (LC)

NUTESA v Technikon Northern Transvaal 1997 (4) BLLR 467 (CCMA)

Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services and Others 2008 (12) BLLR 1179 (LAC)

Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services and Others 2006 (10) BLLR 960 (LC)

Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others Case No: CCT 24/07 – Submissions of the Amici Curiae: Community Law Centre (UWC) and COHRE

OCGAWU and Another v Country Fair Foods (Pty) Ltd 2001 (12) BLLR 1358 (LC)

Old Mutual Group Schemes v Dreyer 1999 (20) ILJ 2030 (LAC)

Old Mutual Life Assurance Co SA Ltd v Gumbi 2007 (8) BLLR 699 (SCA)

Olitzky Property Holdings v State Tender Board 2001 (8) BCLR 779 (SCA)

Oliver v University of Stellenbosch (Unreported) Case Nr 2181/2004

Olivier v Foschini Group Ltd 1995 (8) BLLR 102 (IC)

Orange Free State Provincial Administration v Luyt 1930 AD 394

Oranjevis (Pty) Ltd v CCMA and Others 2005 (1) BLLR 62 (LC)

Ortlieb/Khulani Springbok Patrols 1999 (4) BALR 423 (CCMA)

Oskil Properties (Pty) Ltd v Chairman of the Rent Control Board 1985 (2) SA 234 (SE)

Palaborwa Mining Company Limited v Cheetham 2008 (6) BLLR 553 (LAC)

Papane v Van Aarde NO and Others 2007 (11) BLLR 1043 (LAC)

Parry v Astral Operations Ltd 2005 (10) BLLR 989 (LC)

Pascoe and Another v Minister for the Public Service and Administration and Others 2002 (8) BLLR 791 (LC)

Penrose Holdings (Pty) Ltd v Clark 1993 (14) ILJ 1558 (IC)

Pep Stores v Laka 1998 (9) BLLR 952 (LC)

Performing Arts Council (Transvaal) v Paper Printing Wood and Allied Workers Union 1992 (13) ILJ 1439 (LAC)

Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza 2001 (10) BCLR 1039 (A)

Perumal v Minister of Safety and Security and Others 2001 (8) BLLR 953 (LC)

Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the RSA and Others 2000 (3) BCLR 241 (CC)

Philander v Eco Car Hire CC 2001 (6) BALR 631 (CCMA)

Plaatjies v RK Agencies 2005 (1) BALR 77 (CCMA)

Plaschem (Pty) Ltd v CWIU 1993 (14) ILJ 1000 (LAC)

Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)

Polokwane Local Municipality v SALGBC and Others 2008 (8) BLLR 783 (LC)

POPCRU and Others v Minister of Correctional Services 2006 (4) BLLR 385 (E)

POPCRU v Minister of Correctional Services and Others 1999 (20) ILJ 2416 (LC)

Portnet v SALTAFF obo Lagrange 1998 (7) BALR 963 (IMSSA)

Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State Aided Schools: Eastern Transvaal 1999 (2) BCLR 151 (CC)

President of the RSA v SARFU 2000 (1) SA 1 (CC)

Pretoria City Council v Minister of Labour 1974 (2) TPD 238

Pretoria North Town Council v A1 Electric Ice-Cream 1953 (3) SA 1 (A)

Pretoria Society for the Care of the Retarded v Loots 1997 (18) ILJ 981 (LAC)

Prinsloo v Van der Linde and Another 1997 (6) BCLR 759 (CC)

Protekon (Pty) Ltd v CCMA and Others 2005 (7) BLLR 703 (LC)

Provincial Administration Western Cape (Department of Health and Social Services) v Bikwani 2002 (23) ILJ 761 (LC)

PSA obo Badenhorst v Department of Justice 1999 (20) ILJ 253 (CCMA)

PSA obo Botes and Others v Department of Justice 2000 (21) ILJ 690 (CCMA)

PSA obo Dalton and Another v Department of Public Works 1998 (9) BALR 1177 (CCMA)

PSA obo Haschke v MEC for Agriculture and Others 2004 (8) BLLR 822 (LC)

PSA obo Petzer v Department of Home Affairs 1998 (19) ILJ 412 (CCMA)

