THE APPLICABILITY OF THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT IN REVIEW OF CCMA ARBITRATION AWARDS

by

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SUMMARY

South Africa’s employment law has undergone more frequent and dynamic changes than any area of the law, in recent years. The ability of employers and employees to regulate their respective rights and duties vis-à-vis each other by independent agreement has been progressively whittled down by statutory intervention. In so limiting the capacity of parties to the employment relationship to regulate the nature of their relationship, South Africa has followed development in Western industrialised nations.

Against this background, the drafters of the Labour Relations Act\(^1\) (LRA), as amended, proposed a comprehensive framework of law governing the collective relations between employers and trade unions in all sectors of the economy. The LRA\(^2\) created a specialised set of forums and tribunals to deal with labour and employment related matters. It established Bargaining Councils, the Commission for Conciliation Mediation and Arbitration (CCMA), the Labour Court (LC) and the Labour Appeal Court (LAC). It also created procedures designed to accomplish the objective of simple, inexpensive and accessible resolution of labour disputes.

In redesigning labour law, the legislature decided that some disputes between employers and employees should be dealt with by arbitrators and others by judges. It is this distinction that resulted in the creation of the CCMA and the Labour Court to perform arbitration and adjudication respectively. The result of adjudication is generally subject to appeal to a higher court. The result of arbitration is generally subject to review. Arbitration was given statutory recognition in South Africa by the Arbitration Act\(^3\). That Act provides a framework within which parties in dispute may if they wish appoint their own “judge” and supply him or her with their terms of reference tailored to their needs.

With the foregoing in mind, the purpose of this work is the provision of a selection of landmark cases that dealt with the review function of CCMA awards. This selection

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\(^1\) Act 66 of 1995 as amended.
\(^2\) Ibid.
\(^3\) Act 42 of 1965.
comprises of landmark judgments of the different courts of the land. The study uses, as it departure point, legislative framework to elicit the extent to which review is extended to the litigants.

Apart from looking at the legislative provisions towards review grounds, reference is made to specific landmark judgments that have an effect on this subject in order to provide a comprehensive and explicit picture of how CCMA arbitration awards may be taken on review.

This study focuses on substantive law developed by the Labour Court, High Court, Supreme Court of Appeal and finally the Constitutional Court. This is informed by the very nature and scope of the study because any concentration on procedural and evidentiary aspects of review could lead to failure to achieve the objectives of the study.

It looks at specific South African case law, judgments of the courts and the jurisprudence in the field of employment law so that the reader is presented with a clearer picture of recent developments in addressing review of arbitration awards.

The concluding remarks are drawn from a variety of approaches used by the authorities in the field of employment law in dealing with review of CCMA arbitration awards and issues for further research are highlighted.
CHAPTER 1
INTRODUCTION

1.1 BACKGROUND

This treatise provides an analytical study of review of CCMA awards by the Labour Court with specific reference to the applicability or otherwise of the Promotion of Administrative Justice Act,\(^4\) hereinafter referred to as PAJA. This study does not claim to be profoundly archetypal in the field of employment law relating to review of CCMA awards, but it rather seeks to render an input that will contribute to the jurisprudence of South African employment law.

The review function by the Labour Court with specific reference to the applicability or otherwise of PAJA is significant. It comes about hot on the heels of the debate over the applicable grounds for review of CCMA awards, which has continued to trouble the labour courts. The introduction of PAJA\(^5\) has added another piece to the incomplete puzzle. This is against the background that different courts of law have issued divergent judgments on the same question of the applicability or otherwise of PAJA.\(^6\)

It is consequently submitted that the extensive and optimal use of case law, relevant legislation and legal literature applicable in review proceedings will assist the study to meet its objectives.

This chapter covers the following sub-topics:

- Objective of the study
- Structure of the study

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\(^4\) Act 3 of 2000.
\(^5\) Ibid.
\(^6\) Ibid.
1.2 THE OBJECTIVE OF THE STUDY

The aim of the treatise is to advocate that PAJA is not applicable to arbitration awards and orders issued and made by the CCMA. It was not until the Constitutional Court pronounced on this issue that PAJA is not applicable in review of CCMA awards. To date, the case law bears testimony to the fact that there were as many opinions on the topic as there are judges. The latest judgments by the Constitutional Court on this subject will serve to settle the long debate over whether or not the CCMA was subject to review under the more limited grounds set out in section 145 of the LRA, or whether or not the Labour Court could invoke the provisions of PAJA for this purpose.

1.3 THE STRUCTURE OF THE STUDY

This study consists of five (5) chapters. Chapter two (2) provides a discussion on the legislative framework of review. Chapter three (3) presents a descriptive model of the nature, scope and developments in review of CCMA awards by the courts. Chapter 4 discusses aspects of review with specific reference to the applicability or otherwise of PAJA in review of CCMA awards. Chapter five (5) offers concluding remarks.

It is submitted that this study will show that PAJA is not applicable to arbitration awards and orders issued and made by the CCMA.
CHAPTER 2

LEGISLATIVE FRAMEWORK OF REVIEW

2.1 INTRODUCTION

The early years of this century which saw the operation of the original Industrial Conciliations Act,\(^7\) was vastly accelerated with its metamorphosis into the Labour Relations Act,\(^8\) as amended, after the recommendations of the Wiehahn Commission. The amendments to the 1956 Labour Relations Act provided the basis for most of what has followed. It was against this backdrop that the Cheadle Commission began its work in 1994. This culminated in the signing into law of the Labour Relations Act 66 of 1995 (LRA) after thrashing it out through the National Economic Development and Labour Council (NEDLAC). The LRA of 1995 was implemented on 11 November 1996.

The functional division between the Labour Court and the CCMA was effected by prescribing that certain disputes be referred to the Labour Court after conciliation, while others be referred to the CCMA. The vertical division was effected by providing that the Labour Court can review decisions of the CCMA. In formulating the vertical relationship between the Labour Court and the CCMA, the drafters of the LRA chose to borrow the procedure created by the Arbitration Act. The result was section 145 of the LRA, which provides that awards issued by the CCMA, which are described in section 143 (1) as final and binding can be reviewed by the Labour Court if they are “defective”. For purposes of that procedure, an award is defective if it has been procured by corruption, or if the arbitrating commissioner committed “misconduct in relation to the duties of the commissioner as an arbitrator” or “a gross irregularity in the conduct of the arbitration proceedings”, or “if the commissioner has exceeded his or her powers”. The option of appeal that existed under the 1956 LRA was reserved for litigants in the Labour Court.

\(^7\) Act 11 of 1924.
\(^8\) Act 28 of 1956.
The purpose of this chapter is to provide a discussion on the legal framework in respect to review function of the Labour Court in respect of CCMA awards. It includes the background, the interpretation of courts, embodiments of the Acts governing review, etc. Therefore the chapter traces the historical, recent and current legislation dealing with review in South Africa. It is significant to consider such legislation because it constitutes the cornerstone in regulating reviews of administrative actions. Finally, there is an exploration of the latest constitutional court decisions, which have a direct bearing on this study.

2.2 GENERAL BACKGROUND

Arbitration awards by the CCMA are reviewable by the Labour Court in terms of section 145 of the LRA. An award may be set aside if there is a defect in the arbitration proceedings in that the commissioner:

(i) “committed misconduct in relation to his/her duties,
(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
(iii) exceeded his/her powers,
(iv) or the award has been improperly obtained”

(a) Misconduct in relation to the duties of an arbitrator

The concept of misconduct denotes some moral wrongdoing. Gross negligence may indicate misconduct, as might a gross mistake of law or fact. Misconduct certainly includes bias. The test for bias is not only whether the presiding officer was in fact biased but also whether the conduct complained of would lead a reasonable litigant to doubt the impartiality of the presiding officer. In addition, a wide range of defects in the conduct of proceedings has been held to constitute misconduct; for example:

- misconstruction of evidence;
- retracting permission of proceedings to be recorded;

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9 S 145(2)(a)(i) of the LRA.
• failure to guide lay the parties on evidence to be presented or advise them of the need to call witnesses for proving documents; and

• applying the criminal law test of proof of beyond reasonable doubt in arbitration proceedings.

While the concept of “misconduct” is broad, clear evidence of the conduct complained of is essential. Thus, “unsubstantiated claims of impropriety” against commissioners have been dismissed as bordering on contempt.

(b) **Gross irregularity in the conduct of the arbitration proceedings**

Not all irregularity is “gross”. The test for establishing gross irregularity is whether the irregularity was material and precluded a proper and fair hearing. Gross irregularity may be patent or latent and may arise in relation to the establishment of the commissioner’s jurisdiction as well as the arbitration process itself. Gross irregularity is not necessarily accompanied by bad faith. If bad faith is present, it would also constitute misconduct [section 145(2)(a)(i)].

To establish reviewable irregularity, the applicant must show the irregularity had a material effect on the award.

The following are examples of conduct that the Labour Court has regarded as grossly irregular:

• granting legal representation inappropriately;

• creating a reasonable impression of bias;

• refusing to grant a postponement where the postponement was appropriate;

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10 S 145(2)(a)(ii) of the LRA.
conciliating a dispute at arbitration stage without the consent of both parties;

misconstruing jurisdiction;

failing to determine the dispute;

undermining the party’s right to lead evidence on the substantive issues in dispute;

refusing a party the right to cross-examine;

hearing evidence from a witness in the absence of both parties without their consent;

failing to advise a lay representative of the consequences of not challenging the other party’s evidence;

basing an award on documents not admitted as evidence;

making findings not justified on the evidence;

committing a material error of fact or gravely misunderstanding evidence.

(c) Excess of power

A commissioner exceeds his or her powers, or acts ultra vires, by making an award which he or she did not have the power to make. This may include failure to exercise a power or a discretion that ought to have been exercised.

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11 S 145(2)(a)(iii) of the LRA.
Thus, a commissioner exceeds his or her powers by *inter alia*:

- committing a material error of law, which may relate to proper characterisation of the dispute, or ignoring or misconstruing the appropriate statute or legal principles;
- failing to apply the proper test to interpret relevant statutory or case law, including the law of evidence;
- making findings that are not justified by the evidence;
- determining issues which are not in dispute; and
- failing to consider “appropriate material”.

(d) The award was improperly obtained\(^{12}\)

This category, as in the Arbitration Act, refers to the impropriety by a party unlike “misconduct” or “gross irregularity”, which are limited to the conduct of the commissioner. In practice, section 145(2)(b) is therefore concerned primarily with the conduct of the successful party; for example, in resorting to bribery or fraudulent representations to obtain an award.

(e) Appeal and review on the grounds of “justifiability” or “rationality”

It has been suggested that the test of “justifiability” or “rationality” blurs the distinction between form (process) and content (merits) which is the quintessence of the distinction between appeal and review.

Review on these extended grounds cannot avoid scrutiny of the substance of a decision which, according to the classical approach, could happen only on appeal.

