THE APPLICABILITY OF ADMINISTRATIVE LAW PRINCIPLES IN THE PUBLIC SECTOR EMPLOYMENT IN SOUTH AFRICA: A LEGAL COMPARATIVE ANALYSIS

BY

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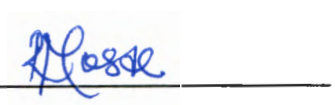
CANDIDATE'S DECLARATION

I DECLARE THAT THIS DISSERTATION FOR THE DEGREE OF MASTER OF LAWS AT NORTH WEST UNIVERSITY HEREBY SUBMITTED, HAS NOT PREVIOUSLY BEEN SUBMITTED BY ME FOR A DEGREE AT THIS OR OTHER UNIVERSITY, THAT IT IS MY OWN WORK IN DESIGN AND EXECUTION AND THAT ALL MATERIAL CONTAINED HEREIN HAS BEEN DULY ACKNOWLEDGED.



MOSAE REITUMETSE NKOTI

STATUTORY DECLARATION

I, Professor Mahao N.L, hereby declare that this dissertation by Reitumetse Nkoti Mosae for the Degree of Master of Laws (LLM) be accepted for examination.

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Professor N.L Mahao

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146	1993	Education Labour Relations Act
104	1994	Public Service Act
66	1995	Labour Relations Act
68	1995	South African Police Services Act
108	1996	Constitution of the Republic of South Africa
76	1998	Employment of Educators Act
3	2000	Promotion of Administrative Justice Act

LESOTHO

24	1992	The Labour Code Order

13	1995	Public Service Act
1	2005	Public Service Act

UNITED KINGDOM

	1978	Employment protection (Consolidation) Act
	1996	Employment Rights Act

GERMANY

	1949	The Constitution of Germany

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CHAPTER 1

GENERAL INTRODUCTION

1.0 BACKGROUND OF THE STUDY

Historically South African labour law has drawn a distinction between the private and public sectors. For many years employees in the public sector were excluded from the ambit of the Labour Relations Act of 1956[1] which was primarily applicable to employers and employees in the private sector only.[2] Section 2(2) specifically excluded from the application of the Act persons employed by the state and persons who taught, educated or trained other persons at any university, technikon, college, school or other educational institution maintained wholly or partly from public funds. This meant that they did not enjoy the benefits that accrued to employees in the private sector, in particular the right to protection against unfair dismissal developed by the Industrial Court as well as access to the statutory bargaining mechanisms.[3]

Employment disputes in the public sector were therefore dealt with by the civil courts according to the principles of the law of contract or administrative law.[4] Thus the supreme court structure offered the only possibility of independent judicial settling of disputes for public servants and the applicable principle was that the rules of natural justice must be adhered to if a decision was taken that adversely affected a public

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[1] Act No. 28 of 1956
[2] Du Plessis J.V et al, A Practical Guide to Labour Law. 5th Ed, Durban: LexisNexis Butterworths. 2001 p383.
[3] Grogan J., Workplace Law, 8th Ed, Durban: Juta & Co. 2005 p10; Cheadle H. et al, Current Labour Law. Durban: LexisNexis Butterworths. 2006 p13
[4] Grogan J, ibid p10

servant in his rights.[5] For instance in decisions such as Administrator, Transvaal And others v Zenzile And others[6], the dismissal of employees who had embarked on strike action was regarded as an exercise of public power which was subject to the principles of natural justice and administrative law.[7] The dismissals were found to be invalid and set aside on the basis that the employees concerned were not given an opportunity to be heard prior to their dismissal.

The right to fair administrative action is now enshrined in section 33 of the Constitution[8] as a fundamental right. It provides that "everyone has the right to administrative action that is lawful, reasonable and procedurally fair". Section 33(2) then provides that national legislation must be introduced to give effect to this right. This legislation was introduced in the form of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

Section 6 of PAJA sets out the grounds on which administrative acts can be reviewed[9]. One of the prerequisites for the application of section 6 is that the conduct or omission that the applicant seeks to review must fall within the definition of "administrative action" as defined in section 1(i) of PAJA.

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[5] Olivier, M. "Labour Relations Legislation for the Public Service: An International & Comparative Perspective," (1993) 14 ILJ 1371 at 1372.

[6] 1991 (1) SA 21 (A). Other cases which were decided in a similar fashion include Administrator, Natal & Another v Sibiya 1992 (4) SA 532 (A) and Minister of Water Affairs v Mangena (1993) 14 ILJ 1205 (A).

[7] At Para 34 B-D.

[8] The Constitution of the Republic of South Africa No.108 of 1996.

[9] It should be noted in this regard that the Constitutional Court has held in Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others 2004 (4) SA 490 (CC) at Para 22 that section 6 codifies these grounds and that administrative acts can only be reviewed and set aside on the basis of one of these grounds and not in terms of common law principles as in the past. See also Minister of Health v New Clicks SA (Pty) Ltd [2006] 1 BLLR 1 (CC) at Para 431 as well as Zondi v MEC for Traditional and Local Government Affairs 2005 (3) SA 589 (CC) at Para 99 to 101.

1.1 STATEMENT OF THE RESEARCH PROBLEM

The exclusion of public sector employees from the ambit of the Labour Relations Act of 1956 resulted in the enactment of the Public Service Labour Relations Act (PSLRA)[10] and the Education Labour Relations Act (ELRA)[11] in order to accord public sector employees rights similar and equal to the rights previously enjoyed by employees in the private sector only.[12] These Acts extended basic labour rights to public servants and teachers respectively and for the first time in the history of South Africa made provision for the comprehensive regulation of the public employment relationship.

However the enactment of the various labour relations Acts caused a proliferation of laws on the statute book which necessitated an overhaul of the then existing laws.[13] The result was the passing of the Labour Relations Act 1995 (LRA)[14] which includes all categories of employees previously excluded or catered for in terms of other legislation.[15] Hence public sector employees now enjoy collective bargaining rights, the right not to be unfairly dismissed, protection against unfair labour practices and the usage of tailor made dispute resolution procedures as private sector employees.[16]

However despite their inclusion in the LRA, judicial review has proved to be a popular route for public sector employees who are aggrieved by the actions of the state in its

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[10] Act no. 102 of 1993
[11] Act no. 146 of 1993
[12] Du Plessis J.V, op cit p383
[13] Du Plessis J.V, op cit p384
[14] Act no. 66 of 1995
[15] Du Plessis J.V, op cit p384. Section 2 thereof states that the Act is applicable to every employer and every employee in every undertaking, industry, trade or occupation in South Africa with the only exceptions being members of the National Defence Force, National Intelligence Agency and the Secret Service.
[16] Cheadle H, op cit p14; Van Jaarsveld F. & Van Eck S, Principles of Labour Law, 2nd Ed, Durban: LexisNexis Butterworths. 2002 p167

role as employer.[17] Hence the problem as of now is that there is uncertainty in the law as to whether public sector employees should be allowed to have administrative law safeguards and remedies at their disposal. This problem manifests itself in the different view points expressed by various writers as well as the conflicting jurisprudence of the courts of law.

Other legal challenges that could arise as a direct consequence of this situation are forum shopping as well as jurisdictional confusion between the Labour Court and the High Court. This is precisely because if administrative law principles were to apply to labour matters in the public sector, the effect would be that every dispute arising between the employee and the state in its capacity as employer would, at the option of the employee be litigated in either the High Court or the Labour Court. Since these courts are of equal status[18], there is an inherent risk that the two courts may give conflicting judgments thus creating an intolerable situation. This would defeat the very purpose of the LRA which is to address the fact that the overlapping and competing jurisdictions and the use of different courts prevent the development of a coherent and developing jurisprudence on labour relations.[19]

[17] For example in decisions such as Nel v. Minister of Justice And Constitutional Development And Another [2006] 7 BLLR 716 (T), POPCRU v. Minister of Correctional Services [2006] 4 BLLR 385 (E) and Hlope And Others v. Minister of Safety And Security And Others [2006] 3 BLLR 297 (LC), employees concerned sought to review the decisions taken against them by their employers in terms of PAJA on the basis that such actions infringed their right to fair administrative action.

[18] According to section 151 of the LRA, the Labour Court has the same authority, inherent powers and standing in relation to matters under its jurisdiction as that which a provincial division of the High Court has in relation to matters under its jurisdiction.

[19] Van Jaarsveld S.R et al, Principles and Practice of Labour Law, Durban: LexisNexis Butterworths, 2003 p19

Furthermore this would also provide a fertile ground for the unacceptable practice of forum shopping in that it would make it possible for a party to bring proceedings in either the High Court or the Labour Court depending on the grounds on which he bases his cause of action. For example, in the case of Transnet Ltd V Petronella Chirwa[20], the respondent had first tried the labour dispute resolution route prescribed by the LRA. The compulsory conciliation process of the Commission for Conciliation, Mediation and Arbitration (CCMA) came to naught. Respondent then shopped for another forum, the High Court and changed her cause of action from unfair dismissal under the LRA to a claim of unfair administrative action under PAJA. This dissertation is therefore concerned with the question whether public sector employees are entitled to resort to judicial review to challenge employment decisions taken against them by their employer and whether that type of action constitutes administrative action subject to review in terms of PAJA.

1.2 OBJECTIVES OF THE STUDY

The objective of this study is to seek to find answers to the following questions:

(a) Whether public sector employees should have administrative law safeguards and remedies at their disposal. This leads us to a further question as to whether;

(b) The state as employer exercises private rights vis-à-vis its employees or whether the state is subject to public duties. In other words; is it possible that a clearly public authority has a purely private employment relationship with an employee?

[20] [2007] 1 BLLR 10

(c) Furthermore, is there any reason for the continued application of administrative law controls to the public sector employment relationship now that the said employees have been included within the purview of the Labour Relations Act?

These questions will help us to understand the nature of the problem better so that meaningful solutions can be proposed.

1.3 PURPOSE OF THE STUDY

In recent years the application for judicial review has become a popular avenue of redress for employees in the public sector who wish to challenge the decisions made against them by their employer. However there is considerable doubt about the applicability of administrative law principles in such circumstances. To that end various writers as well as courts of law have expressed conflicting opinions on the subject. This prevents the development of a coherent jurisprudence on labour relations. The purpose of this study is therefore to look into the position of public sector employees in other jurisdictions, in particular the United Kingdom, Germany and Lesotho in order to enable South Africa to determine how it can benefit from improvements, if any, that have already been undertaken there. An attempt will therefore be made to postulate possibilities of legislative intervention with the hope of bringing to an end this uncertainty that clouds labour relations in the public sector employment.

1.4 SIGNIFICANCE OF THE STUDY

As mentioned above, the aim of this research is to undertake a comparative study with other jurisdictions. This will help to understand our own system better and enlighten South Africa on what can be done to improve the current situation in the public sector. This study will therefore not only contribute to the on-going academic discourse on the subject but will also make an effort to come up with meaningful recommendations for legislative reform in order to end this confusion that clouds labour relations.

1.5 HYPOTHESIS

A distinctive feature of public sector employment relationship is the fact that the employer and the state are the same. This is why there is confusion as to whether the employment relationship in the public sector should be characterized as public or private. However, it is submitted *ex hypothesi* that research will show that the legal relationship between the state as employer and its employees is one between an employer and employee such that recourse would lie within the mechanisms provided for by the LRA and not within the provisions of PAJA where a state employee is aggrieved by the decision of the employer.

1.6 RESEARCH METHODOLOGY

This research will be confined to the qualitative method. In this endeavour published sources such as decisions of the various courts of law, legislation, textbooks as well as journals dealing with the subject will be analysed and interpreted to determine whether

they shed some light on the problem at hand. Reliance will also be placed on material accessed from the internet.

1.7 LITERATURE REVIEW

As it was mentioned earlier, judicial review has proved to be a popular route for public employees who are aggrieved by the actions of their employers. However, the availability of judicial review in such circumstances remains unpredictable and controversial. On one view any type of employment (including public sector employment) is a relationship that should properly be governed by labour law to the exclusion of administrative law.[21] On another view the exercise of public powers inevitably attracts administrative law. Writers such as Stewart have taken the view that there are particular considerations concerning the state which make administrative law controls and remedies particularly appropriate in the public employment context.[22]

Stewart argues that there are certain distinguishing features of the state as employer which relate to the rationale behind decision making as well as the source of power or authority. He explains this by stating that in the public employment relationship, the rationale for decision making is political rather than economic or profit induced as in the private sector. Furthermore, the source of power for the decisions in each sector is different in the sense that in the public sector, decisions are an expression of public power and carry the force of law. On the other hand employment decisions in the private sector are based on contractual power and have ownership of capital as their

[21] Hoexter C, Administrative Law in South Africa, Cape Town: Juta & Co, 2007 p194
[22] Stewart A. "The Characteristics of the State as Employer: Implications for Labour Law" (1995) 16 ILJ 15.

authority.[23] For the purposes of this argument, it makes little difference whether that public power has its origins in statute or whether it is exercised through contract.[24] Another distinguishing feature of the state as employer is that the employer and the state are one and the same and this means that a challenge to an employment decision has political ramifications because a challenge to the employer is a challenge to the state. He therefore argues on that basis that administrative law principles in the public service should be retained.

Others, like Fredman, concede that there are several aspects of the public employment relationship which are indeed private. She argues, however, that the nature of the state makes it inevitable that the exercise of its powers within the employment context also has a public law dimension.[25] She also bases her argument on certain characteristics unique to the state which she says highlight this point. Firstly, in the public sector the source of the power to employ is founded in statute and this makes it all the more necessary for the courts to exercise their supervisory powers over public authorities. Secondly, she argues that the government derives its revenue to pay employees primarily from taxation rather than profits. Apart from the fact that this changes the nature of power relations within employment, it is arguable that because the exercise of the power to contract involves the use of public money, there is a role for judicial review to ensure adherence to public law standards.[26]

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[23] Stewart A, ibid p17
[24] Stewart A, ibid p21
[25] Fredman S. "Public or Private? State Employees and Judicial Review" (1991) 107 L.Q.R 298 at 309
[26] Fredman S. Ibid 310; Fredman S. & Morris G, "The State as Employer: Is it Unique?" (1990) ILJ 142 at 143

Hersch also shares these sentiments and believes that the valid exercise of a state's power is delimited by the principles of natural justice. She states that the state is required to hear an individual before it takes a decision involving consequences detrimental to the individual. She argues that the obligation to hear the employee arises from the asymmetrical power relationship between the state and the individual. The fact that a contractual nexus exists between the two parties negates neither the inequality of the relationship nor the obligation to hear. In fact, the procedural constraints on public decision-making are imported into the contract of employment itself.[27] This is simply because the employer and the decision maker is a public authority whose decision involves the exercise of a public power.[28]

It is therefore obvious from the arguments advanced by the writers above that they believe that the exercise of employment functions in the public sector inevitably involves the use of public powers and should be subject to administrative law standards of legality, rationality and procedural fairness. However, there are those who believe that the state in its role as employer is no different from private employers and that the public employment relationship should therefore be wholly governed by the same rules that govern private sector employment relationship. The proponents of this school of thought agree that the political dimension of the state as employer, more particularly the fact that its revenue is sourced from taxation gives rise to the unique and distinctive characteristics of public sector employment. However they argue that this uniqueness does not justify importing administrative law principles into the relationship of the state

[27] Hersch J, "Fair Play at Work-The Common Law Right of Public Employees to a Hearing prior to Retrenchment", (1993) 14 ILJ 1131 at 1134.
[28] Hersch J, ibid 113; Blair L, "The Civil Servant-A Status Relationship?" (1958) 21 M.L.R 265 at 266.

and its employees. Hence the starting point for them is that all employees should be treated equally and that any deviation from this principle should be justified.[29] The mere fact that employees are state employees is not sufficient justification for differential treatment.

