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Administrative, Labour and Constitutional Law — A Jurisdictional Labyrinth

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1 SETTING THE SCENE

Today, the employment relationship in the public service is regulated by a number of sources of law: the law of contract forms the basis of the employer-employee relationship; labour legislation, most notably the Labour Relations Act 66 of 1995 (LRA), directs fairness in the employer-employee context; and the Promotion of Administrative Justice Act 2 of 2000 (PAJA), which codifies administrative law, steers due process and rationality in the public service. All of this occurs within South Africa's constitutional landscape, which enshrines both 'everyone's' right to fair labour practices,[1] and the right to fair administrative action.[2] Where does this leave the public service employee with a labour related dispute? Should a disgruntled employee refer a dispute to the Commission for Conciliation, Mediation & Arbitration (CCMA) and/or the Labour Court (LC) under the auspices of the LRA, or should the matter rather be taken on review to the High Court (HC) in terms of PAJA?

In the recent past, numerous cases have highlighted the fact that a jurisdictional labyrinth has developed for public service employees,

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[1] s 23(1) of the Constitution of South Africa (Act 108 of 1994) (the Constitution).
[2] s 33 of the Constitution.

which makes it extremely difficult to advise any public service employee on appropriate forums and remedies under this discourse.[3] This jurisdictional muddle could lead to unfortunate results for litigants and we argue that there is an urgent need for law reform that would ensure the development of a coherent legal framework within which these problems may be resolved.

This article will focus on a discussion of a selection of cases highlighting the problem and will conclude with a number of critical observations and suggestions. But, before turning to the present legal dispensation, it is necessary to consider the legal position that prevailed prior to the enactment of the Constitution and the present LRA.

2 From the Preceding to the Present Dispensation

Public service employees were excluded from the scope of the former Labour Relations Act 28 of 1956.[4] Therefore, they did not have the benefit of being able to refer an unfair labour practice dispute to the now dismantled Industrial Court. Between 1980 and 1995, this tribunal played a revolutionary role in the development of the law pertaining to employer-employee relations.[5] Under its unfair labour practice jurisdiction it was recognized that when adjudicating labour disputes, contracting parties were not only bound by common-law principles of lawfulness emanating from the contract of employment, but that they were also bound to treat the other party to the relationship fairly. This led to the development of an employee's right to both procedural and substantive fairness whenever he or she was disciplined or dismissed. But, public sector employees did not enjoy protection under the old LRA, nor was there a constitution which enshrined rights to fair labour practices. Aggrieved employees had to rely on contractual and administrative remedies when the employer unfairly exercised its prerogative to enforce discipline at the workplace.

Initially, public service employees' reliance on common-law principles derived from the audi alteram partem doctrine emanating from

[3] *Public Servants Association on behalf of Haschke v MEC for Agriculture & others* (2004) 25 *ILJ* 1750 (LC); *MEC: Department of Finance, Economic Affairs & Tourism, Northern Province v Mahumani* (2004) 25 *ILJ* 2311 (SCA); [2005] 2 BLLR 173 (SCA); *Engelbrecht v Minister of Safety & Security & others* (2005) 26 *ILJ* 727 (T); *Marcus v Minister of Correctional Services & others* (2005) 26 *ILJ* 745 (SE); *Greyvenstein v Kommissaris van die SA Inkomste Diens* (2005) 26 *ILJ* 1395 (T); *Louw v SA Rail Commuter Corporation Ltd & another* (2005) 26 *ILJ* 1960 (W); *United National Public Servants Association of SA v Digomo NO & others* (2005) 26 *ILJ* 1957 (SCA); *Dunn v Minister of Defence & others* (2005) 26 *ILJ* 2115 (T); *SA Police Union & another v National Commissioner of the SA Police Service & another* (2005) 26 *ILJ* 2403 (LC); *Jones & another v Telkom SA Ltd & others* (2006) 27 *ILJ* 911 (T); [2006] 5 BLLR 513 (T); *Police & Prisons Civil Rights Union & others v Minister of Correctional Services & others* (2006) 27 *ILJ* 555 (E); *Nell v Minister of Justice & Constitutional Development & another* (2006) 27 *ILJ* 2063 (T); [2006] 7 BLLR 716 (T); *Hlope & others v Minister of Safety & Security & others* (2006) 27 *ILJ* 1003 (LC).