PSA obo Van Zyl v Department of Correctional Services 2008 (29) ILJ 215 (BCA)

PSA obo Williams v Department of Correctional Services 1999 (20) ILJ 1146 (CCMA)

PSA of SA and Another v Premier of Gauteng and Others 1999 (20) ILJ 2106 (LC)

PSA v Department of Correctional Services 1998 (7) BALR 854 (CCMA)

R v Canqan 1965 (3) SA 360 (E)

R v Gwantshu 1931 EDL 31

R v Hodos & Jajhbay 1927 TPD 101

R v Nqwevela 1954 (1) SA 123 (A)

R v Zackey 1945 AD 505

Radio Pretoria (geregistreer ooreenkomstig artikel 21 van die Maatskappywet van SA van 1973 soos gewysig) v Voorsitter van due Onafhanklike Kommunikasie-owerheid van SA [2006] 1 All SA 143 (T)

Rafferty/Department of the Premier 1998 (8) BALR 1017 (CCMA)

Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 (2) SA 359 (CC)

Ramotsepane and Others v Barmot Truck Hire 2002 (6) BLLR 525 (LAC)

Rampola v MEC for Education Limpopo and Another 2006 (27) ILJ 591 (T)

Rèan International Supply Company (Pty) Ltd v Mpumalanga Gaming Board 1999 (8) BCLR 918 (T)

Reed Applicant v Richmond Local Board Respondent 1923 AD 50

Riekert v CCMA and Others 2006 (4) BLLR 353 (LC)

Rikhoto v East Rand Administration Board 1983 (3) SA 595 (A)

Rikhotso and Others v Transvaal Alloys (Pty) Ltd 1984 (5) ILJ 228 (IC)

Rivett-Carnac v Wiggins 1997 (3) SA 80 (C)

Robbertze v Matthew Rustenburg Refineries (Waseville) (Edms) Bpk 1986 (7) ILJ 64 (IC)

Roberts Construction Co Ltd v Willcox Bros (Pty) Ltd [1962] 4 All SA 295 (A)

Robin Consolidated Industries Ltd v Commissioner for Inland Revenue 1997 (3) SA 654 (SCA)

Roman v Williams NO 1997 (9) BCLR 1267 (C)

Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA and Others 1997 (11) BLLR 1475 (LC)

Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA and Others 2006 (11) BLLR 1021 (SCA)

Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA and Others 2004 (1) BLLR 34 (LAC)

S v Baleka and Others 1986 (1) SA 361 (T)

S v Khala 1995 (1) SACR 246 (A)

S v Lawrence 1997 (10) BCLR 1348 (CC)

S v Makwanyane and Another 1995 (6) BCLR 665 (CC)

S v Manamela 2000 (3) SA 1 (CC)

S v Mhlungu and Others 1995 (7) BCLR 793 (CC)

S v Prefabricated Housing Corporation (Pty) Ltd 1974 (1) SA 535 (A)

S v Thebus 2003 (6) SA 505 (CC)

S v Williams 1995 (3) SA 632 (CC)

S v Zuma 1995 (4) BCLR 401 (CC)

SA Connexion CC v Chairman, Publications Appeals Board 1996 (4) SA 108 (T)

SA Liquor Traders Association v Chairperson Gauteng Liquor Board 2006 (6) BCLR 901 (CC)

SA Maritime Safety Authority v McKenzie 2010 (5) BLLR 488 (SCA)

SA Municipality Workers Union obo Damon v Cape Metropolitan Council 1999 (20) ILJ 714 (CCMA)

SA Roads Board v Johannesburg City Council 1991 (4) SA 1 (A)

SA Rugby Ltd v CCMA 2006 (1) BLLR 27 (LC)

SA Technical Officials' Association v President of the Industrial Court 1985 (1) SA 597 (A)

SA Veterinary Council v Szymanski 2003 (4) BCLR 378 (SCA)

SAAPAWU v Premier (Eastern Cape) 1997 (9) BLLR 1226 (LC)

SABC v CCMA 2006 (6) BLLR 587 (LC)

SACCAWU v Garden Route Chalets (Pty) Ltd 1997 (3) BLLR 325 (CCMA)