For example, Van Jaarsveld and Van Eck acknowledge the fact that public sector employment relationship places a special responsibility on the state as employer. However they argue that although the relationship between the state as employer and a public servant is special in nature and should be differentiated from the ordinary common law service relationship, it remains a relationship between an employer and employee.[30] They argue further that the scope of labour law would incorrectly be reduced if this relationship would be ousted from the arena of labour law.

Wade is also of the view that the state, in its role as employer, is no different from private employers and that the mere fact that the employer is a public authority does not *per se* inject the necessary public law element into the employment relationship. He therefore concludes that the public employment relationship should be wholly governed by private law.[31] Richardson also argues that it can hardly be doubted that the relationship between civil servants and the government is one of contract.[32] He therefore argues that the nature of the power exercised by the state as employer is derived from employment law and is not related to the government's conduct in relation

[29] See the Explanatory Memorandum to the Draft Labour Relations Bill, 1995. (1995) 16 ILJ 278 at 288.
[30] Van Jaarsveld F. op cit (Fn 16) p167
[31] Wade S, "Procedure and Prerogative in Public Law" (1985) L.Q.R 180 at 195-6.
[32] Richardson "Incidents of the Crown-Servant Relationship" (1955) 33 Can.B.R 427

to its citizenry to which it is accountable in accordance with the principles of administrative law. Logan also shares the same sentiments and he argues that a civil servant's obligations towards the state do not differ materially from those of an ordinary employee towards his employer.[33] Thus he does not see any reason why administrative law principles should be imported into the public sector employment relationship while these do not apply in the private sector.

Van Rensburg adopts a slightly different approach and argues that administrative action is a decision taken or a failure to take a decision by an organ of state when exercising a public power or performing a public function that harms the rights of any person and has a direct legal effect.[34] On that basis, he concludes that conduct of the state such as the dismissal, promotion and change in working conditions of public servants is administrative action subject to review for the purposes of PAJA. According to him, this means that both labour law and PAJA apply in public sector employment. Similarly, disputes concerning the registration of trade unions and employers' organizations by the Registrar of Labour Relations of the Department of Labour will be subject to scrutiny under both the LRA and PAJA.[35] It is submitted that this view is unrealistic and does not take adequate consideration of the fact that the legislature has set its face against matters governed by the LRA being litigated in another court regardless of whether the employee is employed in the private or public sector. Further, this will also cause parallel streams of jurisprudence to develop. One for High Court decisions, another for

[33] Logan A, "A Civil Servant and His Pay" (1945) 61 LQR 242.
[34] See section 1 of PAJA
[35] Van Rensburg J. "Don't Belabour the new administrative justice legislation: The application of PAJA to labour matters", (2001) 9(2) JBL 63

Labour Court decisions; one for administrative law decisions and another for labour law decisions; one for private employees and another for public employees.[36]

One is also inclined to disagree with the view that the relationship between the state and its employees should be governed by administrative law. This is because it loses sight of the fact that historically recourse was had to administrative law remedies in the public sector for the simple reason that these employees were excluded from the application of the relevant labour laws. It is submitted that the categorizing of employer conduct as administrative action has lost its force following the extension of full labour rights to public sector employees by the new LRA.

It is submitted that even though the state as employer is different from private sector employers, disputes in the public sector should be regulated by identical mechanisms as in the private sector: that is, through collective bargaining and the adjudication of unfair dismissals and unfair labour practices as opposed to judicial review of administrative action. Hence those matters that are purely labour law (such as dismissals) and which are encompassed in the LRA should be dealt with in terms of the LRA mechanisms and should not be subjected to judicial review under PAJA. This is simply because in those cases the state does not act as a public authority but acts in its capacity as employer.

It is submitted, on the basis of these conflicting view-points that troublesome questions about the applicability of administrative law principles to labour matters in the public

[36] Pillay D, "PAJA v Labour Law", (2005) 20 S.A Public Law 413

sector will always arise unless provision is made for meaningful solutions to this problem.

1.8 SCOPE OF THE STUDY

This study will be divided into five chapters which will be tackled in the following manner:

Chapter one is the General Introduction. This chapter outlines the background of the study as well as the problem statement and aims of the study. Chapter two is titled "The Impact of the Constitution on Labour Relations". The demise of apartheid and the introduction of a supreme constitution in South Africa can justifiably be described as revolutionary. For the first time in the history of South Africa fundamental rights were accorded to all citizens without any distinction. The importance of the Constitution can therefore not be overstated. This chapter will provide a brief historical background to the Constitution and ultimately measure the impact which it has had within the South African labour relations sphere, and in particular in the public sector employment.

Chapter three is entitled "Historical Perspectives on South African Labour Relations in the Public Sector". This chapter deals with the historical background of dispute resolution in the public service, with the aim of ascertaining the rationale behind the previous exclusion of these employees from the ambit of the 1956 LRA as well as how the law sought to protect them from any unfair conduct performed by the state as employer. This will also help us to find out why public sector employees were ultimately included within the purview of the new LRA. On that basis, this chapter will then

examine the impact of such inclusion on the relationship between the state as employer and the employee. It will conclude by interrogating the question whether there is any reason for the continued reliance on judicial review now that the LRA grants public sector employees full labour rights.

Chapter four is titled "The Applicability of Administrative Law Principles in the Public Sector Employment in South Africa". This chapter deals with administrative law principles and what they entail as well as how they applied under common law. It further discusses how these principles now apply with the advent of the Constitution and PAJA. The chapter also discusses the impact of PAJA on the relationship between the state as employer and the employee as well as the question whether a dismissal or any other action taken against the employees by the state should be characterized as administrative action subject to judicial review under administrative law. The chapter will also deal with the relationship between LRA and PAJA and will interrogate the question whether PAJA has effectively repealed the exclusive jurisdiction provisions of the LRA in respect of public sector employees and thus subjected every conduct of employer to administrative law as opposed to labour law.

Chapter five provides a comparative perspective. This chapter looks into the position of public sector employees in other jurisdictions. In particular it will focus on the treatment of public sector employees in the United Kingdom, Germany and Lesotho.

Chapter six, which is the final, will carry on Conclusions and Recommendations for reform.

CHAPTER 2

THE IMPACT OF THE CONSTITUTION ON LABOUR RELATIONS

2.0 INTRODUCTION

In order to understand labour law in South Africa today it is necessary to look at the historical as well as the socio-political and economic context against which it developed. This is necessary for us to identify the significant factors which have shaped the nature of our labour law. In this chapter we will provide a brief historical background leading to the adoption of the Constitution in 1996 and a sketch of some of its most important features. This will be done with the aim of establishing the impact that the Constitution has had in labour relations in general and in the public sector in particular.

2.1 HISTORICAL BACKGROUND

The discovery of diamonds in 1867 in the interior of South Africa was accompanied by rapid industrialisation.[37] Many employers turned to Europe and Australia and offered high wages in order to recruit skilled labour.[38] Unskilled labour on the other hand was obtained from black agricultural communities. Since they were entirely illiterate and were accustomed to a relatively low standard of living, they were paid minimal wages.[39] With the proclamation of the goldfields in 1886, shortages of cheap black labour

[37] Finnemore M. & Van Rensburg R., Contemporary Labour Relations, 1st Ed, Durban: Butterworths, 2000 p26; Basson A.et al, Essential Labour Law, 2nd Ed, vol 2. Groenkloof: Labour Law Publications, 2000 p8

[38] Ringrose H.G, The Law and Practice of Employment, 2nd Ed. Cape Town: Juta & Co, 1983 p9

[39] ibid

increased and as such the wages of black workers began to rise.[40] This created conflicts between workers largely triggered by the fact that white workers felt threatened by black workers.[41]

After World War I employers sought to force workers' wages down in view of the higher costs of production.[42] In January 1922 this led to the most serious and bloodiest strike that the country had ever seen. It is said that in the ensuing violence, no less than 247 people died, 591 were seriously injured, 46 were tried and convicted of murder and four trade unionists were hanged.[43] The government's response was the introduction of South Africa's first comprehensive piece of labour legislation, the Industrial Conciliation Act No. 11 of 1924.

2.1.1 Industrial Conciliation Act

Section 2 of the Act provided for the registration of employers' organisations and trade unions. Voluntary collective bargaining was promoted by provision for the establishment of industrial councils by agreement between the parties. According to section 2(3) such councils could be registered if the Minister of Labour considered the parties sufficiently representative of the employers and employees within the relevant area and industry.

The most important feature of the Act was that it was based on racial categorisation and discrimination. This was primarily brought about by the exclusion of black workers form

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[40] Finnemore M. op cit p26
[41] Basson A. op cit p9
[42] The Wiehann Report, Johannesburg: Lex Patria Publishers. 1982 pxx
[43] Finnemore M. op cit p29

the definition of employee. Section 24 excluded from the ambit of the Act any person "whose contract of service or labour is regulated by any native pass laws and regulations, or by Act No. 15 of 1911 or any amendment thereof or any regulations made there under, or by Act No.25 of 1891 of Natal or any amendment thereof, or any regulations made there under..." This definition effectively excluded black employees from membership of registered trade unions and from direct representation on industrial councils.[44]

The Industrial Conciliation Act was amended in 1956 with the aim of revising labour legislation in order to bring it in line with the policy of apartheid which was aimed at protecting white workers.[45] To that end section 77 introduced 'job reservation' whereby certain jobs could be reserved for 'persons of a specified race'. White workers were clearly the intended beneficiaries of this protection. According to section 18 black workers could still not form or join registered trade unions and were prohibited from striking.

During the late 1970's wide spread strikes by black workers practically rendered the whole labour relations system unworkable and it became obvious that a dangerous vacuum existed because of a lack of formal and acceptable negotiating structures and procedures for black workers.[46] Furthermore serious pressure was mounting from the international community and in particular the international Labour Organization (ILO) for

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[44] Du toit D. et al, Labour Relations Law: A Comprehensive Guide. 5th Ed. Durban: LexisNexis Butterworths, 2006 p7
[45] Du toit D. ibid p8
[46] Finnemore M. op cit p35

South Africa to abandon its apartheid policies. For example in June 1964 the ILO Conference adopted constitutional amendments to expel members guilty of race discrimination, as well as a Programme for the Elimination of Apartheid in Labour Matters and a Declaration on Apartheid which called on South Africa to renounce forthwith its policy of apartheid.[47] The programme of the ILO required South Africa to do the following:[48]

(a) To promote equality of opportunity and treatment in employment and occupation;

(b) To repeal the statutory provisions which provided for compulsory job reservation or instituted discrimination on the basis of race as regards access to vocational training and employment;

(c) To repeal all legislation which provided penal sanctions for contracts of employment, for hiring prison labour for work in agriculture and industry, and for other forms of direct compulsion to labour, including discrimination on grounds of race in respect of travel and residence, which involved racial discrimination or operated in practice as the basis for such discrimination;

(d) To repeal the statutory discrimination on grounds of race in respect of the right to organise and to bargain collectively, and the statutory prohibition and restriction upon mixed trade unions including persons of more than one race and so to amend the Industrial Conciliation Act that all workers, without discrimination of race, enjoy the right to organise and may participate in collective bargaining.

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[47] Kachelhoffer G.C. et al, Labour Law. Pretoria: University of South Africa, 1988 p370
[48] ibid

Furthermore, in 1971 the conference passed a resolution which called upon the member states to intensify their efforts to secure the elimination of apartheid. The General Assembly of the United Nations also passed a number of resolutions concerning apartheid and racial discrimination. In particular we can refer to Resolution 3068 (XXVIII) on 3rd November 1973 which led to the adoption of the Convention on the Suppression and Punishment of the Crime of Apartheid in 1976.[49]

It is against this background that the government established the Wiehahn Commission[50] in 1977 which recommended a number of reforms that represented a new deal for black workers. One of the most important recommendations was the provision of full labour rights especially those pertaining to freedom of association, to all workers irrespective of race and status. However, there were still no legal provisions governing strikes in the public service. To make matters worse the said employees were specifically excluded from the definition of employee in section 2.[51]

After the recommendations made by the Wiehahn Commission, it was argued that employees now had labour freedom and no political rights. Hence in the 1980s political repression heightened as various strategies were used by the labour movement to fight the apartheid government.[52] Faced with increasingly ungovernable country, pressure from the international community and a growing economic crisis, the government was

[49] Kachelhoffer G.C, op cit p371
[50] Finnemore M, op cit p29
[51] Labour Relations Act 28 of 1956
[52] Du toit D. op cit p13

compelled to let go of its apartheid policies.[53] This resulted in the introduction of a new political dispensation based on democracy as well as the adoption of the Constitution.

2.2 THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

In 1994 the Interim Constitution[54] came into force and was later replaced by the final constitution in 1996[55] bringing to a close a long and bitter struggle for constitutional democracy in South Africa.[56] The human rights abuses characteristic of the apartheid government in South Africa led to the adoption of the concept of constitutionalism and the entrenchment of fundamental rights when the Constitution finally came into force on 4th February 1997.[57] Parliamentary sovereignty was thereby replaced by the principle of Constitutional supremacy. According to the principle of parliamentary supremacy, parliament could make any law it wished and no institution, including the courts, could challenge the validity of the laws of parliament whether they found these laws agreeable or not.[58] According to the case of Harris v Minister of Interior,[59] a court could only declare an Act invalid if it had not been passed in accordance with the procedures for passing legislation that had been laid down in the Constitution.