\(^{12}\) S 145(2)(b) of the LRA.
In Carephone,\textsuperscript{13} Froneman DJP was careful to stress that the two processes remain conceptually distinct, appeal being concerned with the correctness of the result while review is confined to the manner in which a tribunal comes to its decision.

(f) General power of review

The Labour Court may review “the performance or purported performance of any function provided for in this Act on any grounds that are permissible in law.”\textsuperscript{14} Such review is applicable to all decisions and rulings of the CCMA other than arbitration awards.

(g) Procedure on review

Review procedure must be initiated within six weeks of service of an award\textsuperscript{15} or, if the alleged defect involves corruption, within six weeks of the discovery thereof.\textsuperscript{16} Late application may be condoned on “good cause shown.”\textsuperscript{17} An application for review must allege specific grounds and facts in clear terms. Generalised claims and unsubstantiated allegations will not suffice.

(h) Remedies on review

The Labour Court may resolve a matter on review by making a final order and is likely to do so if the facts are not in dispute.\textsuperscript{18} However, the court will not readily substitute its decision for that of a commissioner. If the record is not available the court cannot determine the dispute on the papers and may refer it back to the CCMA to be heard by a different commissioner. The court may also remit a single issue, which had been omitted to be heard by the same commissioner.

\textsuperscript{13} Carephone (Pty) Ltd v Marcus NO [2002] 2 BLLR 139 (LAC).
\textsuperscript{14} S 158(10)(g) of the LRA.
\textsuperscript{15} S 145(1)(a) of the LRA.
\textsuperscript{16} S 145(1)(b) of the LRA.
\textsuperscript{17} S 145(1A) of the LRA.
\textsuperscript{18} S 145(4) of the LRA.
2.3 CONCLUSION

Except in the case of the most flagrant errors of judgment, the court will not lightly substitute its views for that of a commissioner on such subjective issues as whether or not a dismissal was appropriate for a particular offence.

When commissioners exceed the constitutional restraints on their powers during arbitration, their conduct can be reviewed by the Labour Court under section 145 of the LRA. Section 145 must be interpreted in a manner consistent with the constitution.
CHAPTER 3
NATURE, SCOPE AND DEVELOPMENT OF REVIEW

3.1 INTRODUCTION

The grounds set out in section 145 are the only basis in the LRA for setting aside awards issued by CCMA commissioners. Simple as they may seem, they have vexed the judges of the labour and labour appeal courts since the first review application was launched in 1997.\(^{19}\)

The main question was whether the court was bound by the interpretations placed by the former Supreme Court on the like provisions of section 33 of the Arbitration Act.\(^{20}\) This was an important question, because the Supreme Court strongly emphasised the fact that the parties to private arbitration had agreed to take that route and thus, in its view, should put up with more eccentricity - and even ineptness – on the part of arbitrators than would be expected of them had they been subject to some compulsory procedure. “Misconduct” and “gross irregularity” were, therefore, read literally, and were taken to exclude \textit{bona fide} mistakes.

That approach was acceptable in the context of a consensual regime. However, arbitration by the CCMA is not voluntary – at least, in most instances – for employers. Apart from its organisational similarity to IMSSA and the terminology in the Act, the CCMA is a statutory institution with considerable powers over citizens in their capacities as employees or employers. As such the CCMA is subject to the constitution and to the common law applicable administrative tribunals.

Earlier uncertainty as to whether the Labour Court could also review arbitration awards under its general or “broader” power of review [section 158(1)(g)] was resolved by the Labour Appeal Court in \textit{Carephone (Pty) Ltd v Marcus NO}\(^ {21}\) where it was held that review of CCMA arbitration is limited to the grounds set out in section 145 of the LRA. In that judgment, Froneman DJP ruled that the only avenue for

\(^{19}\) \textit{Edgars Stores Ltd v Director CCMA} [1998] 1 BLLR 34 (LC).

\(^{20}\) Act 42 of 1965.

review was section 145, but that, because the CCMA was an administrative tribunal, it was subject to the wider constitutional ground of “justifiability”. Judge Froneman summarised the requirements for an award prescribed by the LRA, at paragraph 20, as follows:

“The constitutional imperatives for compulsory arbitration under the LRA are thus that the process must be fair and equitable, that the arbitrator must be impartial and unbiased, that the proceedings must be lawful and procedurally fair, that the reasons for the award must be given publicly and in writing, that the award must be justifiable in terms of those reasons and that it must be consistent with the fundamental right to fair labour practices.”

At paragraph 21 in the judgment, Froneman DJP added:

“But it would be wrong to read into [section 33 of the constitution] an attempt to abolish the distinction between review and appeal. According to the New Shorter Oxford English Dictionary ‘justifiable’ means ‘able to be legally or morally justifiable, able to be shown to be just, reasonable, or correct; defensible’. It does not mean ‘just’, ‘justified’ or ‘correct’. On its plain meaning the use of the word ‘justifiable’ does not ask for the obliteration between review and appeal. Neither does the LRA itself; it makes a very clear distinction between reviews and appeals.”

The LAC also found, however, that the scope of review under this section is not confined to process as with the review of private arbitration. Although there is a fundamental difference between review and appeal, a public administrative agency which exercises state functions has a constitutional duty to dispense administrative action which is lawful, reasonable and procedurally fair and justifiable in relation to the reasons given for it [section 33 and schedule 6 item 23(b) of the Constitution]. The underlying standard of review in terms of section 145, therefore, is whether there is “a rational objective basis justifying the connection made by the administrative decision maker [that is, the CCMA commissioner] between the material properly available to him and the conclusion he or she eventually arrived at”.

In Shoprite Checkers (Pty) Ltd v Ramdaw NO, the Labour Appeal Court based itself on the principle that decisions taken in the exercise of public power must be rationally related to the purpose for which the power was given. The court went on to hold, at paragraph 10, as follows:

In Shoprite Checkers (Pty) Ltd v Ramdaw NO, the Labour Appeal Court based itself on the principle that decisions taken in the exercise of public power must be rationally related to the purpose for which the power was given. The court went on to hold, at paragraph 10, as follows:

“Although the terms “justifiable” and “rational” may not, strictly speaking, be synonymous, they bear a sufficiently similar meaning to justify the conclusion that rationality can be said to be accommodated within the concept of justifiability as used in Carephone. In this regard I am satisfied that a decision that is justifiable cannot be said to be irrational and a decision that is irrational cannot be said to be justifiable.”

The effect is that the criterion established in Carephone\textsuperscript{23} stands alongside that in \textit{Ramdaw}.\textsuperscript{24} These “extended grounds of review”, however, have not superseded the grounds for review set out in section 145 or created a new discreet test. Rather, section 145 has been “read up” for constitutional consistency. The Labour Court remains obliged to make a finding on section 145 and cannot ignore its specific provisions in favour of a new abstraction of substantive rationality.

On the strength of the above, it can be argued the weight of authority suggests that the court should make a finding that an award is defective on one of the specified grounds, or on the grounds set out in Carephone and Ramdaw, before an award is set aside. Not doing so, it is submitted, creates a situation that is practically indistinguishable from conducting a review in terms of section 158 91)(g) which the Labour Appeal Court, in the cases mentioned above, categorically ruled against.

What was meant by the phrase “justifiable in terms of the reasons given” next received the attention of the Labour Appeal Court in \textit{County Fair Foods (Pty) Ltd v CCMA}\textsuperscript{25} In that case Kroon JA expressed doubt about whether Froneman DJP had correctly captured the distinction between review and appeal. He wrote, at paragraph 10:

“If the word ‘correct’ were excised from those meanings and the remainder were contrasted simply with the word ‘correct’ there would be no quarrel with the distinction drawn. I am not convinced, however, of the correctness, in the present context, of including within the meanings of ‘justifiable’ that of ‘able to be shown to be correct’ and of contrasting ‘justifiable’ with ‘just’ or justified’. The question may in due course have to be revisited.”

\textsuperscript{23} \textit{Ibid.}
\textsuperscript{24} \textit{Ibid.}
\textsuperscript{25} [1999] 11 BLLR 1117 (LAC).
The answer to the semantic issue lies in a further passage from the Carephone judgment that Kroon JA found acceptable. It reads, at paragraph 10:

“In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the ‘merits’ of the matter in some way or another. As long as the judge determining this issue is aware that he or she enters the merits not in order to substitute his/her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order.”

However, County Fair raised deeper issues, which surfaced in Toyota South Africa Motors v Radebe. The facts in both cases were similar, except that County Fair involved an assault by an employee on his estranged girlfriend, while Toyota involved fraud by the employee against his employer. The employee in Toyota had an abysmal safety record with the car he leased from the company. After Mr Radebe had crashed it several times, the company deprived him of the lease benefit for a period. No sooner had that benefit been restored than he had another accident. Rather than own up, Radebe abandoned the car, keys in the ignition, in a public parking lot, and told the police and the company that it had been hijacked. The ruse was later discovered by the company and Radebe was dismissed.

The arbitrating commissioner held that Radebe’s misconduct, though gross, did not, in the circumstances justify dismissal. Influenced primarily by Radebe’s 13 years’ service without a disciplinary record, his contribution and the fact that his supervisor had pleaded for leniency at the disciplinary hearing, the commissioner held:

“However, it is in my view critical for sound labour relations within the respondent’s organisation that the applicant should be appropriately disciplined for his acts of gross dishonesty. Nevertheless, I do believe that there is an opportunity for disciplinary action short of dismissal to ensure that the respondent is reasonably protected from the probability of future similar acts of dishonesty on the part of other employees as a result of the outcome of this case. I therefore find that the appropriate disciplinary sanction in this case is re-employment rather than reinstatement, which represents a suspension without pay, together with a final warning to the applicant in respect of dishonesty.”

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Few examples could better illustrate the substitution by a commissioner of his own opinion for that of the employer, which is what the majority judgment in County Fair precludes. The Labour Appeal Court when called upon to intervene set aside this award, following the Labour Court reluctance to interfere with the commissioner’s award.

3.2 THE INTRODUCTION OF PAJA IN REVIEW OF CCMA AWARDS

As if the jurisdictional puzzle created by the LRA was not complex enough, the legislature added another piece with the PAJA. The PAJA is meant to give statutory flesh to the bones of the administrative justice provisions in section 23 of the Constitution. The PAJA sets out inter alia the grounds on which administrative acts may be reviewed, and compels administrative tribunals and organs to provide reasons for their decisions.

There are a number of points at which the provisions of the PAJA and those of the LRA intersect. The PAJA regulates administrative action. This means, essentially, the conduct of statutory organs. The LRA regulates the actions of the State in its capacity as employer. Many decisions taken by the State in its capacity as employer constitute administrative action. Section 157(2) of the LRA confers concurrent jurisdiction on the labour and high courts in cases involving the state as employer, and further that such cases could be resolved either in the Labour Court under the LRA or EEA, or in the high court under the common law or PAJA.

