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# **THE EMPLOYMENT STATUS OF MAGISTRATES IN SOUTH AFRICA**

by

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## SUMMARY

Magistrates in South Africa play a very important role in the administration of justice. They carry out both judicial and administrative duties to ensure that law and order are maintained.

Because of the vital judicial role that magistrates play it is imperative that there should be certainty regarding the appropriate remedies that are available to them should their constitutional right to fair labour practices be infringed in the performance of their duties.

In this regard section 23 of the Constitution of the Republic of South Africa, 1996 affords everyone the right to fair labour practices. This right has been given effect to by the enactment of the Labour Relations Act 66 of 1995 (LRA), which affords the right to fair labour practices to employees only. Even though magistrates are not specifically excluded from the scope and ambit of the LRA, uncertainty still prevails in South African law regarding their entitlement to the remedies provided for by labour law. It has been suggested that magistrates cannot be employees in view of the fact that the Constitution requires the judiciary to be independent.

This dissertation aims to establish whether magistrates could be categorised as employees in terms of the traditional tests used to establish employment. It furthermore seeks to establish whether the constitutional guarantee of an independent judiciary and the existence of an employment relationship are mutually exclusive.



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**CHAPTER 1**  
**INTRODUCTION**

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**A. CONTEXTUAL BACKGROUND**

Magistrates are said to be at the frontline of the judicial system because the majority of South Africans, in their quest for justice, will first come into contact with the judicial system through the Magistrates’ Courts.<sup>1</sup> According to the latest statistics, there are currently 1711 magistrates serving in South Africa<sup>2</sup> and everyday these judicial officers toil to ensure that law and order are maintained.

Because of the substantial number of magistrates and the vital judicial role that they play, their importance cannot be overstated.<sup>3</sup> Therefore, it is crucial that there should be certainty regarding their employment status and the appropriate remedies that are available to them should their constitutional right to fair labour practices be infringed.<sup>4</sup>

Thus, for example, magistrates ought to know what remedies are available to them and what procedures they should follow in the event that they are constructively dismissed in the performance of their duties. This issue arose in the matter of *Reinecke v The President of South Africa*<sup>5</sup> where the High Court awarded a substantial amount

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<sup>1</sup> Van Dijkhorst (2000) *Advocate* 42; Hoexter and Olivier (2014) 319.

<sup>2</sup> Statistics as at 24 March 2015, supplied by the Department of Justice and Constitutional Development.

<sup>3</sup> Jeffery in his keynote address at the Judicial Officers’ Association of South Africa’s 17th Annual General Meeting Gala Dinner, available at <http://bit.ly/1qWno3m> (accessed on 08 June 2015).

<sup>4</sup> S 23 of the Constitution of the Republic of South Africa, 1996 (hereafter the “Constitution”) provides that everyone has the right to fair labour practices.

<sup>5</sup> *Reinecke v The President of South Africa* unreported case number 25705/2004 of 4 September 2012.



of contractual damages to a magistrate who claimed that the chief magistrate repudiated the contract of employment between the parties by making his (the magistrate's) continued employment intolerable. On appeal, the Supreme Court of Appeal<sup>6</sup> left open the question whether a magistrate is entitled to protection under the Labour Relations Act.<sup>7</sup> The court concluded that the remedies available to an aggrieved magistrate are to be found in administrative law and not in the law of contract on which the magistrate had based his claim.

In *Khanyile v CCMA*<sup>8</sup> the Labour Court was also faced with the question whether magistrates are employees of the State. In that case a magistrate had been denied promotion to the status of senior magistrate and as a result filed an unfair labour practice dispute under the auspices of the LRA<sup>9</sup> against the Minister of Justice, whom the magistrate regarded as his employer. The court held that at face value it would seem that a magistrate could be categorised as an employee, taking into consideration the definition of an "employee" in terms of the LRA<sup>10</sup> and the fact that magistrates are not explicitly excluded from the ambit of this Act.<sup>11</sup> However, the court noted that the statutory definition of an employee should be construed within a broader constitutional framework.<sup>12</sup> The court took the enquiry of the employment status of a magistrate beyond the traditional tests for the existence of employment or an employment relationship. It was held that a judicial officer cannot be an employee, in view of the fact that the Constitution provides that the courts are independent and subject only to the Constitution and the law.<sup>13</sup> The Constitution requires the judiciary to apply the law and Constitution without interference from any person or organ of State.<sup>14</sup> Accordingly, the court refused to bring magistrates within the protective measures of the LRA and found that the constitutional guarantee of an independent

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<sup>6</sup> *President of SA & others v Reinecke* 2014 (3) SA 205 (SCA) (hereafter "*Reinecke*"); for a detailed discussion of the case see Van Eck & Diedericks (2014) *ILJ* 2700; the facts of the case are discussed in greater detail in chapter 5.

<sup>7</sup> 66 of 1995 (hereafter the "LRA").

<sup>8</sup> *Khanyile v CCMA & others* (2004) 25 *ILJ* 2348 (LC) (hereafter "*Khanyile*").

<sup>9</sup> S 186(2) of the LRA prohibits unfair conduct by the employer relating to, *inter alia*, promotion.

<sup>10</sup> S 213 of the LRA defines an employee as (a) "any person, excluding an independent contractor, who works for another person or the State and who receives or is entitled to receive any remuneration; and (b) any person who in any manner assists in carrying on or conducting the business of an employer."

<sup>11</sup> *Khanyile* para 10; s 2 of the LRA expressly excludes members of the National Defence Force and the State Security Agency from its scope and application.

<sup>12</sup> *Khanyile* para 10.

<sup>13</sup> *Idem* para 30.

<sup>14</sup> S 165 of the Constitution.

judiciary would be compromised if judicial officers were to be categorised as employees. The court concluded that it would be difficult to reconcile an employment relationship between a magistrate and the State with judicial independence. It was clear to the court that an employment relationship between a magistrate and the State and the maintenance of an independent judiciary cannot co-exist.<sup>15</sup>

It is significant to note that the court, in construing the definition of an employee in section 213 of the LRA against the constitutional framework, only took into account the constitutional guarantee of an independent judiciary. It is disappointing that the court did not consider the constitutional right to fair labour practices guaranteed to everyone. In *Murray v Minister of Defence*<sup>16</sup> it was confirmed that a soldier, who was specifically excluded from the ambit of the LRA, has the right not to be constructively dismissed on the basis of his constitutional right to fair labour practices.

The aim of this research is to establish whether the constitutional guarantee of an independent judiciary and the existence of an employment relationship are mutually exclusive. In addressing this question, the concept of judicial independence is analysed. This analysis entails a discussion of the core aspects of judicial independence and draws a distinction between institutional independence and personal independence. Through this analysis, this research attempts to establish whether the concept of “judicial independence” is a proper justification for excluding magistrates from protection in terms of labour law.

## B. RESEARCH QUESTION

It is trite in South African labour law that in order to determine who is entitled to protection in terms of labour law it is necessary to establish whether or not an “employment relationship” exists.<sup>17</sup> In light of this statement, the following questions are considered:

- (a) Are magistrates employees in terms of the traditional tests to establish an employment relationship?

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<sup>15</sup> *Khanyile* para 31.

<sup>16</sup> 2009 (3) SA 130 (SCA).

<sup>17</sup> *Van Niekerk et al* (2014) 59.

- (b) Does the constitutional guarantee of an independent judiciary unequivocally justify the exclusion of magistrates from protection in terms of labour law?
- (c) Will the categorisation of magistrates as employees jeopardise the constitutional guarantee of an independent judiciary?

### **C. VALUE OF STUDY**

As stated above, magistrates fulfil an important role in society and the importance of their work cannot be exaggerated. Bringing magistrates within the protective reaches of labour law will be in line with the traditional approach of the courts, namely, to be inclusive rather than exclusive when it comes to labour law protection.<sup>18</sup> To bring magistrates under the protection of labour law would result in the recognition of the constitutional right to fair labour practices. However, this study does acknowledge the importance of an independent judiciary. It is imperative that the employment status of magistrates be clarified. Such clarification will provide certainty to magistrates regarding the relevant institutions that they should approach, and their remedies and the extent thereof, should they be subjected to unfair labour practices.

### **D. RESEARCH METHODOLOGY**

Legislation, case law, journal articles and books form the foundation of this research and are critically analysed. A comparative analysis of the position in England is undertaken with the aim of evaluating whether the independence of the judiciary is sufficient to exclude protection in terms of labour law.

### **E. CHAPTER OVERVIEW**

The dissertation consists of seven chapters. This introductory chapter is followed by a discussion of which persons can be categorised as employees. In that chapter it is established whether magistrates could be employees in terms of the traditional tests for establishing an employment relationship.

The next chapter discusses the legislative and regulatory framework governing the disciplinary procedures applicable to conventional employees and magistrates re-

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<sup>18</sup> See, for example, *Kylie v CCMA* (2010) 31 *ILJ* 1600 (LAC) where labour law protection was afforded to a sex worker even in the absence of a valid contract of employment; see also *Discovery Health v CCMA* (2008) 29 *ILJ* 1480 (LC) where an illegal immigrant could rely on the constitutional right to fair labour practices.

spectively. This chapter deals with the question whether the disciplinary regime applicable to magistrates is effective to ensure that they are appropriately and timeously disciplined when need be in order to ensure a well-functioning judiciary.

In chapter four the concept of judicial independence is discussed. The discussion addresses the question whether judicial independence and employment are mutually exclusive.

In the following chapter, an analysis of the overlap between labour law and administrative law is made. It deals with the question as to what branch of law magistrates ought to find recourse in the event that they are subjected to unfair treatment by their superiors in the execution of their duties. This chapter also contains a discussion of South African case law where the courts had inconsistently applied the law relating to the issue of the overlap between labour law and administrative law.

Chapter six entails a discussion of the legal position in England regarding labour law protection for members of the judiciary. This comparison is particularly aimed at establishing whether the concept of judicial independence is a valid justification for excluding magistrates from labour law protection.

The dissertation concludes with chapter seven. In this chapter, the constitutional guarantees of fair labour practices and an independent judiciary are weighed up against each other. It is followed by a conclusion regarding the question whether magistrates are employees and as a result entitled to labour law protection. This chapter acknowledges potential issues that could arise from the inclusion of magistrates under labour law protection. Recommendations are made as to how a balance may be struck between the constitutional guarantee of fair labour practices on the one hand and the maintenance of an independent judiciary on the other.

## CHAPTER 2 WHO IS AN EMPLOYEE?

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### A. INTRODUCTION

A person's employment status is relevant for a number of reasons. The main reason is that protection in terms of labour law is primarily only available to employees.<sup>19</sup> Such protection includes a number of rights.<sup>20</sup> For example, employees have the right not to be unfairly dismissed or be subjected to unfair labour practices.<sup>21</sup> Employees are also afforded extensive collective bargaining rights<sup>22</sup> and they are protected in that their contracts of employment may not go beyond certain minimum conditions of employment.<sup>23</sup> Furthermore, certain common-law remedies are only available when there is an employer-employee relationship. For example, when an employee commits a delict in the performance of his or her duties, the injured party may institute a claim against the employer on the basis of the doctrine of vicarious liability.<sup>24</sup>

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<sup>19</sup> Brassey (1990) *ILJ* 890; see also *Khanyile* n 8 above, where the court confirmed that it is necessary for the applicant to show that he is an employee before he is entitled to rely on remedies in terms of the LRA.

<sup>20</sup> See Diedericks & Van Eck (2015) *THRHR* 476 for a brief discussion of the rights of employees.

<sup>21</sup> S 185 of the LRA provides that every employee has the right not to be unfairly dismissed and subjected to unfair labour practice.

<sup>22</sup> See Chapter II of the LRA for the general protection afforded to employees regarding collective bargaining.

<sup>23</sup> S 2 of the Basic Conditions of Employment Act 75 of 1997 ("BCEA") sets out the establishment and enforcement of basic conditions of employment as one of the purposes of the said Act.

<sup>24</sup> Du Bois (ed) (2007) 1216; Van Jaarsveld & Van Eck (2005) 69.

It is also of great importance for an employer to determine whether someone is an employee as an employment relationship creates certain duties for the employer. For example, an employer is obliged to deduct tax from remuneration paid to an employee.<sup>25</sup> An employer is also obliged to make certain deductions for purposes of the Unemployment Insurance Fund.<sup>26</sup>

Therefore the first step to determine whether a person is entitled to protection in terms of labour law and whether an employer has certain legislative duties is to establish whether that person is an employee.

The purpose of this chapter is to investigate whether magistrates could possibly qualify as employees in terms of the tests for employment. The investigation commences with a discussion of the traditional tests for employment. This discussion includes an application of these tests to the position of magistrates. The chapter concludes with a determination of the question whether magistrates may indeed qualify as employees and therefore be entitled to rely on the protection afforded by labour legislation.

## **B. TRADITIONAL TESTS TO ESTABLISH EMPLOYMENT**

### **1. Common-law tests**

Traditionally the existence of a contract of employment served as the foundation for an employer-employee relationship.<sup>27</sup> Three main tests have been applied by the courts to identify a contract of employment, namely, the control test, the organisation test and the dominant impression test.<sup>28</sup> These tests distinguish between an employee and an independent contractor. If a person is an independent contractor, no employment relationship exists and generally the rights and duties applicable to such relationship would not apply.

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<sup>25</sup> The rules regarding the deduction of employees' tax are set out in Paragraph 2 of the Fourth Schedule to the Income Tax Act 58 of 1962.

<sup>26</sup> In terms of Chapter 2 of the Unemployment Insurance Contributions Act 4 of 2002 an employer is obliged to deduct 1 % from the remuneration paid or payable to an employee as contribution to the unemployment insurance fund. The employer is then obliged to pay such deduction over to the Commissioner of Revenue Services or the Unemployment Insurance Commissioner.