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[53] Du toit D. op cit p16
[54] The Constitution of the Republic of South Africa No. 200 of 1993.
[55] The Constitution of the Republic of South Africa No. 108 of 1996.
[56] Currie I & De Waal J, The Bill of Rights Handbook, 5th Ed, Cape Town: Juta & Co, 2005 p1
[57] Olivier M.P, "Constitutional perspectives on the enforcement of socio-economic rights: recent South African experiences." 2002, Paper presented to the New Zealand Association for Comparative Law in Wellington on the 7th February 2002 P1
[58] Baxter L, Administrative Law. Cape Town: Juta & Co,1984 p30
[59] 1952 (2) SA 428 (A).

In S v Thuandeleni,[60] the court had the following to say: "The courts are obliged to observe and enforce the will of parliament. In theory, the courts cannot impose their own standards upon the administrative process, whereas parliament can authorise any act it wishes." In R v Jordan,[61] J, who had been sentenced to imprisonment for offences under the Race Relations Act applied for legal aid in order to enable him to apply for habeas corpus on the ground that the Act was invalid as being in curtailment of freedom of speech. In dismissing the application, the court held that parliament was supreme and that there was no power in the courts to question the validity of an Act of parliament. It is obvious therefore that the effective protection of human rights by the courts was virtually impossible in as much as the courts did not have the power to declare invalid any law or conduct that infringed on people's rights.[62]

Constitutional supremacy on the other hand is a principle of constitutional law that dictates that the rules and principles of the constitution are binding on all branches of the state and take precedence over any rules made by the government and/or the legislature.[63] Section 2 of the Constitution gives expression to this principle and provides that "the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled." Of relevance is also section 237 which is to the effect that all constitutional obligations must be performed diligently and without delay. It has been argued that the supremacy of the Constitution would mean very little if the provisions of the Constitution were not

[60] 1969 (1) SA 153 (A) at 172D-173F.
[61] [1965] Crim.L.R 483
[62] Currie I & De Waal J. op cit p2
[63] Currie I & De Waal J. op cit p8

justiciable.[64] Thus for a supreme constitution to be effective, the judiciary must have the power to enforce it. It is therefore submitted that the courts, in particular the Constitutional Court, constitute the most important enforcement mechanism.

According to section 172 of the Constitution, when deciding a constitutional matter within its powers, a court must declare any law or conduct which is inconsistent with the Constitution as invalid to the extent of the inconsistency and may make any order that is just and equitable. The application of this principle was illustrated in the case of SA National Defence Union v Minister of Defence[65] wherein the Constitutional Court found that the provisions of the Defence Force Act[66] to the effect that members of the National Defence Force may not be members of trade unions constituted an unjustifiable limitation on their right to freedom of association. The Act was thus declared unconstitutional and invalid to the extent of the said inconsistency. It was also indicated in the case of The Executive Council of the Western Cape Legislature v The President of the Republic of South Africa[67] that any law or conduct that is not in accordance with the Constitution either for procedural or substantive reasons, will not have the force of law.

Court orders must be obeyed by each individual affected by them including the state and all its branches. In terms of section 165 (5) "an order or decision issued by a court binds all persons to whom and organs of state to which it applies." All these provisions

[64] Currie I and De Waal J. op cit p9
[65] [1999]6 BCLR 615 (CC).
[66] Act 44 of 1957
[67] 1995 (4) SA 877 (CC) at Para 62.

help to ensure that the protection and enjoyment of the rights enshrined in the Constitution remain real and not merely an ideal. Constitutional supremacy has therefore effectively replaced the notion of parliamentary sovereignty in terms of which parliament could enact laws which discriminated against people and allowed for serious human rights abuses.[68]

Alongside this principle, a Bill of Rights has been enacted as part of the Constitution and specially entrenched. Section 74(2) requires the amendment of the Bill to be effected by the National Assembly, with a supporting vote of at least two thirds of its members, while at least six provinces in the National Council of Provinces must cast a supporting vote.[69] The Bill of Rights is applicable to all law, and binds the legislature, the executive, the judiciary and all organs of the state[70], as well as natural or juristic persons.[71] In terms of section 7 (2), the state has a constitutionally entrenched duty to respect, protect, promote and fulfil the rights in the Bill of Rights. Furthermore, an obligation has been placed upon the courts to promote the spirit, purport and objects of the Bill of Rights when interpreting any law.[72]

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[68] Olivier M.P,"Constitutional perspectives on the enforcement of socio-economic rights: recent South African experiences." Paper presented to the New Zealand Association for Comparative Law in Wellington on the 7th February 2002, P1; Prinsloo v Van der linde & another 1997 (3) SA 1012 (CC) at para 25 where the court had the following to say: "we have moved from a past characterized by much which was arbitrary and unequal in the operation of law to a present and a future in a constitutional state where state action must be such that it is capable of being analysed and justified rationally in terms of the law."

[69] Essentially most of the provisions may be amended by a simple (two thirds) majority of the members of the National Assembly only.

[70] Section 8(1)

[71] Section 8(2) provides that a "provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."

[72] Section 39(2)

The idea of constitutionalism is also bolstered by the specific entrenchment of the rule of law in section 1 of the Constitution. This principle requires that state institutions should act in accordance with the law and that the state cannot exercise power over any individual unless the law so permits it to do so.[73] The principle of the rule of law was enunciated in the case of Pharmaceutical Manufacturers Association of South Africa: In Re Ex Parte President of the Republic of South Africa[74]wherein the Constitutional Court had to consider the basis on which the exercise by the president of a power granted by an Act of parliament to bring the Act into operation was constitutionally reviewable. The court held that it is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. The court said that decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary. It was therefore held that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must comply with this requirement.[75]

2.2.1 Fundamental labour rights in the constitution

One of the major characteristics of the 1996 Constitution is the particular importance it attaches to fundamental rights involving labour relations. Section 23 of the Constitution contains a range of collective and individual fundamental labour rights. These are:

(a) The right of every employer and employee to fair labour practices[76]

[73] Currie I & De Waal J. Op cit p11
[74] 2000 (2) SA 674 (CC)
[75] At para 85
[76] Section 23 (1)

(b) The right of every employee to form and join a trade union and to participate in the activities and programmes of a trade union; as well as the right of every employer to form and join an employers' organisation and to participate in the activities of that organisation.[77]

(c) The right to organise and to engage in collective bargaining.[78]

(d) The right to strike.[79]

Other fundamental rights that have a bearing on labour relations include the right of all persons to freedom of association[80], the right to equality before the law[81], the right to freely choose a trade, occupation and profession,[82]the right to assemble, demonstrate, and picket and to present petitions[83] as well as the right to social security and social assistance.[84] The most important feature about the protection of these rights in the Constitution is the fact that they have been accorded to every employer and employee in South Africa without any distinction as to race, colour or the status of the employer. Section 36(1) of the Constitution envisages the limitation of these rights. It provides that "the rights in the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society bases on human dignity, equality and freedom." In S v Zuma[85] the

[77] 23 (2) read with 23 (3)
[78] 23 (4) read with 23 (5)
[79] 23 (1)(c)
[80] Section 18
[81] Section 9
[82] Section 22
[83] Section 17
[84] Section 27
[85] 1995 (4) BCLR 401 (CC) at 414.

court stated that the relevant factors to be considered include the question whether the limitation serves a legitimate purpose; whether there is a sufficient relationship between the limitation and the purpose and also whether there are no other reasonable alternative means through which the objective can be attained.

2.2.2 The impact of the constitution on public sector employment

Public employment enjoys considerable coverage in the Constitution. This coverage relates to a range of democratic values and principles applicable to the public sector as well as specific employer and employee rights.

2.2.3 Constitutional values and principles

Public administration is governed by the democratic values and principles as outlined in the constitution. The democratic values and principles include the following principles:[86]

(a) A high standard of professional ethics must be promoted and maintained.

(b) Efficient, economic and effective use of resources must be promoted.

(c) Public administration must be development- oriented.

(d) Services must be provided impartially, fairly, equitably and without bias.

(e) People's needs must be responded to, and the public must be encouraged to participate in policy- making.

(f) Public administration must be accountable.

[86] Section 195 of the Constitution

(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

(h) Good human-resource management and career development practices must be cultivated to maximise human potential

(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

2.2.4 Constitutional duties

The following duties apply to employers and employees in the public service:[87]

(a) The public service must function in terms of national legislation and must loyally execute the lawful policies of the government of the day.

(b) The terms and conditions of employment in the public service must be regulated by national legislation. Employees are entitled to a fair pension as regulated by national legislation.

(c) No employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause.

(d) Provincial governments are responsible for the recruitment, appointment, promotion, transfer and dismissal of members of the public service in their

[87] Section 197 of the Constitution

administrations within a framework of uniform norms and standards applying to the public service.

These constitutional values and duties have been incorporated in the Code of Good Conduct for the Public Service. The code is applicable in the relationship between the public servant and other branches of the government, relationship with the public, and relationship with fellow employees, performance of duties and personal conduct and private interests.[88] Other relevant constitutional principles that bind the public sector are those contained in the Bill of Rights which contains a comprehensive set of fundamental rights relating to equality,[89] freedom of expression,[90] access to information held by the state,[91] just administrative action,[92] and certain labour rights as outlined above.[93] These constitute important constitutional principles and are as such directly applicable to the public employment relationship.[94]

3. CONCLUSION

The enactment of the Constitution has signalled a dramatic change in the system of governance from one based on the rule by parliament to a constitutional state. The doctrine of parliamentary supremacy was replaced by the doctrine of constitutional supremacy and a Bill of Rights was put in place to protect human rights. Under the new Constitution, parliament remains the most important law making body; however its

[88] Chapter 2 of the Public Service Regulations, 2001.
[89] Section 9
[90] Section 16
[91] Section 32 (1)(a)
[92] Section 33
[93] Section 23
[94] Van Jaarsveld S.R, op cit, (fn19) para1082

powers are no longer unfettered.[95] This means that when making laws, it must respect the fundamental human rights guaranteed in the Constitution. It is obvious therefore that the advent of the Constitution has had a profound effect on labour relations in general and specifically in the public sector in as much as in its relationship with its employees, the state is directly bound by the provisions of the Bill of Rights since it applies to all law and binds all the organs of the state.

[95] Basson A. op cit (fn 37) p5

CHAPTER 3

SOUTH AFRICAN LABOUR RELATIONS IN THE PUBLIC SECTOR: A HISTORICAL PERSPECTIVE

3.0 INTRODUCTION

The new Labour Relations Act (LRA)[96] came into force on the 11th November 1996. The LRA covered all employees with the exception of certain categories and for the first time public servants were included within the ambit of a single LRA.[97] This meant that terms and conditions of employment within the public sector and disputes arising pursuant thereto were included within the purview of the LRA. However, in order to appreciate the impact of the LRA in the public sector we need to consider the conditions that prevailed in the public sector prior to the enactment of the Constitution and subsequently the LRA itself.

3.1 THE PUBLIC SERVICE

The Constitution[98] stipulates that within the public administration "there is a public service for the Republic, which must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day."[99] Most employees in the public sector are employed in terms the Public Service

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[96] Act 66 of 1995.
[97] Albertyn S. & Adair B, "Dispute Resolution and the Public Service", 1999 ILJ 1430
[98] The Constitution of the RSA 108 of 1996
[99] Section 197 (1)

Act, 1994[100] which covers those employees employed in the traditional public service and consists of the national departments and the provincial administration.[101] This Act determines the structure and organization[102] as well as the composition[103] of the public service. It also regulates appointments and the filling of posts[104] within the public service, probationary periods and conditions, transfers within the public service[105] and secondment[106] of public servants, retirement age[107], discharge from the public service[108], employee rights and obligations[109], remuneration, and the performance of private remunerative work.[110]

Other sector specific legislation that apply to particular branches of the broader public service in the public sector include the Employment of Educators Act No.76 of 1998 which covers educators or teachers , the South African Police Services Act No.68 of 1995 which covers police personnel as well as the South African National Defence Force Act No.44 of 1957. Hence, apart from constitutional principles that apply directly to the state administration, both general labour law legislation and specific public sector legislation regulate the public sector employment relationship.

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[100] No. 103 of 1994
[101] Albertyn S. and Adair B. op cit p1430
[102] Section 7
[103] Section 8
[104] Section 11
[105] Section 14
[106] Section 15
[107] Section 16
[108] Section 17
[109] Section 28-36
[110] Section 37 (chapter viii)

A person is an employee of the state irrespective of where in the public service he or she renders services. Hence provincial departments, like national departments, are departments of the state and employees working in provincial departments are also employees of the state in the same way as employees in the national departments.[111]

3.2 THE PUBLIC SECTOR UNDER THE PRE-1994 DISPENSATION

The policy of the apartheid government was strongly opposed to extending labour rights to state employees[112]. Section 2(2) of the Labour Relations Act of 1956 specifically excluded from its application "persons employed by the state and persons who taught, educated or trained other persons at any university, technikon, college, school or other educational institution maintained wholly or partly from public funds." Thus whereas the severely restricted rights contained in the 1956 Labour Relations Act were conferred on employees in the private sector, the employees in the public service were specifically excluded from the ambit of the Act.

This meant that employees in the public service could not complain using the mechanisms created by the Act that the state as employer had committed unfair labour practice either in dismissing an employee or in unreasonably refusing to engage in collective bargaining with public sector trade unions over matters which are the subject matter of collective bargaining.[113] Strikes were also another area which was regulated by common law. This meant that public sector employees could be taken to task and be

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[111] Van Jaarsveld S.R, op cit p18.
[112] Du toit D, op cit p196.
[113] ibid

disciplined or even dismissed for participating in strikes.[114] For example in the case of R v. Smit[115] it was held that according to common law, participation in strike action amounted to a serious breach of the contract of employment which justified the summary dismissal of those participating. The South African courts did not hesitate to apply administrative law principles to extend relief to such employees. In particular, the courts jealously guarded over compliance with the rules of natural justice in this sphere of public sector employment.

3.2.1 Administrative law: general overview of common law principles

The rules of administrative law are those rules which regulate the organization, powers and actions of the state administration.[116] In particular the actions of public authorities exercising public power are subject to the rules of administrative law. These principles, in particular the rules of natural justice, apply whenever an administrative law relationship is present.[117] Certain requirements are set for the validity of an administrative action or decision. For example, the action or decision must fall within the authority granted by statute, it must be taken by a competent person, the powers conferred may not be used for an unauthorized purpose; and there must be compliance with the rules of natural justice.[118]

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[114] Du Plessis J.V, op cit p383; Olivier M.P. "Labour Relations Legislation for the Public Service: International and Comparative Perspectives" (1993) 14 ILJ 1371.
[115] 1955 (1) SA 239 (C).
[116] Van Jaarsveld S.R op cit p30
[117] Baxter L, op cit p3
[118] Van Jaarsveld S.R, op cit p30.