[4] s 2(2) of the old LRA.

[5] Van Niekerk 'In Search of Justification: The Origins of the Statutory Protection of Security of Employment in South Africa' (2004) 25 *ILJ* 853.

administrative law was not straightforward. As pointed out by Baskin before law reform had occurred in this regard, 'a line of cases has held that, if a public official or body exercises power through the medium of contract, the principles of administrative law, and particularly the rules of natural justice, do not apply'.[6] However, all of this changed during the early nineties. During a time when the courts were reluctant to control public power, a 'judge-led renaissance' occurred 'paradoxically at the time of the most relentless executive lawlessness yet experienced'.[7]

In *Administrator of the Transvaal & others v Traub & others*,[8] *Administrator, Transvaal & others v Zenzile & others*[9] and *Administrator, Natal v Sibiya*[10] the Appellate Division (AD) removed all doubt that may have existed over the question whether administrative law principles applied to the contractual relationship between public institutions and their employees. In *Traub* the employer sought to punish a doctor for signing a letter expressing criticism of the hospital administration; in *Zenzile* employees were dismissed on grounds of misconduct; and in *Sibiya* contracts of employment were terminated for economic reasons. In this group of cases, employer decisions were set aside by the AD on grounds that the principle of audi alteram partem was disregarded in the public service employer-employee relationship.

In *Traub*[11] it was held that 'when a statute empowers a public official or body to give a decision prejudicially affecting an individual [whether it is an employee or not] in his liberty or property or existing rights, the latter has the right to be heard before the decision is taken'. This principle was accepted and applied in *Sibiya* and *Zenzile*. One of the principles that was especially emphasized in *Zenzile*[12] was that the right to be heard exists when the decision maker is a 'public authority' exercising a 'public power'.[13]

It is significant to note that this evolution occurred at a time when the protection of employee rights in the public service was precarious and there were compelling reasons for the courts to extend administrative law principles to the employer-employee relationship. Brassey points out that owing to apartheid, officials were overwhelmingly white and employees were overwhelmingly black, and, '[i]n a time

[6] Baskin 'Rattling the Chains of Sibanyoni's Ghost: Contract and Natural Justice Revisited in the Ciskei High Court' (1999) 20 *ILJ* 2228 at 2231. See also *Mkhize v Rector, University of Zululand* 1986 (1) SA 901 (D); *Embling v Headmaster, St Andrew's College (Grahamstown) & another* (1991) 12 *ILJ* 277 (E).

[7] H Corder & T Maluwa (eds) *Administrative Justice in Southern Africa* (1997) at 3 and 7.

[8] (1989) 10 *ILJ* 823 (A).

[9] (1991) 12 *ILJ* 259 (A).

[10] 1992 (4) SA 532 (A.

[11] at 827D.

[12] at 270F–H.

[13] See also Grogan 'Natural Justice and Employment Contracts: A Rearguard Action' (1992) *SALJ* 186.

of transition — and of course the early nineties were exactly this — the courts were very properly looking for ways to ameliorate the horrors of the outgoing regime'.[14]

Leaving the provisions of the LRA and PAJA aside for the moment, it seems that public service employees could in all probability get along quite well in the areas of the regulation of discipline and dismissal without being granted protection by labour legislation. Referring to *Zenzile* and *Sibiya*, Brassey states:

'The judgments reach beyond the *audi* principle . . . for, invoking the general principles of administrative law as they do, they have the effect of making the substantive rules of administrative law equally applicable to the dismissal of public servants. A dismissal can be challenged not just for want of due process, but also on the grounds of irrationality or unreasonableness.'[15]