<sup>27</sup> *Department of Health, Eastern Cape v Odendaal* (2009) 30 *ILJ* 2093 (LC) 2111G; Radley & Smit (2010) *Obiter* 250; Nkosi (2015) *De Jure* 239.

<sup>28</sup> Cole (2004) 408.

The control test entails that when a principal has the right to supervise and control the work to be done, the relationship between the parties would be one of employment.<sup>29</sup> The application of this test entails that the greater degree of control and supervision the employer is entitled to exercise, the greater the probability would be that a contract of employment exists.<sup>30</sup> The courts began to acknowledge that although the presence of the right to supervision and control is an important factor in determining the existence of a contract of employment, it is not the only factor, but merely one of a number of factors.<sup>31</sup>

In accordance with the organisation test, the existence of a contract of employment depends on whether the person performing the work is part and parcel of the organisation.<sup>32</sup> The organisation test was rejected by the courts as it is regarded as too vague and fails to provide clarity on the nature and extent of the integration into the organisation.<sup>33</sup>

The dominant impression test is the most prominent test to establish the existence of a contract of employment.<sup>34</sup> This test was first introduced by the court in *Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB*<sup>35</sup> and then reinforced in the *Smit* case.<sup>36</sup> The dominant impression test entails the weighing-up of a number of factors against each other and the dominant impression gained after the weighing exercise is determinative of the type of contract, for example a contract of employment. The factors taken into account are not exhaustive and the courts have held that there is no single factor that is decisive in determining the existence of a contract of employment.<sup>37</sup>

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<sup>29</sup> *Colonial Mutual Life Assurance Society Ltd v MacDonald* 1931 AD 412 435; see also *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) 53D (hereafter "*Smit*"); *SABC v McKenzie* 1999 20 ILJ (LAC) 589D-E (hereafter "*Mckenzie*"); *R v AMCA Services Ltd* 1959 (4) SA 207 (A) 212H.

<sup>30</sup> *Mandla v LAD Brokers (Pty) Ltd* (2000) 21 ILJ 1807 (LC) 1809C-E.

<sup>31</sup> *Stein v Rising Tide Productions (CC)* (2002) 23 ILJ 2017 (C) 2018D-E; *Smit* 53E. This acknowledgement by the courts led to the formulation of the dominant impression test, which will be discussed below.

<sup>32</sup> *Bank Voor Handel En Scheepvaart NV v Statford* (1952) 2 All ER 956 (CA) 971; see also *Smit* 63D; *McKenzie* 589E.

<sup>33</sup> *R v AMCA Services Ltd* 1962 (4) SA 537 (A) 540H; *Smit* 63D-E.

<sup>34</sup> Olivier (2008) TSAR 3.

<sup>35</sup> 1976 (4) SA 446 (A) 457A.

<sup>36</sup> N 29 above.

<sup>37</sup> N 31 above.

## 2. Application of the dominant impression test

The courts continued to apply the dominant impression test and in the case of *McKenzie*<sup>38</sup> the court identified some of the important characteristics of a contract in order to distinguish between an employee and an independent contractor. If, the court found, the object of the contract was for the performance of specified work or a specified result, it would be an indication that the person is an independent contractor. If the person rendering the service was subject to the supervision and control of the employer or was obliged to render the service personally, it would be indicative of an employment contract. The court further considered when the relevant contract would terminate. If it terminated at the death of the person rendering the service, it would be an indication that the person is an employee.<sup>39</sup>

Almost a decade after *McKenzie*, in *State Information Technology Agency (Pty) Ltd v CCMA*,<sup>40</sup> the court reduced the criteria used to determine whether a contract of employment exists. The court identified three main criteria, namely:

- (a) the principal's right to supervision and control;
- (b) the extent to which the person forms an integral part of the organisation of the principal; and
- (c) the extent to which the person is economically dependent on the employer.

These three criteria are a combination of the control and organisational tests as discussed above. The court, however, introduced an additional criterion, namely, the degree of economic dependence of the person performing the work.

If one were to apply the above three criteria to the position of magistrates, the latter two criteria – at least on the face of it – would be satisfied. In my view magistrates do indeed form an integral part of the organisation of the principal, in the sense that they have their chambers at court and they perform their duties at court on a daily basis. Magistrates would also pass the criterion of economic dependence. According to Benjamin,<sup>41</sup> economic dependence

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<sup>38</sup> N 28 above.

<sup>39</sup> See *McKenzie* 590F-591D for the listed differences between an employee and an independent contractor.

<sup>40</sup> [2008] 7 BLLR 611 (LAC) (hereafter "*SITA*").

<sup>41</sup> Benjamin (2004) *ILJ* 787.

“relates to the entrepreneurial position of the person in the marketplace. An important indicator that a person is not dependent economically is that he or she is entitled to offer skills or services to persons other than his or her employer . . . [D]epending upon an employer for the supply of work is a significant indicator of economic dependence”.<sup>42</sup>

Magistrates do not offer their skills to various principals and rely solely on the State for their income. It is important that magistrates are remunerated adequately and thus placed in a position whereby it will not be necessary for them to engage in other activities in order to supplement their salaries. If there is no economic dependence and security, their ability to act independently may be jeopardised.<sup>43</sup> They may, for example, be tempted to become involved in corruption by accepting bribes to reach certain verdicts in particular matters in which they preside.

However, the criterion of control and supervision has been a contentious issue. It is argued that should a judicial officer be categorised as an employee, the State as the employer will have control over the magistracy and thus be permitted to influence the outcome of a decision which will result in judicial independence being compromised.<sup>44</sup> At first glance, this seems to be a valid argument, but the issue requires further analysis. This issue is discussed in detail in chapter four which contains an analysis of the role of judicial independence in employment.

However, even if, for argument’s sake, it is accepted that magistrates can never be subject to supervision and control, an employment relationship in terms of the *SITA* test could still be present. This is so because all the criteria need not necessarily be complied with.<sup>45</sup> What is conclusive is the dominant impression that is gained from the weighing-up of all the criteria.

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<sup>42</sup> *Idem* 803; see also *Pam Golding Properties (Pty) Ltd v Erasmus* (2010) 31 *ILJ* 1460 (LC) 1468E-H (hereafter “*Pam Golding Properties*”).

<sup>43</sup> *Association of Regional Magistrates of Southern Africa v President of RSA* 2013 (7) *BCLR* 762 (CC) para 43.

<sup>44</sup> *Khanyile* n 8 above ; *LDM Du Plessis obo L Pretorius v Department of Justice* unreported award number GA 26670 considered by Commissioner PJ van der Merwe, 17 December 2002 (hereafter “*LDM Du Plessis*”) Wallis (2012) *SALJ* 653-654.

<sup>45</sup> (N40) 803.

### 3. Statutory test

#### 3.1. Employee defined

As already stated in the previous chapter, the LRA provides for a definition to establish who is an employee.<sup>46</sup> In order to analyse the definition, it is worth quoting it in this chapter as well. Section 213 of the LRA defines an employee as

- (a) “any person, excluding an independent contractor, who works for another person or the State and who receives or is entitled to receive any remuneration; and
- (b) any person who in any manner assists in carrying on or conducting the business of an employer”.

In terms of subsection (a) of the definition, an independent contractor is expressly excluded. However, subsection (b) is wide enough to include an independent contractor. For example, it could be argued that an independent plumber assists in carrying on the business of a hair salon by repairing the blocked taps in the salon. However, while subparagraph (b) is open to wide interpretation, the courts have tended to interpret it conservatively so as to not include an independent contractor.<sup>47</sup>

Irrespective of the statutory definition of an employee, the courts have continued to apply the common-law dominant impression test.<sup>48</sup> The factors developed by the courts are therefore still relevant to assist the courts in establishing who is an employee. The factors as listed in the *Smit* case have been codified in the Code of Good Practice: Who is an employee.<sup>49</sup> Although these factors are still influential in determining who is an employee, less emphasis is being placed on the existence of a contract of employment. Now, the focus has shifted to the existence of an employment relationship as the basis for protection in terms of labour law.<sup>50</sup> Section 200A of the LRA now contains a presumption of employment. This presumption

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<sup>46</sup> See n 10 above.

<sup>47</sup> Casale (ed) (2011) 9; see also *Liberty Life Association of Africa Ltd v Niselow* (1996) 17 ILJ 673 683A-D where the court acknowledged that the latter part of the definition may extend beyond its common meaning. The court, however, held that a literal interpretation of the provision would result in absurdity.

<sup>48</sup> *Pam Golding Properties* n 42 above 1467C-J; see also *Stein v Rising Tide Productions CC* (2002) 23 ILJ 2017 (C) where the court applied this test irrespective of s 213 of the LRA; Casale (ed) (2011) 11.

<sup>49</sup> GN 1774 GG 29445 (hereafter referred to as the “Code of Good Practice”).

<sup>50</sup> *Van Niekerk et al* (2014) 59; see also *Kylie v CCMA* (2010) 31 ILJ 1600 (LAC) and *Discovery Health v CCMA* (2008) 29 ILJ 1480 (LC), n 18 above.

strengthens the notion, that the contract of employment, is not the only basis for establishing an employment relationship.<sup>51</sup>

### 3.2. *Presumption of employment*

In 2002 the legislature introduced a rebuttable presumption in the LRA to establish who is an employee.<sup>52</sup> The introduction was in response to the practice of disguised employment, whereby employers attempted to avoid the provisions of the labour statutes by contracting that the work to be done is for independent contracting.<sup>53</sup> It is clearly stipulated that the presumption applies irrespective of the form of the contract between the parties.

It is worth noting that the presumption does not alter the statutory definition of “employee”. All it means is that if the presumption applies, it only shifts the onus to the employer to prove that the alleged employee is not an employee. Failure to satisfy the burden of proof on the part of the employer will result in the person in question being deemed to be an employee.<sup>54</sup>

In terms of the presumption, a person who works for or renders services to another person is presumed to be an employee if at least one of seven listed factors is present. The factors listed are as follows:

- (a) the manner in which the person is subject to the control or direction of the other person;
- (b) whether the person’s working hours are subject to the control or direction of another person;
- (c) whether the person forms part of the relevant organisation;
- (d) whether the person has worked an average of 40 hours per month over the last three months;
- (e) if the person is economically dependent on the other person;
- (f) whether the person makes use of the tools or trade or work equipment of the other person; and

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<sup>51</sup> Le Roux (2007) *SALJ* 470.

<sup>52</sup> S 83A of the BCEA contains a similar presumption of employment for purposes of that Act.

<sup>53</sup> Casale (ed) (2011) 16.

<sup>54</sup> Van Nickerk *et al* (2014) 64.

(g) whether the person only works for or renders service to one person.

The presumption only operates if the person alleging to be an employee earns below a certain threshold amount.<sup>55</sup>

The presumption of employment will certainly not be applicable to magistrates, because magistrates earn in excess of the threshold amount.<sup>56</sup> As already stated above, it is important that magistrates receive adequate remuneration as it is an important aspect of judicial independence. If they lack such security it may lead them not to act independently.<sup>57</sup> However, the Labour Appeal Court has held that where the presumption is not applicable as a result of a person earning above the threshold, the listed factors may still be applied in order to provide guidance to establish whether an employment relationship exists.<sup>58</sup>

In terms of section 200A(4) of the LRA, NEDLAC<sup>59</sup> was required to prepare and issue a Code of Good Practice setting out guidelines to determine whether persons, including those who earn in excess of the threshold amount, are employees. NEDLAC complied with this provision and developed and issued the Code of Good Practice.<sup>60</sup> This Code incorporated the approach in the *Denel* case<sup>61</sup> and provides that the factors listed in the presumption may be used as guidelines to determine whether or not an employment relationship exists.

In light of the above, even though the presumption does not apply to magistrates, the latter six of the factors in terms of the presumption listed above would be satisfied in the case of magistrates. A magistrate's working hours are set out in regulation 35 of the Magistrates Act<sup>62</sup> and states that a magistrate's office hours will be from Monday

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<sup>55</sup> The threshold amount is currently R205 433.30 and is determined from time to time by the Minister of Labour in terms of s 6(3) of the BCEA.

<sup>56</sup> In 2015 a magistrate earned R788 155 per annum in terms of a proclamation by the President in GG 38568 of 2015-03-13. Higher scales apply in respect of different categories of magistrates, a senior and a regional magistrate earn higher than a magistrate, for example.

<sup>57</sup> N 43 above.

<sup>58</sup> *Denel (Pty) Ltd v Gerber* (2005) 26 ILJ 1256 (LAC) (hereafter "*Denel*").

<sup>59</sup> In terms of s 213 of the LRA, NEDLAC means the National Economic Development and Labour Council established by s 2 of the National Economic, Development and Labour Council Act 35 of 1994.

<sup>60</sup> See n 49 above.

<sup>61</sup> N 58 above.

<sup>62</sup> 90 of 1993.

to Friday, from 07:45 to 16:15 with a lunch interval of not more than 45 minutes. Also, in terms of regulation 37, a magistrate may not be absent from his or her place of duty during office hours without the consent of the head of office.

These regulations are firstly an indication that the working hours of magistrates are subject to the control or direction of another person. Secondly, it may also be an indication that magistrates work an average of 40 hours per month over a period of three months. In this regard they would satisfy the factor as listed under paragraph (d) above. Furthermore, magistrates would also be regarded as satisfying the requirement that they form part of the relevant organisation. This is borne out by the amount of time they are required to be at work. As noted above, magistrates are expected to be at work from Monday to Friday, in other words five days a week. Also, as already stated above, magistrates are economically dependent on remuneration and do not render services to different organisations.<sup>63</sup>

Finally, magistrates are provided with tools or work equipment. For example, they are required to use a cloak when they preside over matters and are provided with chambers at court and all the facilities that enable them to exercise their duties.