3.2.1.1 The rules of natural justice

The rules of natural justice are common law rules applicable to administrative decisions, enquiries and hearings.[119] Their aim is to ensure that public authorities do not act arbitrarily and that they take decisions that are fair and in the public interest.[120] These principles are important in as much as they facilitate accurate and informed decision-making.[121] They focus primarily on procedural protection since they require that a fair procedure be followed.

The first principle of natural justice is *audi alteram partem* which provides that the individual concerned should, as a rule, be given the opportunity to state his case before the intended action is taken against him. According to this principle, sufficient and timeous notice of the intended action should be given, as well as reasonable time to prepare a defence.[122] The rationale behind this principle is that a decision maker can only be sure that he is properly apprised of the relevant facts if he has heard the submissions of the persons likely to be affected by his decision.[123] Thus in *R v Nomveti*[124] a removal order issued against a resident without having afforded him a hearing was set aside. The court was of the view that affording the resident an opportunity to put his case might have led to the removal order not being issued against

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[119] Olivier M.P, "Public Sector Employment Law: Recent Case Law developments in South Africa" 1994 SA Public Law 50 at 56

[120] Van jaarsveld S.R op cit p19

[121] Baxter L, op cit p536.

[122] Olivier M.P, op cit (Fn 119) p56.

[123] Baxter L. op cit p538

[124] 1960 (2) SA 108 (E) at 118 A-D; Heatherdale Farms (Pty) Ltd v Deputy Minister of Agriculture 1980 (3) SA 476 (T) at 486 where the court held that a person who is entitled to the benefit of the audi rule should be given reasonable time within which to assemble the relevant information and to prepare and put forward his representations. Of relevance is the case of Chief Constable, Pietermaritzburg v Ishim (1908) 29 NLR 338 at 341 wherein the court held that "it is a principle of the common law that no man shall be condemned unheard."

him. In Cooper v Wandsworth Board of Works[125], the board had, without notice, demolished certain buildings because the builder had not given the board the statutorily required notification of his intention to erect them. The court awarded damages against the board on the basis that the demolition was unlawful simply because no notice had been given and the builder had thus been denied an opportunity to explain his failure to submit notification of the proposed building.

The second broad principle is *nemo iudex in sua causa* (the rule against partiality) which is to the effect that the decision maker should have no personal or pecuniary interest in the matter.[126] In this instance it has been argued that decisions which are informed and aimed at serving the public interest require objectivity on the part of the decision-maker. Hence in Liebenberg v Brakpan Liquor Licensing Board[127] it was held that "every person who undertakes to administer justice is disqualified if he has a bias which interferes with his impartiality; or if there are circumstances affecting him that might reasonably create a suspicion that he is not impartial". In the celebrated case of R v Sussex Justices, ex parte McCarthy,[128] this principle was expressed in the following terms: "it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

If a court, in exercising its review powers made a finding that the administrative act or decision was invalid (for failure to comply with the rules of natural justice), the court

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[125] (1863) 14 CB (NS) 180
[126] Olivier M.P, op cit (Fn 119) p51.
[127] 1944 WLD 52 at 54-55
[128] [1924]1 KB 256 at 259; S v Radebe 1973 (1) SA 796 (A) at 811

would set aside the action or decision, restore the status quo ante and remit the matter for reconsideration to the employer. [129] For example in the case of a dismissal, this would mean that the employee would be reinstated in his position, since in the light of the invalidity of the said dismissal he was regarded as not having been dismissed

3.2.1.2 Applicability of administrative law principles in public sector employment

As mentioned earlier, employment disputes in the public sector were dealt with by the civil courts according to the principles of administrative law as public servants were excluded from the operation of the labour laws. The courts applied these principles in matters involving promotions,[130] transferals,[131] and the accrual/retention of service benefits, disciplinary proceedings, suspensions[132] and dismissals in the public sector. As regards dismissals, the courts required that the opportunity to be heard be given not only where a public employee was dismissed due to operational requirements of the employer, but also in the case of a dismissal on account of misconduct, incapacity or participation in strike action.[133] For example, in the case of Matanzima v Holomisa[134], the court found that where a decision is one which affects the interests, career and reputation of a person, there is a clear duty to act fairly, which includes compliance with the *audi alteram partem* maxim.

[129] Van jaarsveld S.R, op cit p19
[130] See the case of Teachers Association v Pillay 1993 (1) SA 111 (D) and Foster v Chairman, Commission for Administration and Another 1991 (4) SA 403 (C)
[131] Gemi v Minister of Justice Transkei 1993 (2) SA 276 (Tkg) and Hlongwa v Minister of Justice, Kwazulu Government (1992) 13 ILJ 338 (D)
[132] Mngoma and others v Major of Katlehong City Council and another 1992 (3) SA 226 (W) and Mhlauli v Minister of Home Affairs and others NNO 1992 (3) SA 635 (SE).
[133] Olivier M.P op cit (fn 119) p62
[134] 1992 (3) SA 876 (TkG) at 879D-G.

3.2.1.3 Administrative law decisions impacting on the public employment relationship

In Administrator, Natal v Sibiya[135], the respondents were dismissed on the grounds of operational requirements. They challenged the dismissal on the basis that it was unlawful in that they were not given a hearing and an opportunity to make representations with regard to the said dismissals. The court held that this was a case in which elementary fairness required that the respondents should have been accorded a hearing before the appellants took their decision to dismiss the respondents. The court stated further that the failure of the appellants to apply the *audi alteram* principle constituted a procedural impropriety vitiating the decision to dismiss. The case of Minister of Health, Kwazulu v Ntozakhe[136], involved the summary dismissal of the respondents from the public service after participation in a strike. The respondents thereupon brought an application against the appellants for an order reviewing and setting aside the decision to terminate their employment without having afforded them an opportunity of making representations concerning their dismissals. It was held that the respondents were entitled to a prior hearing before the dismissals and since this was not done, such dismissals were declared null and void.

In Ngongoma v Minister of Education and Culture[137], applicant was summarily dismissed from the employment of the Natal Education Department for reasons relating to misconduct. He therefore sought an order declaring that his dismissal was null and

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[135] 1992 (4) SA 532

[136] 1993 (1) SA 442 (A). Other cases which were decided in a similar fashion include Administrator, Transvaal v Zenzile 1991 (1) SA 21 (A) and Minister of Water Affairs v Mangena (1993) ILJ 1205 (A).

[137] (1992) 13 ILJ 329 (D) at 336 D-F; Administrator, Cape and another v Ikapa Town Council 1990 (2) SA 882 (A) at 889 G-I.

void, setting aside that dismissal and reinstating him with effect from the date of the said dismissal. This was based on the fact that he had not been afforded a hearing before being dismissed. The court stated that "where a public official or body is authorized by statute to give a decision which is prejudicial to an employee in his liberty, property or existing right, the *audi alteram partem* principle has to be complied with." It was consequently held that the applicant's dismissal was null and void and of no force or effect and was thus set aside.

In Gemi v Minister of Justice, Transkei,[138] the applicant was employed at the office of the Attorney General as an assistant administrative clerk. At some stage his relations with his superiors became very strained. It was averred that he was guilty of dereliction of his duties and absenteeism. Consequently it was decided to transfer him to another station. The applicant challenged this decision on the grounds that it was unfairly taken in violation of the principles of natural justice, in particular the *audi alteram partem* principle. In setting aside the decision to transfer the applicant, the court stated that the views and personal circumstances of the applicant in this case were relevant and ought to have been taken into consideration. It was said that the decision to transfer could only have been properly reached after the respondent had heard the applicant's side of the story. The transfer was thus declared null and void.

[138] 1993 (2) SA 276 at 289G; SA Roads Board v Johannesburg City Council 1991 (4) SA 1 (A) 13 B-C wherein the court stated that the audi principle applies where the authority exercising the power is obliged to consider particular circumstances of the individual affected. Its application has a two-fold effect; it satisfies the individual's desire to be heard before he is adversely affected and provides an opportunity for the repository of power to acquire information which may be pertinent to the just and proper exercise of the power.

Similarly, in Holgate v Minister of Justice,[139] the applicant was demoted from the post of state prosecutor to that of senior administrative clerk and his salary reduced accordingly without being afforded the opportunity to be heard. It was held that a "person whose contractual rights might be affected by the exercise of an administrative discretion after the conclusion of the contract between himself and a statutory authority should generally be afforded a right to a hearing before such a decision is taken, especially so in the case of a contract of employment between an employee and a public authority."

The reason for the approach of the courts was said to lie in the peculiar administrative law status of the employees concerned and in the fact that the employer and decision-maker was a public authority whose decision involved the exercise of a public power which had to be exercised in accordance with the principles of natural justice.[140] The position of public sector employees thus differed from that of their private sector counterparts in that they could challenge a decision taken against them by their employer in terms of the ordinary principles of administrative law.

It is clear therefore that in terms of administrative law principles (in particular as regards the rules of natural justice) protection afforded to the aggrieved employees was purely procedural in nature. These principles have now been encapsulated in the Promotion of Administrative Justice Act 3 of 2000 which has been described as in large part a partial codification of administrative law.[141] In Bato Star fishing v Minister of Environmental

[139] 1995 (3) SA 921 at 934F
[140] Olivier M.P, op cit (fn 119) p66.
[141] Van Jaarsveld S.R. op cit p19

Affairs and Tourism,[142] the court stated that the grounds for judicial review are now partly codified in section 6 of PAJA which sets out the grounds on which administrative acts can be reviewed.

3.3 LEGISLATIVE REFORMS IN THE EARLY 1990s

South Africa was seriously criticized by the International Labour Organization (the ILO) for its policy of excluding public sector employees from the application of the 1956 LRA. This came as a result of an official complaint lodged by the Congress of South African Trade Unions (Cosatu) to the ILO in 1988.[143] Cosatu's complaint arose out of the legislative process that culminated in the amendment of the 1956 LRA. Its major criticisms were that:

(i) The proposed amendments infringed the ILO principles of freedom of association by promoting racially constituted trade unions and by infringing the right to strike.

(ii) Secondly there were no legal provisions governing strikes in the public service. Consequently they were covered by the common law, according to which strike action was considered a serious misconduct entitling the employer to dismiss employees summarily.[144]

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[142] 2004 (4) SA 490 (CC).
[143] Saley S. and Benjamin P, op cit p731.
[144] Saley S. op cit p777

After extensive investigation the ILO's Fact Finding and Conciliation Commission found that this fell short of the principles established in the relevant ILO conventions[145] and the jurisprudence developed around them. It also found that public servants suffered "significant disadvantages" under the South African industrial relations law as a result of the exclusion. The ILO recommended that legislation which conformed to the principles of the ILO should be promptly enacted to regulate the right to strike and extend protection against anti-union discrimination to all public sector employees. Furthermore, it should introduce a system for the negotiation and determination of terms and conditions of employment of employees in the various branches of the public service which provides for the participation of their representative organizations in accordance with the principles established in the Conventions of the ILO.

The power and militancy of trade unions including those organizing in the public sector grew significantly in the early 1990s. As a result of this trade union pressure coupled with that of the international community on South Africa to discard its apartheid policies, change became unavoidable. The impact of these developments was the extension of labour rights to public service employees. This resulted in the enactment of the Public Service Labour Relations Act (PSLRA) and the Education Labour Relations Act (ELRA).

The Public Service Labour Relations Act No.102 of 1993 regulated labour relations in the public service and applied to all employees in government departments and

[145] In particular the ILO convention no 87 of 1948 (concerning Freedom of Association and the Protection of the Right to Organize) as well as convention 98 of 1949 (concerning the Application of the Principles of the Right to Organise and to Bargain Collectively relating to Labour Relations in the public service). See also the ILO Convention 151 of 1978 (concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service.

provincial administrations.[146] It provided for collective bargaining at central and departmental levels. To that end, section 4 guaranteed certain organizational rights such as access, check-off facilities and disclosure of information. It also regulated the resolution of disputes between the state as employer and its employees. According to section 22, public servants had the right to approach the Industrial Court where they alleged that a specific action or ruling amounted to an unfair labour practice. The court was empowered to award a wide range of remedies, including urgent interim relief[147] and status quo orders.[148] This created the possibility for both procedural and substantive fairness grounds to be considered by an independent tribunal; for more flexible remedies and for a more affordable process to be followed.[149]

The Act recognized certain fundamental rights, such as the right to freedom of association. Section 19 provided as follows: "subject to the provisions of the Act, employees shall have the right to strike and employers lock-out." Thus employees had the freedom to strike and employers to lock-out, except those in essential services who had to refer a dispute to compulsory arbitration. Subsection (10)(a) stated that "no employer shall penalize or discharge an employee on account of his participation in a strike if the requirements set out in the Act in regard thereto have been complied with and such strike is not conducted in an unfair manner."

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[146] Section 3 of the Act.
[147] Section 22 (2)(a)
[148] Section 23
[149] Olivier M.P. op cit (fn 119) p52

Furthermore, subsection (b) provided that "if the strike is conducted in an unfair manner, or is continued after the prescribed period of 30 days, the employer concerned may discharge or otherwise penalize an employee involved in the strike." It is clear therefore that striking public servants could only be dismissed if the strike did not conform to the requirements set out in the Act and also if it was conducted in an unfair manner. The Act also provided for the expansion of common law (administrative law) remedies.[150] Section 2(2) stipulated that "any rights of employees in terms of the Act shall be in addition to any rights which they have in terms of any other law or common law."

For its part, the Education Labour Relations Act No.146 of 1993 regulated labour relations in education. According to section 3 this Act was applicable to the state and employees in the service of the Department of Education. This Act also regulated fundamental rights. Section 5(c) guaranteed employees the "right to establish and join any employee organization of their choice, or to refrain from establishing or joining an employee organization." Subsection (1) (b) provided the said employees with the right "to bargain collectively with the employer on matters that may arise out of the normal working relationship between the employer and employees." The right to be protected against unfair labour practices was provided for under subsection (1) (f). The Act also provided for the right to strike or lock-out. Section 15 thereof provided that "every employee shall have the right to strike and the employer shall have the right to lock-out." However, this was on condition that no strike or lock-out would be allowed during the currency of a collective agreement binding on the employers and employees.[151]

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[150] Olivier M.P, op cit p52.
[151] Section 15 (1) (a)

In addition, the emergence of trade unions within the police force led to the promulgation of the South African Police Labour Relations Regulations in terms of the Police Act on 29 November 1993. These regulations extended labour rights to members of the police force. In 1995, the South African Police Services Act came into effect. With it came the South African Police Services Labour Relations Regulations.[152] These regulations effectively set new procedures governing the discipline and dismissal of members of the police services.[153]

These statutes for the first time in the South African history of labour relations made provision for the comprehensive regulation of the public employment relationship by way of statute, recognizing the importance of notions such as collective bargaining and the application of fairness criteria in resolving certain types of labour disputes.[154] These statutes also granted employees in the public sector the freedom to associate with trade unions, the right to participate in collective bargaining and protection against unfair labour practices. In addition, employees employed by the state were granted the right to strike subject to reasonable limitations. Consequently civil servants were accorded rights similar and equal to the rights traditionally granted to employees in the private sector only.