Further:

'In both cases the dismissals were set aside on the grounds that the decision had been taken without first complying with the principles of *audi alteram partem*. The effect of the judgments was to reinstate the employees retrospectively to the date of their dismissal.'[16]

Today, things are so different. Section 23 of the Constitution serves as the principal constitutional guarantee for all employees, including members of the defence force.[17] The LRA seeks to give effect to and regulate the fundamental rights conferred by this section.[18] All public service employees, to the exclusion of members of the defence force, the intelligence agency and the secret service,[19] are covered by unfair dismissal provisions and dispute-resolution mechanisms which have been carefully crafted for the 'effective resolution of labour disputes' by the LRA.[20] Public service employees, however, are granted more than this. They have an additional constitutional guarantee to just administrative action,[21] bolstered by the provisions of PAJA. This state of affairs creates a situation where public service employees can forum shop and, to say the least, it renders the area of the law pertaining to dispute resolution incoherent.[22]

3 The Position Adopted by the Civil Courts

The first portion of the next part deals with the stance of the civil courts during the last year or two in respect of the right of public

[14] Brassey 'Sense or Zenzile: Administrative Law in the Public Law since 1994' *SA Society for Labour Law* 23 February 2006 unpublished paper at 7.
[15] Brassey *SA Society for Labour Law* 2006 unpublished paper at 1.
[16] Brassey *SA Society for Labour Law* 2006 unpublished paper at 1.
[17] *SA National Defence Union v Minister of Defence & another* (1999) 20 *ILJ* 2279 (CC).
[18] s 1*(a)* of the LRA.
[19] s 2 of the LRA.
[20] s 1*(d)*(iv) of the LRA.
[21] s 33 of the Constitution.
[22] Brassey *SA Society for Labour Law* 2006 unpublished paper at 8.

service employees to be legally represented at disciplinary hearings. In *Mahumani*[23] public service employees chose to refer their dispute to the civil courts rather than the tailor-made labour dispute-resolution mechanisms created by the LRA. The facts were as follows: The chairperson of a disciplinary enquiry refused a request for legal representation, based on a clause in the disciplinary code for the public service, which specifically prohibited representation by a legal representative. The disciplinary code was incorporated into a binding collective agreement in terms of s 23 of the LRA. This gave the clause a contractual nature. Based on an unreported LC decision,[24] the chairperson of the hearing ruled that he had no discretion to decide whether to allow legal representation or not. This decision was taken on review to the HC, and the chairperson's ruling was set aside. This decision, in turn, was taken on appeal to the Supreme Court of Appeal (SCA). The SCA confirmed the decision of the HC and referred the matter back to the chairperson, providing him with certain guidelines to be considered when applying the discretion to permit legal representation.[25]

In his decision, Patel AJA broadly followed the *Hamata* decision[26] based on the following reasons. Firstly, the court held that in terms of the common law, a person has no absolute right to legal representation. However, the common law does require disciplinary hearings to be fair, and in order to achieve this, it may be necessary to permit legal representation after considering the facts of each case (para 11). Secondly, although it is unnecessary to decide whether the bodies concerned engaged in 'administrative action', s 3(1) and (3) of PAJA broadly reflects the common-law position that administrative action must be procedurally fair. To give effect to this, an 'administrator may, in his or her discretion' give a person an opportunity to obtain legal representation.[27] Thirdly, irrespective of whether administrative law applies or not, based on the fact that the parties were intent on devising a 'fair procedure . . . it is fair to assume that they also knew that there may be circumstances in which it would be unfair not to allow legal representation'.[28] Therefore, the court continued, it is likely that they would have intended the chairperson (despite the fact that they had expressly excluded such right) to have such discretion.

[23] (2004) 25 *ILJ* 2311 (SCA).

[24] *Mosena v Premier: Northern Province* case no 1401/2000 (LC).