In light of the above, it is submitted that magistrates comply with at least six of the seven listed factors, of which any one must be present in order for the presumption of employment to take effect. It is only the first factor, namely, supervision and control, which may not be satisfied conclusively at this stage. However, as stated above, an evaluation of such factor is conducted in the chapter on judicial independence.

### **C. CONCLUSION**

It is important for parties to know whether or not their relationship is one of employment. This is so because an employment relationship creates rights, remedies and duties for the respective parties. Over the years the courts have developed different tests to establish whether a contract of employment existed between the parties. These tests have been incorporated into legislation and remain relevant in the enquiry as to who is an employee. As stated above, the courts have adopted an ap-

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<sup>63</sup> See n 41-43 above.

proach to establish an employment relationship rather than the existence of a contract of employment.<sup>64</sup> The legislature has also now broadened the scope of the application of labour law with the recent amendments to the LRA.<sup>65</sup> In this regard the definition of a dismissal<sup>66</sup> has now been amended to mean a termination of *employment*.<sup>67</sup> Prior to the amendment, dismissal in terms of the relevant provision meant a termination of the contract of employment by the employer. Now, the termination of an employment relationship rather than employment contract is sufficient to satisfy the meaning of a dismissal.

The continuous shift to focus on an employment relationship instead of a contract of employment reaffirms the inclusive approach of the courts in respect of protection in terms of labour law.<sup>68</sup>

As mentioned in the previous chapter, the court in *Khanyile* acknowledged that a magistrate could qualify as an employee in terms of the statutory definition of an employee.<sup>69</sup> However, the court was not prepared to make the protection of labour law available to the aggrieved magistrate. Chapter four analyses the rationale for the courts' failure to provide protection to magistrates in terms of labour law.

In the case of *Reinecke*, the Supreme Court of Appeal was also prepared to accept that an employment relationship existed between the State and the aggrieved magistrate.<sup>70</sup> However, the court refused to conclude that the LRA applies to magistrates.<sup>71</sup> Although magistrates could possibly pass the tests used to establish who is an employee, it still remains uncertain whether the LRA could apply and provide protection to this category of persons.

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<sup>64</sup> N 50 above.

<sup>65</sup> The LRA was amended by the Labour Relations Amendment Act 6 of 2014.

<sup>66</sup> S 186(1) of the LRA provides for a definition of dismissal and lists various situations which would constitute a dismissal.

<sup>67</sup> Emphasis added; see s 186(1)(a) of the LRA.

<sup>68</sup> See n 18 above.

<sup>69</sup> *Khanyile* para 10; see also n 11 above.

<sup>70</sup> *Reinecke* para 13.

<sup>71</sup> *Idem* para 23.

The following chapter sets out the legislative and regulatory framework regarding the disciplinary regimes applicable to employees in terms of the LRA and magistrates in terms of the Magistrates Act respectively.

## CHAPTER 3

### THE LEGISLATIVE AND REGULATORY FRAMEWORK OF THE DISCIPLINARY PROCEDURES GOVERNING EMPLOYEES AND MAGISTRATES

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#### A. INTRODUCTION

The previous chapter identified the importance of having the status of an employee as it creates certain rights and protection for the person concerned. An employment relationship also provides an employer with certain rights, for example, the right to lay down rules in order to regulate the conduct required from its employees.<sup>72</sup> This right of the employer is recognised by the Code of Good Practice: Dismissal,<sup>73</sup> which requires all employers to adopt disciplinary rules that establish the standard of conduct required from employees.<sup>74</sup> If an employee fails to adhere to the required rules or standards, the employer has recourse in the form of discipline.<sup>75</sup> Disciplinary action is usually initiated in response to poor work performance or unwarranted behaviour by workers and is aimed at restraining employees from behaving in a manner that could hamper production and the functioning of the organisation.<sup>76</sup> When an employer exercises the right to discipline, regard must be had to the employee's right to be treated fairly.<sup>77</sup> It is therefore important that disciplinary procedures should

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<sup>72</sup> Grogan (2014) 151.

<sup>73</sup> Published under schedule 8 of the LRA (hereafter "the Code").

<sup>74</sup> Item 3 of the Code.

<sup>75</sup> Grogan (2014) 149; see also Van Niekerk *et al* (2014) 89.

<sup>76</sup> Nel *et al* (2008) 140; Van der Bank, Engelbrecht & Strümpher (2008) *SAJHRM* 2.

<sup>77</sup> See n 21 above regarding every employee's right to not be subjected to unfair labour practices.

maintain a proper balance between the respective rights of employers and employees in the disciplining process.

The aim of this chapter is to compare the procedures for disciplining employees in terms of the LRA with the procedures to discipline magistrates in terms of the Magistrates Act.<sup>78</sup> The purpose of the comparison is to evaluate whether the disciplinary regime applicable to magistrates effectively ensures that they are appropriately and timeously disciplined when necessary in order to ensure a well-functioning judiciary. The chapter concludes with recommendations regarding stream-lined processes that would provide role players in the judiciary with certainty about the applicable remedies and the appropriate dispute resolution institutions where their disputes may be resolved.

## **B. DISCIPLINARY FRAMEWORK GOVERNING EMPLOYEES**

### **1. Introduction**

The Constitution is the supreme law which provides for a number of labour rights.<sup>79</sup> The most important right provided by the Constitution, for purposes of this chapter, is the right to fair labour practices guaranteed to everyone.<sup>80</sup> This fundamental right has been given effect to by the LRA which expressly protects employees against unfair treatment.<sup>81</sup> Apart from the LRA, various other employment-related statutes have been enacted to provide protection to employees.<sup>82</sup>

Although the protection afforded to employees by labour legislation does not provide immunity from being disciplined, the employer's right to discipline is limited by the

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<sup>78</sup> In this chapter reference is made to employees and magistrates respectively. However, it does not in any way conclude that magistrates can never be employees and subject to the LRA.

<sup>79</sup> Some of these rights include the right to freedom of association in terms of s 18, the right to freely choose a trade, occupation and profession in terms of s 22 and the rights dealing with labour relations in terms of s 23.

<sup>80</sup> S 23 is entitled "labour relations" and in addition to the right to fair labour practices it also provides for the right to strike and to form and join a trade union, and an employer's right to form and join an employer's organisation.

<sup>81</sup> S 1 of the LRA provides that one of the primary objectives of the Act is to give effect to and regulate the fundamental rights conferred by s 23 of the Constitution.

<sup>82</sup> The other main employment-related statutes that provide protection to employees include the BCEA, Employment Equity Act 55 of 1998, Compensation for Occupational Injuries and Diseases Act 130 of 1993, Unemployment Insurance Act 63 of 2001, Occupational Health and Safety Act 85 of 1993 and the Skills Development Act 97 of 1998.

LRA's codification of unfair dismissal and the Code.<sup>83</sup> The Code is regarded as the basis for policy statements on disciplinary procedures.<sup>84</sup>

In principle, discipline and the consequences flowing therefrom, for example sanctions, must take place within the broader framework of the right to fair labour practices. In this regard the Code provides:

“While employees should be protected from arbitrary action, employers are entitled to satisfactory conduct and work performance from their employees.”<sup>85</sup>

## 2. Disciplinary procedures

The first step in the disciplinary process would be for the employer to hold a disciplinary enquiry where the employee will have the opportunity to respond to the allegations made against him or her and to defend him- or herself.<sup>86</sup>

Should the employee be found guilty of misconduct at the enquiry, the employer is entitled to impose a sanction. The more common sanctions include warnings, transfers, demotions, suspensions and dismissal. The appropriate sanction will depend on the circumstances of each case and the relevant factors must be weighed up against each other.<sup>87</sup> Relevant factors to take into account include the severity of the misconduct, the employee's disciplinary record and his or her length of service.<sup>88</sup>

If the circumstances and facts of the case permit, the employer may impose dismissal as a sanction, provided that the employer complied with the requirements of fairness. Fairness entails that the employer may only dismiss an employee for a substantive reason<sup>89</sup> and after it followed a fair procedure<sup>90</sup> to effect the dismissal.<sup>91</sup>

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<sup>83</sup> Finnemore (2006) 218.

<sup>84</sup> *Ibid* 220; Van der Bank, Engelbrecht & Strümpher (2008) *SAJHRM* 2.

<sup>85</sup> Item 1 of the Code.

<sup>86</sup> (N83) 223.

<sup>87</sup> Basson *et al* (2005) 110.

<sup>88</sup> Item 3(5) of the Code; Grant & Behari (2012) *Obiter* 145; see also *Nampak Corrugated Wadeville v Khoza* (1999) 20 *ILJ* 578 (LAC) 584A-C where the court held that the circumstances of the case would determine whether dismissal was the appropriate sanction.

<sup>89</sup> In terms of s 188(1)(a) of the LRA the substantive reasons for dismissal recognised by the Act are reasons relating to an employee's conduct or capacity or reasons based on the employer's operational requirements.

<sup>90</sup> The initiation of the disciplinary enquiry may satisfy the requirement of procedural fairness of the dismissal. See *Avril Elizabeth Home for the Mentally Handicapped v CCMA* (2006) 27 *ILJ* 1644 (LC) for guidelines for a disciplinary enquiry to satisfy the requirement of fairness.

<sup>91</sup> S 188(1)(b).



Should the employer fail to comply with these requirements, the dismissal will be rendered unfair if the dismissal is not automatically unfair.<sup>92</sup>

If an employee feels aggrieved by a dismissal, he or she is entitled to challenge the fairness thereof at the relevant dispute resolution institution.<sup>93</sup> The employee may refer a dispute to the bargaining council if the parties to the dispute fall within the scope of the relevant council.<sup>94</sup> If no council has jurisdiction over the dispute, the employee may refer the dispute to the Commission for Conciliation Mediation and Arbitration (CCMA).<sup>95</sup> The dispute must be lodged within 30 days from the date of the dismissal or since the date the employer made a final decision to dismiss the employee.<sup>96</sup>

The LRA sets out the burden of proof in dismissal disputes by requiring the employee to prove the dismissal.<sup>97</sup> In other words, the employee must prove that he or she was indeed dismissed.<sup>98</sup> If a dismissal has been established, the burden shifts to the employer to show that the dismissal was fair.<sup>99</sup> As stated above, if the employer cannot satisfy the burden of proof, the dismissal will be regarded as unfair and this will entitle the employee to certain remedies.

The specified remedies for unfair dismissal in terms of the LRA are re-instatement, re-employment or compensation.<sup>100</sup> From the wording of the LRA it can be inferred that re-instatement and re-employment are the primary remedies available to an employee in the case of unfair dismissal. The LRA states that the Labour Court or the arbitrator must impose re-instatement or re-employment unless there are particular circumstances that justify the award of compensation.<sup>101</sup> Furthermore, the LRA limits

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<sup>92</sup> S 187 of the Act lists the automatically unfair reasons for dismissal. If the dismissal is found to be automatically unfair, it means that the dismissal will be unfair by virtue of the reasons listed in s 187 and the employer will not be given an opportunity to justify the reason for the dismissal.

<sup>93</sup> S 191(1)(a) of the LRA.

<sup>94</sup> S 191(1)(a)(i).

<sup>95</sup> S 191(1)(a)(ii).

<sup>96</sup> S 191(1)(b)(i). In terms of s 191(2) the employee may still be allowed to refer a dispute where the time limits for referral have expired.

<sup>97</sup> S 192(1).

<sup>98</sup> Conduct that constitutes dismissal is defined in s 186 of the Act.

<sup>99</sup> S 192(2).

<sup>100</sup> S 193(1)(a)-(c).

<sup>101</sup> In terms of s 193(2)(a)(d) the particular instances where compensation will be the appropriate remedy include the consideration whether the employee wants to be re-instated or re-employed, whether a continued employment relationship would be intolerable; the practicality for the employer to re-instate or re-employ the employee and if the dismissal is only unfair by virtue of the employee having failed to follow a fair procedure.

the amount of compensation that may be awarded to an employee. It provides that in the case of unfair dismissal, an employee will be entitled to compensation of up to 12 months' remuneration. If the dismissal was automatically unfair the compensation awarded may exceed 24 months' remuneration.<sup>102</sup>

The above provisions of the LRA provide employers with peace of mind that their business standards and integrity can be maintained. Conversely, employees have certainty that their fundamental right to fair labour practices cannot be undermined by employers. In this regard, the LRA strikes a balance between the rights of employers and employees and ensures efficiency and certainty in the resolution of disputes arising in the course and scope of employment.

In what follows, attention is given to the disciplinary procedures applicable to magistrates should they not maintain the reasonable standards expected of them. This is followed by an evaluation of whether these procedures also ensure efficiency and certainty in the resolution of disputes arising in the course of magistrates executing their duties.

### **C. DISCIPLINARY FRAMEWORK GOVERNING MAGISTRATES**

#### **1. Introduction**

The Constitution does not provide for labour relations, similar to section 23, pertaining to magistrates specifically. It is worth noting that section 23(1) affords the right to fair labour practices to “everyone” and not only to “employees”. The Supreme Court of Appeal previously held that soldiers who are not employees in terms of the LRA may rely on their constitutional right to fair labour practices.<sup>103</sup> This was also the High Court's view in the *Reinecke* case.<sup>104</sup>

It could therefore be argued that magistrates are also protected by the constitutional right to fair labour practices. However, on appeal,<sup>105</sup> the Supreme Court of Appeal did not pronounce on the aggrieved magistrate's constitutional rights. The matter was also never heard by the Constitutional Court and therefore, in terms of the Su-

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<sup>102</sup> S 194(1).

<sup>103</sup> See n 16 above.

<sup>104</sup> (N 5) para 44.