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[152] See GN R1489 of 27th September 1995.
[153] Du toit D, op cit p1578
[154] Olivier M.P, op cit p51.

3.4 FRAMEWORK OF THE LABOUR RELATIONS ACT 1995[155]

The introduction of the Constitution necessitated the review of the South African labour law in order to bring it in line with the Constitution as well as the standards set by the International Labour Organization. This, together with the fact that the LRA of 1956 had become a clumsy piece of legislation after numerous amendments, necessitated an overhaul of the then existing laws.[156] Furthermore the multiplicity of laws led to inconsistency, unnecessary complexity, duplication of resources and jurisdictional confusion.[157] It also placed an added administrative and financial load on the state as well as financial burdens on the tax payer.[158] Therefore, a single statute that applies to the whole economy but nevertheless accommodates the special features of its different sectors was found to be preferable.[159] The result was the passing of the new Labour Relations Act in 1995. The new LRA repealed all of the above mentioned labour relations legislations and replaced them with a single comprehensive statute governing all employees in the country.

One of the primary objectives of the Act is to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution as well as obligations incurred by South Africa as a member state of the International Labour Organization.[160] The relevant parts of section 1 of the LRA read as follows:

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[155] Act 66 of 1995.
[156] Du Plessis J.V, op cit p384
[157] Explanatory Memorandum to the Draft Labour Relations Bill, 1995. (1995) 16 ILJ 278 at 281.
[158] ibid
[159] Ibid
[160] Section 1 of the LRA.

"The purpose of this Act is to advance economic development, social justice, labour peace and the democratization of the workplace by fulfilling the primary objects of this Act, which are-

(a) To give effect to and regulate the fundamental rights conferred by section 23 of the Constitution;

(b) To give effect to obligations incurred by the Republic as a member sate of the International Labour Organization;

...

(d)To promote-

...

(iv) the effective resolution of labour disputes."

To that end the Act reflects and confirms the rights contained in section 23 of the Constitution. For example, it affirms the right of employers and employees to form and join employers' organizations and trade unions respectively[161]. It also provides for the right of employees to embark on strike action.[162]

3.4.1 Application of the act

The Act applies to every employer and employee engaged in a labour relationship with the sole exception of members of the National Defence Force, National Intelligence Agency and the Secret Service[163]. This has the important effect of standardizing labour

[161] See sections 4-10 of the LRA.
[162] Sections 64-77 of the LRA.
[163] See section 2 of the LRA.

rights and labour processes resulting in greater opportunity for consistency and efficiency.

The main effect of this extension is that universal labour law principles have, as a rule, been made applicable to public employers and their employees. Hence freedom of association,[164] the exercise of organizational rights,[165] tailor-made collective bargaining mechanisms,[166] strike and lock-out action,[167] unfair dismissal protection[168] and the unfair labour practice protection[169] have in this way been introduced to the public sector and are therefore directly enforceable *vis-à-vis* the state and public sector employees.[170]

To reaffirm this position, the Public Service Act, 1994 also attempts to synchronize its provisions and the powers vested in the responsible authorities with the provisions of and mechanisms foreseen by the Labour Relations Act. This is because any matter regulated by a binding collective agreement concluded by a bargaining council which involves the state as employer must be dealt with only in accordance with such agreement.[171] Furthermore, the power to discharge a civil servant must be exercised

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[164] See Chapter II of the LRA
[165] Chapter III
[166] Chapter IV
[167] Chapter VI
[168] Chapter VIII
[169] Specifically in sections 185 (b), 186 (2) and 191
[170] Grogan J, op cit p6. The relevant provisions of the LRA have for example been applied in cases involving the dismissal of employees on account of misconduct. In particular, see the case of NEHAWU obo September v National Department of Social Services [2004] BALR 606 and also NEHAWU v obo Zulu v Department of Health [2003] 5 BALR 618.
[171] Public Service Act, 1994 (Proc 103 of 1994), section 5 (4) thereof.

with due observance of the provisions of the Labour Relations Act relating to unfair dismissals.[172]

3.5 CONCLUSION

During the past years we have seen major developments in the area of public employment in South Africa. These developments extend protection to public sector employees and place them on the same footing as employees in the private sector. Based on the fact that civil servants and the state as employer have access to the structures and remedies of the new Labour Relations Act, one would logically think that the civil courts may no longer be approached on the basis of an alleged infringement of the administrative law principles. However, despite their inclusion in the LRA, judicial review still proves to be a popular route for public sector employees who are aggrieved by the actions of the state as employer.

The question that arises at this juncture is whether public sector employees are entitled to resort to judicial review to challenge employment decisions taken against them by their employer now that they have access to the structures and remedies of the new Labour Relations Act. Furthermore, does the conduct of the state as employer constitute administrative action subject to judicial review? The next chapter seeks to find answers to these controversial and yet important questions.

[172] See section 17 (1) of the Public Service Act 1994.

CHAPTER 4

THE APPLICABILITY OF ADMINISTRATIVE LAW PRINCIPLES IN THE PUBLIC SECTOR: A SOUTH AFRICAN PERSPECTIVE

4.1 INTRODUCTION

We will recall that employees employed in the public sector were excluded from the ambit of the 1956 Labour Relations Act, such that they did not enjoy the benefits that accrued to other employees in terms of this statute. The courts were prepared to provide some form of protection through the application of administrative common law principles. As seen earlier, most public sector employees are now included within the ambit of the present Labour Relations Act. Consequently they enjoy the same protection against the conduct of the employer as private sector employees. Nevertheless, these employees still find it preferable to seek to review prejudicial conduct taken against them by the employer instead of employing mechanisms provided for by the LRA. This chapter seeks to interrogate the question whether they are entitled to resort to judicial review to challenge such decisions and most importantly whether that type of action constitutes administrative action subject to review as defined by PAJA.

4.2 HISTORICAL BACKGROUND

Prior to the Constitution superior courts possessed a common law power to review administrative action.[173] In Johannesburg Consolidated Investment Co. Ltd v. Johannesburg Town Council[174], this power was described in the following terms:

> "Whenever a public body has a duty imposed on it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity, or clear illegality in the performance of the duty, this court may be asked to review the proceedings complained of and set aside or correct them. This is no special machinery created by the legislature; it is a right inherent in the court."

The body of legal principles and rules developed by the courts in the course of their application of this power is referred to as administrative law. A more precise term is "general administrative law", as distinguished from "particular administrative law". General administrative law consists of the "general principles of common law which regulate the organization of administrative institutions and the fairness and efficacy of the administrative process, govern the validity of and liability for administrative action and inaction, and govern the administrative and judicial remedies relating to such action or inaction."[175] Particular administrative law on the other hand comprises the legislation that governs and the legal rules, principles and policies that have been developed in

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[173] Currie I. & De Waal J, op cit p643

[174] 1903 TS 111 at 115; Pharmaceutical Manufacturers Association of South Africa: in Re Ex Parte President of the Republic of South Africa 2000 (2) SA 674 (CC) at Para 38; Johannesburg Stock Exchange v Witwatersrand Nigel Ltd 1988 (3) SA 132 at 152 A-E.

[175] Baxter L., op cit p2

respect of specific areas of administration, for example, vehicle licensing or state tendering procedures.[176]

As mentioned earlier, the principles of administrative law arise where ever public authorities exercise their powers and perform their duties.[177] Hence when administrative officials or bodies acted *ultra vires* or failed to perform their statutory duties, aggrieved persons could challenge their actions and decisions in the superior courts by means of an application for judicial review.[178] Judicial review thus served the purpose of enabling courts to place constraints upon the exercise of public power. The right to fair administrative action is now enshrined in section 33 of the Constitution[179] as a fundamental right.

To that end Section 33 (1) of the Constitution provides that "everyone has the right to administrative action that is lawful, reasonable and procedurally fair." Furthermore, section 33 (3) provides that "national legislation must be enacted to give effect to this right and must provide for review of administrative action by a court or an independent and impartial tribunal". This legislation was enacted in the form of the Promotion of Administrative Justice Act (PAJA) No. 3 of 2000. This Act thus places the institution of judicial review of administrative action on a statutory footing and sets out procedures to be followed before certain decisions are made.[180]

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[176] ibid
[177] Baxter L. op cit p3
[178] Currie I. op cit p643
[179] The Constitution of the Republic of South Africa no 108 of 1996.
[180] Breitenbach A. "The Place of the Common Law in Constitutional Administrative Law" in Realising Administrative Justice (Eds: Hugh Corder and Linda Van der Vijver), Cape Town: Siber INC, 2002 p37 at p40.

4.3 THE RELATIONSHIP BETWEEN PAJA AND COMMON LAW

As mentioned earlier, prior to the adoption of the Constitution the control of public power by the courts through judicial review was exercised through the application of common law. The question that arises is what role, if any, remains for the common law in this area. According to the Constitutional Court in the Pharmaceutical case[181], "the common law is no longer the source of the courts' power of judicial review or the rules of administrative law. Both of these are now rooted in the Constitution and PAJA. However these principles will continue to inform the content of administrative law and contribute to their future development."

It is therefore clear that the cause of action when administrative action is taken on review now ordinarily arises from PAJA and not from the common law as was the case in the past.[182]

4.4 JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

PAJA requires a fair procedure in the event that administrative action materially and adversely affects the rights or legitimate expectations of any person.[183] What constitutes

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[181] Pharmaceutical Manufacturers Association of South Africa: In Re Ex Parte President of the Republic of South Africa 2000 (2) SA 674 (CC) at Para 45

[182] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (4) SA 490 (CC) at Para 22 wherein the court indicated that the courts' power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself. Of relevance is also the case of Zondi v MEC for Traditional & Local Government Affairs [2005] 4 BLLR 347 (CC) as well as Minister of Health v New Clicks SA *(Pty) Ltd* [2006] 1 BCLR 1 (CC).

[183] Section 3(1)

fair administrative procedure depends on the circumstances of each case,[184] but must, as a rule, include the following:[185]

(a) Adequate notice of the nature and proof the proposed action;

(b) A reasonable opportunity to make representations;

(c) A clear statement of the action;

(d) Adequate notice of any right of review or internal appeal, where applicable;

(e) Adequate notice of the right to request reasons.

4.4.1 Grounds for judicial review

The Act gives effect to the constitutional right to lawful administrative action by providing a right to judicial review of administrative action on a number of specific grounds. In terms of section 6 (1) of PAJA, any person may institute proceedings in a court[186] or tribunal[187] for the judicial review of an administrative action. The grounds on which administrative action may be taken on judicial review are set out in section 6(2) of the Act. They relate to:

(a) Where the administrator who took the action was not authorized to do so by the empowering provision; or acted under a delegation of power which was not authorized by the empowering provision; or was biased or reasonably suspected of bias;

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[184] Section 3(2)(a)
[185] Section 3 (2)(b)
[186] Meaning the Constitutional Court, a High Court and a magistrates' court (section 1).
[187] According to section 1 of the Act tribunal means any independent and impartial tribunal established by national legislation for the purposes of exercising judicial review.

(b) Where a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) Where the action was procedurally unfair;

(d) Where the action was materially influenced by an error of law;

(e) Where the action taken was for a reason not authorized by the empowering provision; was for an ulterior purpose or motive; took into account irrelevant considerations or relevant considerations were not considered; was because of the unwarranted dictates of another person or body; was taken in bad faith; or was taken arbitrarily or capriciously;

(f) Where the action itself contravenes a law or is not authorized by the empowering provision; or is not rationally connected to the purpose for which it was taken, the purpose of the empowering provision, the information before the administrator; or the reasons given for it by the administrator.

(g) Where the action concerned consists of a failure to take a decision; or

(h) Where the exercise of power or the performance of the function authorized by the empowering, in pursuance of which the administrative action was purportedly taken is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

(i) The action is otherwise unconstitutional or unlawful.

4.4.2 Administrative action

Judicial review under PAJA is only applicable to administrative action. Hence in order to for the applicant to succeed, he has to establish that conduct complained of constitutes

administrative action subject to review under the Act. The question is what constitutes administrative action for purposes of PAJA? Administrative action has been defined in section 1 of the Act as "any decision taken, or any failure to take a decision by an organ of state when-

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

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) A natural or juristic person, other that an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect."

In summary, it can be said that administrative action relates to conduct of an administrative nature performed by public authorities as well as conduct of private persons and entities when they exercise public powers or perform public functions.[188] Though one begins with the definition of administrative action, the enquiry into the scope of application of the Act does not end there. This is because administrative action as defined in section 1 refers to a "decision" and/or "failure to take a decision". One must therefore also consider the definition of decision. According to section 1, decision means any decision of an

[188] Currie I, op cit p645

administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to:

(a) making, suspending, revoking or refusing to make an order, award or determination
(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
(c) Issuing, suspending, revoking or refusing to issue a license, authority or other instrument;
(d) Imposing a condition or restriction;
(e) Making a declaration, demand or requirement'
(f) Retaining, or refusing to deliver up, an article; or
(g) Doing or refusing to do any other act or thing of an administrative nature.

Ascertaining whether an action is an administrative action for the purposes of PAJA has been discussed in several decisions. In the case of the President of the RSA v South African Rugby Football Union[189], the Constitutional Court stated that the test for determining whether conduct constitutes administrative action is not the "question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not." It was also pointed out in *Grey's*

[189] 2000 (1) SA (CC) at Para 41

Marine Hout Bay (Pty) Ltd v Minister of Public Works[190] that whether a particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so. Other considerations which may be relevant are the source of the power, the subject matter, whether it involves the exercise of a public duty and how closely related it is to the implementation of legislation.[191] In Pennington v Friedgood[192] it was held that what is important is the nature of the power exercised and that therefore PAJA applies to the exercise of public and not private power.

