

**DOES THE PROMOTION OF
ADMINISTRATIVE JUSTICE ACT APPLY TO
DISMISSALS IN THE PUBLIC SECTOR?***

Transnet Ltd v Chirwa (2007) 11 BLLR 10 SCA

1 Introduction

The Supreme Court of Appeal (hereinafter “the SCA”) was recently tasked with resolving the elusive answer to an unsettled question: may employees in the public service challenge dismissals and other forms of alleged unlawful practices in the High Court as infringements of their right to lawful, rational and procedurally fair administrative action?

The High Court and the Labour Court have been divided on the issue to such an extent that neither forum has managed to follow a consistent approach. The uncertainty has arisen, in essence, from two irreconcilable bases: the first, that dismissals and other employment practices in the public sector do not constitute administrative action, and so cannot be subjected to scrutiny under the common law, the PAJA or the Constitution; the second, that public sector employees have always been regarded as administrative law subjects under the common law, and as the PAJA does not expressly alter the position, they retain the protection.

Amid this legal setting of uncertainty emerged Ms Chirwa. She was dismissed for alleged incompetence following an enquiry in which she refused to participate as she was adamant that the presiding manager was biased or could reasonably be seen to be biased against her. She challenged her dismissal in the High Court as an infringement of her right to lawful, reasonable and procedurally fair administrative action in terms of the PAJA, alternatively the Constitution. (S 33(1) of the Constitution reads: “Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.”) The court agreed with Ms Chirwa’s contentions, declared her dismissal a nullity, and reinstated her with retrospective effect. (Brassey AJ found that Transnet had breached the *audi alteram partem* rule, a principle of natural justice applicable to public sector dismissals. This case note does not offer a critique of the court *a quo*’s decision.)

On appeal, Transnet contended that Ms Chirwa’s dispute was one over which the Labour Court had exclusive jurisdiction in terms of section 157(1)

* In this case note references to the LRA and the PAJA are references to the Labour Relations Act 66 of 1995 and the Promotion of Administrative Justice Act 3 of 2000 respectively. The Constitution of the Republic of South Africa, 1996 (hereinafter “the Constitution”).

of the LRA, (s 157(1) of the LRA which reads: “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.”); alternatively, that her dismissal did not constitute administrative action as defined in section 1 of the PAJA. Section 1 of the PAJA reads:

“In this Act, unless the context indicates otherwise – ‘**administrative action**’ means any decision taken, or any failure to take a decision, by –

- (i) (a) an organ of State, when –
 - (i) exercising a power 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; or
- (b) a natural or juristic person, other than an organ of State, when exercising a public power or performing a public function in terms of an empowering provision; which adversely affects the rights of any person and which has a direct, external legal effect, but does not include – ... [exclusions listed]; ...
- (v) ‘**decision**’ means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision ...;
- (vi) ‘**empowering provision**’ means a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative decision was purportedly taken; ...”

Put simply, the issue on appeal was whether Ms Chirwa had an administrative justice cause of action justiciable in the High Court. Of the five judges who heard the appeal, three held that the High Court could not assist her. On the face of it, *Chirwa* therefore appears to have resolved the jurisdictional dispute in favour of the exclusive jurisdiction of the Labour Court in employment disputes. However, scratching the surface of the judgment, the worth of its appearance quickly fades. This case note offers a critique and attempts to determine the real worth of *Chirwa*, a judgment by what, as will be explained, was actually a divided bench of the SCA.

2 The Majority view

2.1 *Mthiyane JA (Jafta JA concurred)*

Mthiyane JA disposed of Transnet’s contention that the Labour Court enjoyed exclusive jurisdiction over Ms Chirwa’s dismissal by referring to section 157(2) of the LRA which gives the Labour Court concurrent jurisdiction with the High Court in respect of any violation of a constitutional right (14F-G). (S 157(2) of the LRA reads: “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.”) As Ms Chirwa had alleged that the termination of her employment constituted a violation of her right to lawful, reasonable and procedurally fair administrative action as guaranteed by the Constitution, Mthiyane JA reasoned that she had raised a matter over which the High Court acquired jurisdiction in terms of section 169 of the Constitution, and retained in terms of section 157(2) of the LRA (14E-F). (S 169 of the Constitution reads: “A High Court may decide – (a) any constitutional matter except a matter that – (i) only the Constitutional Court may decide; or (ii) is assigned by an Act of Parliament to another court of a status similar to a High Court; and (b) any other matter not assigned to another court by an Act of Parliament.”)