SACCAWU v Irvin & Johnson Ltd 1999 (8) BLLR 741 (LAC)

Sachs v Dönges, NO 1950 (2) SA 265 (AD)

Sachs v Minister of Justice 1934 AD 11

SACTWU and Others v Afrox Ltd 1999 (10) BLLR 1005 (LAC)

SACTWU and Others v Discreto – a Division of Trump and Springbok Holdings 1998 (12) BLLR 1228 (LAC)

SACTWU v Jatex SA (Pty) Ltd 1992 (13) ILJ 1252 (IC)

SACWU and Others v Afrox Ltd 1999 (10) BLLR 1005 (LAC)

SACWU obo Mhlongo and Silicon Technology (Pty) Ltd 2002 (23) ILJ 2134 (CCMA)

Sajid v Mohamed NO and Others 2000 (21) ILJ 1204 (LC)

SALGA v SAMWU 2008 (1) BLLR 66 (LC)

Saloojee v McKenzie NO and Others 2005 (3) BLLR 285 (LC)

SALSTAFF obo Vrey v Datavia 1999 (6) BALR 757 (IMSSA)

SAMWU obo Damon v Cape Metropolitan Council 1999 (20) ILJ 714 (CCMA)

SANDU v Minister of Defence and Others 2007 (9) BLLR 785 (CC)

SANDU v Minister of Defence and Others: In re SA National Defence Union v Minister of Defence and Others 2003 (9) BLLR 932 (T)

SANDU v Minister of Defence and Others; Minister of Defence and Others v SANDU and Others 2006 (11) BLLR 1043 (SCA)

SAPO Ltd v Jansen van Vuuren NO and Others 2008 (8) BLLR 798 (LC)

Sappi Forest (Pty) Ltd v CCMA and Others 2009 (3) BLLR 254 (LC)

SAPU and Another v National Commissioner of the Police Service and Another 2006 (1) BLLR 42 (LC)

SAPU v SAPS and Others 2004 (6) BLLR 567 (LC)

Schierhout v Minister of Justice 1925 AD 417

Schierhout v Minister of Justice 1926 AD 99

Schierhout v Union Government (Minister of Justice) 1919 AD 30

Schierhout v Union Government (Minister of Justice) 1926 AD 286

Schierhout v Union Government (Minister of Justice) 1926 AD 295

Schoeman and Another v Samsung Electronics SA (Pty) Ltd 1997 (10) BLLR 1364 (LC)

Schoon v MEC, Department of Finance, Economic Affairs and Tourism, Northern Province and Another 2003 (9) BLLR 963 (T)

Schoonbee v MEC for Education, Mpumalanga 2002 (4) SA 877 (T)

Schreuder v Nederduitse Gereformeerde Kerk, Wilgespruit 1999 (20) ILJ 1936 (LC)

Scribante v Avgold Ltd: Hartebeesfontein Division 2000 (11) BLLR 1342 (LC)

Semenya and Others v CCMA and Others 2006 (6) BLLR 521 (LAC)

Setlhoane v Department of Education: North-West Province [2009] ZALC 119

Shabalala v Attorney-General, Transvaal 1996 (1) SA 725 (CC)

Shames v South African Railways and Harbours 1922 AD 228

Sheard v Attorney-General 1908 TS 1077

Shepstone & Wylie and Others v Geyser NO 1998 (3) SA 1036 (SCA)

Shezi v Consolidated Frame Cotton Corporation Ltd 1984 (5) ILJ 3 (IC)

Shiras v Union Government (Minister of Finance) 1927 TPD 764

Shoprite Checkers (Pty) Ltd v Ramdaw NO 2001 (22) ILJ 1603 (LAC)

Sibiya and Another v Administrator, Natal and Another 1991 (12) ILJ 530 (D)

Sidorov v Minister of Home Affairs 2001 (4) SA 202 (T)

Sidumo and Another v Rustenburg Platinum Mines Ltd and Others 2007 (12) BLLR 1097 (CC)

Sikhosana and Others v Sasol Synthetic Fuels 2000 (1) BLLR 101 (LC)

Simelela and Others v MEC for Education, Province of the Eastern Cape and Another 2001 (9) BLLR 1085 (LC)