[25] This decision has led to speculation as to whether it will also apply in the private sector. See Le Roux 'The Right to Legal Representation at Disciplinary Hearings' (2005) *CLL* 14; Van Jaarsveld 'Weer eens die Reg op Regsverteenwoordiging by Dissiplinêre Verhore' (2005) *THRHR* 3–5.

[26] *Hamata & another v Chairperson, Peninsula Technikon Internal Disciplinary Committee & others* 2002 (5) SA 449 (SCA); (2002) 23 *ILJ* 1531 (SCA).

[27] s 3(3) of PAJA, as referred to at para 11.

[28] para 11.

In our view, the *Mahumani* case is weakly reasoned and open to criticism on all three counts. Firstly, ignoring administrative law for the moment, there has never been a common-law principle requiring that disciplinary hearings should be conducted when contracts of employment are terminated. Therefore the presence of legal representation could not have developed along with such principle. It was due to the shortcomings in the common law (insofar as it does not require a fair reason and procedure before contracts of employment may be terminated) that the notion of fairness was introduced into the employment relationship by labour legislation. These principles filtered into administrative law only during the early nineties when the public service was still excluded from the old LRA. Surely, one cannot take account of notions of fairness which may have developed from administrative law without first making a determination whether this sphere of law is applicable to the particular facts.

Secondly, instead of looking for answers in the LRA or unfair labour practice precedent that had developed over a number of years, the court chose to rely on the provisions of PAJA without first enquiring whether the particular ruling of the chairperson of the hearing constituted 'administrative action'. The LRA specifically legislates the requirements in respect of disciplinary enquiries and provides guidelines about who may, and who must, be present at such hearings in both the private and public sectors.[29] As a starting-point in its enquiry into legal representation at disciplinary hearings, why did the court not rely on the constitutional right to fair labour practices before turning to PAJA?

Thirdly, it is hard to see how the court could have come to the conclusion that the drafters of the disciplinary code implied that chairpersons had a discretion to admit legal representatives when the code expressly states that they are excluded from such proceedings. Recently, the SCA has confirmed the civil court sentiment that disciplinary codes have to be followed to the letter due to their contractual nature[30] and that the right to fair labour practices would not entitle any of the parties to an agreement to circumvent their contractual responsibilities.

The next part of the discussion concerns disciplinary proceedings in general. Whereas a reasonable measure of certainty has been established by the SCA in *Hamata* and *Mahumani* in respect of legal representation at disciplinary hearings in the public domain, the same can unfortunately not be said of principles regarding other aspects of such proceedings. In two well-reasoned HC cases, each dealing with disciplinary enquiries in the public sector, different provincial divisions adopted diametrically opposing views.

[29] Code of Good Practice: Dismissal schedule 8 to the LRA.
[30] See *Denel (Pty) Ltd v Vorster* (2004) 25 *ILJ* 659 (SCA) para 16.

In *Greyvenstein v Kommissaris van die SA Inkomste Diens*[31] a disgruntled employee applied to the HC for an order to set aside the decision of a disciplinary hearing resulting in his dismissal. The application was based on the employee's contention that the allegations against him were grounded on something that had to be determined by litigation between himself and a third party before the charges could be formulated. The review was launched with reference to the provisions of PAJA and it had to be determined whether disciplinary action against an employee constituted 'administrative action'. Having considered a wide range of precedents, Webster J broadly followed a line of arguments developed in the labour courts, which is discussed under the view of the LC below.[32]

Webster J's decision culminates in the view that 'the act of instituting disciplinary proceedings could not ... be said to constitute the exercise of public power or the performance of a public function',[33] that it does not fall under 'administrative action' as defined in PAJA, and that consequently, the application for review had to fail.[34]