While the reasoning of Mthiyane JA on the jurisdictional issue was no doubt correct in respect of Ms Chirwa’s direct reliance on section 33 of the Constitution (see, *eg*, *Fredericks v MEC for Education and Training EC* 2002 2 SA 693 (CC); *United National Public Servants Association of South Africa v Digomo NO* (2005) 26 ILJ 1957 (SCA); and *Mbayeka v MEC for Welfare, EC* [2001] 1 All SA 567 (Tk)), the authors would have taken a different approach in light of the fact that Ms Chirwa’s first point of departure had to be PAJA, not the Constitution. (In *Minister of Health v New Clicks SA (Pty) Ltd* 2006 1 BCLR 1 (CC) par 96 Chaskalson CJ held: “A litigant cannot avoid the provisions of [the] PAJA by going behind it, and seeking to rely [directly] on s 33(1) of the Constitution or the common law. That would defeat the purpose of the Constitution in requiring the rights contained in s 33 to be given effect by means of national legislation.” See also *Zondi v MEC for Traditional and Local Government Affairs* 2005 3 SA 589 (CC) par 99-101.) Accordingly, the authors’ first question would have been whether the Labour Court ousted the High Court’s jurisdiction in terms of PAJA, not whether the Labour Court ousted the High Court’s jurisdiction on constitutional issues in employment disputes. However, in the authors’ view, the result and reasoning are in substance the same: the High Court retains jurisdiction because no general jurisdiction is afforded to the Labour Court in employment disputes. The remarks of O’Regan J in *Fredericks v MEC for Education and Training, EC* (*supra* par 40) are apposite:

“As there is no general jurisdiction afforded to the LC in employment matters, the jurisdiction of the HC is not ousted by S 157(1) simply because a dispute is one that falls within the overall sphere of employment relations. The HC’s jurisdiction will only be ousted in respect of methods that are to be determined by the LC in terms of [that] Act.”

As it turned out, however, Mthiyane JA took the view that the High Court’s jurisdiction to determine Ms Chirwa’s dispute did not assist her as her dismissal did not constitute administrative action as defined in section 1 PAJA (16D-18G). The essence of the judge’s finding in this regard was premised on the view that the common law decisions which held that public sector dismissals constituted administrative acts are no longer good law and are negated by the PAJA, which places emphasis on the nature of the power exercised (and not simply whether the decision maker was a public

functionary) (19A-B). (See the *locus classicus* *Administrator, Transvaal v Zenzile* 1991 1 SA 21 (A). See also *Langeni v Minister of Health and Welfare* 1988 4 SA 93 (W); *Mokoena v Administrator, Transvaal* 1988 4 SA 912 (W); *Administrator, Orange Free State v Mokopanele* 1990 3 SA 780 (A); *Administrator, Natal v Sibiyi* 1992 4 SA 532 (A); and *Minister of Water Affairs v Mangena* (1993) 14 ILJ 1205 (A). Recent decisions favouring the view that public sector dismissals constitute administrative acts include *POPCRU v Minister of Correctional Services* 2006 4 BLLR 385 (E); *Mbayeka v MEC for Education, EC* [2001] 1 All SA 567 (Tk); and *Simelela v MEC for Education, EC* [2001] BLLR 1085 (LC).) With that in mind, Mthiyane JA concluded (19B-D):

“The nature of the conduct involved here is the termination of a contract of employment. It is based on contract and does not involve the exercise of any public power or the performance of a public function in terms of some legislation. Ordinarily the employment contract has no public law element to it and it is not governed by administrative law. The mere fact that Transnet is an organ of state does not impart a public law character to its employment contract with the applicant. The power to dismiss is found, not in legislation, but in the employment contract between Transnet and the applicant. When it dismissed the applicant, Transnet did not act as a public authority but simply in its capacity as employer. The factual matrix in which *Zenzile*, *Sibiyi* and *Mangena* were decided has changed. ... at the time, public sector employees were expressly excluded from the Labour Relations Act, 28 of 1956 ...”