Sithole v Noqwaza NO and Others 1999 (12) BLLR 1348 (LC)

Smith v Minister of Environmental Affairs and Tourism, RSA and Another [2003] 1 All SA 628 (C)

Solidarity obo Kerns v Muau and Others 2007 (28) ILJ 1146 (LC)

Somers v Friederich-Naumann-Stiftung 2000 (3) BLLR 356 (LC)

Somyo v Ross Poultry Breeders (Pty) Ltd 1997 (7) BLLR 862 (LAC)

Soobramoney v Minister of Health, KwaZulu-Natal 1998 (1) SA 765 (CC*)*

South African Breweries Ltd (Beer Division) v Woolfrey and Others 1999 (5) BLLR 525 (LC)

South African Jewish Board of Deputies v Sutherland NO 2004 (4) SA 368 (W)

South African Revenue Services v CCMA and Others 2001 (6) BLLR 670 (LC)

South African Roads Board v Johannesburg City Council 1991 (4) SA 1 (A)

SRV Mill Services (Pty) Ltd v CCMA 2004 (2) BLLR 184 (LC)

Staatsdiensliga van Suid-Afrika en Andere v Minister van Waterwese 1990 (2) SA 440 (NK)

Standard Bank of Bophuthatswana Ltd v Reynolds NO 1995 (3) SA 74 (B)

Standard Bank of South Africa v CCMA and Others 1998 (19) ILJ 903 (LC)

Stander v Administrator, Natal 1960 (1) SA 327 (N)

Stanfield v Minister of Correctional Services and Others 2003 (12) BCLR 1384 (C)

Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC)

Stoner v SA Railways and Harbours 1933 TPD 446

Sun Couriers (Pty) Ltd v CCMA and Others 2002 (23) ILJ 189 (LC)

Sweet Food & Allied Workers Union and Another v Delmas Kuikens 1986 (7) ILJ 628 (IC)

Theron and Others v FAWU and Others 1998 (5) BLLR 528 (LC)

Theron v Ring van Wellington van die NG Sending 1976 (2) SA 1 (A)

Tiopazi v Bulwayo Municipality 1923 AD 317

Tirfu Raiders Rugby Club v SA Rugby Union and Others [2006] 2 All SA 549 (C)

Tither v Trident Steel 2004 (4) BALR 404 (MEIBC)

TOWU obo Malan v Commuter Handling Services (Pty) Ltd 2006 (3) BALR 327 (CCMA)

Toyota SA Motors (Pty) Ltd v Radebe 2000 (21) ILJ 340 (LAC)

Trade and Investment South Africa and Another v GPSBC and Others 2005 (5) BLLR 517 (LC)

Transnet Ltd and Others v Chirwa 2007 (1) BLLR 10 (SCA)

Transnet Ltd v Goodman Brothers (Pty) Ltd 2001 (2) BCLR 176 (SCA)

Transport and General Workers Union v S Bothma and Son Transport 1987 (8) ILJ 343 (IC)

Transport Fleet Maintenance (Pty) Ltd and Another v NUMSA and Others 2004 (25) ILJ 104 (LAC)

Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa 2004 (3) SA 346 (SCA)

Truth and Reconciliation Commission v Du Preez 1996 (3) SA 997 (C)

Tsika v Buffalo City Municipality 2009 (3) BLLR 272 (E)

Turner v Jockey Club of South Africa 1974 (3) SA 633 (A)

Twala v ABC Shoe Stores 1978 (8) ILJ 714 (IC)

TWK Agriculture Ltd v Competition Commission and Others [2007] JOL 20764 (CAC)

Tyikana v Rous 1996 (8) BLLR 1046 (LAC)

UAMAWU v Fodens (SA) 1983 (4) ILJ 213 (IC)

Union Government (Minister of Justice) v Schierhout 1922 AD 179

Union Government (Minister of Justice) v Schierhout 1925 AD 322

Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Limited 1928 AD 220

Union Government v Whittaker 1916 AD 194

Union of Pretoria Municipal Workers v Stadsraad an Pretoria 1992 (13) ILJ 1563 (IC)

United National PSA of SA v Digomo NO 2005 (12) BLLR 1169 (SCA)