The overlap between the PAJA and the LRA in the context of review was noted by the Labour Appeal Court in *Shoprite Checkers (Pty) Ltd v Ramdaw NO*27 in which Zondo JP said obiter and tentatively, at paragraph 29:

> “Even though the view expressed by this Court in Carephone that the making of an arbitration award by a CCMA commissioner constitutes an administrative action might not be correct, it seems to me that the definitions of ‘administrative action’ and of ‘decision’ in section 1 of the PAJA may be wide enough to include it. I say this despite the reference in the definition of ‘decision’ to a decision ‘of an administrative nature’. It is not necessary to express a final view on this issue in this matter. It is sufficient, if it appears that the PAJA may well be applicable to

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the making of an arbitration award by the CCMA commissioner because the
question that has arisen in this matter is whether or not there is a warrant to
reconsider the decision of this Court in Carephone."
that the question of whether the PAJA applies to labour matters was important enough to warrant comment.

Pillay J noted that the debate over the grounds of review of CCMA awards began with the judgment in Carephone. Pillay J said that the Constitution has radically altered the situation. The rights to fair labour practices are now entrenched as distinct rights. Subsequently, labour rights were specifically codified in the LRA, the Basic Conditions of Employment Act (BCEA) and the Employment Equity Act (EEA). Other labour-related statutes (the Public Service Act 1994, the South African Police Service Act 68 of 1995 and the Employment of Educators' Act 76 of 1998 have also been amended to regulate labour rights in the public sector. These Acts are all specifically designed to give expression to the constitutional right to fair labour practices. The LRA and the EEA expressly provide that they shall take precedence over any other laws save the constitution. Thus, to the extent that the PAJA conflicts with them, the PAJA must give way. Furthermore, to the extent that the labour laws do not protect labour rights, recourse must be had directly to the constitutional right to fair labour practices. Given this exclusive framework of labour laws, said Pillay, there is no need to rely any longer on administrative law in labour matters.

In any event, according to the judge, arbitration is not an administrative act. It may have characteristics common to “adjudicative administrative acts” but arbitration is essentially an alternative to litigation. Simply because the arbitrator acts under the auspices of an administrative organ does not alter arbitration’s essential character. It remains arbitration. PAJA cannot therefore apply to arbitrations. It follows that arbitration proceedings must be reviewed under section 145 of the LRA.

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30 Ibid.
31 Act 75 of 1997.
34 Act 68 of 1995.
35 Act 76 of 1998.
Pillay AJ could discern no difference between rulings and arbitrations. She said, at paragraph 21:

“The nature and essential content of the process of issuing rulings are similar to arbitration. As such, they too do not amount to administrative action. If this were so, then the anomaly that arises is that a ruling made in the course of arbitration and which finds itself as one of the grounds of review of an award is itself tested against section 145, whereas other rulings that are made outside arbitration [such as rulings on condonation] are tested against section 158 (1)(g).”

The judge was unable to see why different tests should apply to awards and rulings made outside arbitration. If different tests were to apply, a further anomaly would arise: since no rules have yet been made for the Labour Court under the PAJA, the Labour Court is unable to apply the PAJA. A litigant wishing to attack a purely administrative ruling by the CCMA and it seems, bargaining councils, on the grounds set out in the PAJA, would then have to approach the High Court, which would then apply a different test to that applied by the Labour Court. This, said the judge, would raise the spectre of another “unintended consequence” of the PAJA: the splitting of jurisdiction between the Labour Court and the High Court over labour issues.

But the prospect of split jurisdiction (which already exists) is not in itself sufficient to warrant the conclusion that the PAJA does not apply to acts of the CCMA. Pillay J recognised this, as did the LAC in *Shoprite* and the Labour Court in *Basson v Provincial Commissioner (Eastern Cape), Department of Correctional Services* and *National Employers Forum v Minister of Labour.* But, said the judge, the provisions of the PAJA itself indicate that a conflict exists between the PAJA and labour legislation. This clash requires that the former should give way to the latter to the extent of such conflict.

In the first place, Pillay J noted that the procedures for judicial review under the PAJA clash with those prescribed in the LRA. Under the LRA, review must be launched within six weeks of the date on which an award is issued; litigants relying on the PAJA have 90 days within which to request reasons for an administrator’s action. The administrator has a further 90 days to furnish reasons. The PAJA

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requires that internal remedies be exhausted before a court is approached; under the LRA, an internal appeal is not required before the court permits access. Furthermore, the LRA prescribes specific remedies for dismissal; the PAJA permits a court to direct the administrator to act, as the court deems necessary.

Secondly, said Pillay J, the clash between the PAJA and labour laws becomes evident in the sphere of public sector authorities not to appoint a particular applicant for employment on the grounds of affirmative action or where public sector employees are suspended without hearings? At first glance, people affected by such decisions seem to have the choice between relying on the LRA in the Labour Court and invoking the PAJA in the High Court. But, said the judge, this choice does not withstand more careful reflection. She said, at paragraph 41,

“Exercising a choice between the PAJA and labour law is linear. Labour law is polycentric. Affirmative action is collectively bargained as a planned progression towards employment equity. Disputes arising from it must be channelled through the carefully constructed procedure of conciliation followed, if necessary, by adjudication. Conciliation seeks to address all interests as opposed to determining rights. Insofar as rights have to be determined by adjudication, this is accomplished by specialists who must give effect to the primary objectives of the labour laws. If the claim succeeds should, as a matter of policy, such individual action be allowed to trump collectively bargained decisions?”

According to the judge, the objectives of the LRA call for a negative answer to her question. If labour decisions were to be reviewable under the PAJA, the implications for collective bargaining and effective dispute resolution would be “catastrophic”. Not only that; the rights of other parties would be adversely affected. Employers, in particular, have a right to assume that they can act in terms of labour legislation and that labour and employment disputes will be resolved within the time limits prescribed by labour legislation. If the PAJA were to be applied in labour matters, employers would find themselves confronted with different time limits and different standards of conduct.

However, according to Pillay J, the most drastic difference between PAJA and the LRA lies in the different standards of review required by the two acts. At paragraph 28 she observed that:
“The grounds of review under section 145 are misconduct by the arbitrator, commission of a gross irregularity, acting ultra vires and improperly obtaining an award. The PAJA grounds of review are a complete codification of the common-law grounds of review. Any grounds not specifically mentioned has been captured in the catch-phrase that empowers a court to review action that is otherwise unconstitutional or unlawful. Such a comprehensive codification can encourage a mechanical checklist mentality when reviewing awards.”

Pillay observed that not only does PAJA encourage a mechanistic approach; it also urges a court to delve into the merits of administrative action. This is because, as the PAJA requires and the Constitutional Court has observed (see Pharmaceutical Manufacturers Association of SA; In Re Ex parte Application of the President of the RSA\(^{38}\) that lawful and fair administrative action must be rational. The result, said Pillay J, at paragraph 34, would be that:

“If PAJA applies to labour law decisions it could widen the door that Carephone opened to the risk of judges substituting their decisions for those with which they simply do not agree. If that happens then the objectives of speed and finality of dispute resolution will be thwarted.”

And, at paragraph 35, further:

“To subject CCMA adjudication to a constitutional test for just administrative action could not only broaden the grounds of review and blur the distinction between appeal and review even further but also cause parallel streams of jurisprudence to develop; one for private and bargaining council adjudication and another for CCMA adjudication; one for high court decisions, another for labour law decisions.”

3.3 CONCLUSION

It is accordingly submitted that the debate over the grounds of review of CCMA awards began with the judgment in Carephone. The Constitution has, however, radically altered the situation. The rights to fair labour practices are now entrenched as clearly discernible rights. Subsequently, labour rights were specifically codified in the LRA and other labour legislation. These Acts are all specifically designed to give expression to the constitutional right to fair labour practices. The LRA and the EEA expressly provide that they shall take precedence over any other laws save the Constitution. Thus, to the extent that the PAJA conflicts with them, the PAJA must give way.

\(^{38}\) 2000 (3) BCLR 241 (CC).
CHAPTER 4
APPLICABILITY OR OTHERWISE OF THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT (PAJA) IN REVIEW PROCEEDINGS

4.1 THE PAJA OR THE LRA?

The SCA found that PAJA applies. It took the view that because PAJA was the national legislation passed to give effect to the constitutional right to just administrative action, was required to “cover the field”\(^39\) and purported to do so, it applied to CCMA awards by commissioners.

In this regard it relied on decisions of the Constitutional Court in New Clicks\(^40\) and Bato Star.\(^41\) It did not examine the nature of a Commissioner’s function by reference to section 33 of the Constitution, nor did it explore whether PAJA provided an exclusive statutory basis for the review of all administrative decisions.

In President of the Republic of South Africa v South African Rugby Football Union the following appears, at paragraph 141:

“In s 33 the adjective ‘administrative’ not ‘executive’ is used to qualify ‘action’. This suggests that the test for determining whether conduct constitutes ‘administrative action’ is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not.”

In form, characteristics and functions, administrative tribunals straddle a wide spectrum. At one end they implement or give effect to policy or to legislation. At the other, some tribunals resemble courts of law. The old Industrial Court established in terms of the Labour Relations Act 28 of 1956, although performing functions similar

\(^39\) Minister of Health v New Clicks SA (Pty) Ltd (Treatment Action Campaign and Innovative Medicines SA as Amici Curiae) 2006 (1) BCLR 1 (CC).

\(^40\) Ibid.

\(^41\) Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism 2004 (7) BCLR 687 2004 (4) SA 490 (CC).
to that of a court of law, was regarded as administrative in nature. In this regard, the Appellate Division said the following:

“An administrative body, although operating as such, may nevertheless in the discharge of its duties function as if it were a court of law performing what may be described as judicial functions, without negating its identity as an administrative body and becoming a court of law.”

The Amnesty Committee, established in terms of the Promotion of National Unity and Reconciliation Act,42 was empowered to conduct hearings in relation to applications for amnesty. Its proceedings were similar to those of a court of law. Nevertheless, it was an administrative body.

There are similarities between CCMA arbitrations and proceedings before a court of law. Section 138(2) of the LRA provides for the manner of adducing evidence, the questioning of witnesses and concluding arguments. Section 142 gives the commissioner powers of subpoena. Section 142(8) provides for contempt proceedings in the Labour Court in the event that a party fails to comply with an award that orders the performance of an act other than the payment of money. Section 143(1) of the LRA provides that an award is final and binding and may be enforced as though it were an order of the Labour Court. A commissioner may make an order for payment of costs in terms of section 138(10) of the LRA.

However, there are significant differences. The CCMA is not a court of law. A commissioner is empowered in terms of section 138(1) to conduct the arbitration in a manner he or she considers appropriate in order to determine the dispute fairly and quickly, but with the minimum of legal formalities. There is no blanket right to legal representation. The CCMA does not follow a system of binding precedents. Commissioners do not have the same security of tenure as judicial officers.