It is therefore clear that the nature of the power or function is paramount and not necessarily the identity of the person exercising the power or performing the function. This is why PAJA does not confine the definition of administrative action to decisions by public bodies only and thus applies also to natural and juristic persons when exercising a public power or performing a public function in terms of any legislation.

4.5 THE RELATIONSHIP BETWEEN PAJA AND LRA

A difficult issue that has emerged since the enactment of PAJA is the relationship between that Act and the LRA especially in public sector employment. For example in a case of a dismissal of a public sector employee the question usually arises as to which Act will apply in terms of determining the validity of such a dismissal.[193] Ordinarily one would think that an enquiry into the validity of dismissal decisions is the province of the

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[190] 2005 (6) SA 313 (SCA) at Para 24.
[191] Cape Metropolitan Council v Metro Inspection Services (Western Cape) 2001 (3) SA 1013 (SCA) at para 16-17.
[192] 2002 (1) SA 251 (c) at para 40.
[193] Currie I, op cit p645

Commission for Conciliation, Mediation and Arbitration (CCMA) and the labour courts as per the provisions of the LRA. However, PAJA's mechanism of judicial review of administrative action may well provide an alternative path for litigants aggrieved by the actions of the state as employer. This is evident from a number of decisions that have been handed down by the courts regarding this matter.

The question that arises at this juncture is whether decisions of the state performed in its capacity as employer fall within the definition of administrative action as outlined above and also whether public sector employees are entitled to make use of PAJA to challenge such decisions. Whether or not certain conduct performed by the state as employer might be characterized as administrative action within the meaning of PAJA has been the subject of consideration before several courts whose conclusions have not been harmonious. Some decisions have taken the view that public sector employees are not entitled to make use of PAJA to challenge their dismissal and other actions taken against them by their employer. In PSA obo Haschke V MEC for Agriculture and Others (LC)[194] the applicants sought to set aside a decision by a CCMA commissioner not to condone the late referral of a dispute on the basis that the Commissioner had not provided reasons for her decision as required by PAJA. The issue to be determined by the court was whether or not the decision of the Commissioner was reviewable under PAJA. The Labour Court was of the view that public sector employees should not be allowed to make use of PAJA to challenge disciplinary and other actions taken by their employer against them. One of the reasons why the court thought PAJA should not apply to labour law matters is that it feared that the applicability of PAJA would enable

[194] [2004]25 ILJ 1750 (LC). Also reported at [2004] 8 BLLR 822 (LC)

individuals to litigate matters which are regulated by collective bargaining. It was the opinion of the court that if such litigation were to be encouraged, it would have adverse effects on collective bargaining. The court also observed that historically recourse has been had to administrative law in order to advance labour rights where labour laws were inadequate. It noted however that the categorization of employer conduct as administrative action had lost its force following the codification of administrative law and labour law and the extension of full labour rights to public sector employees by the new Labour Relations Act.[195] It was thus held that all decisions affecting employment should be processed in terms of the labour law and the Constitution.

In *SAPU* and another v. National Commissioner of the South African Police Service and another (LC),[196] the applicant employees were members of the South African Police Service. They challenged the validity of a decision taken by the Commissioner of Police to change their shifts from 12 hours to 8 hours and sought an order reviewing and setting aside this decision. It was common cause that the decision of the Commissioner was made without any prior consultation with the union or the employees themselves.

They challenged the decision on the ground that it was procedurally unfair, unreasonable and irrational administrative action in terms of PAJA. The issue therefore was whether the Commissioner of Police was exercising a public power or performing a public function in terms of any legislation as envisaged by section 6 of PAJA. In other words the question was whether the decision of the Commissioner constituted

[195] At Para 1775 D-H.
[196] [2006] 1 BLLR 42 (LC)

administrative action. The Labour Court came to the conclusion that this was not the case. It held as follows:

> "There is nothing inherently public about setting the working hours of police officers. Nor is there any public law concern here. The matter falls more readily within the domain of contractual regulation of private employment relationships. 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 relation to 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. One is instinctively drawn to the conclusion that the concept of administrative action is not intended to embrace acts properly regulated by private law. To render every contractual act of an organ of state a species of administrative action carries the risk of imposing burdens upon the state not normally encountered by other actors in the private sphere."[197]

The court held further that there were also important policy concerns of relevance in the sense that the resolution of employment disputes in the public sector should be accomplished by identical mechanisms and in accordance with the same values as in the private sector.[198] It was therefore held that the applicants were not entitled to seek review of the Commissioner's decision in terms of section 6 of PAJA in as much as the change in the shift system had been effected under a contract concluded on equal

[197] At Para 51

terms between equal parties and without any element of superiority or authority deriving from the SAPS's public position.[199]

In Hlope and Others v Minister of Safety and Security and Others (LC)[200] the applicants were members of the South African Police Service (SAPS) and were engaged as plain clothes detectives. They sought an urgent interdict restraining the SAPS from transferring them to various uniformed posts. They based their claim on a right to fair administrative action and contended that this right had been infringed by a failure to consult them prior to a decision to transfer them. The Labour Court observed that it does not follow that because the power to suspend or transfer is sourced in legislation it necessarily means that the power or function concerned is a public one. The court concluded that disciplinary or operational transfers and suspensions are employment or labour related matters, not administrative acts.[201] It was held on that basis that the decision to transfer the applicants did not constitute administrative action that invited review either under PAJA or section 33 of the Constitution.[202]

The case of Western Cape Workers Association v Minister of Labour (LC)[203] concerned an appeal against the decision of the Registrar of Labour Relations to deregister the applicant as a trade union from the register of trade unions lodged with the department of labour. The applicants claimed that the appeal should be dealt with in terms of the provisions of PAJA. The Labour Court rejected this argument on the grounds that the

[199] Para 53
[200] [2006] 3 BLLR 297 (LC)
[201] At Para 12, p303
[202] At Para 14, p304
[203] [2006] 1 BLLR 79 (LC)

LRA was specifically designed for labour disputes including administrative law type disputes arising from labour law.[204] The court held further that PAJA did not apply to labour disputes and that since the dispute *in casu* was clearly a labour law matter, it should be dealt with in terms of the LRA and not PAJA as the applicants argued.

These sentiments were shared in the case of Louw v SA Rail Commuter Corporation & Another (W)[205] wherein it was held that the right entrenched in section 23 of the Constitution obviously regulates the powers of dismissal of employees, so that the remedies for any unfair dismissal would be under the fundamental right to fair labour practices as opposed to the fundamental right to fair administrative action.

On the other hand there are decisions that have taken the view that public sector employees are entitled to make use of PAJA.[206] The strongest example is the decision in POPCRU and Others v. Minister of Correctional Services and Others (E)[207] wherein a number of correctional officers were dismissed for refusing to work. The issue that arose was whether such dismissals constituted an exercise of public power reviewable under PAJA. The High Court rejected the view that because the LRA now covers virtually all employment relationships it is no longer necessary to apply the principles of administrative law to the field of employment relationship within the public sector. The court opined that the concept of public power is not limited to exercises of power that

[204] At Para 10

[205] (2005) 26 ILJ 1960 (W). Of relevance in this regard is the case of Transnet Ltd & Others v Chirwa [2007]1BLLR 10 wherein it was held that the dismissal of applicant was based on contract and did not involve the exercise of any public power or performance of a public function; Lamprecht v Mcneillie (1994) 15 ILJ 998 (A) at 1000 A-H.

[206] For example, Mbayeka And Another v MEC for Welfare, Eastern Cape [2001] 1 ALL SA 567 (Tk) and Simela And Others v MEC for Education Eastern Cape And Another [2001] 9 BLLR 1085 (LC)

[207] [2006] 4 BLLR 385 (E)

impact on the public at large. It observed that in some instances what made the power involved a public power was the fact that it had been vested in a public functionary who was required to exercise it in the public interest, and not in his or her own private interest or at his or her own whim.[208] The court did not find anything wrong with individuals having more legal protection rather that less, or of more than one fundamental right applying to one act, or of more that one branch of law applying to the same set of facts.[209] According to the court, the protections offered by labour law and administrative law are complementary and cumulative and not destructive of each other simply because they are different. It was thus held as follows:

> "In my view, however, the statutory basis of the power to employ and dismiss correctional officers, the subservience of the respondents to the constitution generally and section 195 in particular, the public character of the department and the pre-eminence of the public interest in the proper administration of prisons... all strengthen my view that the powers that are sought to be reviewed in this matter are public powers as envisaged by the common law, the constitution and the PAJA."[210]

POPCRU was followed in the case of Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services[211] which concerned a decision to transfer the applicant. The court pointed out that transfers within the public sector had always been regarded as administrative acts even before the enactment of PAJA- a fact which

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[208] At Para 53
[209] At Para 61
[210] At Para 54 D-E. A similar approach was adopted in Dunn v Minister of Defence And Others (2005) 26 ILJ 2115 (T) and De Jager v Minister of Labour [2006] 7 BLLR 654 (LC).
[211] [2006] 10 BLLR 960 (LC)

the legislature must have been aware of when drafting the statute.[212] The court was therefore not convinced that the LRA must be taken impliedly to have removed existing rights enjoyed by public sector employees.[213] It was held, on that basis, that the decision to transfer the applicant constituted administrative action reviewable under PAJA.

In the case of Nel v Minister of Justice and Constitutional Development and another (T),[214] the High Court was of the view that a public sector dismissal is also an administrative act. In this case the applicants had been dismissed for misconduct. It was common cause that the Director General took the decision to terminate the applicant's employment without informing them that such a decision was being considered or affording the applicants an opportunity to make representations. The issue to be determined by the court was whether the decision to dismiss was reviewable under PAJA The court held that the purported dismissal of the applicant was administrative action in terms of PAJA on the basis that conduct may constitute administrative action even where it takes place in a contractual context.[215] The same sentiments were expressed in Bester v Sol Plaatje Municipality (NC)[216] and others wherein the court held that disciplinary action taken by an organ of state falls within the administrative law framework of PAJA.

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[212] See Para 71-3
[213] Para 59
[214] [2006] 7 BLLR 716 (T).
[215] Para 19.
[216] [2004] 9 BLLR 965 (NC)

It is obvious from the conflicting decisions of the courts of law discussed above that there is a lot of confusion as to whether public sector employees are entitled to make use of PAJA to challenge dismissal and other actions taken by their employer against them. However, from the definitions of 'administrative action' and 'decision' as set in section 1 of PAJA, which define administrative action to include any decision or failure to take a decision by an organ of state when exercising public power in terms of any statute, one is forced to concede that dismissals and other conduct performed by the state in its capacity as employer can be classified as constituting administrative action. Thus the real inquiry at this stage is not whether the decisions of the state as employer amount to administrative action. We are prepared to accept that they do constitute administrative action. The question, therefore, is whether, having regard to certain policy considerations, public sector employees are nonetheless free to challenge prejudicial decisions under PAJA.

It is submitted that apart from the jurisdictional uncertainty that will arise as a result of this admission, forum shopping, parallel jurisprudence and the possible undermining of the purpose of the LRA (to harmonise the law pertaining to the private and public sectors and to provide for effective dispute resolution for public and private employees) are some of the social and/or legal evils that will be created by this situation.[217] It is therefore argued on that basis that public sector employees should not be allowed to utilize the provisions of PAJA to challenge decisions that have been made by the state in execution of its functions as employer. One thus agrees with the sentiments

[217] Pillay D, "PAJA v Labour Law" (2005) 20 SAPL 413

expressed by Murphy J in the case of SAPU[218] to the effect that "the resolution of employment disputes in the public sector should be accomplished by identical mechanisms and in accordance with the same values as in the private sector: that is, through collective bargaining and the adjudication of unfair labour practices, as opposed to judicial review of administrative action."

Alternatively, if we maintain that the conduct of the employer is reviewable according to the principles of administrative law, it is submitted that such action is not intended to be available in terms of PAJA but rather in terms of the LRA. This is simply because the jurisdiction provision in section 157(1) of the LRA confers exclusive jurisdiction on the Labour Court in respect of all matters that elsewhere in terms of the LRA or any other law are to be determined by the Labour Court. The very next section, section 158 (1) (h) gives exclusive jurisdiction to the Labour Court to review any decision taken or any act performed by the state in its capacity as employer, on such grounds as are permissible in law. This is a special provision dealing with the regulation of any conduct performed by the state in its capacity as employer. As a general rule, "when the legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject matter and its own terms."[219] It is submitted that PAJA was enacted against the background of this provision and yet the legislature did not deem it fit to repeal the said provision. If we apply the principle

[218] [2006] 1 BLLR 42 (LC) at Para 55 and 62.
[219] Barker v Edger and others [1898] AC 748 at 754.

outlined above, this effectively means that any decision to review any prejudicial conduct performed by the state in its capacity as employer is actionable in terms of the LRA and not PAJA. This would help to ensure that all labour disputes are resolved through the mechanisms provided for by the LRA thus maintaining consistency and speedy resolution of labour disputes.

4.6 CONCLUSION

As shown above, there is controversy as to how powers exercised by the state in its capacity as employer ought to be characterised. It is submitted that this confusion arises largely because the state in its capacity as employer combines functions which are essentially public with those, like the power to contract, which parallel the powers of private employers.[220] However, the question is whether the fact that the qualities of state authority and employer are situated in the same person warrant the continued application of administrative law principles in the employment relationship? There are writers who answer this question in the affirmative whereas others are of the view that although the relationship between the state as employer and the public servant is special in nature, it remains a relationship between the employer and employee. They argue, therefore that labour law as opposed to administrative law, should apply whenever there is a dispute between the parties which arises out of the employment relationship.

It would seem that troublesome questions about the applicability of PAJA to labour matters in the public sector will always arise until such time as the legislature intervenes

[220] Fredman S, op cit p298.

or the Constitutional Court hears a matter on this controversial issue. Otherwise the continuation of the conflicting and divergent view-points expressed by various writers and courts of law on the matter will accentuate an already growing problem of uncertain, incoherent and conflicting jurisprudence on labour relations in the public sector. It is on the basis that the next chapter seeks to examine what developments have been made in other jurisdictions as regards public sector employment relationship in order to ascertain whether South Africa can in any way benefit from such jurisdictions. This will be discussed in the following chapter.