<sup>105</sup> N 6 above.

preme Court of Appeal decision, it remains uncertain whether magistrates are protected against unfair labour practices.<sup>106</sup>

The only reference in the Constitution regarding labour-related matters pertaining to magistrates specifically relates to the appointment of judicial officers in terms of section 174. It is provided that judicial officers, other than judges (i.e. magistrates) must be appointed in terms of an Act of Parliament. The relevant Act must ensure that the appointment, promotion, transfer, dismissal of, or disciplinary steps against, these judicial officers take place without fear, favour or prejudice.<sup>107</sup>

The Magistrates Act has been enacted to give effect to the above constitutional provision.<sup>108</sup> Prior to the enactment of the Act, magistrates held the status of employees and were appointed by the Minister of Justice.<sup>109</sup> Their conditions of service, retirement, remuneration, discipline, transfer, promotion and dismissals were regulated by the provisions of the Public Service Act.<sup>110</sup> Magistrates were statutorily removed from the public service in order to establish an independent judiciary.<sup>111</sup>

It is worth noting that even though historically magistrates were employees, they were never covered by the protection of the LRA. The predecessor of the current LRA excluded public servants from its scope and application.<sup>112</sup>

Since the removal of magistrates from the public service, the Magistrates Act is the primary Act providing for employment related-protection for magistrates. The Act established the Magistrates Commission,<sup>113</sup> which is required to ensure, amongst other things, that disciplinary steps taken against magistrates take place without favour or prejudice.<sup>114</sup>

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<sup>106</sup> See n 70 above.

<sup>107</sup> S 174(7) of the Constitution.

<sup>108</sup> The preamble to the Act states that the Act was enacted to further regulate, amongst other things, the appointment and remuneration of, and vacation of office by, magistrates.

<sup>109</sup> S 9 of the Magistrates' Courts Act 32 of 1944.

<sup>110</sup> Act 111 of 1984 (repealed); see also *Reinecke* n 6 para 8.

<sup>111</sup> Franco & Powell (2004) *SALJ* 567. The issue of judicial independence of magistrates is discussed in the following chapter.

<sup>112</sup> S 2 of the LRA 28 of 1956 (repealed); see also Grogan (2007) 6.

<sup>113</sup> S 2 of the Act.

<sup>114</sup> S 4 of the Act.

## 2. Disciplinary procedures

The disciplinary procedures for magistrates in the case of misconduct are set out under part five of the regulations in terms of the Act.<sup>115</sup> Regulation 25 contains the general provisions regarding misconduct and in essence describes the circumstances in which a magistrate may be accused of misconduct.<sup>116</sup>

When there are allegations of misconduct against a magistrate, it is required that a preliminary investigation be conducted. This investigation may be held by another magistrate or an investigation officer.<sup>117</sup>

If the magistrate is found guilty or has admitted guilt, the Minister may suspend or relieve<sup>118</sup> such magistrate from office.<sup>119</sup> If the Minister finds that the conduct does not warrant suspension or removal, the following sanctions may be imposed:

- (a) caution or reprimand;
- (b) withholding of translation to a higher salary scale or promotion to a higher post for a period not exceeding five years;
- (c) transfer;
- (d) a fine not exceeding R10 000; and
- (e) a postponement of the decision to impose any of the listed sanctions, with or without conditions, for a period of 12 calendar months.<sup>120</sup>

An aggrieved magistrate who is not satisfied with being found guilty of misconduct by the presiding officer may file a grievance to the Commission within 21 days after the conviction.<sup>121</sup>

The grievance procedures set out the route that an aggrieved magistrate must take in order to have any dispute resolved.<sup>122</sup> These relate to disputes where a magistrate

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<sup>115</sup> S 16 provides that the Minister may make regulations regarding, *inter alia*, the requirements for disciplinary steps against magistrates.

<sup>116</sup> These include, but are not limited to, situations when the magistrate is found guilty of an offence, contravenes a provision of the regulations, is negligent in the performance of duties and refuses to execute a lawful order.

<sup>117</sup> The procedures for the preliminary investigation are set out in regulation 26.

<sup>118</sup> Relieve, remove and dismissed bears in essence the same meaning. S 174(7) of the Constitution refers to dismissal of magistrates as opposed to removal.

<sup>119</sup> R 26(17).

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*

<sup>122</sup> The grievance procedures are contained in R 31-33.

is dissatisfied with an official act or omission. Generally, the magistrate must first approach the head of office, then the Commission and finally the Minister. The Minister makes the final decision and will inform the magistrate thereof in writing.

If the conduct of the magistrate warrants removal or suspension as a sanction, the procedures for such sanctions must be carried out in accordance with the provisions of the Act.<sup>123</sup> The Act provides that the Commission may make recommendations to the Minister regarding the suspension of a magistrate. After considering the recommendations of the Commission, the Minister may provisionally suspend a magistrate. It is furthermore required that Parliament must pass a resolution to confirm or lift the suspension.<sup>124</sup>

If the Commission recommends that a magistrate be removed from office, the Minister is obliged to suspend the magistrate or confirm the suspension if the magistrate had been provisionally suspended. Parliament is then required to pass a resolution as to whether or not the restoration of the magistrate into office is recommended.<sup>125</sup>

Despite the above procedures and the provision in the Act stipulating that Parliament must pass the relevant resolution as soon as reasonably possible,<sup>126</sup> this has not been the case in practice. The Commission raised concern that the cases for misconduct against magistrates are not timeously resolved. One of the cases before the Commission was of a magistrate who had been found guilty of murder and provisionally suspended in 2011, but whose suspension had not yet been confirmed by Parliament.<sup>127</sup> Another matter concerned the provisional suspension of a magistrate where the matter remained unresolved for 10 years.<sup>128</sup>

#### D. CONCLUSION

The respective disciplinary procedures for conventional employees and magistrates differ in many respects. Some of these differences include the remedies for an unwarranted dismissal. In terms of the LRA, employees are entitled to specified remedies as noted above. The regulations in terms of the Magistrates Act do not provide

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<sup>123</sup> S 13.

<sup>124</sup> S 13(3).

<sup>125</sup> S 13(4)(c).

<sup>126</sup> S 13(3)(c).

<sup>127</sup> Hartley 2014, available at <http://bit.ly/1YEDQ2J> (accessed on 14 July 2015).

<sup>128</sup> *Ibid.*

for remedies in case of an unwarranted dismissal. It has been held that an aggrieved magistrate ought to find remedies in terms of administrative law, with the Promotion of Administrative Justice Act<sup>129</sup> being the principal Act. The provision of specified and limited remedies could assist presiding officers in dispute resolution with guidance as to the appropriate relief. It seems that the significant amount of damages claimed by the aggrieved magistrate in *Reinecke*<sup>130</sup> contributed to the court's decision to reject the claim.<sup>131</sup>

Another difference is that the Magistrates Act does not provide for established institutions for the resolution of disputes, as the LRA does. The dispute resolution institutions established by the LRA are aimed at ensuring expediency and efficiency, amongst other things.<sup>132</sup> The procedures to resolve disputes in terms of the Magistrates Act are lengthy and complex and give rise to delays. Delays in disciplinary procedures can have many consequences. So, for example, the person subjected to discipline may be under the impression that their conduct is not of such a serious nature. The greater the period between the occurrence of the offence and the eventual discipline, the less likely it is for the offender to realise the link between unsatisfactory conduct and the application of discipline.<sup>133</sup>

In light of the above, it is submitted that the disciplinary procedures applicable to magistrates are not as effective and efficient as the disciplinary procedures applicable to other employees in terms of the LRA. This raises the question as to the possibility of making the procedures in terms of the LRA applicable to magistrates in order to ensure a well-functioning judiciary. As already stated, the Supreme Court of Appeal left open the question as to whether the LRA applies to magistrates<sup>134</sup> and in an earlier decision the Labour Court held that magistrates are not employees.<sup>135</sup> The provisions of the LRA are aimed at protecting employees. The next chapter considers the rationale for excluding magistrates from the status of employees.

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<sup>129</sup> 3 of 2000 (hereafter "PAJA").

<sup>130</sup> N 6 above.

<sup>131</sup> Van Eck & Diedericks (2014) *ILJ* 2708.

<sup>132</sup> Benjamin (2009) *ILJ* 46.

<sup>133</sup> Van der Bank, Engelbrecht & Strümpher (2008) *SAJHRM* 7.

<sup>134</sup> *Reinecke* n 6 above.

<sup>135</sup> *Khanyile* n 8 above.

## CHAPTER 4

### THE CONCEPT OF JUDICIAL INDEPENDENCE AND EMPLOYMENT

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#### A. INTRODUCTION

In the previous chapters it was concluded that magistrates could qualify as employees in terms of the tests for employment. It was also shown that should the LRA be made applicable to magistrates, it could significantly contribute to the efficiency of the judicial system. However, the exclusion of magistrates from employment status has been justified by the fact that the Constitution requires that the judiciary be independent.<sup>136</sup>

In *Van Rooyen v The State*,<sup>137</sup> the Constitutional Court noted that magistrates are not entitled to engage in collective bargaining due to their judicial independence.<sup>138</sup> The CCMA in the case of *LDM Du Plessis*<sup>139</sup> followed a similar approach when it held that a magistrate who referred an unfair labour practice dispute was not an employee and therefore not entitled to rely on the dispute resolution mechanisms established by the LRA. The CCMA relied on the reference made to the issue of the employment status of magistrates in the *Van Rooyen* case. In *Khanyile* the Labour Court in no uncertain terms held that magistrates cannot have the status of employ-

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<sup>136</sup> S 165 of Constitution; see also n 14 above.

<sup>137</sup> 2002 (5) SA 246 (CC) para 139.

<sup>138</sup> It is argued that the court did not give a conclusive judgment on this issue. The central focus of the case was the extent of the independence of the magistracy and this *obiter* statement was the only reference in the entire case where the court remarked on the status of magistrates as employees. In this regard see Van Eck & Diedericks (2014) *ILJ* 2707.

<sup>139</sup> N 44 above.

ees due to the fact that the Constitution requires the judiciary to be independent.<sup>140</sup> Therefore, this decision established a clear precedent that the LRA cannot be applicable to magistrates because of the constitutional guarantee of an independent judiciary.

In 2010, the issue regarding the employment status of magistrates again arose in *Reinecke*.<sup>141</sup> Although the High Court took cognisance of the constitutional right to fair labour practices, it remarked that the LRA is not directly applicable to a judicial officer.<sup>142</sup> The court concluded that a contract of employment existed between the parties and awarded a substantial amount of damages to the aggrieved magistrate for breach of contract. On appeal<sup>143</sup> the Supreme Court of Appeal left open the question as to whether the LRA are applicable to magistrates. However, the court was clear on the issue of judicial independence and held that it is not a valid justification for excluding magistrates from labour law protection. In this regard the court held:

“Nothing in the judgment affects the constitutional position of magistrates as part of the judiciary and the judicial authority in this country in terms of chapter 8 of the Constitution. The narrow question is simply whether . . . magistrates were employees of the State in terms of contracts of employment . . . A finding that they were so employed does not impact upon their independence, which is constitutionally guaranteed.”<sup>144</sup>

From the above quotation it is clear that the Supreme Court of Appeal overruled, on the basis of *stare decisis*,<sup>145</sup> the position of the Labour Court in *Khanyile* with regard to the issue of employment and the concept of judicial independence. The position regarding the applicability of the LRA to magistrates, however, remains uncertain, as the Supreme Court of Appeal did not pronounce on that issue.

For purposes of this research it is important to analyse the view that judicial independence and employment are mutually exclusive. Because judicial independence is

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<sup>140</sup> *Khanyile* para 31; see also n 15 above.

<sup>141</sup> *Reinecke* n 5 above.

<sup>142</sup> *Ibid* para 45; see also Van Eck & Diedericks (2014) *ILJ* 2708 where the authors argue that the High Court was misdirected in such finding.

<sup>143</sup> *Reinecke* n 6 above.

<sup>144</sup> *Ibid* para 7.

<sup>145</sup> This principle entails that a court is bound by the prior decisions of a higher court and by its own decisions in similar matters; see Hahlo & Kahn (1973) 214.

constitutionally guaranteed, a potential infringement of such an important constitutional principle is worth investigating.

The investigation of a potential infringement of judicial independence is conducted by way of an analysis of the core of the principle in order to establish whether employment status is reconcilable with such core.

## **B. THE CORE OF JUDICIAL INDEPENDENCE AND EMPLOYMENT**

### **1. Introduction**

Although there is no universally agreed definition of the principle of judicial independence,<sup>146</sup> it is accepted that the principle is based on two fundamental doctrines of constitutional governance.<sup>147</sup> In the first instance, it stems from the doctrine of separation of powers between the different branches of government, namely, the executive, legislature and the judiciary.<sup>148</sup> Judicial independence is also derived from the supremacy of the rule of law<sup>149</sup> which is foundational to the Constitution.<sup>150</sup>

Consensus also exists regarding the core of the principle. In broad terms it essentially entails that judicial officers should be independent from any influence, direction, control or any other form of interference when they perform their judicial functions, which is mainly to adjudicate.<sup>151</sup> Accordingly, it is argued that should a judicial officer be categorised as an employee, the State as the employer will have control over the magistracy and thus be permitted to influence the outcome of a decision which will result in judicial independence being compromised.<sup>152</sup> At first glance, this seems to be a valid argument. However, it requires further analysis, taking into account the traditional tests to determine who is an employee.

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<sup>146</sup> Malleon (1997) *Modern Law Review* 657.

<sup>147</sup> Ajibola & Van Zyl (eds) (1998) 107.

<sup>148</sup> *Ex Parte Chairperson of the Constitutional assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) para 123; *Van Rooyen* para 17; *Carpenter* (2005) *TSAR* 499-500.

<sup>149</sup> *Van Rooyen* para 17.

<sup>150</sup> S 1(c) of the Constitution provides that the Republic of South Africa is founded on the values of the supremacy of the Constitution and the rule of law.