Commenting on the status of the CCMA, Brassey states as follows:

“Unlike the labour court, it enjoys none of the status of a court of law and so has no judicial authority within the contemplation of the constitution. It is an administrative tribunal in the same way as the industrial court was and, being an

42 Act 34 of 1995.
organ of state under s 239 of the constitution, is directly bound by the Bill of Rights. It is also subject to the basic values and principles governing public administration."

Currie and De Waal state:

“The CCMA is not a branch of the judiciary and does not exercise judicial power. Rather, the exercise of the compulsory arbitration power is an exercise of public power of an administrative (‘governmental’) nature. The arbitration power is designed to fulfil the primary goal of the Act which is to promote labour peace by the effective settlement of disputes. It does so with an element of compulsion, corresponding to the traditional government/governed relationship.”

Compulsory arbitrations in terms of the LRA are different from private arbitrations. CCMA commissioners exercise public power which impacts on the parties before them. In the language of the pre-constitutional administrative law order, it would have been described as an administrative body exercising a quasi-judicial function.

On the basis of the above, the honourable acting judge Navsa, concluded that a Commissioner conducting CCMA arbitration is performing an administrative function.

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.

The LRA, including section 145, was in place at the time that the Constitution came into force. Section 33(3) read with item 23(2) of Schedule 6 to the Constitution contemplates that the national legislation referred to in section 33 of the Constitution is to be enacted in the future. It is clear that what was envisaged was legislation of general application. PAJA was the resultant legislation. The definition of administrative action in PAJA is extensive and intended to “cover the field”.

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. Of course, any legislation giving effect to section 33 must comply with its prescripts.

In *Bato Star*\(^{43}\) the following appears, at paragraph 25:

“The provisions of s 6 divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past. And the authority of PAJA to ground such causes of action rests squarely on the constitution. It is not necessary to consider here causes of action for judicial review of administrative action that do not fall within the scope of PAJA. As PAJA gives effect to s 33 of the constitution, matters relating to the interpretation and application of PAJA will of course be constitutional matters.”

PAJA is a codification of the common law grounds of review. It is apparent, though, that it is not regarded as the exclusive legislative basis of review.

It is against this background that the following dictum in *New Clicks* (relying on *Bato Star*) is to be understood, at paragraph 95:

“PAJA is the national legislation that was passed to give effect to the rights contained in s 33. It was clearly intended to be, and in substance is, a codification of these rights. It was required to cover the field and purports to do so.”

This does not in any way detract from the reservation contained in the quoted dictum from *Bato Star*.

The Constitutional Court, through Navsa, found that arbitration by a commissioner is administrative action. Does this mean that review provisions of PAJA are automatically applicable in CCMA arbitration reviews?

To answer this question it is necessary first to deal with the LRA and its applicable provisions in relation to PAJA. The LRA is a specialised negotiated national legislation giving effect to the right to fair labour practices. The Ministerial Task Team responsible for the drafting of the Bill that led to the LRA was tasked, amongst

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\(^{43}\) See fn 41.
other things, to “provide simple procedures for the resolution of disputes through statutory conciliation, mediation and arbitration and the licensing of independent alternative dispute resolution services.” 44 The task team was tasked to “provide a system of labour courts to determine disputes of right in a way that would be accessible, speedy and inexpensive, with only one tier of appeal”. NEDLAC referred the Draft Bill to Cabinet recommending its adoption subject to agreed amendments. Section 145 was purposefully designed as was the entire dispute resolution framework of the LRA.

The Supreme Court of Appeal was of the view that the only tension in relation to the importation of PAJA was the difference in time-scales in relation to reviews under section 145 of the LRA and PAJA. This difference is but one symptom of a lack of cohesion between provisions of the LRA and PAJA.

Section 157(1) of the LRA provides that, subject to the Constitution and except where the LRA provides otherwise, the Labour Court has exclusive jurisdiction. Section 157(2) provides that the Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened infringement of any right in the Constitution and arising, inter alia, from employment and labour relations. High courts will of course always have jurisdiction where a fundamental right is pertinently implicated in the labour relations field, as for example, when a union might seek to interdict an employment practice that is obviously racist. This of course, does not mean that in the ordinary course of reviewing decisions of CCMA commissioners concerning unfair labour practices, the Labour Court does not enjoy exclusive jurisdiction.

If PAJA were to apply, section 6 thereof would not allow for such exclusivity and would enable the High Court to review CCMA arbitrations. This would mean that the High Court would have concurrent jurisdiction with the Labour Court. This negates the intended exclusive jurisdiction of the Labour Court and provides a platform for forum shopping.

44 Explanatory Memorandum at 279.
The powers of the Labour Court set out in section 158 of the LRA differ significantly from the powers of a court set out in section 8 of PAJA. The powers of the Labour Court are directed at remedying a wrong and, in the spirit of the LRA, at providing finality speedily. If an application in the normal course for the review of administrative action succeeds, an applicant is usually entitled to no more than the setting aside of the impugned decision and its remittal to the decision-maker to apply his or her mind afresh. Section 8(1)(c)(ii) of PAJA provides that only in exceptional cases may a court substitute the administrative decision or correct a defect resulting from the administrative action. This is a significant difference between the LRA and PAJA.

All of this explains why section 210 of the LRA was enacted, and why it was not amended or repealed by PAJA. Section 210 of the LRA provides as follows:

“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 State in both its executive and legislative arms was involved in finalising the LRA together with persons representing business, labour and community interests. Section 210 is unsurprising. The main protagonists in industrial relations, having negotiated the terms of the legislation, were not likely to countenance any non-agreed intrusions. This is particularly so in relation to the method and manner of determining disputes.

For more than a century courts have applied the principle that general legislation, unless specifically indicated does not derogate from special legislation. Lord Hobhouse delivering the judgment of the Privy Council in Barker v Edger stated the following:

“When the Legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms … It would require a very clear expression of the mind of the Legislature before we should impute to it the intention of destroying the foundation of the work which it had initiated some four
years before, and to which the Court has ever since been assiduously addressing itself."^{45}

In *R v Gwantshu*,^{46} after citing Barker with approval, the court quoted the following passage from Maxwell on the Interpretation of Statutes:^47

“Where general words in a later Act are capable of reasonable and sensible application without extending to subjects specially dealt with, by earlier legislation, that earlier and special legislation is not to be held indirectly … altered … merely by force of such general words, without any indication or particular intention to do so."

The legislature had knowledge of section 210 of the LRA and deliberately decided not to repeal that section or section 145 of the LRA. Moreover, it resulted from intense negotiations that led to the enactment of the LRA. This is an appropriate case for the application of the principle that specialised provisions trump general provisions.

For the reasons set out above, the SCA was found to have erred in holding that PAJA applied to arbitration awards in terms of the LRA.

### 4.2 DOES PAJA APPLY IN DISPUTES INVOLVING PUBLIC SECTOR EMPLOYEES?

One of the unintended consequences of the provisions of section 157(2) has been that employees in the public sector consider themselves as having more than one cause of action. Public sector employees normally allege that when a State employer dismisses them, such conduct amounts to the exercise of public power and therefore constitutes administrative action. Much store is placed by the decision in *Administrator, Transvaal v Zenzile*^{48} and its progeny, which held that the dismissal of a public sector employee is an exercise of public power. Public sector employees

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45 754.

46 *R v Gwantshu* 1931 EDI 29.

47 Bridgman (ed) *Maxwell on the Interpretation of Statutes* 7th ed (1929) at 153. See also *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at para 49 and 1420H-1421B; *Sasol Synthetic Fuels (Pty) Ltd v Lambert* 2002 (2) SA 21 (SCA) at para 17; *Consolidated Employers Medical Aid Society v Leveton* 1999 (2) SA 32 (SCA) at 401-41B; *Khumalo v Director-General of Co-operation and Development* 1991 (1) SA 158 (A) at 164C-165D.

48 1991 (1) SA 21 (A) at 34B-D; (1991) 12 ILJ 259 (A) at 270G.
contend therefore that this implicates the constitutional right to just administrative action in section 33 of the Constitution. This, they argue, entitles them to approach the High Court under section 157(2) of the LRA. But do they have more than one cause of action?

4.3 THE SCA JUDGMENT: CHIRWA v TRANSNET

The argument that the decision by Transnet to dismiss Ms Chirwa (Chirwa), gave rise to two causes of action is premised on the assumption that the dismissal of a public sector employee constitutes administrative action. Judicial opinion on this issue is not harmonious. The debate reduces itself to how powers exercised by a public entity in its employment relations ought to be characterised. One school of thought holds the view that all employment relations should be governed by labour law, including the right to fair labour practices in section 23 of the Constitution to the exclusion of administrative law, PAJA and the right to just administrative action in section 33. This school of thought has been adopted in a number of cases. The other school of thought holds the view that the exercise of public power inevitably attracts both administrative law and labour law with the result that public sector employees have remedies under both branches of law. This approach too has been adopted in several cases.


50 See Western Cape Workers Association v Minister of Labour [2006] 1 BLLR 79 (LC) at para 10 (PAJA is not applicable to labour disputes); Hope v Minister of Safety and Security [2006] 3 BLLR 297 (LC) at para 10 (transfer of employees does not constitute administrative action); Greyvenstein v Kommissaris van die SA Inkomste Diens (2005) 26 ILJ 1395 (T) at 1402F-G (instituting disciplinary proceedings is not an exercise of public power); Louw v SA Rail Commuter Corporation Ltd (2005) 26 ILJ 1960 (W) at paras 16-18 (decision to dismiss not governed by PAJA); SA Police Union v National Commissioner of the SA Police Service (2005) 26 ILJ 2403 (LC); [2006] 1 BLLR 42 (LC); (SA Police Union) at paras 50-51 (setting the working hours of police officers does not constitute administrative action); and Public Servants Association on behalf of Haschke v MEC for Agriculture (2004) 25 ILJ 1750 (LC) (Public Servants Association) at paras 11-12, where Pillay J held that labour law is not administrative law. In addition, she noted that historically administrative law had been used to advance labour rights where labour laws were considered to be inadequate.

51 See Police and Prisons Civil Rights Union v Minister of Correctional Services (2006) 27 ILJ 555 (E); [2006] 4 BLLR 385 (E) (POPCRU) at para 64 (the decision to dismiss correctional service employees constitutes administrative action); Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services [2006] 10 BLLR 960 (LC) at paras 56-58 and 64 (transfer of correctional services employee constitutes administrative action); Nell v Minister of Justice & Constitutional Development [2006] 7 BLLR 716 (T) at para 23 (purported dismissal was administrative action in terms of PAJA); Johannesburg Municipal Pension Fund v City of Johannesburg 2005 (6) SA 273 (W) at para 14 (a decision to terminate certain pension funds amounted to administrative action under PAJA); Mbayeka above n 8 at para 29 (failure to hear
What ultimately divides these schools of thought is a disagreement over whether the decision of a public entity to dismiss an employee should be characterised as the exercise of public power. The views expressed by members of the SCA in the Transnet case reflect this disagreement. It will be convenient, first, to consider these two schools of thought; then to identify the principles laid down in President of the Republic of South Africa v South African Rugby Football Union (SARFU) on what constitutes administrative action; and ultimately, to apply those principles – retooled insofar as may be necessary, to the facts of the Transnet case before the SCA.