Some reservations exist about this finding. The common law principles, previously the grounds for the review of the decisions of public functionaries, have now been subsumed under the Constitution, and to that extent, gain their validity from the Constitution (see *Pharmaceutical Manufacturers Association: in re ex parte President of the RSA* 2000 2 SA 674 (CC)). The PAJA was enacted to give effect to the Constitution. The Act therefore had a codifying effect; it purported to give effect to section 33 of the Constitution as informed by the common law. In the authors' view, the PAJA should therefore be interpreted in light of the common law and its scope determined accordingly. The authors' conclusions are only reinforced when regard is had to the fact that if the legislature sought to deprive public employees of their administrative justice rights, it could have made that fact clear when enacting PAJA. In the words of Cameron JA in his minority judgment (38C-D):

“Far from doing so, PAJA's extensive list of exclusions from the definition of 'administration action' refrains from any such mention. That cannot be but a telling feature. It follows in my view that the cause of action survives unscathed”.

It is evident from *Chirwa* that Mthiyane JA attached great significance to the distinction between contract (private law) and public administration (administrative law). The distinction, however, in the authors' view, is somewhat artificial as it ignores the reality that statutory bodies are inevitably required to use contract as a means to carry out their functions and duties, and exercise their powers. Further, the PAJA specifically recognises that administrative decisions may be based in contract (see s 1(vi) of the PAJA). The mere fact that the power to dismiss Ms Chirwa had a basis in contract –

and did not derive from a particular statutory provision – did not, therefore, in the authors' view, mean that decision was not subject to scrutiny under the PAJA.

2.2 *Conradie JA*

The third judge, Conradie JA, differed in his reasons for upholding Transnet's appeal. For Judge Conradie, the issue of whether or not public sector dismissals constitute administrative acts was not even a necessary question for the High Court to decide since the advent of the LRA; he was prepared to accept that public sector dismissals indeed are administrative acts and that the common law position remains unchanged in that regard (22D-G).

In the view of Conradie JA, the pivotal question on which the appeal turned was whether the LRA had from its inception removed the possibility of the High Courts subjecting public sector dismissals to scrutiny under administrative law (22G). In this regard, Conradie JA found the jurisdiction of the High Court had indeed been removed because the legislature, in enacting the LRA, desired "a comprehensive scheme of labour regulation" (22H-23A):

"The legislative intent evident from the LRA is beyond doubt: it is subject the dispute about the unfair dismissal of *any* employee within its scope to the dispute resolution mechanisms of that Act. If there is a way to give effect to that intention, I think one should try and find it" (own emphasis).

Accordingly, Ms Chirwa's dismissal, in his view, despite being an administrative act, was not capable of being dealt with under the PAJA. This was because Ms Chirwa's cause of action, a dismissal, was a "quintessential" LRA matter that had to be determined by the LC in terms of section 157(1) of the LRA (26F). He hastened to add that, if he was wrong, Ms Chirwa nevertheless should have approached the Labour Court to enforce her administrative law or common law rights (25E-F). In support of this contention, Conradie JA raised the rather alluring argument that section 158(1)(h) of the LRA, which states 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", must have been considered necessary by the legislature to ensure the Labour Court's exclusive jurisdiction over all dismissals and other "pure" employment disputes, even those in the public sector (25F-H). Conradie JA reasoned that the special provision made for the review of State decisions in the employment sphere on any grounds permissible in law suggested that matters that might otherwise be considered to fall outside the LRA and the Labour Court's exclusive jurisdiction – an administrative decision under the PAJA or the common law, for example – are now matters falling within the exclusive jurisdiction of the Labour Court in terms of section 157(1) (26A-B). This, in the judge's view, meant that even if Ms Chirwa did have a justiciable cause of action in terms of the PAJA, the High Court was not the correct forum to adjudicate her complaint (26D).

Conradie JA took a “holistic” approach to the matter. In the process, he disposed of a long-standing problem for proponents of the Labour Court’s exclusive jurisdiction. That problem was, assuming public sector dismissals constitute administrative acts (in terms of the PAJA or the Constitution), on what basis could the LRA validly deprive an employee of a constitutionally derived cause of action? Conradie JA’s answer to the problem was that the employee was still entitled to pursue an administrative justice cause of action in the Labour Court in terms of section 158(1)(h) of the LRA as read with the PAJA, and was, therefore, not deprived of anything. Ms Chirwa, in his view, simply chose the wrong court to pursue her rights.