<sup>151</sup> Ajibola & Van Zyl (eds) (1998) 107; *De Lange v Smuts* 1998 (3) SA 785 (CC) para 70 ; *Van Rooyen* para 19; see also *Carpenter* (2005) *TSAR* 500.

<sup>152</sup> See n 44 above.

## 2. Supervision and control

As stated in chapter two, the three main criteria to establish employment are supervision and control; the extent of integration in the organisation and the economic dependence of the alleged employee. It was concluded in chapter two that magistrates would satisfy the latter two criteria.

However, the first criterion, namely, control and supervision has been a contentious one.<sup>153</sup> Control or direction of the alleged employer is also one of the listed factors to be taken into account for the presumption of who is an employee to take effect.<sup>154</sup> This factor raises the question whether control in the context of employment entails that the State will be entitled to direct or instruct a magistrate to come to a specific decision in a case, for example, and thereby infringe upon the core of judicial independence. The Code of Good Practice<sup>155</sup> provides the following explanation:

“The factor of control or direction will generally be present if the applicant is required to obey the lawful and reasonable commands, orders or instructions of the employer or the employer’s personnel (for example, managers or supervisors) as to the manner in which they are to work. It is present in a relationship in which a person supplies only labour and the other party directs the manner in which he or she works . . . It is an indication of an employment relationship that the ‘employer’ retains the right to choose which tools, staff, raw materials, routines, patents or technology are used.”

From the above explanation it is clear that supervision and control entail that the person alleging to be an employee is only required to obey *lawful* and *reasonable*<sup>156</sup> commands, orders or instructions of the “employer”. Should magistrates be categorised as employees, there will be control over them in the sense that they are not entitled to set their own working hours and that they are subject to a specific dress code at work, for example. They may also be subjected to performance appraisal and are furthermore provided with the tools in order to perform their functions, for example a cloak and chambers.

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<sup>153</sup> *Ibid.*

<sup>154</sup> As stated above, the same guidelines may be applied even to persons to which the presumption does not apply, for example magistrates.

<sup>155</sup> N 49 above.

<sup>156</sup> Emphasis added.

In light of the above, it is submitted that control and direction do not mean that the State or any other person will be authorised to demand or instruct a magistrate to act in breach of the constitutional duty of judicial independence. The Code of Good Practice clearly states that control and direction entail that the person will only be required to obey the lawful and reasonable demands of the employer. Also in terms of the regulations under the Magistrates Act, a magistrate may only be accused of misconduct if he or she failed to execute a lawful order.<sup>157</sup> The common law also requires an employee to carry out lawful and reasonable instructions of the employer.<sup>158</sup> The LRA furthermore protects employees in that they may not be prejudiced for failure to do something that an employer may not lawfully permit an employee to do.<sup>159</sup> If an employee is dismissed on the basis of refusing to carry out an unlawful instruction, such dismissal will be automatically unfair.<sup>160</sup> It would be unlawful and unreasonable for the State to instruct a magistrate, for example, to reach a specific outcome in a case. Such interference would be contrary to the Constitution, which expressly provides that the courts are independent. Therefore, in terms of the Constitution, a magistrate will not be obliged to obey instructions from the State which will have the effect of infringing the principle of judicial independence.

Should a magistrate submit to such unlawful demands, judicial independence will be infringed by the individual magistrate and not by virtue of magistrates being employees. The judiciary has been appointed as the guardian of judicial independence and should they be swayed to compromise the principle, the judiciary itself will be responsible for it.<sup>161</sup>

Although the constitutional guarantee of an independent judiciary and the structures to protect courts and judicial officers against interference<sup>162</sup> are aimed at protecting the judiciary from improper pressures, it cannot assure that they will indeed apply independence.<sup>163</sup> The state of mind of the magistrate or his or her attitude in the ac-

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<sup>157</sup> See n 116 above.

<sup>158</sup> Van Niekerk *et al* (2014) 88.

<sup>159</sup> S 5(2)(c)(iv) of the Act.

<sup>160</sup> S 187(1) of the LRA provides that a dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to the provisions of s 5 of the Act.

<sup>161</sup> Nugent (2000) *Advocate* 37-38.

<sup>162</sup> This notion is referred to as institutional independence.

<sup>163</sup> Clark (ed) (2012) 195.

tual, exercise of judicial independence is referred to as individual independence.<sup>164</sup> However, it is possible for magistrates to consider that if they go against what the State would expect them to do, they may jeopardise promotion or may even be transferred.<sup>165</sup> In this regard the Magistrates Commission could play an important role. The Commission was established in terms of the Magistrates Act to ensure that the appointment, promotion, transfer or discharge of, or disciplinary steps against, magistrates take place without favour or prejudice and to ensure that no victimisation takes place against magistrates.<sup>166</sup> Although the Magistrates Act was enacted to provide for conditions of service of magistrates, it does not mean that they cannot be regarded as employees in terms of the LRA. The mere fact that another statute regulates conditions of employment does not alter the nature and character of an employment relationship.<sup>167</sup>

The fact that institutional independence is provided for by the Constitution does not mean that control and supervision in the context of employment may not be exercised over the magistracy. Therefore, in my view, independence and employment can be present at the same time and the two concepts are accordingly not mutually exclusive.

As mentioned above, it may still be possible for an employment relationship in terms of the *SITA* test to exist, even though it may, for argument's sake, be accepted that magistrates can never be under the supervision and control of the State.<sup>168</sup>

### 3. Public confidence as an aspect of judicial independence

It has been stated that the core of judicial independence is that judicial officers should be free from interference when they perform their duties. However, the concept has other dimensions and entails more than the idea that the judiciary should not be taking instructions from the government.<sup>169</sup> Judicial independence is one of

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<sup>164</sup> See *De Lange v Smuts* 1998 (3) SA 785 (CC) para 71 where the court quotes a passage from the Canadian case of *Valente v The Queen* (1986) 24 DLR (4th) 161 (SCC) at 169-170 where a distinction was drawn between institutional and individual independence; see also *Van Rooyen* para 19.

<sup>165</sup> Van Dijkhorst (2000) *Advocate* 39.

<sup>166</sup> S 4 of the Magistrates Act; see also n 114 above.

<sup>167</sup> Nkosi (2015) *De Jure* 238. See *Reinecke* para 13 where the Supreme Court of Appeal accepted that an employment relationship exists between a magistrate and the State.

<sup>168</sup> See n 45 above.

<sup>169</sup> Ajibola & Van Zyl (eds) 172; Carpenter (2006) *CILSA* 364.

the fundamental values of justice. Some of these values include procedural fairness, efficiency, accessibility and public confidence in the courts.<sup>170</sup> The principle of judicial independence is important in ensuring justice by creating an efficient and reliable judiciary.

In recent months, magistrates have featured prominently in the news because of their conduct.<sup>171</sup> As already noted, the Magistrates Commission expressed concern regarding the delays in the finalisation of the cases against these magistrates.<sup>172</sup> The delays in effectively resolving disputes regarding the suspension and removal of magistrates from office give rise to delays in court proceedings, as magistrates on suspension cannot perform their judicial duties. Delays in the judicial process undermine judicial independence because they destroy the public's confidence in the judiciary.<sup>173</sup> Furthermore, the public will lose confidence in the judiciary if it seems that appropriate action is not being taken against magistrates who misbehave.

This research acknowledges the potential argument that the recognition of magistrates as employees of the State may create the public perception that magistrates are not independent and only an extension of government.<sup>174</sup> This may hamper the public's confidence in the magistracy.

However, in *Reinecke* the Supreme Court of Appeal remarked that the enactment of the Magistrates Act was not aimed at completely removing magistrates from the public service.<sup>175</sup> The court suggested that if the legislature intended to remove them completely, legislation should have expressly stated so in clear language. This, the court stated, would have entailed the removal of the rights of magistrates which they had under the public service and the substitution thereof by other rights.<sup>176</sup>

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<sup>170</sup> Shetreet & Forsyth (2011) 18.

<sup>171</sup> Wagner *Business Day* 02 December 2014, available at <http://bit.ly/1NkkrTY> (accessed on 9 December 2014); Du Plessis *Beeld* 29 October 2014.

<sup>172</sup> See n 127 above.

<sup>173</sup> *Pharmaceutical Society of South Africa (Pty) Ltd v Tshabalala-Msimang NO; New Clicks South Africa (Pty) Ltd v Minister of Health* 2005 (3) SA 238 (SCA) 260G-261H; *National Director of Public Prosecutions v Naidoo* 2011 (1) SACR 336 (SCA).

<sup>174</sup> Franco & Powell (2004) *SALJ* 562.

<sup>175</sup> *Reinecke* paras 12-14.

<sup>176</sup> *Idem* para 12.

In this regard the court referred to section 18(3) of the Magistrates Act which provides that the conditions and service applicable to magistrates immediately prior to the commencement of section 12 of the Act<sup>177</sup> shall not be affected to the detriment of such magistrate. This, the court held, indicates that magistrates are entitled to the same rights under the Magistrates Act as they were under the public service.<sup>178</sup>

Therefore, the Magistrates Act did not extinguish the relationship between magistrates and the State in its entirety.<sup>179</sup> Classifying magistrates as employees would not mean that a new relationship with the State will be created. A relationship already exists and therefore the argument that the classification of magistrates as employees will infringe public confidence cannot hold water.

The rationale for excluding magistrates from protection in terms of labour law is said to be the protection of judicial independence. However, the current disciplinary regime applicable to magistrates in terms of the Magistrates Act gives rise to delays in disciplining magistrates.<sup>180</sup> As stated above, these delays have the effect of jeopardising judicial independence by eroding public confidence. It is therefore submitted that judicial independence as rationale for excluding magistrates from protection in terms of labour law is unsubstantiated.

### C. CONCLUSION

The inclusion of magistrates under the LRA will not necessarily result in the undermining of judicial independence. Instances exist where the executive is involved in the administration of justice.<sup>181</sup> The judiciary cannot operate as an island<sup>182</sup> and it has certain connections with the executive, relating to issues such as funding.<sup>183</sup> The challenge is to have in place proper protection against influences that may interfere with the judiciary's independence in performing its duties.<sup>184</sup> In this regard the Constitution provides for institutional independence and the Magistrates Act can also be

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<sup>177</sup> S 12 of the Magistrates Act provides for the remuneration of magistrates.

<sup>178</sup> *Reinecke* par 12.

<sup>179</sup> *Idem* para 14.

<sup>180</sup> The procedure for disciplining magistrates was explained in detail in the previous chapter.

<sup>181</sup> Shetreet & Forsyth (2011) 25.

<sup>182</sup> Hatchard & Slinn (eds) (1999) 76.

<sup>183</sup> *Idem* 77.

<sup>184</sup> Russell & O'Brien (2001) 21.

useful in ensuring that magistrates comply with the requirements of judicial independence.

Furthermore, when the LRA was drafted, the Constitution, which provides for judicial independence, was already in force. If it was the legislature's intention that labour legislation should not apply to magistrates, it should have excluded them from the ambit of the Act in express terms.<sup>185</sup> The legislature failed to do so and therefore it is submitted that it was not intended for magistrates not to have recourse in terms of labour legislation. Even if the legislature had such intention, the Constitution provides the right to fair labour practices to "everyone", including magistrates.<sup>186</sup>

Because the majority of South Africans are introduced to the judicial system through the magistrates courts,<sup>187</sup> it has been stated that:

"Magistrates tend to shape the impressions and perceptions of litigants, witnesses and onlookers of the administration of justice. It is in the Magistrates courts that admiration is earned and respect is lost."<sup>188</sup>

In light of the important role that magistrates fulfil and the image they portray to the public, it is imperative that public confidence in the judicial system should be fostered and promoted. It is therefore recommended that magistrates be categorised as employees and be subjected to the dispute resolution procedures and remedies in terms of the LRA. This will result in the efficient and timeous resolution of disputes, which in turn will ensure the proper administration of justice. Making the tailor-made procedures established by the LRA available to magistrates will not only provide clarity to magistrates regarding their remedies, but it will also ensure that they are appropriately and timeously disciplined when necessary in order to ensure a well-functioning judiciary.

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<sup>185</sup> See n 11 above.

<sup>186</sup> Nkosi (2015) *De Jure* 237; see also *Reinecke* n 5 above para 44; see also *Murray v Minister of Defence* 2009 (3) SA 130 (SCA) where protection against unfair dismissal was afforded to a member of the National Defence Force (who is expressly excluded from the ambit of the LRA) based on the constitutional right to fair labour practices.

<sup>187</sup> See n 1 above.

<sup>188</sup> Hoexter & Olivier (2014) 319.

The uncertainty regarding the application of labour legislation to magistrates raises the question in which branch of law a magistrate is entitled to find recourse for unfair treatment when they execute their duties. The following chapter deals with this question.

**CHAPTER 5**  
**THE ROLE OF ADMINISTRATIVE LAW IN THE RESOLUTION OF EMPLOYMENT**  
**DISPUTES OF MAGISTRATES**

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**A. INTRODUCTION**

In South African law it is not unusual for the same set of facts to attract the application of different fields of law.<sup>189</sup> The interaction between administrative law and labour law has caused a long-standing and contentious debate in our courts.<sup>190</sup>

The issue usually arose when a public sector employee was subjected to unwarranted treatment by the employer in the execution of his or her duties. In such a case the employee would potentially be entitled to remedies for just administrative action as provided for in the PAJA.<sup>191</sup> At the same time the employee could rely on remedies for unfair dismissal in terms of the LRA.<sup>192</sup> As a third possibility, the aggrieved em-

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<sup>189</sup> Pillay (2005) *SAPL* 414.

<sup>190</sup> Brassey (2009) *Constitutional Court Review* 210.

<sup>191</sup> See n 129 above.