Mthiyane JA held that the nature of the conduct involved in that case is the termination of a contract of employment which is based on a contract. The conduct of Transnet in terminating the employment contract did not therefore involve the exercise of public power or performance of a public function in terms of some legislation as required by PAJA. He reasoned that the mere fact that Transnet is an organ of State “does not impart a public law character to its employment contract with the applicant”. Its power to dismiss is not found in legislation but in the employment contract between it and the applicant. When Transnet dismissed the applicant it “did not act as a public authority but simply in its capacity as employer”. He further reasoned that “ordinarily” the employment contract has no public element and is not governed by administrative law. He held that the applicant was protected by the provisions of the LRA. He concluded that the conduct of Transnet in dismissing the applicant did not therefore constitute administrative action as defined in PAJA nor did it violate Chirwa’s rights under section 33 of the Constitution.

employees before suspending them was unconstitutional administrative action) and Simela v MEC for Education, Province of the Eastern Cape [2001] 9 BLLR 1085 (LC) at paras 42 and 59 (decision to transfer an employee without consultation amounted to both an unfair labour practice and unjust administrative action).

2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 141.

Above n 3 at paras 14-15.

Para 15.

Ibid.

Ibid.

Conradie JA assumed that the conduct of Transnet in dismissing the applicant constituted administrative action, para 26.
Cameron JA held that the decision of a State organ to dismiss an employee constitutes administrative action.\textsuperscript{58} He relied upon \textit{Zenzile}\textsuperscript{59} which held that a public sector employer is a public authority whose decision to dismiss involves the exercise of public power.\textsuperscript{60} That the applicant’s contract of employment or Transnet’s authority to employ the applicant “did not derive from a particular, discernable, statutory provision” is of no significance, Cameron JA reasoned.\textsuperscript{61} What matters, he said, is that Transnet is a public entity created by legislation and operating under statutory authority. Cameron JA concluded that when Transnet dismissed Chirwa, its action trenched on two constitutional rights, namely, her right to fair labour practices and her right to just administrative action.\textsuperscript{62}

Cameron JA therefore upheld Chirwa’s contention that she had two causes of action as a result of her dismissal; one under the LRA, the other under the Constitution and PAJA. In upholding this contention he reasoned that the fact that an employee has remedies under the LRA does not preclude the employee from approaching the High Court for relief.\textsuperscript{63} He expressed the view that he could not find any doctrine of constitutional law which confines a beneficiary of more than one constitutional right to only one remedy.\textsuperscript{64} Nor, he reasoned, could he find any “intention to prefer one legislative embodiment of a protected right over another; nor any preferent entrenchment of rights or of the legislation springing from them”.\textsuperscript{65}

It is necessary to refer to two recent decisions of the Labour Court and the High Court which reach different conclusions on this issue. The first is \textit{SA Police Union v National Commissioner of SA Police Services (SA Police Union)}, a decision of the Labour Court.\textsuperscript{66} In this case the primary issue was whether the decision of the Commissioner to introduce the adapted eight-hour shift constituted administrative

\begin{itemize}
\item \textsuperscript{58} Para 47.
\item \textsuperscript{59} \textit{Supra}.
\item \textsuperscript{60} 34B-D; 270F-G.
\item \textsuperscript{61} Above fn 3 at para 52.
\item \textsuperscript{62} Para 57.
\item \textsuperscript{63} Paras 63-65.
\item \textsuperscript{64} Para 63.
\item \textsuperscript{65} Para 65.
\item \textsuperscript{66} \textit{SA Police Union} above fn 62. This decision was followed by the Labour Court in \textit{Hlope} above n 62.
\end{itemize}
action. The court concluded that the conduct of the Commissioner in question did not constitute administrative action.\textsuperscript{67} The reasoning of the Labour Court rests on three main propositions. The first is that the Constitution draws a distinction between administrative action and labour relations. The court reasoned that these are “two distinct species of juridical acts [to which the Constitution] subjects … different forms of regulation, review and enforcement”.\textsuperscript{68} The second is that “[t]here is nothing inherently public about setting the working hours of police officers”.\textsuperscript{69} Employment relations, the court said, “are conducted internally in service of the immediate objectives of the organ of state and are premised upon a contractual relationship of trust and good faith”.\textsuperscript{70}

Lastly, the court held that there was “no logical, legitimate or justifiable basis upon which to categorise all employment conduct in the public sector as administrative action”.\textsuperscript{71} But Zenzile, which held that the dismissal of workers by a public body does not fall beyond the reach of administrative law and that the decision to dismiss a public sector employee involved the exercise of public power, stood in its way. The court reasoned 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. It concluded that cases such as Zenzile which extended labour rights to public sector employees “have lost their force following the codification of our administrative law and labour law, and the extension of full labour rights to public sector employees by the LRA”.\textsuperscript{72}

This decision must be contrasted with the High Court decision in Police and Prisons Civil Rights Union v Minister of Correctional Services (POPCRU),\textsuperscript{73} which was handed down by the Eastern Cape High Court after the Labour Court decision in SA Police Union. This case concerned an application to review the decision of the Department of Correctional Services to dismiss some of its employees. The

\begin{thebibliography}{99}
\bibitem{67} SA Police Union above fn 62 at para 51.
\bibitem{68} Para 54.
\bibitem{69} Para 51.
\bibitem{70} Para 52.
\bibitem{71} Para 62.
\bibitem{72} Para 66.
\bibitem{73} POPCRU above fn 63. This decision was followed by the Labour Court in Nxele above fn 63.
\end{thebibliography}
Department contended that the decision to dismiss its employees did not constitute administrative action and consequently was not reviewable under the provisions of PAJA. The court held that the decision in question constituted the exercise of public power and thus amounted to administrative action.\textsuperscript{74} Factors which influenced the court in concluding that the power involved was public, included the statutory basis of the power to employ and dismiss correctional officers, the subservience of the officials to the Constitution generally, and the public character of the Department.\textsuperscript{75}

The court rejected the argument that it is neither necessary nor desirable for one act to attract the protection of both labour law and administrative law. It reasoned firstly that the fundamental right to fair labour practices does not trump every other right.\textsuperscript{76} The right to administrative justice and the right to fair labour practices provide employees with rights which “are complimentary and cumulative, not destructive of each other simply because they are different”.\textsuperscript{77} The second proposition is that there is nothing incongruous about individuals having more legal protection rather than less, or more than one fundamental right applying to one act, or more than one branch of law applying to the same set of facts.\textsuperscript{78} The third proposition is that section 157(2) of the LRA envisages that certain employment-related acts will also be administrative acts when vesting jurisdiction in the Labour Court concurrent with the jurisdiction of the High Court.\textsuperscript{79}

### 4.4 THE CONSTITUTIONAL COURT: CHIRWA v TRANSNET

In this case the Chief Justice held that the High Court had jurisdiction because the Chirwa alleged a violation of the constitutional right to administrative action, a right in the Bill of Rights. However, he found that the decision to terminate Chirwa’s employment contract did not constitute administrative action under PAJA for two reasons. First, the dismissal of Chirwa did not take place in terms of any statutory

\begin{itemize}
\item \textsuperscript{74} POPCRU above fn 63 at para 54.
\item \textsuperscript{75} Ibid.
\item \textsuperscript{76} Para 59.
\item \textsuperscript{77} Para 60.
\item \textsuperscript{78} Ibid.
\item \textsuperscript{79} Para 62.
\end{itemize}
authority, but rather in terms of the contract of employment.\textsuperscript{80} Second, the dismissal did not constitute the exercise of public power.\textsuperscript{81} In this regard he found that the source of Transnet’s power to dismiss is contractual and this "point[s] strongly in the direction that the power is not a public one".\textsuperscript{82}

Ngcobo was unable to agree with the view that in dismissing Chirwa, Transnet did not exercise public power. In his view, what makes the power in question a public power is the fact that it has been vested in a public functionary, who is required to exercise the power in the public interest. When a public official performs a function in relation to his or her duties, the public official exercises public power. Ngcobo agreed with Cameron JA that Transnet is a creature of statute. It is a public entity created by the statute and it operates under statutory authority. As a public authority, its decision to dismiss necessarily involves the exercise of public power and, "[t]hat power is always sourced in statutory provision, whether general or specific, and, behind it, in the Constitution".\textsuperscript{83} Indeed, in \textit{Hoffmann v South African Airways},\textsuperscript{84} the Constitutional Court held that "Transnet is a statutory body, under the control of the State, which has public powers and performs public functions in the public interest".\textsuperscript{85}

However, reasoned Ngcobo, the fact that the conduct of Transnet, in terminating Chirwa’s employment contract, involves the exercise of public power is not decisive of the question whether the exercise of the power in question constitutes administrative action. The question whether particular conduct constitutes administrative action must be determined by reference to section 33 of the Constitution. Section 33 of the Constitution confines its operation to "administrative action", as does PAJA. Therefore to determine whether conduct is subject to review under section 33 and thus under PAJA, the threshold question is whether the conduct under consideration constitutes administrative action. PAJA only comes into

\textsuperscript{80} Para [185].
\textsuperscript{81} Para [194].
\textsuperscript{82} Para [189].
\textsuperscript{83} \textit{Ibid}.\textsuperscript{84} 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC); (2000) 21 \textit{ILJ} 2357 (CC); [2000] 12 BLLR 1365 (CC).
\textsuperscript{85} Para 23.
the picture once it is determined that the conduct in question constitutes administrative action under section 33. The appropriate starting point is to determine whether the conduct in question constitutes administrative action within the meaning of section 33 of the Constitution.\footnote{Sidumo v Rustenburg Platinum Mines Ltd [2007] ZACC 22 at para 202 and Minister of Health NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as Amici Curiae) 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at para 100.} The question therefore is whether the conduct of Transnet in terminating Chirwa’s contract of employment constitutes administrative action under section 33.