However, in a more recent case, *Police & Prisons Civil Rights Union v Minister of Correctional Services*,[35] applicants once again sought an order in the HC to set aside a decision of a disciplinary hearing, but the court came to a completely different conclusion from the one maintained in *Greyvenstein* above. Seventy-five correctional officers at the Middeldrift Prison were summarily dismissed following their refusal to work over the Christmas and New Year period. The prison authority conceded that the appropriate disciplinary procedures agreed to in the collective agreement had not been adhered to in dismissing the employees. Firstly, the court had to determine if it had jurisdiction to entertain the matter on review. It began by traversing a line of cases, from a common-law and constitutional perspective, which dealt with the competing jurisdictions of the HC and the LC. The central question in these cases was whether the codification of labour rights and the establishment of the CCMA and the labour courts had ousted the jurisdiction of the HC to adjudicate labour disputes on common-law and constitutional grounds. Having considered the views of the SCA in *Fedlife Insurance Ltd v Wolfaardt*,[36] and of the Constitutional

[31] (2005) 26 *ILJ* 1395 (T).

[32] The LC's position derives mainly from *Public Servants Association on behalf of Haschke v MEC for Agriculture & others* (2004) 25 *ILJ* 1750 (LC) and was refined in *SA Police Union v National Commissioner of the SA Police Service* (2005) 26 *ILJ* 2403 (LC). The court also relied on the following Constitutional Court (CC) and HC decisions: *President of the RSA v SA Rugby & Football Union* 1999 (10) BCLR 1059 (CC); *Pharmaceutical Manufacturers Association of SA: In re ex parte President of the Republic of SA* 2000 (2) SA 674 (CC); *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC).

[33] at 1402F.

[34] See also the HC decisions in *Louw v SA Rail Commuter Corporation Ltd* (2005) 26 *ILJ* 1960 (W) and *Jones v Telkom SA* (2006) 27 *ILJ* 911 (T) where similar points of view were adopted.

[35] (2006) 27 *ILJ* 555 (E).

[36] 2002 (1) SA 49 (SCA); (2001) 22 *ILJ* 2407 (SCA).

Court (CC) in *Fredericks & others v MEC for Education & Training, Eastern Cape & others*[37] the court in this matter came to the following conclusion:[38]

'From the above analysis I conclude that this court has jurisdiction to determine the issues raised by the applicant. Since these issues include allegations that fundamental rights had been violated, this court and the LC have concurrent jurisdiction in terms of s 157(2) of the Labour Relations Act. I also conclude that in its jurisdiction to award remedies this court is not restricted to the remedies and their limitations listed in s 193 and s 194 of the Labour Relations Act. If the PAJA applies, any one or more of the remedies contemplated by s 8 of that Act may be awarded, if appropriate, and if the decisions under challenge are reviewable in terms of s 1*(c)* of the Constitution, then any one or more of the remedies contemplated by s 172 of the Constitution may be awarded.'

Turning to the question whether the dismissal of employees constitutes 'administrative action', and in particular if it entails the exercising of a 'public power', Plasket J held that the definition of 'administrative action', as contained in PAJA, is not exhaustive. He held at para 50 that 'the common law has not been abrogated [by the new constitutional order] and it informs ... the interpretation of the PAJA'. The judge relied on the pre-constitutional common-law heritage which culminated in *Zenzile* in holding that disciplinary proceedings against public service employees do fall within the ambit of administrative action and are therefore reviewable.[39]

Although the *Police & Prisons Civil Rights Union* decision was well researched and reasoned, there is a significant issue that makes it questionable whether Plasket J came to the correct conclusion. In our view, administrative law reform, which was spearheaded by the Constitution and the promulgation of PAJA, has moved this area of the law beyond *Zenzile*. In *Bato Star Fishing* the CC held that s 6 of PAJA 'divulge[s] a clear purpose to codify the grounds of judicial review of administrative action'. The mere fact that Plasket J agrees, as he does, with criticism levelled against the PAJA definition of 'administrative action', does not mean that he can go as far as using common-law principles, which have since been supplanted, to widen its meaning.[40] The definition of 'administrative action' may very well have been given a limited scope with a very specific purpose, namely to prevent a situation where other spheres of the law, which are also regulated by legislation, overlap with administrative law.

Although employer decisions about the payment of benefits, and

[37] (2002) 23 *ILJ* 81 (CC).