United People's Union of SA v Grinaker Duraset 1998 (19) ILJ 107 (LC)

Unitrans Zululand (Pty) Ltd v Cebekhulu 2003 (7) BLLR 688 (LAC)

UWC and UWCUWU 1992 (13) ILJ 699 (ARB)

Vaal Toyota (Nigel) v Motor Industry Bargaining Council 2002 (10) BLLR 936 (LAC)

Van Coller v Administrator, Transvaal 1960 (1) SA 110 (T)

Van der Merwe v Smith NO en 'n Ander 1999 (20) ILJ 564 (C)

Van der Riet v Leisurenet t/a Health and Racquet Clubs 1997 (6) BLLR 721 (LAC)

Van der Walt v Metcash 2002 (5) BCLR 454 (CC)

Van Dyk v Maithufi NO and Others [2004] 1 All SA 568 (T)

Van Eyk v Minister of Correctional Services 2005 (27) ILJ 1706 (LC)

Van Huyssteen v Minister for Environmental Affair 1995 (9) BCLR 1191 (C)

Van Neel v Jungle Oats Company (Unreported) Case Nr NHR 11/2/170

Van Niekerk v Medicross Health Care Group (Pty) Ltd 1998 (8) BALR 1038 (CCMA)

Van Rensburg v Austen Safe Company 1998 (1) BLLR 86 (LC)

Van Rensburg v Northern Cape Provincial Administration 1997 (18) ILJ 1421 (CCMA)

Van Wyk v Albany Bakeries Ltd and Others 2003 (12) BLLR 1274 (LC)

Van Zyl v Duvha Opencast Services (Edms) Bpk 1988 (9) ILJ 905 (IC)

Van Zyl v New National Party and Others 2003 (10) BCLR 1167 (C)

Velinov v University of Kwa-Zulu and Another 2006 (6) BLLR 607 (LC)

Vereeniging van Staatsamptenare obo Badenhorst v Department of Justice 1999 (20) ILJ 253 (CCMA)

Visser and Vodacom 2003 (24) ILJ 693 (ARB)

Visser v Safair Freighters (Edms) Bpk 1989 (10) ILJ 529 (IC)

Vorster v Department of Economical Development, Environment & Tourism: Limpopo Provincial Government 2006 (5) SA 291 (T)

Wahl v AECI Ltd 1983 (4) ILJ 298 (IC)

Walele v City of Cape Town 2008 (11) BCLR 1067 (CC)

WC Greyling & Erasmus (Pty) Ltd v Johannesburg Local Transport Board and Others 1982 (4) SA 427 (A)

Webber v Fattis & Monis 1999 (20) ILJ 1150 (CCMA)

Western Cape Workers Association v Minister of Labour 2006 (1) BLLR 79 (LC)

Whall v BrandAdd Marketing (Pty) Ltd 1999 (6) BLLR 626 (LC)

Wheeler v Pretoria Propshaft Centre CC 1999 (11) BLLR 1213 (LC)

Whitcutt v Computer Diagnostics and Engineering (Pty) Ltd 1987 (8) ILJ 356 (IC)

White v Medpro Pharmaceuticals (Pty) Ltd 2000 (10) BALR 1182 (CCMA)

Whitfield v Inyati Game Lodge 1995 (1) BLLR 118 (IC)

Wiehman v Commissioner of Pensions 1938 TPD 573

Wilcaris (Edms) Bpk v Williams [1999] 4 All SA 209 (NC)

WL Ochse Webb and Pretorius (Pty) Ltd v Vermeulen 1997 (18) ILJ 361 (LAC)

Wood v Potane NO and Others 2004 (7) BLLR 722 (LC)

Woolworths (Pty) Ltd v Whitehead 2000 (3) SA 529 (LAC)

Wyeth SA (Pty) Ltd v Manqele and Others 2005 (26) ILJ 749 (LAC)

X v Elvey International (Pty) Ltd 1995 (16) ILJ 1210 (IC)

Yates v University of Bophuthatswana 1994 (3) SA 815 (B)

Yichiho Plastics (Pty) Ltd v Muller (1994) 15 ILJ 593 (LAC)