In \textit{SARFU},\footnote{Above fn 64.} the Constitutional Court emphasised that not all conduct of State functionaries entrusted with public authority will constitute administrative action under section 33. The court illustrated this by drawing a distinction between the constitutional responsibility of cabinet ministers to ensure the implementation of legislation and their responsibility to develop policy and to initiate legislation. It pointed out that the former constitutes administrative action, while the latter does not. It held that “the test for determining whether conduct constitutes ‘administrative action’ is not the question whether the action concerned is performed by a member of the executive arm of government”.\footnote{Para 141.} But what matters is the function that is performed. The question is whether the task that is performed is itself administrative action or not.\footnote{Ibid.}

Against this background the court concluded:

“Determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will, as we have said above, depend primarily upon the nature of the power. A series of considerations may be relevant to deciding on which side of the line a particular action 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. While the subject-matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of section 33. Difficult boundaries may have to be drawn in deciding what should and what should not be characterised
as administrative action for the purposes of section 33. These will need to be
drawn carefully in the light of the provisions of the Constitution and the overall
constitutional purpose of an efficient, equitable and ethical public administration.
This can best be done on a case by case basis.\textsuperscript{90}

The subject matter of the power involved here is the termination of Chirwa’s contract
of employment by Transnet for poor work performance. The source of the power is
the employment contract between Chirwa and Transnet. The nature of the power
involved here is therefore contractual. The fact that Transnet is a creature of statute
does not detract from the fact that in terminating the applicant’s contract of
employment, it was exercising its contractual power. It does not involve the
implementation of legislation which constitutes administrative action. The conduct of
Transnet in terminating the employment contract does not, in Ngcobo’s view,
constitute administration. It is more concerned with labour and employment
relations. The mere fact that Transnet is an organ of State which exercises public
power does not transform its conduct in terminating Chirwa’s employment contract
into administrative action. Section 33 is not concerned with every act of
administration performed by an organ of state. It followed therefore that the conduct
of Transnet did not constitute administrative action under section 33, Ngcobo found.

Support for the view that the termination of the employment of a public sector
employee does not constitute administrative action under section 33 can be found in
the structure of our Constitution. The Constitution draws a clear distinction between
administrative action on the one hand and employment and labour relations on the
other. It recognises that employment and labour relations and administrative action
are two different areas of laws. It is true they may share some characteristics.
Administrative law falls exclusively in the category of public law while labour law has
elements of administrative law, procedural law, private law and commercial law.\textsuperscript{91}

The Constitution contemplates that these two areas will be subjected to different
forms of regulation, review and enforcement. It deals with labour and employment
relations separately. This is dealt with in section 23 under the heading “Labour
Relations”. In particular, section 23(1) guarantees to “[e]veryone … the right to fair

\textsuperscript{90} Para 143.

\textsuperscript{91} \textit{Public Servants Association} above fn 62 at paras 11-13.
labour practices”. The Constitution contemplates that labour relations will be regulated through collective bargaining and adjudication of unfair labour practices. To this extent, section 23 of the Constitution guarantees the right of every employee and every employer to form and join a trade union or an employers’ organisation, as the case may be.

Nor is there anything, either in the language of section 23 or the context in which that section occurs, to support the proposition that the resolution of labour and employment disputes in the public sector should be regulated differently from disputes in the private sector. On the contrary, section 23 contemplates that employees regardless of the sector in which they are employed will be governed by it. The principle underlying section 23 is that the resolution of employment disputes in the public sector will be resolved through the same mechanisms and in accordance with the same values as in the private sector, namely, through collective bargaining and the adjudication of unfair labour practice as opposed to judicial review of administrative action.92 It is apparent from the Public Administration provisions of the Constitution that employment relations in the public service are governed by fair employment practices.

Section 195 which sets out the basic values and principles governing public administration, includes as part of those values and principles, “employment and personnel management practices based on … fairness”.93 These provisions contemplate fair employment practices. In addition, one of the powers and functions of the Public Service Commission is “to give directions aimed at ensuring that personnel procedures relating to … dismissals comply with [fair employment practices]”.94 This flows from the requirement that dismissals in the public service must comply with the values set out in section 195(1). These provisions echo the right to fair labour practices in section 23(1). And finally, section 197(2) provides that the terms and conditions of employment in the public service must be regulated by national legislation.

92  *SA Police Union* above fn 62 at para 55.
93  S 195(1).
94  S 198(4)(d).
These provisions must be understood in the light of section 23 of the Constitution which deals with labour relations, 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. Indeed, the LRA, which was enacted to give effect to section 23 of the Constitution, and the Public Service Act, 1994,\textsuperscript{95} which was enacted to give effect to section 197(2) of the Constitution, complement and supplement one another. By its own terms, the LRA governs all employees, including those in the public sector except those specifically excluded. For 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”.\textsuperscript{96}

As pointed out somewhere above, the line of cases which hold the power to dismiss amounts to administrative action rely on \textit{Zenzile}. The Chirwa case and its progeny must be understood in the light of our history. Historically, recourse was had to administrative law in order to protect employees who did not enjoy the protection that private sector employees enjoyed. Since the advent of the new constitutional order, all that has changed. Section 23 of the Constitution guarantees to every employee, including public sector employees, the right to fair labour practices. The LRA, the Employment Equity Act, 1998,\textsuperscript{97} and the Basic Conditions of Employment Act, 1997,\textsuperscript{98} have codified labour and employment rights. The purpose of the LRA and the Basic Conditions of Employment Act\textsuperscript{99} is to give effect to and regulate the fundamental right to fair labour practices conferred by section 23 of the Constitution. Both the LRA and the Basic Conditions of Employment Act were enacted to give effect to section 23, now govern the public sector employees, except those who are specifically excluded from its provisions. Labour and employment rights such as the right to a fair hearing, substantive fairness and remedies for non-compliance are now

\begin{flushleft}
\textsuperscript{95} Act 103 of 1994.
\textsuperscript{96} S 17(1).
\textsuperscript{97} Act 55 of 1998.
\textsuperscript{98} Act 75 of 1997.
\textsuperscript{99} S 2(a).
\end{flushleft}
100 It was no longer necessary therefore to treat public sector employees differently and subject them to the protection of administrative law, Ngcobo determined.

Labour and employment relations are dealt with comprehensively in section 23 of the Constitution. Section 33 of the Constitution does not deal with labour and employment relations. There is no longer a distinction between private and public sector employees under our Constitution. 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. Therefore, Ngcobo was unable to agree with the view that a public sector employee, who challenges the manner in which a disciplinary hearing that resulted in his or her dismissal, has two causes of action, one flowing from the LRA and another flowing from the Constitution and PAJA.

Ngcobo concluded that the decision by Transnet to terminate Chirwa’s contract of employment did not constitute administrative action under section 33 of the Constitution. This conclusion rendered it unnecessary to decide whether PAJA applied or not.

For all these reasons, he held that the dispute between Chirwa and Transnet fell within the exclusive jurisdiction of the Labour Court. It followed therefore that the High Court did not have jurisdiction in respect of Chirwa’s claim.

4.5 ADMINISTRATIVE ACTION IN TERMS OF PAJA

Section 1 of PAJA defines administrative action as follows:

“any decision taken, or any failure to take a decision, by -
(a) an organ of state, when -

100 Ss 138, 185-188 and 193-195 of the LRA.
(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”.

The relevant part of the definition in this matter is contained in sub-section (a)(ii). In order for the dismissal of Chirwa to constitute administrative action under that part of the definition, seven requirements must be met: the dismissal must be

(i) a decision,
(ii) by an organ of state,
(iii) exercising a public power or performing a public function,
(iv) in terms of any legislation,
(v) that adversely affects someone’s rights,
(vi) which has a direct, external, legal effect, and
(vii) that does not fall under any of the exclusions listed in section 1 of PAJA.

101 Grey’s Marine Hout Bay (Pty) Ltd v Minister of Public Works 2005 (6) SA 313 (SCA); 2005 (10) BCLR 931 (SCA) at para 21.
102 PAJA defines “decision” as -
“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, including a decision relating to -
(a) making, suspending, revoking or refusing to make an order, award or determination;
(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
(c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
(d) imposing a condition or restriction;
(e) making a declaration, demand or requirement;
(f) retaining, or refusing to deliver up, an article; or
(g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly”.

103 Those exclusions are -
“(aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79(1) and (4), 84(2)(a), (b), (c), (d), (f), (g), (h), (i) and (k), 85(2)(b), (c), (d) and (e), 91(2), (3), (4) and (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution;
(bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121(1) and (2), 125(2)(d), (e) and (f), 126, 127(2), 132(2), 133(3)(b), 137, 138, 139 and 145(1) of the Constitution;
(cc) the executive powers or functions of a municipal council;
The dismissal clearly constituted a decision by an organ of state\textsuperscript{104} that adversely and directly affected someone’s rights, which did not fall under any of the enumerated exclusions. It is worth consideration whether it was taken in terms of any legislation and whether it amounted to an exercise of public power or the performance of a public function. The conclusions reached on those questions make it unnecessary to consider whether the decision had an “external” effect.

In terms of any legislation the South African Transport Services Conditions of Service Act\textsuperscript{105} used to govern the conditions of service of Transnet employees. After this Act lapsed,\textsuperscript{106} no successor was enacted in its place. Currently the terms and conditions of service are controlled through contracts.

However, it could be argued that the Legal Succession to the South African Transport Services Act,\textsuperscript{107} the statute founding Transnet, is the source of all powers and functions providing the basis for its operational activities, including those of a contractual nature.\textsuperscript{108} This argument cannot hold water, the Chief Justice Langa opined. It would render the requirement that the decision be taken “in terms of any legislation” meaningless, as all decisions taken by a body created by statute would meet the requirement. If that is what the legislature intended, one would have

\begin{itemize}
  \item[(dd)] the legislative functions of Parliament, a provincial legislature or a municipal council;
  \item[(ee)] the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;
  \item[(ff)] a decision to institute or continue a prosecution;
  \item[(gg)] a decision relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person, by the Judicial Service Commission in terms of any law;
  \item[(hh)] any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or
  \item[(ii)] any decision taken, or failure to take a decision, in terms of section 4(1)\textsuperscript{104}.
\end{itemize}

\textsuperscript{104} Hoffmann above at para 23: “Transnet is a statutory body, under the control of the State, which has public powers and performs public functions in the public interest.” The Court went on to hold that SAA, as a business unit of Transnet was also an organ of state. The Transnet Pension Fund is also a business unit of Transnet and is therefore also an organ of state.

\textsuperscript{105} Act 41 of 1988.

\textsuperscript{106} The Act lapsed as of 6 October 1991.

\textsuperscript{107} Act 9 of 1989.

\textsuperscript{108} Chirwa above at para 52 (Cameron JA).
expected them to have said as much. Instead they chose to distinguish between powers exercised by the same body, including a body created by legislation, according to the source of the power.

There is, furthermore, no legislative provision in other legislation providing for the appointment and dismissal of persons in the position previously occupied by Chirwa. The Transnet Pension Fund Amendment Act only makes provision for the appointment of employees in particular positions, which are generally of a managerial or other high-responsibility nature.

It followed, therefore, that the dismissal of Chirwa did not take place in terms of any statutory authority, but rather in terms of the contract itself. Therefore, the decision could not, for this reason alone, amount to administrative action. The question then turned on whether or not the dismissal of Chirwa amounted to the exercise of a public power or performance of a public function.

Exercising a public power or performing a public function

“Determining whether a power or function is ‘public’ is a notoriously difficult exercise. There is no simple definition or clear test to be applied. Instead, it is a question that has to be answered with regard to all the relevant factors including:

(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.

The absence of a statutory power to dismiss immediately distinguishes the Chirwa case from Administrator, Natal v Sibiya 1992 (4) SA 532 (A) at 543E-F and Administrator, Transvaal v Zenzile 1991 (1) SA 21 (A) at 26D-E. In both cases the decision to dismiss was taken in terms of a statutory power.