[38] at para 44.

[39] See also *Marcus v Minister of Correctional Services* (2005) 26 *ILJ* 745 (SE) where it was held that a decision to suspend a public service employee constitutes administrative action and *Nell v Minister of Justice & Constitutional Development* (2006) 27 *ILJ* 2063 (T) where it was held that the decision to dismiss employees constitutes administrative action.

[40] C Hoexter *The New Constitutional and Administrative Law* (2002) at 100 says that 'the definition of administrative action in the Act [PAJA] is both extremely narrow and highly convoluted'.

about the placement and promotion of public service employees do not squarely fall under disciplinary proceedings against employees, the civil courts have in a cluster of cases been consistent in their view that such decisions do raise constitutional issues, or constitute administrative action, and that such decisions are therefore reviewable by the HC.[41] The view of the courts in this regard was possibly best formulated by the SCA in *United National Public Servants Association of SA v Digomo NO & others*[42] where it was held:

'Particular conduct by an employer might constitute both an ''unfair labour practice'' (against which the Act provides a specific remedy) and it also might give rise to other rights of action. The appellant's claim in the present case was not that the conduct complained of constituted an ''unfair labour practice'' giving rise to the remedies provided for by the Labour Relations Act, but that it constituted administrative action that was unreasonable, unlawful and procedurally unfair. Its claim was to enforce the right of its members to fair administrative action — a right that has its source in the Constitution and that is protected by s 33 — which is clearly cognizable in the ordinary courts.'

Although this proposition by the SCA may be true, this does not leave us with a satisfactory conclusion to this jurisdictional tangle. From a policy perspective, it is common cause that labour and administrative law provisions which could potentially both apply to disciplinary enquiries are not synchronized; that private sector employees have recourse only to the provisions of the LRA (apart from their contractual remedies) while public service employees may rely both on the LRA and PAJA; and that labour and administrative law statutory remedies differ significantly (s 193 and s 194 of the LRA place limits on compensation, whereas an application for review would typically result in a reinstatement order and backpay which bears no limitations).

4 The Position Adopted by the Labour Court

Over the past three years, a relatively uniform point of view has emerged from the LC regarding the overlap of labour law and administrative law principles. Quite predictably, by virtue of its nature as a specialist court, the court has taken the position that it is inappropriate to implement the provisions of PAJA in labour disputes.[43]

As will be seen below, the main point of disagreement between the LC and the HC (with the exception of *Greyvenstein*, *Nell* and *Jones*)

[41] See *Dunn v Minister of Defence* (2005) 26 *ILJ* 2115 (T); *Engelbrecht v Minister of Safety & Security* (2005) 26 *ILJ* 727 (T).

[42] (2005) 26 *ILJ* 1957 (SCA) at para 4.

[43] Van Eck 'The Constitutionalisation of Labour Law: No Place for a Superior Labour Appeal Court in Labour Matters: (Part 1) Background to the South African Labour Courts and the Constitution' (2005) *Obiter* vol 26 (3) 549 and 'The Constitutionalisation of Labour Law: No Place for a Superior Labour Appeal Court in Labour Matters: (Part II) Erosion of the Court's Jurisdiction' (2006) *Obiter* vol 27 (1) 20.

revolves around the question whether employer actions can be equated with the exercise of 'public power'. The issues that served as a conduit for the perpetuation of the jurisdictional debate in the LC did not necessarily concern disciplinary enquiries. Nonetheless, the principles formulated by the LC in these cases are equally applicable to the current argument.

In *Public Servants Association on behalf of Haschke v MEC for Agriculture*[44] the question was posed whether the provisions of PAJA apply to CCMA awards and rulings, in *SA Police Union v National Commissioner of the SA Police Service*[45] the question was whether a decision to change public service employees' shift systems constituted administrative action and in *Hlope v Minister of Safety & Security*[46] the issue at stake was whether a decision to transfer public service employees constituted administrative action.