<sup>192</sup> See n 100 above.

employee could base a claim on breach of the contract of employment,<sup>193</sup> In some instances the courts held that decisions taken by employers, such as dismissal or promotion, amounted to administrative action and that administrative law, therefore, was applicable to such decisions. In other instances the courts held that employer conduct did not constitute administrative action and was therefore not subject to administrative law.

The debate has been laid to rest in *Chirwa v Transnet*.<sup>194</sup> In this case it was held that decisions taken in the context of employment, for example the termination of an employee's service, do not amount to administrative action. Such decisions are therefore not reviewable as contemplated in the PAJA. The court accordingly concluded that employment-related decisions should be resolved by tailored labour-law remedies. This principle was confirmed and reinforced by the Constitutional Court in *Gcaba v Minister of Safety and Security*.<sup>195</sup>

In *Reinecke* the issue concerned the remedies of a magistrate who claimed that he was constructively dismissed. Regardless of the established law on the overlap between administrative law and labour law, the Supreme Court of Appeal held that the aggrieved magistrate ought to have sought his remedies in administrative law and was not entitled to bring his claim on the basis of breach of contract.<sup>196</sup> This decision seems to be at odds with the previous settled law confirmed in *Gcaba*.

This chapter provides a contribution to the debate on the role of administrative law in the context of employment. It aims to analyse the decision in the *Reinecke* case and to evaluate whether it indeed amounted to a deviation from the settled law, taking into account the uncertainty that currently prevails on the labour law position of magistrates in South Africa.

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<sup>193</sup> Brassey (2009) *Constitutional Court Review* 210.

<sup>194</sup> 2008 (4) SA 367 (CC) (hereafter "*Chirwa*").

<sup>195</sup> 2010 (1) SA 238 (CC) (hereafter "*Gcaba*").

<sup>196</sup> *Reinecke* n 6 above para 17.

## B. THE APPLICABILITY OF ADMINISTRATIVE LAW TO EMPLOYER CONDUCT

### 1. Introduction

PAJA gives effect to the constitutional right to just administrative action.<sup>197</sup> The starting point in determining whether a person may have remedies under PAJA is to establish whether the conduct in question amounts to administrative action and therefore attracts the application of PAJA.<sup>198</sup> An inquiry as to whether a particular decision constitutes administrative action must begin with the definition of “administrative action” in section 1 of PAJA.<sup>199</sup> The definition in the Act is lengthy and complex, but broadly entails decisions taken or failure to take a decision by an organ of state when exercising public power.<sup>200</sup> Because administrative law is aimed at controlling the exercise of public power, the requirement of “public power” has often been at the core of the question as to whether or not a particular decision amounts to administrative action.<sup>201</sup>

Over the years, the courts have applied different approaches to the question whether decisions taken in the context of employment constitute administrative action as contemplated in PAJA. The first approach draws a distinction between private and public power. In terms of this approach, decisions taken in the scope of employment are private affairs and therefore the exercise of public power is absent. Accordingly, such decisions do not constitute administrative action.<sup>202</sup> The second approach is related to the first, but considers the source of the power. It entails that the conduct of a public sector employer does not constitute the exercise of public power if the source of the power is contractual rather than statutory.<sup>203</sup>

What follows is a discussion of the case law illustrating the abovementioned approaches to the question whether administrative law applies to employer conduct.

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<sup>197</sup> S 33 of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair; see also the preamble to the PAJA.

<sup>198</sup> Brand (2008) 93.

<sup>199</sup> Stacey (2008) *SALJ* 307.

<sup>200</sup> *Greys Marine Houtbay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) para 21; see also Van Heerden (2009) *Journal of Public Administration* 184.

<sup>201</sup> Stacey (2008) *SALJ* 307; Stacey (2007) *SAPL* 79; Hoexter (2012) 211.

<sup>202</sup> *South African Police Union (SAPU) v National Commissioner of the South African Police Service* (J1584/05) [2005] ZALC 91 illustrates this approach.

<sup>203</sup> See *Police and Prisons Civil Rights Union (POPCRU) v Minister of Correctional Services* 2008 (3) SA 91 (E) for an illustration of this approach.



## 2. *SAPU v National Commissioner of South African Police Service*<sup>204</sup>

In this case the commissioner of the South African Police Service (“SAPS”) introduced a new shift system in respect of its members. The shift system was changed from a twelve-hour shift period to an eight-hour shift period. The employees preferred the initial twelve-hour shift system because it provided them with a balance between their work and family duties. The unions representing the respective members sought an interdict ordering the commissioner to refrain from implementing the new shift system. The parties involved in the dispute attempted to negotiate on the matter but reached a deadlock. As a result a dispute on the basis of the unilateral change of conditions of employment was referred to the relevant bargaining council. The union challenged the decision of the commissioner to change the shift system based on the right to just administrative action in terms of PAJA. It contended that SAPS failed to take relevant considerations into account when introducing the new shift system and therefore the decision was procedurally unfair, arbitrary, capricious and irrational. It was argued that as a result of SAPS being an organ of state the decision to introduce the new shift system constituted administrative action and on those grounds a review of the decision in terms of section 6 of PAJA was sought.<sup>205</sup> The court confirmed that such review is dependent on whether the decision in question qualifies as “administrative action”.<sup>206</sup> It considered the nature of the power of the commissioner to make the decision. The court held that the setting of working hours was not a public affair and accordingly fell within the scope of the contractual regulation of private employment relations.<sup>207</sup> The court held that:

“The nature of the power exercised and the function performed in the setting or agreeing of shift times does not relate to the government’s conduct in its relationship with its citizenry to which it is accountable in accordance with the precepts of representative democracy and governance. The powers and functions concerned derive from employment law and are circumscribed by the constitutional rights to fair labour practices and to engage in collective bargaining.”<sup>208</sup>

<sup>204</sup> N 202 above (hereafter “*SAPU*”).

<sup>205</sup> *SAPU* para 39.

<sup>206</sup> *Ibid* para 45.

<sup>207</sup> *Ibid* para 51.

<sup>208</sup> *Ibid*.

The court concluded that the decision of SAPS was not administrative action and the applicants were therefore not entitled to seek review of the decision in terms of PAJA.

In *Hlope v Minister of Safety and Security*<sup>209</sup> the court followed a similar approach. The case concerned the transfer of employees who were engaged in the SAPS as plain-clothes detectives to various posts. The employees contended that the transfer amounted to a demotion as the position of a plain-clothes detective was more prestigious and offered better promotional opportunities when compared with uniformed police.<sup>210</sup> The applicants challenged the decision to transfer them and contended that the decision infringed their right to just administrative action as they were not consulted prior to the decision to transfer them.<sup>211</sup> Relying on the *SAPU* decision, the court held that employment-related decisions do not constitute administrative action, as they do not involve the exercise of public power or the performance of a public function that has a direct external effect.<sup>212</sup>

Other cases which adopted a similar view include *Louw v SA Rail Commuter Corporation*<sup>213</sup> and *Greyvenstein v Kommissaris van die SA Inkomstediens*.<sup>214</sup> These cases involved the application for review under PAJA of a decision to institute disciplinary proceedings against the respective employees, which ultimately led to their dismissal. In both cases the court held that the act of disciplining an employee is not the exercise of public power or the performance of a public function. Accordingly it was held that such conduct is not administrative in nature as contemplated by PAJA.

In terms of this approach, a clear distinction is drawn between public and private matters and it is assumed that where the power to exercise a particular decision emanates from the contract of employment, such decision could never be the exercise of public power. It can therefore not be administrative action and does not attract the application of PAJA.

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<sup>209</sup> (J1828/05) [2005] ZALC 103.

<sup>210</sup> *Idem* para 3.

<sup>211</sup> *Idem* para 8.

<sup>212</sup> *Idem* paras 10 and 14.

<sup>213</sup> (2005) 26 *ILJ* 1960 (W) para 22.

<sup>214</sup> (2005) 26 *ILJ* 1395 (T) para 1402F-G.

3. *POPCRU v Minister of Correctional Services*<sup>215</sup>

The approach in this case was to consider the source of the power to make the relevant decision. The employees in this case were employed as correctional officers at the Middelburg Prison and were members of the applicant union. The issue arose when the employees refused to work over weekends. The employer successfully obtained court orders that the employees refrain from embarking on any strike relating to their work duties. Despite the court order, the union continued with threats of disruptive action. The employer notified its employees that strikes and other disruptive actions were prohibited and unlawful because they engaged in an essential service and they were informed that they risk being dismissed if they participated in strike action.<sup>216</sup>

The employees failed to adhere and after refusing to work over the Christmas and New Year's holiday periods they were dismissed during January 2005. This resulted the union seeking relief under PAJA and claiming review of the employer's decision to dismiss the employees. The employer argued that the decision to dismiss was not administrative action since it did not involve the exercise of public powers because it did not affect the public as a whole. Consequently, the employer contended, the decision to dismiss was not reviewable in terms of PAJA.<sup>217</sup>

The court rejected this argument and expressed the view that the concept of public power is not limited to the exercise of power that impact the public at large.<sup>218</sup> The court held as follows:

“[W]hat makes the power involved a public power is the fact that it has been vested in a public functionary who is required to exercise it in the public interest, and not in his or her own private interest or at his or her own whim.”<sup>219</sup>

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<sup>215</sup> N 203 (hereafter “*POPCRU*”).

<sup>216</sup> *Idem* para 11.

<sup>217</sup> *Idem* paras 35, 45 and 52.

<sup>218</sup> *Idem* para 53.

<sup>219</sup> *Ibid.*

In light of the fact that the commissioner of correctional services derived its power to dismiss the employees from statute,<sup>220</sup> the court held that the source of the power under these circumstances was not derived from the private contract of employment. Therefore the decision was held to constitute administrative action and the employer's decision was subject to review.<sup>221</sup>

In *Nxele v Chief Deputy Commissioner, Corporate Services*<sup>222</sup> it was held that a decision to transfer an employee constitutes administrative action as defined in PAJA. The court expressly rejected the decision in *SAPU and Hlope*.<sup>223</sup> *Nell v Minister of Justice and Constitutional Development*<sup>224</sup> is another example where the court categorised employment-related conduct as administrative action. In that case the court held the dismissal of the employee to be administrative action and therefore reviewable under PAJA.<sup>225</sup>

The above case law illustrates the inconsistent views of the courts regarding the question whether administrative law was applicable to employer conduct. This meant that in some circumstances employer conduct could be administrative action and in other instances not. It was not clear when a particular court would apply which approach and the parties to a dispute could only hope that the court would accept their claim and grant the relief sought.

The conflicting views of the courts and the legal uncertainty it created was cleared in the renowned *Chirwa* matter.<sup>226</sup> A discussion of *Chirwa* to illustrate the current principle regarding the applicability of administrative law in employment decisions follows.

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<sup>220</sup> In terms of s (3)(5)(g) of the Correctional Services Act 111 of 1998 the commissioner of correctional services has the power to appoint, promote, transfer or dismiss correctional officials.

<sup>221</sup> *POPCRU* para 54.

<sup>222</sup> (C160/2006) [2006] ZALC 74.

<sup>223</sup> *Idem* para 56.

<sup>224</sup> (410/2006) [2006] ZAFSHC 167.

<sup>225</sup> *Idem* para 23.

<sup>226</sup> See Zweel (2008) LLM dissertation 27.

## 4. *Chirwa v Transnet*

### 4.1. *Facts*

Ms Chirwa (the employee) was appointed as a human resources manager at the employer (a wholly state-owned public company). She was later promoted to the position of human resource executive manager. During 2002 the employee was called for a disciplinary enquiry on the basis of poor work performance. She failed to participate in the enquiry, contending that the chairperson could not be the complainant, witness as well as the presiding officer in the matter. The chairperson proceeded with the matter despite the employee's non-participation and subsequently ruled that she be dismissed. The employee challenged the outcome of the disciplinary enquiry by referring an unfair dismissal dispute to the CCMA. The matter could not be resolved by conciliation and instead of referring the matter for arbitration, the employee approached the High Court claiming reinstatement to her previous position. The employee contended that she had two remedies at her disposal – one under the LRA and another under the PAJA. She submitted that this entitled her to choose which court to approach. She explained that it was more practical for her to approach the High Court for relief as opposed to the institutions set out by the LRA. As a result, she argued that the High Court and Labour Court had concurrent jurisdiction.<sup>227</sup>

The High Court found in the employee's favour and ordered her reinstatement. The court relied on the judgment of *Administrator of the Transvaal v Zenzile*<sup>228</sup> where it was held that a dismissal of a public sector employee was not simply the termination of a contractual relationship but also entailed the exercise of a public power which afforded protection in terms of administrative law.

### 4.2. *Supreme Court of Appeal decision*

On appeal to the Supreme Court of Appeal, the court was divided on the issue whether the employee's dismissal constituted administrative action for purposes of PAJA.

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<sup>227</sup> *Chirwa* para 19. In *Chirwa* the court also considered, but did not settle, the issue of whether the Labour Court and High Court had concurrent jurisdiction in employment-related disputes. The issue regarding jurisdiction is beyond the scope of this chapter and any reference thereto is only for the sake of completeness.

<sup>228</sup> 1991 (1) SA 21 (A) (hereafter "*Zenzile*"). The rationale for the *Zenzile* decision was that at the time public sector employees were not covered by the protection of labour law. The courts were of the view that excluded employees should have some recourse in terms of administrative law.