Act 41 of 2000.

For example s 12(1) of the Amendment Act governs the appointment and dismissal of a Manager (Principal Officer): “The Managing Director shall appoint a member of the personnel of the employer to be the Manager (Principal Officer) of the Fund and may, at any stage, terminate such appointment.” Similarly, the appointment and dismissal of the Secretary is regulated by s 13(1): “The Managing Director shall appoint a member of the personnel of an employer as the Secretary of the Fund and may, at any stage, terminate any such appointment.”

Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC 2001 (3) SA 1013 (SCA); 2001 (10) BCLR 1026 (SCA) at para 18.
None of these factors will necessarily be determinative; instead, a court must exercise its discretion considering their relative weight in the context."

The first factor was particularly relevant in Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC where the Supreme Court of Appeal found that a decision to terminate a contract was not administrative action, because the organ of state in question had contracted in an equal power relation with a powerful commercial entity without any additional advantage flowing from its public position.113 In the Chirwa case, in exercising its contractual rights Transnet had no specific authority over its employees, in general, and gains no advantage over Chirwa in particular, by virtue of the fact that it is a public body. The power it has over its employees flows merely from its position as an employer and would be identical if it had been a private company.114 In this context, therefore, the presence of a power imbalance between Chirwa and Transnet was of diminished importance, Chief Justice Langa noted.

Secondly, Chirwa’s dismissal would have a very small impact, if any on the public.115 While Transnet conducts work that has a constant and significant public impact, it was important to recognise the Chirwa’s role in that venture. Her job was to ensure the smooth running of the Transnet Pension Fund. While that was important to Transnet employees, its impact on the public at large is further removed. She affected the proper functioning of the body that ensures the future of Transnet employees after retirement. She did not take decisions regarding transport policy or practice, and while her work might in some way have affected the morale of the

113 Para 18. See also Logbro Properties CC v Bedderson NO 2003 (2) SA 460 (SCA) at para 10.
114 This fact immediately distinguishes the Chirwa case from those cases that deal with state tendering. See, for example, Logbro above fn 113 at para 8 where Cameron JA held, in the tendering context, that “[t]he principles of administrative justice … framed the parties’ contractual relationship, and continued in particular to govern the province’s exercise of the rights it derived from the contract”. In this respect, see the comments of Murphy AJ in SAPU v National Commissioner of the South African Police Service [2006] 1 BLLR 42 (LC); (2005) 26 ILJ 2403 (LC) at para 52, that “there is considerable contextual difference between tendering and employment. Tendering serves the public interest in promoting competition in the provision of services to government and advances equality in business development. … Employment relationships, on the other hand, are conducted internally in service of the immediate objectives of the organ of state and are premised upon a contractual relationship of trust and good faith”.
115 Impact on the public was the deciding factor in Johannesburg Stock Exchange v Witwatersrand Nigel Ltd 1988 (3) SA 132 (A) at 152E-I and Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange 1983 (3) SA 344 (W) at 364H-365A.
people who did take those decisions, the ultimate effect of her dismissal on the public service provided by Transnet was negligible.

The next relevant factor was the source of the power.\(^{116}\) As noted above, in the *Chirwa* case, the power is contractual. It must again be stressed that this factor is not always decisive,\(^ {117}\) but is one that can have relevance. In this instance, it seemed simply to point strongly in the direction that the power was not a public one.

Finally, certain powers must be exercised for public, rather than private benefit. In *Police and Prisons Civil Rights Union v Minister of Correctional Services (POPCRU)*\(^ {118}\) the question arose whether the dismissal of a number of correctional officers for refusing to work amounted to the exercise of a public power. The court held that where there was limited or no impact on the public at large,

> “what 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.”\(^ {119}\)

Factors that strengthened the view of the court that the dismissal did amount to the exercise of a public power were: the subservience of the Department 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 the Correctional Services Act 111 of 1998.\(^ {120}\)

None of these “strengthening factors” were present in the *Chirwa* case, Chief Justice Langa found. Whilst Transnet is certainly subservient to the Constitution, so are all business entities in South Africa. In any event, subservience to the Constitution can very rarely be decisive, since every legal person, whether private or public, is

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\(^{116}\) See *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 143; *Cape Metropolitan* above fn 112 at paras 17-18; and *SAPU* above fn 114 at para 51.

\(^{117}\) See also *Logbro* above fn 113 at paras 5-11.

\(^{118}\) [2006] 2 All SA 175 (E); [2006] 4 BLLR 385 (E); (2006) 27 *ILJ* 555 (E).

\(^{119}\) Para 53.

\(^{120}\) Para 54.
subservient to the Constitution. The Transnet Pension Fund does not have the same public character that the Correctional Services Department has. Section 2 of the Correctional Services Act sets out the aims of the Department, which clearly have a public element. The Transnet Pension Fund does not have such obviously public goals. Lastly, whilst there is a clear “pre-eminence” of public interest in the proper administration of correctional services, the same could not be said for the Human Resources Department of the Transnet Pension Fund.

The approach followed in POPCRU is similar to that adopted by the Supreme Court of Appeal in Bullock NO v Provincial Government, North West Province. The case concerned a decision of the North West Government to grant rights over land it owned on Hartebeestpoort Dam to a single private person. In holding that the decision, despite flowing from the Government’s rights as owner, constituted administrative action, the court held:

“The dam is a valuable recreational resource available to the public at large. … A decision by the [North West Government] to grant, in perpetuity, a right over a part of the foreshore to one property owner to the exclusion of all other persons, significantly curtails access to that resource by the public.”

This factor is, of course, intimately linked to the impact a decision has on the public. In the Chirwa case, there did not seem to be any similar duty for Mr Smith to have acted in the public interest. Instead, he was acting in the best interests of the Transnet Pension Fund and Transnet’s employees by ensuring the smooth running of their pension fund.

121 Section 2 reads -
“The purpose of the correctional system is to contribute to maintaining and protecting a just, peaceful and safe society by -
(a) enforcing sentences of the courts in the manner prescribed by this Act;
(b) detaining all prisoners in safe custody whilst ensuring their human dignity; and
(c) promoting the social responsibility and human development of all prisoners and persons subject to community corrections.”

122 According to rule 2.2 of the Pension Fund Rules published in Government Gazette 21817 GN 1300, 1 December 2000, the sole object of the Transnet Pension Fund is “to invest and administer the credit amounts in the Member Accounts and Reserve Accounts in respect of every Member for the benefit of such Member or their Dependants or Nominees as the case may be”.


124 Para 14.
For all these reasons, CJ Langa concluded that the dismissal of Chirwa by Transnet did not constitute the exercise of a “public” power or the performance of a “public” function, and therefore was not administrative action under PAJA. It is important to note, however, that the above reasoning did not entail that dismissals of public employees will never constitute “administrative action” under PAJA. Where, for example, 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, the requirements of the definition of “administrative action” may be fulfilled.

4.6 MAKING SENSE OF SIDUMO \(^{125}\) CASE

4.6.1 SUMMARY OF BACKGROUND FACTS

Sidumo was a security guard at the Rustenburg Platinum Mine and was required to conduct personal searches on employees at the end of the shift. He was observed to have failed to conduct personal searches on at least 23 occasions and was charged and dismissed for negligence and failure to follow (search) procedures. He won in the CCMA, Labour and Labour Appeal Courts (reinstatement and 3 months’ back pay) but lost in the SCA. The matter was then referred to the Constitutional Court.

4.6.1.1 RULING BY THE CONSTITUTIONAL COURT

In reaching its determination, the Constitutional Court made the following observations:

(i) Sidumo had breached a workplace rule (favoured the employer).

(ii) The rule was important (favoured the employer).

\(^{125}\) Sidumo v Rustenburg Platinum Mines Ltd 2008 (2) BCLR 158 (CC)
(iii) The employer did not suffer any actual loss (in the form of stolen platinum) (favoured the employer).

(iv) Sidumo had not acknowledged guilt and shown remorse (favoured the employer).

(v) The misconduct by Sidumo did not involve dishonesty (favoured Sidumo).

(vi) Sidumo could benefit from further training and counselling (favoured Sidumo).

(vii) Sidumo had long service and a clean disciplinary record (favoured Sidumo).

(viii) The award by the CCMA commissioner was not one that a reasonable decision maker could not have made.

4.6.2 NATURE OF CCMA ARBITRATION PROCEEDINGS

The Constitutional Court has determined that the CCMA arbitration constitute administrative action as defined by the Promotion of Administrative Justice Act (“PAJA”) Navsa AJ, Moseneke DCJ, Madala J, O'Regan J (separate judgment) and Van Der Westhuizen J. Ngcobo J (and Mokgoro J, Nkabinde J and Skweyiya J) said that CCMA arbitration proceedings do not constitute administrative action but are adjudicative in nature. Sachs J said it is both administrative and adjudicative in nature and coins the concept of hybridity to the nature of the CCMA Arbitration proceedings.

The majority found that the relief provided in PAJA, however, does not apply to the arbitration awards made by CCMA commissioners. The LRA provides relief to those aggrieved by decisions of CCMA commissioners.
4.6.3 POWERS AND DUTIES OF COMMISSIONERS

Commissioners must:

(i) consider the matter afresh by hearing evidence;

(ii) act impartially;

(iii) consider whether the sanction imposed by the employer for misconduct is fair;

(iv) not defer to the decision of the employer (rejection of reasonable employer test).

4.6.4 RELEVANT FACTORS FOR COMMISSIONERS TO CONSIDER WHEN ARBITRATING UNFAIR DISMISSAL DISPUTES (MISCONDUCT CASES)

CCMA Commissioners must take into account the following relevant factors when arbitration unfair dismissal disputes regarding misconduct cases:

(i) The importance of the rule that the employee has breached;

(ii) The reason the employer imposed the sanction;

(iii) The basis of the employee’s challenge to the dismissal (admission of guilt, remorse);

(iv) The harm caused (to the employer’s business) by the employee’s conduct;

(v) Whether additional counselling and training may result in the employee not repeating the misconduct (progressive discipline);

(vi) The effect of dismissal on the employee (personal circumstances like age, family responsibility, ability to get new job);
(vii) Long service record.

4.6.5  A REVIEW OF SOME OF THE DECISIONS OF THE LAC AND THE LC SINCE SIDUMO

This section examines some of the notable cases that came before the courts after the Constitutional Court judgement in the *Sidumo* matter. Inasmuch as the cases did not deal exclusively with the administrative action per se, it does however, serve some useful purpose to review these cases with a view to see whether or not the *Sidumo* matter had any influence on the lower courts in determining labour disputes. It will also be noteworthy to examine the factors that the Courts take into account for purposes of determining the fairness or otherwise of dismissal disputes, in the face of *Sidumo*, and the remedies they mete out in this regard.