The set of facts that presented itself in *SA Police Union* and Murphy J's line of reasoning in this matter possibly best illustrate the opinion of the LC. The police unions argued that the decision to change their members' conditions of service from a 12-hour to an eight-hour shift was a unilateral amendment to their contracts of employment. The commissioner, however, contended that the decision was an alteration of a work practice, which was permitted in terms of the prevailing and valid collective agreement. It was common cause that the commissioner's decision was made without prior consultation with the public service employees, but the commissioner was of the opinion that he was under no duty to consult. The collective agreement provided that shift duties would be performed in either eight- or 12-hour shifts and that if there was a dispute about the interpretation of the agreement it had to be referred to the bargaining council for resolution.

The main challenge was based on the contention that the decision constituted administrative action and that it was therefore reviewable in terms of s 6 of PAJA and s 33 of the Constitution. Murphy J considered three often referred to CC cases before concluding that the commissioner's decision did not fall under administrative action.

In *Pharmaceutical Manufacturers Association of SA & another: In re ex parte President of the Republic of SA & others*[47] the CC held that under our new constitutional order the control of 'public power' is always a constitutional matter. The implications of that decision were further highlighted in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others* where it was held[48] that the 'courts' power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution'. In *Bato Star* the court further

[44] (2004) 25 *ILJ* 1750 (LC).
[45] (2005) 26 *ILJ* 2403 (LC).
[46] (2006) 27 *ILJ* 1003 (LC).
[47] 2000 (2) SA 674 (CC).
[48] 2004 (4) SA 490 (CC) at para 22.

stated that the provisions of s 6 of PAJA are a clear attempt to codify the grounds of review and that such grounds are ordinarily not to be found in the common law as in the past. In *President of the RSA v SA Rugby Football Union*[49] the CC highlighted the fact that not all conduct of state functionaries entrusted with public authority will fall under 'administrative action'. The court, in this instance, cited a number of considerations that could be relevant in determining whether an action qualifies as reviewable administrative action. Included under these are the source and nature of the power being exercised, its subject-matter, whether it involves a public duty, how closely related it is to policy matters on the one hand (which are not administrative) and on the other to the implementation of legislation (which is administrative in nature). The court further indicated that these boundaries would have to be drawn in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration which may best be achieved on a case-by-case basis.

Having considered these decisions, Murphy J held that, notwithstanding the fact that the SA Police Service is an organ of state, the commissioner was not exercising a public power or performing a public function when he made the decision. The judge noted that the commissioner is empowered by s 24(1) of the Police Act 68 of 1995 to make regulations relating to members' conditions of service, which includes the determination of working hours. He could make determinations unilaterally or bilaterally in terms of existing contracts of employment and collective agreements. The court accepted that while the commissioner's power was derived from a public source, this fact was relevant, but not necessarily decisive. Of more importance was the nature of the power, its subject-matter and whether it involved the exercise of a public duty.

The court subsequently found that as there was nothing inherently public about the setting of work hours of police officers, no public law concern existed and the matter fell within the domain of the contractual regulation of private employment relations. These powers and functions are derived from employment law, which is circumscribed by the constitutional rights to fair labour practices and to engage in collective bargaining. The court therefore found that the exercise of power surrounding the shift arrangements was not of a public nature but flowed from the commercial or private domain of labour relations (at para 56) and the unions were therefore not entitled to seek review of the decision in terms of s 6 of PAJA or s 33 of the Constitution.

Although the trade unions did not base their case on this, the court briefly considered the applicants' remedies based on their constitutional right to fair labour practices. As an aside, Murphy J opined at

[49] 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC).

para 80 that the union probably did not base its claim on the general constitutional right to fair labour practices on the grounds that —

'[some] courts have taken the approach that the doctrine of avoidance provides that once a constitutional right is regulated in detail by statute, persons seeking to enforce that right are confined to the statutory remedies and may no longer rely directly on the constitutional provision'.