Mthiyane JA with Jafta JA concurring followed an approach similar to that taken in *SAPU* by distinguishing between private and public power. They found that the dismissal of the employee did not constitute the exercise of public power or the performance of a public function and accordingly did not amount to administrative action.<sup>229</sup>

Cameron JA and Mpati DP adopted the approach in *POPCRU* by holding that dismissals in the public sector could constitute administrative action. In reaching the conclusion they reasoned that the source of the power of the respondent was derived from statute and therefore the decision to dismiss the employee amounted to administrative action. The judges expressed the view that employees in the public sector have multiple remedies and are entitled to choose the forum and legislation in terms of which they want to claim relief.<sup>230</sup>

Although Conradie JA accepted that the dismissal constituted administrative action, he was of the view that disputes about dismissals in the public sector should not be resolved by administrative law, because it was the intention of the legislature, by enacting the LRA, that labour disputes be dealt with by the dispute resolution mechanisms established by the LRA.<sup>231</sup>

#### 4.3. *Constitutional Court decision and the decision in Gcaba*

On appeal, the Constitutional Court not only had to consider whether the dismissal constituted administrative action but also had to decide the issue of jurisdiction. It was noted that jurisdiction is an issue because dismissals in the public domain implicate rights in the fields of labour and administrative justice. As already mentioned above, the issue regarding jurisdiction is beyond the scope of this research.

Skweyiya J (with seven judges concurring) held that it was not necessary to answer whether or not the decision to dismiss constituted administrative action, because it was a labour dispute and the Labour Court had exclusive jurisdiction to entertain the

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<sup>229</sup> *Chirwa* para 28.

<sup>230</sup> *Idem* paras 32 and 33.

<sup>231</sup> *Idem* para 30.

matter.<sup>232</sup> This approach was similar to that of *Conradie JA* in the Supreme Court of Appeal.

Ngobo J (with six judges concurring) held that the dismissal did not constitute administrative action, because the source of the power to dismiss flows from the contract of employment and the termination of the contract is concerned with labour and employment relations.<sup>233</sup>

The judgment handed down by Langa CJ (with two judges concurring) considered whether the decision to dismiss was taken in terms of legislation and whether it amounted to the exercise of public power or the performance of a public function.<sup>234</sup> It was held that it did not and as a result the dismissal did not constitute administrative action for purposes of PAJA.<sup>235</sup>

The majority of the judges in *Chirwa* held (or were at least willing to accept) that administrative law does not apply to employer conduct. The stance was taken that decisions and conduct in the context of employment are not administrative action as contemplated in PAJA. Therefore, where labour law and administrative law overlap, an aggrieved employee will have to pursue his or her claim under the shield of labour law.

This principle was reinforced and confirmed in the *Gcaba*.<sup>236</sup> In this case the Constitutional Court provided a proper interpretation of the provisions of the Constitution, PAJA and LRA concerning the overlap between labour law and administrative law.<sup>237</sup> The case broadly concerned the failure of the SAPS to appoint the applicant to a promotional position. The applicant approached the High Court to have the SAPS' decision not to promote him reviewed and set aside in terms of PAJA. His application was rejected by the High Court on the basis that it was a labour dispute and the

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<sup>232</sup> *Idem* para 36.

<sup>233</sup> *Idem* para 142.

<sup>234</sup> *Idem* para 181.

<sup>235</sup> *Idem* paras 185 and 194.

<sup>236</sup> *Gcaba* n 195 above; see also Mupangavanhu & Mupangavanhu (2012) *Stell LR* 44.

<sup>237</sup> *Gcaba* para 3.

court therefore lacked jurisdiction to entertain the matter.<sup>238</sup> In essence the Constitutional Court had to decide whether the SAPS' decision not to promote the applicant constituted administrative action and whether the High Court was correct in holding that it had no jurisdiction to entertain the matter.<sup>239</sup> In this regard the court held that:

“The order of the High Court was correct. The applicant’s complaint was essentially rooted in the LRA, as it was based on conduct of an employer towards an employee which may have violated the right to fair labour practices. It was not based on administrative action. His complaint should have been adjudicated by the Labour Court.”<sup>240</sup>

Despite the settled law on the role of administrative law in employment-related issues, the court in *Reinecke* held that the aggrieved magistrate ought to have utilised his administrative law remedies and was not entitled to bring a contractual claim for breach of the common-law contract of employment.<sup>241</sup>

What follows is a brief discussion of *Reinecke* and an evaluation of the court’s possible rationale for holding that administrative law applied to the magistrate’s constructive dismissal.

## C. THE REINECKE CASE

### 1. Facts and judgment

Reinecke was appointed as a relief magistrate in Randburg. He alleged that the chief magistrate made his continued employment intolerable and that such conduct left him with no other alternative but to resign. This, Reinecke alleged, was a constructive dismissal which amounted to a repudiation of his contract of employment, which repudiation he accepted by way of his resignation.<sup>242</sup> Initially, Reinecke referred an unfair dismissal dispute to the CCMA, but did not follow through with this route after he became aware that in a previous matter it was held that a magistrate is not an

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<sup>238</sup> *Idem* para 4.

<sup>239</sup> *Idem* paras 5 and 19.

<sup>240</sup> *Idem* para 76.

<sup>241</sup> *Reinecke* para 17.

<sup>242</sup> *Idem* para 3.

employee and, therefore, not entitled to remedies under the LRA.<sup>243</sup> As a result, Reinecke proceeded with a claim in the High Court in terms of which he claimed damages for breach of contract. The High Court awarded a significant amount of contractual damages to the aggrieved magistrate and on the facts held that his continued employment was made intolerable by the chief magistrate. The conduct of the chief magistrate therefore amounted to a constructive dismissal.

On appeal, the Supreme Court of Appeal had to consider the appropriate remedy for the magistrate in the above circumstances. The court did not pronounce on the question whether a magistrate was an employee in terms of the LRA, as the court was of the view that such a conclusion may raise other issues.<sup>244</sup> The court did not explain what such issues entail. The court concluded that the remedies for an aggrieved magistrate are to be found in administrative law and not in the law of contract. The court reasoned that it would be inappropriate for Reinecke to have a multiplicity of remedies, those available to him in administrative law as well as a contractual remedy sounding in damages. The court said that to hold otherwise would place the aggrieved magistrate in a significantly better position than a conventional employee.<sup>245</sup>

This conclusion of the Supreme Court of Appeal reopens the issue of the role of administrative law to employment-related conduct. If *Chirwa* and *Gcaba* brought finality to the issue, the question arises as to the Supreme Court of Appeal's rationale for holding that a magistrate was to find recourse in terms of public law, of which administrative law is a branch. As noted above, the court did say that the magistrate could not be entitled to both remedies. The evaluation of the *Reinecke* case below considers why the court possibly held that administrative law should have been utilised by the aggrieved magistrate instead.

## 2. Evaluation of the *Reinecke* decision in light of the settled law

From the outset it should be noted that magistrates do not form part of the public sector. They were removed by the Magistrates Act in order to establish an inde-

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<sup>243</sup> *Idem* para 24.

<sup>244</sup> *Idem* paras 16 and 23.

<sup>245</sup> *Idem* para 24.

pendent judiciary.<sup>246</sup> As noted above, it is debatable whether they had been completely removed from the public service.<sup>247</sup> However, decisions concerning magistrates may still involve administrative law. Section 1(gg) of PAJA expressly excludes from the definition of administrative action a decision concerning the nomination, selection or appointment of a judicial officer (for example a judge) or any other person, by the Judicial Services Commission.<sup>248</sup> There is no similar exclusion for the appointment and other matters relating to magistrates by the Minister of Justice or the Magistrates' Commission.<sup>249</sup> Accordingly, conduct relating to magistrates may be susceptible to the application of PAJA, provided that it complies with the requirements for administrative action.<sup>250</sup>

I now turn to the decision in *Reinecke* regarding the aggrieved magistrate's appropriate remedy and proceed to establish the court's possible rationale for the decision. At paragraph 17 of the judgment, the court held:

"In other words he would have needed to resort to public law remedies, not contractual remedies, in order to resolve the issue. That example illustrates the point that the appropriate remedy for any grievance Mr Reinecke had, or any other magistrate might have had, relating to their appointment as a magistrate would ordinarily have been a public law remedy such as a mandamus, or an interdict or proceedings by way of judicial review, and not a contractual remedy."

Also in *Dunn v Minister of Defence*,<sup>251</sup> the court found that the decision of the South African National Defence Force (SANDF) to appoint one Coetzee instead of the applicant fell within the definition of administrative action in section 1 of PAJA, because the minister had the authority in terms of the Defence Act<sup>252</sup> to appoint officers in the

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<sup>246</sup> See n 111 above.

<sup>247</sup> See n 175 above.

<sup>248</sup> The Judicial Services Commission only deals with matters relating to the conduct of judges (and not magistrates) specifically; see the preamble to the Judicial Service Commission Act, 1994.

<sup>249</sup> S 10 of the Magistrates Act provides that the minister shall, after consultation with the Magistrates' Commission, appoint magistrates in respect of lower courts under and subject to the Magistrates' Courts Act 32 of 1944.

<sup>250</sup> See also *Wessels v Minister for Justice and Constitutional Development* 2010 (1) SA 128 (GNP) (hereafter "*Wessels*").

<sup>251</sup> 2006 (2) SA 107 (T) (hereafter "*Dunn*").

<sup>252</sup> 44 of 1957.

SANDF and by appointing Coetzee, the minister exercised a public power or function.<sup>253</sup>

Furthermore in the case of *Wessels*<sup>254</sup> the court held that the minister's decision to appoint the second respondent as Regional Court President of Limpopo, instead of the applicant magistrate, amounted to administrative action which is reviewable under PAJA.<sup>255</sup>

At first glance, the view of the courts in the above cases seems at odds with the *Chirwa* and *Gcaba* decisions, namely, that administrative law does not apply to employment-related decisions. However, the issue requires further analysis when one takes into account the traditional rationale of the courts' approach to make administrative law remedies available to public sector employees.<sup>256</sup> Historically, public sector employees were given recourse in terms of administrative law as they were excluded from labour law protection.<sup>257</sup> All three cases, *Reinecke*, *Dunn* and *Wessels*, have one common denominator with *Zenzile*, namely, that the aggrieved parties had no remedies under the LRA.<sup>258</sup> This raises the question whether *Reinecke* was indeed a deviation from *Chirwa* and *Gcaba*. Perhaps the court felt that because it was uncertain whether magistrates have remedies under the LRA, administrative law should protect them, as was the position in *Zenzile*. It is submitted that such an argument does not hold water, in light of the constitutional right to fair labour practices.<sup>259</sup>

Even though the aggrieved magistrate (or the SANDF member) had no remedies under the LRA, they were still protected by section 23 of the Constitution. The right to fair labour practices applies to everyone, including those not covered by the LRA. This was confirmed in *Murray v Minister of Defence*<sup>260</sup> where the court held that the constitutional guarantee of fair labour practices also applies to those not covered by

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<sup>253</sup> *Dunn* para 5.

<sup>254</sup> N 250 above.

<sup>255</sup> *Idem* para 22; see also Hoexter & Olivier (2014) 325.

<sup>256</sup> See *Zenzile* n 228 above.

<sup>257</sup> *Public Servants Association obo Haschke v MEC for Agriculture* (2004) 25 ILJ 1750 (LC) para 16; see also Cheadle (2009) ILJ 742; Hoexter (2008) *Constitutional Court Review* 209.

<sup>258</sup> Members of the SANDF are expressly excluded from the ambit of the LRA by s 2 of the Act and as mentioned above, it is uncertain whether the LRA could possibly apply to magistrates.

<sup>259</sup> See n 4 above.

<sup>260</sup> N 16 above.

the LRA and that it offers protection through the constitutionally developed common law.<sup>261</sup> Therefore, *Reinecke* was indeed protected in terms of labour law and the *Zenzile* rationale could not apply in these circumstances. It should be noted that *Zenzile* was heard before the adoption of the Constitution and therefore it made sense that administrative law remedies were made available to those excluded from labour legislation.

The court's decision in *Reinecke* to hold that administrative law was applicable under the circumstances was potentially influenced by the extent of the damages awarded by the High Court, and the difficulties relating to the calculation of damages.<sup>262</sup> In my view, the Supreme Court of Appeal held that the aggrieved magistrate was not entitled to claim for breach of contract, because the court did not want to set a precedent whereby aggrieved magistrates could claim substantial amounts of contractual damages.

This would not have been an issue had there been certainty that magistrates can rely on remedies in terms of the LRA. The LRA provides for specific remedies<sup>263</sup> and furthermore limits the amount of compensation that may be awarded in the case of unfair dismissal.<sup>264</sup>

In light of the above, it is submitted that the Supreme Court of Appeal in *Reinecke* strengthened the uncertainty regarding the appropriate remedies available to magistrates when they are subjected to unfair treatment in the execution of their duties. The aggrieved magistrate was uncertain regarding the correct forum to resolve his dispute. If certainty existed regarding the appropriate cause of action for magistrates, *Reinecke* would, in my view, never have sought recourse from the CCMA and later on abandon the proceedings to file a claim in the High Court.<sup>265</sup>

<sup>261</sup> *Idem* para 9; see also Nkosi (2015) *De Jure* 234.

<sup>262</sup> See para 25 of *Reinecke* n 6 above; see also Van Eck & Diedericks (2014) *ILJ* 2708.

<sup>263</sup> S 193 of the LRA provides for re-instatement, re-employment or compensation in the case where an employee has been subjected to unfair dismissal or unfair labour practices; see also n 100 and 192 above.

<sup>264</sup> In terms of s 194 of the LRA an employee is entitled to up to 12 months' remuneration in case of unfair dismissal and an amount of up to 24 months' remuneration where the dismissal was automatically unfair; see n 102 above.

<sup>265</sup> See *Reinecke* n 6 above para 24.

## D. CONCLUSION

In the past the courts expressed diverse views regarding the question whether decisions taken in the context of employment constitute administrative action for purposes of PAJA. The *Chirwa* and *Gcaba* decisions brought finality regarding this issue and found that employment-related decisions do not constitute administrative action.