It is submitted, however, that Conradie JA’s approach encounters two stumbling blocks: firstly, on a plain reading of the PAJA; and secondly, on a plain reading of the LRA. As regards the PAJA, Conradie JA’s approach was premised on the notion that the Labour Court is a competent court to adjudicate PAJA matters. The judge, however, failed to consider that, in terms of sections 7(3) (s 7(3) of the PAJA reads: “The Rules Board for Courts of Law established by section 2 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), must within one year after the date of commencement of this Act, make and implement rules of procedure for judicial review”) and 7(4) (s 7(4) of the PAJA reads: “Before the implementation of the rules of procedure referred to in subsection (3), all proceedings for judicial review must be instituted in a High Court or the Constitutional Court”) of the PAJA, and only the High Court and Constitutional Court can review administrative action in terms of the PAJA until such time as the rules of procedure for judicial review in terms of the PAJA have been implemented. As no rules of procedure have as yet been implemented, it follows that the Labour Court is not yet a competent court in terms of the PAJA. As regards the LRA, the authors’ view is that Conradie JA’s approach is irreconcilable with the actual wording of section 158(1)(h) as read with section 157(1) of the LRA. The authors submit it is trite that the literal wording of statutory provisions must lend themselves to a proffered contextual meaning in order to be adopted. Section 157(1) reads that the Labour Court has exclusive jurisdiction only in respect of those matters which in terms of the LRA or any other law “are to be determined” by the Labour Court. As the PAJA does not prescribe that the Labour Court must hear certain disputes in terms of the PAJA, it follows that the PAJA cannot be the source of the Labour Court’s exclusive jurisdiction over all employment-related or “pure” employment disputes. The only other basis for asserting the Labour Court’s exclusive jurisdiction over these disputes is therefore the LRA itself. While Conradie JA pointed out that section 158(1)(h) confers on the Labour Court the power to adjudicate judicial reviews over the State’s actions in its capacity as employer, the authors respectfully disagree that this in itself means that the Labour Court has exclusive jurisdiction to hear such reviews. Section 158(1)(h) provides that the Labour Court “may” hear such reviews, and the provision does not on a plain reading impose a prescription that the Labour Court must hear such reviews. It follows that such reviews are not matters that are necessarily to be determined by the Labour Court and, therefore, the Labour Court, in the

authors' view, cannot claim exclusive jurisdiction over those matters in terms of section 157(1) of the LRA.

Further, it is submitted that prior to the enactment of the PAJA an employee's administrative law rights were governed directly by the Constitution as informed by the common law. Given the provisions of section 157(2) of the LRA, it necessarily follows that the drafters of the LRA could not have intended to deprive the High Courts of jurisdiction in employment disputes concerning infringements of an employee's administrative law rights when enacting the LRA (see 3 below, regarding the "pre-eminence argument"). In the authors' view, it would be perverse to reason that when the legislature later enacted the PAJA to give effect to section 33 of the Constitution, and so remove administrative law disputes from the constitutional realm, that the Labour Court simultaneously acquired exclusive jurisdiction over disputes it never previously possessed; it would be even more perverse to assume that the drafters of the LRA envisaged and endorsed such a scenario.

3 The minority view

3.1 Cameron JA (Mpathi DJP concurred)

Cameron JA had a different perspective to his colleagues on the SCA bench. He explained (29F-30A):

"The essence of my difference with my colleagues Mthiyane and Conradie is that I think the Constitution permits an employee of a public body to seek relief in the ordinary courts for dismissal related process injustices that constitute administrative action. And I consider that too many conceptual, doctrinal and interpretative difficulties obstruct the paths to the conclusion that both reach, which is that the employee was not entitled to any relief in the ordinary courts. In my view, these difficulties compel the contrary conclusion."

For Cameron JA, the appeal centered on a two-stage enquiry: if there were no LRA, would Ms Chirwa have been entitled to bring a claim under the PAJA? If so, did the advent of the LRA remove that entitlement? (30G-31D.)

The answer to the first question centered on whether dismissals by organs of State (Transnet conceded that it was an organ of State; and s 239 of the Constitution defines an organ of State to include any functionary exercising a public power or performing a public function in terms of any legislation (excluding the courts and judiciary)) constitute administrative action in terms of the PAJA. In determining the bounds of Transnet's statutory liability in terms of the PAJA, Cameron JA posited that the fact that Transnet was a "profit-directed commercial entity operating on market principles" did not affect the enquiry (30H-31A). The judge rejected Transnet's argument that Ms Chirwa's dismissal was a purely contractual matter which was beyond the reach of administrative law and natural justice because, in his view, the existence of a contract did not alter the public nature of the relationship between Transnet and Ms Chirwa (in this regard, Cameron JA followed the decisions of the Appellate Division in *Zenzile supra*

and the High Court in *POPCRU v Minister of Correctional Services supra* (31E-G):