Zenzile and Others v Administrator of the Transvaal and Others 1989 (10) ILJ 34 (W)

Zondi and Others v Administrator, Natal 1991 (12) ILJ 497 (A)

Zondi and Others v The President of the Industrial Court and Another 1997 (8) BLLR 984 (LAC)

Zondi v MEC for Traditional and Local Government Affairs and Others 2004 (5) BCLR 547 (N)

Zondi v MEC for Traditional and Local Governmental Affairs and Others 2005 (4) BCLR 347 (CC)

5 United Kingdom

Attorney-General of Hong Kong v Ng Yuen Shiu [1983] 2 All ER 346

Associated Provincial Picture Houses v. Wednesbury Corporation [1948] 1 KB 223

Baschet v London Illustrated Standard Co [1900] 1 Ch 73

Barker v Edgar [1898] AC 748

Board of Education v Rice [1911] AC 179

Boys v Chaplin [1971] AC 356

Brind v Secretary of State for the Home Department [1991] 1 All ER 720

British Leyland UK Ltd v Swift [1981] IRLR 91

Council of Civil Service Union v Minister of Civil Service [1984] 3 All ER 935

Doody v Secretary of State for the Home Department and Other Appeals [1993] 3 All ER 92

Dunn v The Queen [1896] 1 QB 116

Edwards (Inspector of Taxes) v Bairstow [1955] 3 All ER 48

Hull Prison Board of Visitors, ex p St Germain [1979] 1 All ER 701

HTV Ltd v Price Commission [1976] ICR 170

In re HK (An Infant) [1967] 2 QB 617

John v Rees and Others; Martin and Another v Davis and Others; Rees and Another v John [1970] Ch 345

Khanum v Mid-Glamorgan Area Health Authority [1978] IRLR 215

Lett v Lett [1906] 1 IR 618 (CA)

Lynoch v Cereal Packaging Ltd [1988] IRLR 510

M v Home Office [1994] 1 AC 377

Maxwell v Department of Trade and Industry [1974] 2 All ER 122

Minister of Home Affairs v Fisher [1980] AC 319

Nicholson v Haldimand-Norfolk Regional Board of Commissioners of Police [1979] 1 SCR 311

O'Reilly v Mackman [1982] 3 All ER 1124

Poplar Housing and Regeneration Community Association Ltd v Donoghue [2001] 4 All ER 604

R (on the application of ProLife Alliance) v British Broadcasting Corporation [2003] 2 All ER 977

R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltt [1999] 1 All ER 129

R v Electricity Commission 1924 (1) KB 171 (CA)

R v Goldsmith [1983] 1 WLR 151

R v Higher Education Funding Council, ex parte Institute of Dental Surgery [1994] 1 All ER 651

R v Liverpool Corporation, Ex Parte Liverpool Taxi Fleet Operators' Association [1972] 2 All ER 589

R v Panel on Takeovers and Mergers, ex parte Datafin plc [1987] 1 QB 815

R v Secretary of State for the Home Department, ex parte Doody [1994] 1 AC 531

Rederiaktiekbolaget "Amphirite" v King [1921] 3 KB 500

Ridge v Baldwin [1964] AC 40 (CA)

Rodwell v Thomas [1944] 1 KB 596

Schmidt v Secretary of State for Home Affairs 1969 (2) Ch 149

Selvarajan v Race Relations Board [1976] 1 All ER 12

Terrell v Secretary of State for the Colonies [1953] 2 All ER 490

Warner Bros Pictures Inc v Nelson [1937] 1 KB 209

Wiseman v Borneman [1969] 3 All ER 275

6 United States

Abood and Others v Detroit Board of Education 1995 (4) LCD 183 (USA)

Arnett v Kennedy 94 S Ct 1633 (1972)

Cleveland Board of Education v LaFleur 1974 (4141) US 632

Keyisgian v Board of Regents 1967 (385) US 589

McAuliffe v Mayor of New Bedford 1892 (155) Mass 216

RAV v City of St Paul 112 S Ct 2538 (1992)

The Vera Cruz 1884 (10) App Cas 59

Thompson v Gallagher 1973 (489) F 2d 443 (5th Cir)