4.6.5.1  *FIDELITY CASH MANAGEMENT SERVICE v CCMA*¹²⁶

Fidelity Cash Management Services is in the business of transporting cash. An amount of R1.2 million was stolen from Virginia Airport, Durban. The accused employee was a “Planner” and 4 charges were levelled against him namely:

(i) Gross negligence.

(ii) Dereliction of duty (failure to ensure that there was an escort vehicle at airport).

(iii) Failure to comply with contract of employment which required him to take polygraph test.

(iv) Failure to be at disciplinary enquiry on time.

At the disciplinary hearing the employee was found guilty of all 4 charges and consequently summarily dismissed. The matter was referred to the CCMA. The

¹²⁶ [2008] 3 BLLR 197 (LAC).
CCMA found the dismissal to be unfair and ordered retrospective reinstatement. The matter was referred to the Labour Court, and the court confirmed the CCMA ruling. The matter was finally referred to the Labour Appeal Court. The employer (FCMS) had relied on the following charges as reasons for the dismissal:

(i) The employee’s refusal to undergo a polygraph test.

(ii) The employee not being in the control room when he was supposed to be.

(iii) Failure to supervise or monitor the control room properly (which resulted in the chain of events leading to the robbery).

Therefore the charges the employer relied upon to justify dismissal at CCMA, LC and LAC were different to those for which the employee was dismissed.

It is trite that an elementary principle of labour law provides that the fairness of a dismissal must be determined on the basis of the reasons for dismissal which the employer gave at the time of the dismissal. The employer no longer continues to justify the dismissal on the basis of the allegations of misconduct of which the employee was found guilty and for which he was dismissed. The LAC found that the appeal fell to be dismissed on this ground alone.

The LAC then considered in turn whether dismissal for any of the 4 charges was in any event justified. The LAC went through each in turn and said it was not; therefore found no reason to interfere with the CCMA decision.

The LAC made 5 main points about applying Sidumo:

(i) A commissioner must not apply the reasonable employer test, must not, in any way, defer to the employer and must decide the issue on the basis of his or her own sense of fairness.
(ii) A commissioner conducting an arbitration is conducting administrative action.

(iii) PAJA does not apply to such administrative action.

(iv) Justifiability of administrative action in relation to the reasons given for it, as propounded in Carephone, as a ground of review of arbitration awards under section 145 does not apply any more.

(v) The grounds of review set out in section 145 are suffused by the criterion of reasonableness and the constitutional requirement that arbitration awards must meet is that they must be lawful, reasonable and procedurally fair.

What must a commissioner do when deciding whether dismissal is a fair sanction or not?

The commissioner must

(i) Take into account the totality of circumstances.

(ii) Consider the importance of the rule that had been breached.

(iii) Consider the reason the employer imposed the sanction of dismissal, as s/he must take into account the basis of the employee’s challenge to the dismissal.

(iv) Consider the harm caused by the employee’s conduct.

(v) Consider whether additional training and instruction may result in the employee not repeating the misconduct.

(vi) Consider the effect of dismissal on the employee.
(vii) Consider the employee’s service record.

(viii) Take into account that LRA and the Code of Good Practice: Dismissal.

Then the commissioner must answer the question whether or not dismissal was, in all of the circumstances, a fair sanction and in such a case which finding must be reasonable.

Sidumo does not require that an arbitration award be grossly unreasonable before it can be interfered with on review – it only requires it to be unreasonable. This indicates a balance that a court must strike, namely: on the one hand, interfering too much or too easily with arbitration awards; and on the other, refraining too much from interfering with awards.

The test is whether or not the commissioner’s decision, one way or another, is one that a reasonable decision-maker could not reach in all of the circumstances. The grounds of review in section 145 are not obliterated:

Arbitration awards can be reviewed on the grounds, for example, that the CCMA had no jurisdiction in a matter or any of the other grounds specified in section 145.

The reasonableness or otherwise of a commissioner’s decision does not depend – at least not solely – upon the reasons that the commissioner gives for the decision.

Other reasons upon which the commissioner did not rely, to support the decision but which were legitimately before him and which can render the decision reasonable or unreasonable, can be taken into account.

4.6.5.2 EDCON v CCMA\textsuperscript{127}

The facts relating to the above mentioned case are as follows:

\textsuperscript{127} [2008] 5 BLLR 391 (LAC).
The employee was dismissed for dishonesty in regard to accident with company vehicle (failing to report it). He was dishonest during the investigation stage. He was however not charged with the latter allegation, which caused the real breach of trust.

The Labour Appeal Court found that the employee should have been charged with the real issue.

4.6.5.3 **HULLET ALUMINIUM (PTY) LTD v BARGAINING COUNCIL FOR THE METAL INDUSTRY**

The facts relating to the above mentioned case are as follows:

The case related to dismissal for dishonesty in respect to employee sales. The court said that the CCMA decision was not reasonable. The court determined that in this case dishonesty was involved, the employee showed no remorse, and finally found that consistency was not an issue because other employee’s case was different and thus not applicable. Accordingly the CCMA arbitration award was overturned on review.

There are therefore instances/cases where the courts will still grant a review, when appropriate.

4.6.5.4 **PALABORWA MINING COMPANY LIMITED v CHEETHAM**

The facts relating to the above mentioned case are as follows:

The case is about the Company Secretary who got dismissed upon failing the random blood test for alcohol. The Labour Appeal Court refused to intervene and grant the review. The LAC said that the Labour Court should not “second guess” decisions of the CCMA.

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128 [2008] JOL 21224 (LC).
4.6.5.5 *MANZINI v SAPS*¹³⁰

The facts relating to the above mentioned case are as follows:

The matter related to a Police Officer who was dismissed for corruption. The Police Officer claimed that there was no evidence to prove that he demanded or received a bribe. He was however present as the driver of vehicle when transaction took place. Inappropriate action took place in his presence. Technically he was not guilty of the allegation as specifically worded but clearly did wrong and knew or reasonably should have known so.

The Labour Court was unwilling to find in his favour because of the imprecise tagging / wording of unacceptable conduct which caused irretrievable damage to relationship.

The Labour Court followed the *Fidelity*¹³¹ case and *Sidumo*:

The court reaffirmed that its task is to ensure that the CCMA decision falls within bounds of reasonableness. Although Commissioner did not refer to circumstantial evidence or inference to be drawn on the proven facts, there was an inference to be drawn that Manzini was taking part in corrupt activities (he drove the car and knew what was going on).

Therefore his decision was one that a reasonable decision maker could reach in the circumstances.

The questions that arise, notwithstanding, after reading this judgment are:

What about the principle that the employee is entitled to be told allegations against him?

¹³⁰ [2008] JOL 21865 (LC).
¹³¹ See fn 126.
What about the principle that the fairness of a dismissal must be determined on the basis of the reasons for dismissal which the employer gave at the time of the dismissal?

If the allegation was different, the employee might have decided to give evidence after all (here he did do so because he claimed that the employer had not made out its case).

4.7 CONCLUSION

As stated earlier, section 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.

The Carephone test, which was substantive and involved greater scrutiny than the rationality test set out in Pharmaceutical Manufacturers, was formulated on the basis of the wording of the administrative justice provisions of the Constitution at the time, more particularly, that an award must be justifiable in relation to the reasons given for it. Section 33(1) of the Constitution presently states that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. The reasonableness standard should now suffuse section 145 of the LRA.

The reasonableness standard was dealt with in Bato Star. In the context of section 6(2)(h) of PAJA, O'Regan J said the following:

“[A]n administrative decision will be reviewable if, in Lord Cooke’s words, it is one that a reasonable decision-maker could not reach.”

The Constitutional Court recognised that scrutiny 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. However, the distinction between appeals and reviews continues to be significant.
Review for reasonableness, as explained by Professor Hoexter, does threaten the distinction between review and appeal. The Labour Court in reviewing the awards of commissioners inevitably deals with the merits of the matter. This does tend to blur the distinction between appeal and review. She points out that it does so in the limited sense that it necessarily entails scrutiny of the merits of administrative decisions. She states that the danger lies, not in careful scrutiny, but in “judicial overzealousness in setting aside administrative decisions that do not coincide with the judge’s own opinions”. The Constitutional Court in *Bato Star* recognised that danger. A judge’s task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.

To summarise, *Carephone* held that section 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that section 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star*: Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it 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.
CHAPTER 5
CONCLUDING REMARKS

The analysis of reviews of CCMA awards by the labour courts, as contended throughout this study suggests that the persuasive evidence with respect to broader review function of CCMA awards by the Labour Courts requires a complex web of information and analysis. The study has demonstrated that CCMA proceedings constitute administrative action as defined by the Promotion of Administrative Justice Act. The relief provided in PAJA, however does not apply to the arbitration awards made by CCMA Commissioners. The LRA provides relief to those aggrieved by decisions of CCMA commissioners.

It is accordingly submitted that the scope for further comparable research in reviews in other areas of employment law is broad. This study has focused on review function of CCMA awards by the Labour Courts with specific reference to the applicability or otherwise of PAJA. It did not look at all possible reviews with the result that there are some unanswered questions even after *Chirwa* and *Sidumo*, such as:

(i) Does the *Chirwa* case only cover dismissal disputes?
(ii) Does any employment decision constitute administrative action?
(iii) Can the Labour Court apply PAJA?
(iv) Can employees still approach the High Court with contractual claims?

The study has demonstrated that the following key practical points ought to be borne in mind when dealing with disciplinary matters:

(i) The employer must investigate the allegations properly.

(ii) The employer representative must get the charges right.

(iii) The employer ought to show that it has taken all circumstances into account before deciding to dismiss.
(iv) If a party wants to succeed with a review s/he must show that the CCMA decision was unreasonable.

(v) The decision of the CCMA can be reasonable on grounds other than those relied on by the commissioner.

(vi) Parties can still review CCMA Awards on 145 grounds víz:

- Misconduct by commissioner
- Gross irregularity in conduct of proceedings
- Exceeded powers / jurisdiction

With regard to CCMA commissioners, the study has also established that the following is apposite:

- A commissioner must not apply the reasonable employer test, must not in any way defer to the employer and must decide the issue on the basis of his or her own sense of fairness.

- A commissioner conducting an arbitration is conducting administrative action.

- PAJA does not apply to such administrative action.

- Justifiability of administrative action in relation to the reasons given for it, as propounded in Carephone, as a ground of review of arbitration awards under section 145 does not apply any more.

- The grounds of review set out in section 145 are suffused by the criterion of reasonableness and the constitutional requirement that arbitration awards must meet is that they must be lawful, reasonable and procedurally fair.
The Constitutional Court in the *Sidumo* case did not require that an arbitration award be grossly unreasonable before it can be interfered with on review—it only requires it to be unreasonable.

A fair hearing demands that at the very least there be some reasonably sustainable fit between the evidence and outcome. The application of the standard of reasonableness requires scrutiny of the merits by the reviewing court but this does not mean that a review is now equal to an appeal.

The test is whether or not the commissioner’s decision, one way or another, is one that a reasonable decision maker could not reach in all the circumstances.
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