CHAPTER 5

THE APPLICABILITY OF ADMINISTRATIVE LAW PRINCIPLES IN THE PUBLIC SECTOR: A LEGAL COMPARATIVE ANALYSIS

5.1 INTRODUCTION

As we have seen in the previous chapters, judicial review still proves to be a popular route for public sector employees who are aggrieved by the actions of the state in its capacity as employer. This is so despite the inclusion of the said employees within the general framework of the LRA and the protection afforded to them under this Act. The question that we have been grappling with, therefore, is whether public sector employees should have administrative law safeguards and remedies at their disposal. As we have seen, several writers have expressed divergent opinions on the subject and even the courts of law have not been consistent as regards the applicability of administrative law principles in such circumstances. The purpose of this chapter, therefore, is to look into the position of public sector employees in other jurisdictions. This will give an idea of the way in which public sector employees are treated by legislatures, governments and courts elsewhere. The significance of this comparative study is to enable South Africa to determine whether it can change its laws and adopt measures that have already been undertaken elsewhere if that would be in the interests of effective dispute resolution in the public sector. However, it is submitted that this comparative perspective is useful not only for the importation of solutions for South Africa. It will also help one to "gain a deeper grasp of one's own law, of its strong and

weak points, the specific nature and originality of its norms, institutions and principles."[221] It has also been argued on that basis that a more profound knowledge of labour law is impossible without studying foreign law or, at least without being sufficiently familiar with it.[222] It is against this background that we wish to embark on a comparative study of other jurisdictions.

In particular we will focus on the position of the United Kingdom for the simple reason that, like South Africa, there was a controversy, at some stage, as to the remedies that public sector employees have to utilise when they have been aggrieved by conduct of the state as employer.[223] Hence we want to see how they finally, if at all, managed to deal with that problem. We will also consider the position of Germany. This is because this country seems to adopt a different approach as regards public servants in that there are those public servants who can utilise public law remedies whereas others are covered by general labour law provisions. In that endeavour, therefore, we will be able to see why Germany accords differential treatment to its public sector employees and also to test whether this approach will be suitable for South Africa to adopt in as much as the South African Constitution was adopted in line with the German experience. We also decided to consider the position of public sector employees in Lesotho. This is because that country has adopted a completely different approach when it comes to public sector employees. It accords these employees full labour rights and yet at the same time excludes them from the general application of labour legislation. Dispute

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[221] Buttler E. et al, Comparative Labour Law. England: Gower Publishing Co. Ltd, 1985 p11
[222] ibid
[223] For example see Blair L,"The Civil Servant-Political Reality and Legal Myth" 1958 Public Law 32

resolution is thus regulated by specific public sector oriented legislation. It is submitted that South Africa could learn a lot from this approach.

However, we wish to indicate from the beginning that because of lack of concrete information about the legal regulation of public service labour relations in the said countries, it was difficult to undertake comprehensive study on these jurisdictions.[224] We hope, however, that the little that we managed to gather in this work will be useful and that the results can be applied not only in academic work and teaching but also in reforming our system.[225]

5.2 THE LEGAL STATUS OF PUBLIC EMPLOYEES IN THE UNITED KINGDOM

In the UK the civil service comprises all the permanent and non-political offices and employments held under the crown with the exception of the armed forces.[226] Therefore, as a principle, all civil servants are in law the servants of the crown and are paid from funds voted by parliament.[227] The civil service is regulated under orders in council notably the Civil Service Order in Council 1982 under which regulations are made and the code on pay and conditions of service is issued.[228] This is the authority by which the service formulates its disciplinary procedures. As in South Africa, civil servants in the UK are covered by laws affording them protection against unfair dismissal as well as other laws benefitting employees. Thus labour laws do not draw

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[224] Buttler E, op cit p12
[225] Ibid
[226] Wade W. & Forsyth C, Administrative Law, (8th Ed), New York: Oxford University Press, 2000 p51
[227] Bainbridge v Postmaster General [1906] 1 KB 178 and Marshall v Southampton Health Authority [1986] QB 401 at 414
[228] Wade W, op cit p53

any distinction between public and private sector employees. For example the Employment Protection (Consolidation) Act 1978 affords civil servants the general rights of employees to join trade unions and engage in union activities. Section 138 thereof provides that the provisions of that Act shall apply, with certain modifications, to crown employment and crown employees. The Employment Rights Act 1996 also provides that under that Act crown employees are entitled to financial compensation for unfair dismissal as defined in the Act once they have completed the one year qualification period.[229] Claims are made to an employment tribunal, from which appeal lies to the Employment Appeal Tribunal.[230] If one was still not satisfied he could appeal further to the Court of Appeal and finally to the House of Lords. In some circumstances the tribunal may make an order for reinstatement or re-engagement.

However, there has been controversy about the status of civil servants and the nature of the relationship between the crown and civil servants. The issue has been whether the relationship can be classified as merely that of master and servant or as public in which latter case such employees would be entitled to resort to judicial review as a remedy.[231] This position was first clarified in R v B.B.C, ex parte Lavelle[232] wherein Woolf J refused to allow judicial review to be used to challenge the internal disciplinary procedures of the B.B.C at the instance of a dismissed employee. He said that the prerogative remedies always were, and still remained, inappropriate remedies for enforcing a master's ordinary obligations to his servant, and that judicial review ought not to be

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[229] See SS 95-107. See also the case of Earl v Slater & Wheeler (Airlyne) Ltd [1973] 1 WLR 57
[230] Section 111
[231] See Blair L,"The Civil Servant-A Status Relationship?" (1958) 21 MLR 265
[232] [1983] 1 W.L.R 23

extended to what he called a 'pure employment situation'. In R v East Berkshire Health Authority, ex parte Walsh[233] the Court of Appeal refused to grant judicial review to quash a dismissal, allegedly in breach of natural justice, of a male nurse employed at a hospital by the local health authority. The court held that judicial review was wholly unsuitable since this was merely a case between employer and employee and that the fact that the employer was a public authority did not inject any element of public law into the relationship.

In another case, McClaren v Home Office[234] Wool J attempted to clarify the tests for assessing the availability of judicial review within an employment context. He held that an employee of a public body is normally in the same position as other employees and that the mere fact of public employment does not open the door to judicial review. However he went further to stipulate exceptional circumstances which may warrant the applicability of judicial review within an employment context. According to the court, a separate development where judicial review may be available concerns a public body's policy decisions, which have a collective dimension.[235] In other words if an employee of the crown or other public body is adversely affected by a decision of general application by his employer he could be entitled to challenge that decision by way of judicial review. The rationale for this is that in that case one is not concerned with one particular officer who is engaged in that establishment. On the contrary he is concerned with a policy decision which affects all employees at that establishment.[236] Another area where

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[233] [1984] 3 W.L.R 818
[234] [1990] IRLR 338
[235] Carty H, "Aggrieved Public Sector Workers and Judicial Review" (1991) 54 MLR 129 at 132
[236] ibid

judicial review may be available is where a disciplinary or other body exists under statute to which public sector employers and employees are entitled or required to refer disputes concerning their relationship. The court argued that in that case judicial review would be appropriate because it has always been part of the role of the court in public law proceedings to supervise inferior tribunals and the court, in reviewing disciplinary proceedings, would be performing a similar function.[237]

It is clear from the discussion above that the general trend set by decisions of the courts of law is that disputes over terms and conditions of employment in the public sector belong to private law and as such fall outside the scope of public law and the fact that the employer is a public authority makes no difference.

5.3 LEGAL FRAMEWORK OF THE CIVIL SERVICE IN GERMANY

Germany's administrative system is to a large extent moulded by the country's constitutional principles. These are as far as the public sector is concerned – "federalism which defines the states ("Länder") as members of the Federation yet retaining a sovereign state power of their own as well as local self-government which mainly operates on two levels, that of the local authorities and of the counties."[238] Due to these prevailing constitutional principles, German public administration is considerably varied and complex giving rise to a whole variety of sub-national

[237] R v Civil Service Appeal Board, ex parte Bruce [1988] ICR 649

[238] Sabine Kuhlmann & Manfred Rober "Civil Service in Germany: Characteristics of Public Employment and Modernisation of Public Personnel Management" Paper presented at the meeting of Modernisation of State and Administration in Europe: A France-Germany Comparison, 14-15 May 2004, Bordeaux, Goethe-Institut. Accessed at http://www.uni-konstanz.de/bogumil/kuhlmann/Download/kuhlmannRober1.pdf on 09/11/07

peculiarities which diverge more or less in their administrative cultures.[239] Nevertheless, the core elements of the German civil service are relatively uniform for the public service at all levels of government, with the term "public servant" being used as a generic term to include several categories of public sector employees. The range of civil servants is extremely wide, consisting of the Beamte (civil servants), *Angestellte* (Public employees) and manual workers (*Arbeiter*).[240]

The Beamte are a special category of public sector employees and are individuals who are appointed by the state to exercise public authority or state powers as agents of the state.[241] This is in accordance with article 33(4) of the Basic Law which provides that the exercise of state authority as a permanent function shall as a rule be entrusted to civil servants. The duties of the Beamte are to guarantee sound administration based on expertise, professional ability and the loyal fulfilment of duties and to ensure that essential tasks are continuously carried out in the public's interest.[242] Therefore, it is mainly civil servants who are employed in core areas of traditional administration, in supervisory positions and in areas involving the exercise of state authority.[243] In theory, the Beamte are not paid for the work they do, but given financial compensation for their duties to the State. Thus they do not receive a salary as such (nor are paid overtime) but receive a separate form of remuneration simply known as '*Besoldung*' (or 'pay').[244] The *Beamte* also have a protected employment status, which provides for the

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[239] ibid
[240] Article accessed at http://ww1.worldbank.org/publicsector/civilservice/rsGermany.pdf on 09/11/07
[241] Stefan Zagelmeyer "Career Public Servants in Germany" article accessed at http://www.eurofound.europa.eu/eiro on 09/11/07.
[242] See http://www.verwaltung-innovativ.de./Anlage/original on 09/11/07
[243] ibid
[244] http://ww1.worldbank.org/publicsector/civilservice/rsGermany.pdf on 09/11/07

maintenance of the civil servant from confirmation of appointment to death, including total security of employment to retirement age at which point *Beamte* receives a pension equivalent to 75% of their final pay.[245] They are also exempt from paying social security contributions. It is clear therefore that the Beamte have a special relationship with the employer and it is for this reason that the said relationship is governed by public law principles and in particular administrative law principles. Theirs is a relationship of service and loyalty characterised by commitment to the good of the people and the body politic. The crucial element of this particular employment relationship is the civil servants' commitment to the interests of the public for his entire life which requires a high level of professional achievement, a sense of responsibility and commitment.[246]

In contrast, the position of the other two categories of employees is regulated in terms of contract under private law and by labour law principles, although certain aspects relating to staff representation bodies are dealt with by the administrative law courts.[247] This means that their employment contract is based on the general rules of German labour law and as in other sectors of the economy, on the specific rules of the relevant collective agreements.[248] These collective agreements specify almost all the major working conditions for these employees. Hence labour courts are responsible for resolving legal disputes arising within this relationship and employees can defend themselves before a labour court against any conduct performed by the state in its capacity as employer. Like employees in the private sector, these categories of public

[245] ibid
[246] ibid
[247] Olivier M.P, "Employment Protection of Public Servants: A Legal Comparative Enquiry" 1998 SA Public Law 256
[248] http://www.verwaltung-innovativ.de./Anlage/original on 09/11/07

servants also have the right to strike in order to enforce their demands within the framework of collective bargaining.[249]

This functional classification of public sector employees in Germany has been advocated for the reason that it may help towards delineating various categories of employees who may be entitled to protection which may differ according to the functions exercised by such employees.[250] The only problem with this approach is that it does not indicate whether there may not still be public service employees who are entitled to peculiar protection according not only to the functions they exercise, but also to the position or status occupied by them.[251]

5.4 THE CIVIL SERVICE IN LESOTHO

Public servants in Lesotho have struggled for labour rights since the country's independence in 1966.[252] For example in the 1970s an attempt by the said employees to establish a bargaining formation was crushed by the government of the day.[253] After the new democratic government came into power in 1993, many public servants were hopeful that things would change and that public employees would be afforded labour rights. However the government passed the Public Service Act 1995[254] which specifically excluded the said employees from the ambit of the Labour Code Order

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[249] ibid
[250] Olivier M.P. op cit (Fn 247) p11
[251] ibid
[252] Welcoming speech made by Mr Ntsoaole, president of the Lesotho Public Service Staff Association (LPSSA). Accessed at http://www.ictuglobalsolidarity.org/uploads/ICTU%20Visit.doc on 10/8/07
[253] ibid
[254] Act 13 of 1995

1992.[255] It also excluded them from becoming members of any trade union registered under the Labour Code Order 1992. This was so despite the existence of section 16 of the Constitution of Lesotho which guarantees the right to freedom of association to everyone. Public sector employees tried to have these provisions declared unconstitutional in the case of Lesotho Union of Public Employees (LUPE) v The Speaker of the National Assembly[256]. In a controversial ruling, the High Court of Lesotho held that the government was empowered by the Constitution to impose the restrictions upon public officers as this was done in the interests of the public and of preserving a sound economy of the country.[257] In the aftermath of the case serious pressure mounted by the ILO forced Lesotho to reconsider its stance as regards its public employees. This resulted in the enactment of the current Public Service Act No.1 of 2005. As will be seen in the following discussion, the Act grants public employees the right to freedom of association as enshrined in section 16 of the Constitution and also tries to provide for certain dispute resolution measures akin to those provided in the Labour Code even though such measures are only allowed within the framework of the Act.

The Public Service Act 2005 regulates appointments[258] and advancement[259] within the public service, secondment[260] of public servants, retirement age[261] as well as conditions

[255] Order No. 24 of 1992
[256] 1997 BLLR 1485 (Les)
[257] The court was also of the view that the exclusion of public employees from the right to strike is not unconstitutional. It held that industrial action did not have any legitimate place in the public service because public activities are not profit oriented but meant to serve the people. It was held that if public employees are afforded the right to strike government services would come to a standstill in as much as owing to Lesotho's economic conditions, the government would not have any money to meet the unreasonable demands made by trade unions.
[258] Section 7
[259] Section 8

of employment[262] of public servants. As was the case in South Africa during the reign of apartheid, employees in the public service are excluded from the ambit of the Labour Code Order, 1992[263] (as amended) which is primarily applicable to employers and employees in the private sector only. Section 30 of the Public Service Act specifically provides that "the Labour Code Order 1992 shall not apply to public officers." As we will recall, the 1995 Act had a similar provision excluding public servants from the ambit of the Labour Code Order as well. What this means is that public servants in Lesotho do not have access to the structure of the labour courts designed to protect employees and deal with disputes arising within the employment relationship. The government has thus succeeded in removing cases concerning civil servants' rights from the Labour Court, thereby effectively taking away their rights to present their cases before the said court. It is therefore obvious from these provisions that public sector employees are not regarded as having a private employment relationship with the employer which can be regulated by the same rules as private sector employees. However, what is peculiar about the situation of public sector employees in Lesotho is that even though they are still excluded from the ambit of general labour provisions, they have been accorded labour rights[264] even though it is considered a misconduct to engage in strike action.[265] This constitutes a departure from the 1995 Act which did not only exclude the said employees from the ambit of the Labour Code but also denied them the right to freedom of association and to form and join associations of their choice for purposes of collective

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[260] Section 9
[261] Section 26
[262] Section 14 thereof
[263] Order No.24 of 1992
[264] For example section 21 states that public officers are entitled to freedom of association as outlined in section 16(1) of the Constitution of Lesotho. In pursuance of that right, the said employees may form a public officers' association for the purpose of collective bargaining with the employer. This is according to section 22(1) of the Act.
[265] Section 19 of the Public Service Act 2005.

bargaining.[266] This position also differs considerably from that which was obtaining in South Africa during the 1956 Labour Relations Act because public sector employees under that Act did not even have the right to freedom of association.