“It is in my view of no significance that the employee’s contract of employment, or Transnet’s authority to employ her, did not derive from a particular, discernible, statutory provision. Transnet is a public entity created by legislation and operating under statutory authority. It would not exist without statute. Its every act [therefore] derives from its public, statutory character, including the dismissal at issue here. The doctrine propounded in *Zenzile*, and the cases that followed it, was that employment with a public body attracts the protections of natural justice because the employer is a public authority whose employment-related decisions involve the exercise of a public power. That power is always sourced in statutory provision, whether general or specific, and, behind it, in the Constitution. Its exercise, therefore, constitutes administrative action. That reasoning is as compelling today as it was a decade and a half ago.”

Accordingly, Cameron JA held that the public dimension of Ms Chirwa’s employment with Transnet, a public body, rendered her employment subject to administrative law oversight, and hence Ms Chirwa’s dismissal was within the definitional reach of the PAJA (33C-D).

That conclusion led to the next enquiry: did the LRA supersede Ms Chirwa’s right to rely on the PAJA or her administrative justice cause of action in the ordinary courts? In Judge Cameron’s view, both existing authority and principle dictated that the LRA could not be seen to have such a sweeping and deleterious effect (33G-H). In his view, the so-called “pre-eminence argument” was a non-starter (the argument asserts a preferent entrenchment of rights in the employment context; and it asserts that when the legislature provided an express statutory vehicle for the realisation of right to fair labour practices, the LRA, both the Act and the Constitution occlude a reliance on other rights whose breach may be involved) (35B-C):

“No doctrine of constitutional law confines a beneficiary of more than one right to only one remedy, even where a particular statute provides a remedy of great amplitude.”

Cameron JA pointed out that the SCA itself confirmed in *United National Public Servants Association of South Africa v Digomo NO* (2005 12 BLLR 1169 (SCA)) that, where the same conduct gives rise to different causes of action in terms of the PAJA and the LRA, employees may choose the forum and the legislation under which they wish to pursue their rights. (See also *Fedlife Assurance v Wolfaardt* 2002 1 SA 49 (SCA); and *Fredericks supra*. Both decisions reasserted that the LRA’s remedies are not exhaustive of those that may be available to employees arising from their employment.) (34C-F.) In his view, Conradie JA’s approach, which suggested that the LRA, a statute preceding the PAJA, implicitly deprived an employee of an administrative justice cause of action in the ordinary courts, entailed too hefty a conclusion to be drawn from obliquely inferred grounds (34H-I). He asserted that the evaporation of a constitutional cause of action should be inferred with great hesitation (35A-B).

Accordingly, Cameron JA held that Ms Chirwa was free to frame her cause of action under PAJA instead of the LRA, and pursue that cause of

action in the High Court, as she did (35F). In his view, while section 158(1)(h) gave the Labour Court power to review State conduct, there was no legislative intent to confer exclusivity (35D-E).

4 Conclusion

Of the five SCA judges that heard *Chirwa*, four held that the High Court retained jurisdiction to review public sector dismissals and three accepted that such dismissals entail the exercise of administrative action. Ms Chirwa, however, was unsuccessful on appeal as only two judges, Cameron JA and Mpathi DJP, found in her favour on both issues. Ironically, therefore, it is arguable that despite Ms Chirwa's lack of success, *Chirwa* is authority for the proposition that employees in the public sector can challenge dismissals and other unlawful employment practices in the High Courts as infringements of their right to lawful, reasonable and procedurally fair administrative action. Unfortunately for Ms Chirwa, her substantive success could not avail her.

It is submitted that of the judgments in *Chirwa*, Cameron JA's judgment correctly reflects the present position. It is difficult to accept without reservation that the new "*factual matrix*", the LRA and the PAJA, has implicitly deprived public sector employees of a cause of action they had always legally possessed, and arguably, still do in terms of the Constitution. The issue, however, remains an unusually difficult and complex one to resolve.

What then is the real worth of *Chirwa*? In light of the SCA's division on the issues involved, it is submitted that the decision has merely entrenched the uncertainty which existed before. What is certain, however, is that the Constitutional Court's decision is eagerly anticipated. (The SCA's decision has been taken on appeal to the Constitutional Court. A judgment is imminent.)

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