In the matter under discussion the court in the final instance held at para 88 that:

'I have been persuaded to this conclusion with a measure of reluctance. My decision goes not only against the grain of past progressive developments in our law of due process, but against compelling policy and value based arguments, even if superficial, favouring a requirement of consultation prior to changing work practices affecting employees. The solution, it would seem to me, lies in conscientious collective bargaining or the amendment of the statuary code of unfair labour practices, to provide for such. It does not lie in straining the concept of administrative action by extending it into the domain of private and internal employment arrangements, collapsing in the process the valid constitutional distinction between administrative action and labour relations on the basis of a social expediency no longer necessary or desirable or, for that matter, doctrinally or textually justified.'

5 Concluding Remarks

It is clear that there is at present an unacceptable tangle of jurisdictional uncertainties in respect of labour dispute resolution in the realm of the public service. There can surely be no reservations about the fact that something needs to be done about this unhealthy state of affairs, which is nourished by an increasing number of inconsistent judgments. But, the more vexed question is, what avenues could be explored to address the problem?

In the interim, there is a dire need for the CC to provide guidance regarding a number of issues that would remove points of difference between HC and LC decisions. The most significant of these is whether employer actions constitute the exercise of public power, which would bring them under the definition of administrative action. Should the CC move beyond *Zenzile* and hold that employer actions do not fall under the province of the constitutional right to fair administrative action and PAJA, the jurisdictional debate would (for the most part thereof) be resolved. However, should the CC uphold the predominant view of the SCA, as mapped out in *Hamata*, *Mahumani* and *Digomo*, forum shopping will be further stimulated in the arena of the public sector. The only possibility then in resolving the inconsistencies between dispute-resolution mechanisms and remedies would be by means of statutory intervention.

The finalization and implementation of the Superior Courts Bill (B3 of 2003) would go some way to resolve the issue of forum shopping. This bill, which paves the way for the demise of the LC, will have the

effect that labour disputes emanating from both the private and public sectors (apart from those falling under the jurisdiction of bargaining councils and the CCMA) will be considered by the same institution, namely the HC. However, the divide, which currently exists by virtue of the differences between the LRA and PAJA, will not be removed with the abolition of the LC. HC judges will still be approached to decide review applications in terms of PAJA notwithstanding the fact that specific labour legislation already regulates the same issues to be reviewed.

In order to remove this dichotomy, further statutory intervention will have to be considered, such as an amendment to PAJA, to specify that a matter is not susceptible to review should there be an alternative remedy in terms of labour legislation. (A similar sentiment is expressed in s 7(2)*(a)* of PAJA, in respect of internal remedies, insofar as it stipulates that 'no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted'.)

Another option would be to amend the LRA to stipulate that if a particular dispute can be resolved by means of procedures created in terms of the LRA, such matters may not be taken on review to the HC under the auspices of PAJA. This alternative, however, may not be viable in the light of the debate about the status of the labour courts and the interpretation of s 157 of the LRA.[50] Yet another option would be to remove chapter VIII of the LRA, which regulates unfair dismissal law, and to redraft this portion of the law into a separate piece of legislation, with the view of developing coherent provisions which will not only regulate principles in the administrative and labour spheres, but will also address termination of contracts of employment from a contractual perspective. This would be in line with one of the initial viewpoints adopted by the Ministerial Task Team which drafted the LRA that a chapter on unfair dismissal would be included in the LRA only as an interim measure. However, this has never been given effect to.

[50] See Waglay 'The Proposed Re-organisation of the Labour Court and the Labour Appeal Court' (2003) 24 *ILJ* 1223; Benjamin 'A Termination for Operational Requirements? Some Thoughts on the End of the Labour Court' (2003) 24 *ILJ* 1869; Strydom 'Changing the Labour Court: The Superior Courts Bill 2003' 2003 *CLL* vol 13 no 3 22; Ngcukaitobi 'Sidestepping the Commission for Conciliation, Mediation & Arbitration: Unfair Dismissal Disputes in the High Court' (2004) 25 *ILJ* 1.