The *Dunn* and *Wessels* cases were decided prior to *Gcaba*, which was decided by the highest court of South Africa.<sup>266</sup> It is therefore submitted that the earlier cases were overturned by *Gcaba* based on the principle of *stare decisis*. This principle entails that a court is bound by the prior decisions of a higher court and by its own decisions in similar matters.<sup>267</sup> However, *Reinecke* was decided by the Supreme Court of Appeal in 2014 (after *Gcaba*) which means that the Supreme Court of Appeal was bound by the decision of the Constitutional Court in *Gcaba*. By departing from the precedent set by the Constitutional Court, the court flagrantly ignored the *stare decisis* principle. This doctrine is important for the maintenance of legal certainty, equality before the law and the satisfaction of legitimate expectations.<sup>268</sup>

Furthermore, it is disappointing that the court failed to take into account the renowned case of *Murray v Minister of Defence*,<sup>269</sup> which provides authority for the notion that those not covered by the provisions of the LRA may still rely on their constitutional right to fair labour practices.

Throughout this research, reference was made to the important role that magistrates play in the administration of justice. In light of their vital judicial role it is crucial that there should be certainty regarding the appropriate remedies that are applicable to magistrates should their constitutional right to fair labour practices be infringed. Until an opportunity presents itself for the courts to provide certainty to magistrates regarding their appropriate remedies, they will continue to be left out in the cold.

The next chapter contains a discussion of the employment status of judicial officers in England. It draws a conclusion as to whether South Africa could learn any lessons

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<sup>266</sup> S 167(3) (a) of the Constitution provides that the Constitution is the highest court of the Republic.

<sup>267</sup> See n 145 above.

<sup>268</sup> *Gcaba* para 58; see also Ngcukaitobi (2012) *Acta Juridica* 155.

<sup>269</sup> N 16 and 260 above.

from the approach taken in English law with regard to protection of members of the judiciary.

## CHAPTER 6

### THE EMPLOYMENT STATUS OF MEMBERS OF THE JUDICIARY IN ENGLAND

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#### A. INTRODUCTION

The preceding chapters not only illustrated the uncertainty surrounding the employment status of magistrates in South Africa, but also highlighted the significance of holding employment status. It was said that the primary reason for the courts' reluctance to confer employment status on magistrates is the fact that the South African Constitution provides for the independence of the judiciary. However, an analysis of South African labour legislation demonstrated that such rationale is unjustifiable.

This chapter sets out the position regarding the employment status of judicial officers in England and the extent to which they are protected in terms of labour law.<sup>270</sup> The position is illustrated with reference to a case in which the English Supreme Court had to decide whether a part-time judge could be classified as a "worker" and was therefore entitled to pension benefits upon his retirement.<sup>271</sup>

The aim of a discussion of the English position is to illustrate the same issue that arose in South Africa, namely, the co-existence of employment and judicial independence. The discussion intends to demonstrate that South African magistrates could be protected by labour law without the principle of judicial independence being jeopardised.

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<sup>270</sup> The English position is discussed with reference to judicial officers in general. In this regard no distinction is drawn between the different types of judicial officers, for example between judges and magistrates. The South African position deals only with the position of magistrates.

<sup>271</sup> *O'Brien v Ministry of Justice (formerly the Department of Constitutional Affairs)* [2013] UKSC 6.

## B. *O'BRIEN V MINISTRY OF JUSTICE*<sup>272</sup>

### 1. Facts

The appellant, a part-time judge, claimed entitlement to a retirement pension from the then Department of Constitutional Affairs. However, his request was declined on the basis that the Judicial Pensions and Retirement Act of 1993 placed the position held by the appellant outside the scope of judicial officers for whom provision was made for a pension.<sup>273</sup> A further reason advanced by the Department for declining the appellant's claim was that under European Law he was not a worker, but an office-holder and therefore not entitled to a pension.<sup>274</sup>

The aggrieved appellant lodged a discrimination claim in the Employment Tribunal against the Department on the basis that he was discriminated against because he was a part-time worker. The Employment Tribunal ruled in favour of the appellant, but on appeal to the Employment Appeal Tribunal his claim was rejected because of a procedural issue, namely, that he failed to bring the initial claim within the prescribed time limitations. Nevertheless, it was consented that the Court of Appeal would adjudicate the case, on both the procedural and substantive issues, on a test basis.<sup>275</sup>

The Court of Appeal allowed the appellant's appeal regarding the time limitations, but on the issue of substance rejected the Employment Tribunal's finding and in effect the appellant's claim, on the basis that judges are not workers.<sup>276</sup>

### 2. Issues before the Court of Justice of the European Union ("CJEU")

In 2010 the appellant appealed to the Supreme Court, which in turn referred two questions to the CJEU for a preliminary ruling.<sup>277</sup>

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<sup>272</sup> *Idem* (hereafter "*O'Brien*").

<sup>273</sup> S 1 of the Act sets out the categories of persons who qualify for a pension under the Act.

<sup>274</sup> *O'Brien* par 5.

<sup>275</sup> *Idem* para 6.

<sup>276</sup> *Idem* para 7.

<sup>277</sup> *O'Brien v Ministry of Justice* C-393/10. Article 267 of the Treaty for the Functioning of the European Union provides that the CJEU shall have jurisdiction to make preliminary rulings regarding questions on the interpretation of treaties and the validity and interpretation of statutes.

The first issue for consideration by the CJEU was whether national law should determine whether judges are workers as contemplated in clause 2 of the Framework Agreement.<sup>278</sup> In this regard the CJEU ruled that it is for member states to determine whether judges fall within the category of workers.<sup>279</sup> It was noted that an exclusion from the protection provided by the relevant Directives will only be permitted if the relationship between judges and the Ministry of Justice is substantially different from that between employers and employees.<sup>280</sup>

This ruling seems to be consistent with the approach taken by South African courts, namely, that protection in terms of labour law should be determined with reference to an employment relationship as opposed to the existence of a contract of employment.<sup>281</sup> However, as stated in the previous chapters, even though the Supreme Court of Appeal in *Reinecke* accepted that an employment relationship existed between the aggrieved magistrate and the Department of Justice, the court was not prepared to extend protection in terms of labour legislation to the magistrate.<sup>282</sup>

The second question for consideration before the CJEU was that if it is established that judges are indeed workers, whether it is permissible for national law to draw distinctions between the different kinds of judges when it relates to the provision of pension. With regards to this issue it was ruled that national law should not draw a distinction between different types of judges unless objective reasons exist for such distinction.<sup>283</sup>

The discussion below primarily focuses on the issue whether judicial officers are workers and thus entitled to labour law protection (the worker issue).

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<sup>278</sup> This issue is referred to as the “worker” issue. Clause 2.1 of the Framework Agreement under the European Union’s Part-Time Work Directive 97/81/EC of 15 December 1997 provides that the agreement applies to part-time workers engaged in an employment contract or employment relationship.

<sup>279</sup> N 270 above para 32.

<sup>280</sup> *Idem* para 42.

<sup>281</sup> See n 17 and 50 above.

<sup>282</sup> See n 69-70 above.

<sup>283</sup> *O’Brien* para 67.

### 3. Judgment on the worker issue.

The CJEU stated that the decision to determine whether judges are workers is to be made by the Supreme Court.<sup>284</sup> However, the CJEU laid down certain factors and principles as guidelines to be considered by the Supreme Court in order to establish whether the relationship between part-time judges and the Ministry of Justice is substantially different from the relationship between employers and employees.<sup>285</sup> The following factors and criteria were identified:

- (a) the difference between judges and self-employed persons;
- (b) the rules relating to the appointment and removal of judges as well as their working hours; and
- (c) judges' entitlement to sick, maternity and paternity pay as well as other benefits.<sup>286</sup>

The CJEU also confirmed that the fact that judges are judicial office-holders does preclude them from protection afforded by the Framework Agreement.<sup>287</sup> The Supreme Court is obliged to determine the issues before it in accordance with the above guidelines and principles laid down by the CJEU.<sup>288</sup>

In evaluating the relationship between judges and the Ministry of Justice, in accordance with the principles laid down by the CJEU, the Supreme Court concluded that the appellant was engaged in an employment relationship as contemplated in clause 2.1 of the Framework Agreement and accordingly had to be treated as a worker.<sup>289</sup>

It was also held that the work conducted by judges differs from the work done by self-employed persons. Judges are furthermore obliged to work within set times and are entitled to various benefits.<sup>290</sup>

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<sup>284</sup> *Idem* para 43.

<sup>285</sup> *Idem* para 43.

<sup>286</sup> *Idem* paras 44-46

<sup>287</sup> *Idem* para 41; see also *Holland et al* (2016) 30.

<sup>288</sup> S 3 (1) of the European Communities Act, 1972.

<sup>289</sup> *O'Brien* par 42.

<sup>290</sup> *Idem* para 30.

The court adopted the guidance of the CJEU regarding the issue of employment and judicial independence and confirmed that the status of judges as workers would not impede their judicial independence.<sup>291</sup> In this regard the court referred to the view of the CJEU that an entitlement to a pension strengthens the economic independence of judges rather than jeopardising the core of judicial independence.<sup>292</sup> It was accordingly concluded that judicial independence is not an appropriate justification for the exclusion of judicial officers from protection afforded by the Framework Agreement.<sup>293</sup>

In light of the above, the appellant judge's appeal was upheld and his entitlement to pension benefits confirmed. The order of the Court of Appeal was accordingly set aside.<sup>294</sup>

### C. CONCLUSION

The issues that arose regarding the employment status of certain members of the judiciary are similar in South Africa and in England. The South African courts have confirmed that employment and judicial independence cannot co-exist.<sup>295</sup> In this regard the English position differs from that of South Africa in that the *O'Brien* case confirmed that the mere fact that judges are regarded as office-holders and independent does not preclude them from labour law protection.

Should one apply the factors laid down by the CJEU to the position of magistrates in South Africa, one would not be able to come to a conclusion other than that the relationship between magistrates and the Department of Justice are substantially no different from the relationship between an employer and employee. As discussed in chapter two, magistrates are obliged to work within defined periods of time and their work differs from that of self-employed persons.

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<sup>291</sup> *Idem* para 30.

<sup>292</sup> *Idem* para 34.

<sup>293</sup> *Idem* para 34; see also Shetreet & Turenne (2013) 175 where the authors accept the view in *O'Brien* that judicial independence is not a valid justification for excluding members of the judiciary from entitlement to labour law protection.

<sup>294</sup> *O'Brien* para 76.

<sup>295</sup> See n 140 above.

If the trend of a more inclusive labour regime as applied by South African courts is adopted consistently, there would be no need for magistrates to be remediless in terms of labour law. As already stated, judicial independence and employment are not mutually exclusive. On the contrary, employment status could strengthen judicial independence.<sup>296</sup>

In light of the above it is submitted that South Africa can indeed learn lessons from the English position regarding the labour law protection of judicial officers.

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<sup>296</sup> See n 43 above.

## CHAPTER 7

### CONCLUSION AND RECOMMENDATIONS

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The important role that magistrates play in the administration of justice has been emphasised throughout this research. It is therefore of great importance that magistrates be protected against unfair treatment when they perform their duties. In this regard the Constitution affords to everyone the right to fair labour practices.<sup>297</sup> This right has been given effect to by the enactment of the LRA, which affords the right to fair labour practices to the category of “employees” only.<sup>298</sup> Even though magistrates are not specifically excluded from the scope and ambit of the LRA, the court was still not prepared to afford an aggrieved magistrate protection afforded by the LRA in view of the fact that the Constitution requires the judiciary to be independent.<sup>299</sup>

Thus, when it comes to the protection of magistrates in the execution of their duties, the constitutional right to fair labour practices and the constitutional guarantee of an independent judiciary seem to be in conflict with one another. However, this research has shown that these two fundamental principles are not mutually exclusive. Protection in terms of labour law can exist without compromising judicial independence. In fact, labour law protection could advance the independence of magistrates.<sup>300</sup> As explained in chapter 2, magistrates qualify as employees in terms of the traditional tests for employment. It is therefore recommended that magistrates be categorised as such and provided the protection available to other employees. A complete reform of the law is not called for, because tests and legal principles relating to labour law protection have already been established through legislation and case law. What this research recommends is that existing legal principles be applied consistently. Such an approach would ensure that legal certainty is maintained.

The importance of judicial officers remaining free from outside influence in their decision-making is acknowledged. However, the classification of magistrates as employees would not necessarily impede judicial independence. This was acknowledged by

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<sup>297</sup> See n 4 above.

<sup>298</sup> See n 21 above.

<sup>299</sup> See n 8 and 13 above.

<sup>300</sup> See chapter 3 above.

the Supreme Court of Appeal in *Reinecke*, where the court specifically referred to other jurisdictions, such as English law, where labour law protection was granted to members of the judiciary without their independence being jeopardised.<sup>301</sup> Judicial independence is therefore not a valid justification to deviate from the traditional tests to establish labour law protection.

It is furthermore acknowledged that potential issues may arise from the inclusion of magistrates under labour law protection. It may, for example, not be ideal or practical for magistrates to embark on strike action should an issue arise between them and their employer. This would indeed impede the administration of justice. However, a solution to this potential issue is already provided for in existing legislation. Although the Constitution recognises the right to strike, the LRA limits this right if the relevant employee is engaged in an essential service.<sup>302</sup> To prevent the administration of justice from being hampered, it is recommended that magistrates be classified as employees, but included under the definition of essential services in terms of the LRA.

To further protect judicial independence and ensure that it is maintained, it is recommended that regulations in terms of the Magistrates Act be promulgated that would provide guidelines on the extent of the protection magistrates may enjoy in terms of labour law. These regulations could lay down principles specifically regarding the maintenance of judicial independence, should issues arise in the performance of their duties by magistrates. This would ensure that a proper balance is struck between the right to fair labour practices and the constitutional guarantee of an independent judiciary.

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<sup>301</sup> See n 144 above.

<sup>302</sup> S 65(1)(d)(i) of LRA states that no person may partake in a strike if that person is engaged in an essential service.

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