One of the important features about the Public Service Act is the fact that it provides for dispute resolution within the public service. The guiding principles which have to be adhered to in handling any dispute in the public service are that a public officer should be accorded a fair hearing and that the rules of natural justice should also be taken into consideration.[267] Section 17 provides for the settlement of disputes of interest[268] through conciliation whereas section 18 provides for the settlement of disputes of right[269] through arbitration. However a dispute of interest that remains unresolved after conciliation may be referred for arbitration as well. The decisions of the arbitration are final and binding on the parties even though they may be reviewed in the courts of law.[270] Section 20 establishes a Public Service Tribunal to deal with appeals instigated by a public officer, a registered public officers' association, or employer arising from a grievance and disciplinary action. The Tribunal also has the powers to deal with disputes of interest that remain unresolved after an attempt at conciliation.[271] The decisions of this tribunal are final subject only to review by the courts of law. What this means is that parties to the employment relationship in the public sector have to

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[266] Under the 1995 Act, employees could only form and join associations that had "consultative status" and thus could not engage in collective bargaining with the employer.
[267] Section 4 of the Disciplinary Code as well as section 4 of the Grievance Code.
[268] Section 4 defines a dispute of interest as a dispute over employment matters to which a public officer or employer does not have an established right.
[269] Dispute of right has been defined as a dispute arising from a breach or contravention of law, contract of employment or collective bargaining agreement.
[270] Section 18 (4)
[271] See section 3(1)(e) of the Code on Dispute Resolution.

exhaust these internal remedies. It is only when one is not satisfied either with the decision of the arbitration or the Tribunal that he can approach the ordinary courts for relief through judicial review. These dispute resolution mechanisms are similar to those provided for in the Labour Code order even though in the case of public servants they are effected within the framework of the Public Service Act. This is yet another attempt to depart from the challenges that were imposed by the 1995 Act. It is submitted that this position is preferred because it accords public sector employees labour rights whilst at the same time taking into consideration the peculiar status of such employees as employees of the state.

6. CONCLUSION

In the countries surveyed above, in particular Germany and Lesotho, a distinction persists in the employment sphere, between public and private sector employees. It is submitted that this arises mainly because of the argument that government actions which impact on the public employment relationship do not only affect the interests of employees but by their very nature also involve the exercise of public power or government authority.[272] In the United Kingdom the labour laws do not draw any distinction between public and private sectors. However as mentioned earlier there was controversy at some stage as to whether such employees are also entitled to public law remedies. As we have seen from the cases discussed, the general trend seems to be that the relationship between the employer and a public employee falls to be governed by labour law as opposed to public law. This position is preferred because it ensures that all labour disputes are heard by a judiciary that is conversant with the intricacies of

[272] Olivier M.P. op cit (fn 247) p256

the labour relationship as well as the law pertaining to it. In that way, efficiency and consistency in the resolution of labour disputes is guaranteed. The position of Lesotho, as indicated earlier, is preferred because it accords public employees labour rights and dispute resolution mechanisms similar to those pertaining in the private sector whilst at the same time taking into consideration the peculiar status of such employees as employees of the state. However, the disadvantage is that the existence of separate structures will definitely place an added administrative and financial load on the state as well as financial burdens on the taxpayer. The German position is advantageous because it recognises the fact that there are certain categories of public sector employees who require special protection afforded by administrative law by virtue of the functions exercised by such employees as well as the position or status occupied by them.[273] These are employees whose functions are normally considered as policy making and are of a highly confidential nature. However, the problem that may arise in this case is that it might be difficult to delineate such categories and draw the line between them and other categories of employees. This is because functions performed by the various categories are bound to overlap at one point or another. It is submitted that South Africa could learn a lot from the various approaches adopted by the jurisdictions discussed above even though, as indicated, each of the different approaches has its own merits and disadvantages. It is on this basis that the next chapter seeks to proffer some solutions to the problems in the public sector with regard to the lessons attained in the jurisdictions discussed.

[273] ibid

CHAPTER 6

CONCLUSIONS AND RECOMMENDATIONS

6.1 INTRODUCTION

We have seen from preceding chapters that there is an uncertainty in the law as to whether public sector employees in South Africa should be allowed to resort to the provisions of PAJA where they have been aggrieved by the conduct of the state as the employer. Several authors have expressed divergent view-points on this subject. There are those who hold the view that the state as the largest employer wields immense power which needs to be checked and curbed in a way prescribed by norms and rules of particular application to the relationship between the state and its employees.[274] They argue that by their very nature, administrative law principles will be able to fulfil this need and that therefore administrative law should apply in public sector employment. On the other hand, there are those who feel that even though the relationship between the state and its employees is special in nature, the said relationship remains one between an employer and employee and should as such be governed by the general principles of labour law.

This issue has also been the subject of consideration before several courts who have handed down different and conflicting decisions. However, what appears to be the prevailing labour court view was articulated in the case of SAPU v National

[274] Olivier M.P. op cit (Fn 247) p257.

Commissioner of the Police Service[275] wherein the court held that there was no logical, legitimate or justifiable basis upon which to categorize employment conduct in the public sector as administrative action. The court went on to point out that the "Constitution draws an explicit distinction between administrative action and labour practices as two distinct species of juridical acts, and subjects them to different forms of regulation, review and enforcement."[276] What appears to be the prevailing High Court view on the other hand was expressed in the case of POPCRU v Minister of Correctional Services[277] wherein the court held that the exercise of the power to employ and dismiss employees in the public sector amounts to administrative action which is amenable to review under the Constitution and PAJA.

An analysis of the position of public sector employees in other jurisdictions has also shown that various states categorise the employment relationship in the public sector differently. For example in Germany there are those employees, referred to as civil servants, whose relationship with the employer is governed by the rules of administrative law whereas the remaining categories fall to be governed by the general principles of labour law. In Lesotho section 30 of the Public Service Act excludes public officers from the ambit of the labour laws which are only applicable in the private sector. However, as seen earlier, the said Act accords public employees labour rights which are only exercisable within the framework of the Act. This shows that public employees are not regarded as having a private employment relationship with the employer which can be regulated by the same rules as private sector employees.

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[275] Supra Para 62
[276] Ibid at Para 54
[277] [2006] 4 BLLR 385 (E)

6.2 CONCLUSIONS

We agree with the view expressed in the case of POPCRU in that any proper dismissal enquiry in the public domain necessarily has the procedural attributes of administrative action which may entitle employees to seek to review the conduct in question under PAJA. It now seems possible, from this concession, for the same set of facts to give rise to more than one cause of action; one flowing from the LRA, and another flowing from PAJA where the matter involves a public sector employee. Thus one can change his cause of action from an unfair dismissal under the LRA, for example, to a claim of unfair administrative action under PAJA. The question that we have been grappling with in the previous chapters is whether public employees should be allowed to do this. It is submitted that there are important policy considerations which lead us to conclude that even though public sector employees may be entitled to remedies under PAJA they should not, however, be allowed to challenge dismissals and other conduct of the employer in terms of PAJA. This is simply because apart from several reasons that have already been advanced previously, the application of PAJA also has important implications for effective labour dispute resolution as will be shown.

The ministerial task team that was responsible for the drafting of the Labour Relations Bill was tasked, amongst other things, with the duty of providing "simple procedures for the resolution of disputes through statutory conciliation, mediation and arbitration and the licensing of independent alternative dispute resolution services."[278] It was also tasked with providing a system of labour courts to determine disputes of right in a way

[278] See the Explanatory Memorandum to the Draft Labour Relations Bill, op cit p279.

that would be accessible, speedy and inexpensive, with only one tier of appeal.[279] This was effected by providing for short time limits for processing disputes.[280] A dispute must be referred for conciliation within 30 days after it arises and to arbitration within 90 days after a certificate of its non-resolution at conciliation is issued. This shortened period sets a departure from a review which must be launched within 180 days[281] and can be extended if and when circumstances so require. Section 5 of PAJA allows 90 days within which an aggrieved party can request written reasons for administrative action from an administrator who in turn has further 90 days to furnish such reasons. These time limits and procedures show that labour was specifically designed for speedy resolution of disputes in an efficient and cost-effective manner, whereas the time limits imposed by PAJA are too long and consequently are likely to protract labour disputes.[282] It is for this reason that we argue that public sector employees should not be allowed to seek a remedy under PAJA when they have been aggrieved by the decision of their employer.

Furthermore, the Bill of Rights creates two distinct sources of power. The one in section 23 of the Constitution feeds the procedures of the labour law; the other, in section 33, those of administrative law.[283] The statutes enacted to give effect to each of the Constitutional provisions, LRA and PAJA respectively, differ fundamentally in the substantive remedies they provide.[284] If any application in the normal course for the

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[279] ibid
[280] Pillay D, op cit p421
[281] Section 7
[282] Pillay D, op cit p421
[283] Chirwa v Transnet, supra at Para
[284] Pillay D, op cit p422

review of administrative action succeeds, an applicant is usually entitled to no more than the setting aside of the impugned decision and its remittal to the decision maker to apply his mind afresh.[285] Section 8(1) (c)(ii) of PAJA provides that only in exceptional cases may a court substitute the administrative decision or correct a defect resulting from the administrative action. The principle is that the subject is entitled to a procedurally fair and lawful decision, not to a correct one.[286]

Under the LRA, for example, the procedure to have a dismissal overturned involves a rehearing of evidence by the parties and the substitution of a correct decision for an incorrect one.[287] The scope of relief consequent upon such order is extensive; the LRA conceives reinstatement as the primary remedy for unfair dismissal and pegs the amount of compensation for unfair dismissal.[288] Hence the scope of relief offered under the LRA is quite different from that afforded by an administrative law review of the decision. It is submitted therefore that if PAJA procedures and remedies were to apply to decisions of the public employer then the primary objective of effective labour dispute resolution of the LRA would be defeated.[289]

In addition, section 157 of the LRA confers on the Labour Court's "exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court."[290] It is submitted on that basis that the

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[285] Sidumo & another v Rustenburg Platinum Mines LTD & Others (unreported) CCT 85/06 (CC), Para 98 at p49
[286] See the case of Chirwa v Transnet, supra, Para 31
[287] ibid
[288] Pillay D, op cit p421
[289] ibid
[290] Section 157(2) provides for concurrent jurisdiction of these courts where an alleged or threatened infringement of any fundamental rights in the Constitution and arising from employment and labour relations has occurred.

application of PAJA would negate this intended exclusive jurisdiction of the Labour Court in that it would enable the High Court to have concurrent jurisdiction with the Labour Court in every dispute involving public sector employees. This possibility of multiple jurisdictions would not only cause parallel and incoherent jurisprudence to occur; but would also provide a fertile ground for the unacceptable practice of forum shopping as well as jurisdictional confusion.[291] It is therefore argued on that basis also, that PAJA should not apply within the employment relationship in the public sector. These sentiments were recently expressed by the Constitutional Court in the case of Sidumo & another v Rustenburg Platinum Mines.[292] The issue to be determined by the court in this case was whether the decisions of the Commission for Conciliation Mediation and Arbitration (CCMA) can be classified as administrative action subject to review under PAJA. The court expressed its fears regarding the applicability of PAJA in labour matters. It held that if PAJA were to apply in labour matters, the objective of effective, speedy and inexpensive resolution of employment disputes through statutory conciliation, mediation and arbitration would be defeated. It was held on that basis that the decisions of the CCMA could not be classified as administrative action.

6.3 RECOMMENDATIONS

As shown above, troublesome questions about the applicability of administrative law principles in the public sector will always arise unless and until provision is made for meaningful solutions to the problems at hand. This part is therefore an attempt to postulate possibilities of legislative intervention with the hope of bringing to an end this

[291] See the Sidumo case, supra, Para 97.
[292] Ibid

uncertainty that clouds labour relations in the public sector. It is submitted that parliament must seriously consider enacting legislation to ensure that all labour disputes (including those that emanate from the public sector) are handled by the Labour Court. That is to say that all labour disputes in the public sector should be dealt with according to dispute resolution procedures created by the LRA and not judicial review of administrative action under PAJA. This will result in greater opportunity for consistency and efficiency.

In this instance the position in the United Kingdom is preferred in as much as it does not draw any distinctions between private and public sectors. In the United Kingdom, the fact that one is an employee of the state does not make a difference. The relationship remains one between an employer and employee which falls to be governed by labour law principles. In this way all labour disputes are heard by the labour courts, thereby ensuring greater efficiency in the resolution of disputes. To that end the legislature could start by amending the definition of "administrative action" in section 3 of PAJA to exclude functions performed by the state in its capacity as employer from the ambit of the Act.[293] In this way such action would, instead, be reviewable under section 158(1)(h) of the LRA which gives exclusive jurisdiction to the labour court to review any decision taken by the state in its capacity as employer. In this way, we will ensure that labour matters will be heard by a judiciary that is acquainted with the intricacies of the labour relationship thus guaranteeing the maintenance of consistency and certainty within the public employment.

[293] See Pillay D, op cit p425

However, we also acknowledge that there are certain categories of public sector employees who require special protection afforded by administrative law by virtue of the functions exercised by them as well as the position or status they occupy. Hence the German position is preferred in this regard. To that end, the legislature would have to delineate various categories of employees and state specifically which group may be entitled to protection of administrative law. In that instance, the remainder of the public employees will fall to be governed by labour law principles. Hence as an alternative to granting a blanket inclusion of every employee within the ambit of general labour laws, the legislature could consider adopting this functional approach. The Lesotho position could come in handy in this case in that the legislature could then adopt a separate legal framework for those employees who would have been identified as being entitled to special protection. This would go a long way in ensuring that there is efficiency in the dispute resolution in the public sector.

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