

**PAJA NEWSLETTER
SPECIAL ISSUE:
THE APPLICATION OF
PAJA TO EMPLOYMENT
LAW DISPUTES**

There can be no doubt that many of the decisions taken by public sector companies and organs of state will amount to administrative action as defined in section 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Recently, however, the question has arisen as to whether the employment decisions of public sector employers in relation to their employees constitute administrative action. If they do, then public sector employers would have to comply with the requirements of administrative justice as set out in PAJA as well as with the requirements of fair labour practice as set out in the Labour Relations Act 66 of 1995 (LRA). In the same vein, the question has arisen as to whether decisions of the Commission for Conciliation, Mediation and Arbitration (CCMA) taken in terms of the LRA are reviewable as administrative acts in terms of PAJA. Various courts have answered this question in contrasting ways, but the both questions were recently aired before the Constitutional Court. This special edition of the PAJA Newsletter is a review of the case law and academic opinion dealing with these two issues so far.¹

1 Public sector employment decisions as administrative action for the purposes of PAJA

The definition of administrative action in section 1 of PAJA reads:

¹ The following academic articles and books were relied on in the preparation of this review: Richard Stacey 'Administrative law in public sector employment relationships' (2007) 124(4) *South African Law Journal* (forthcoming), Cora Hoexter *Administrative Law in South Africa* (2007), 194-99, Carl Mischke, 'Administrative action and employment law: Do employees in the public sector enjoy additional remedies?' (2006) 15 *Contemporary Labour Law* 86, Stefan van Eck & Ronell Jordaan-Parkin, 'Administrative, Labour and Constitutional Law - A Jurisdictional Labyrinth' (2006) 27 *Industrial Law Journal* 1987, Dhaya Pillay, 'PAJA v labour law' (2005) 20 *SA Public Law* 413 (considering a broader range of issues), and PAK Le Roux, 'Individual Labour Law' (2006) *Current Labour Law* 1 at 12-17.

"administrative action" means any decision taken, or any failure to take a decision, by-

- (a) an organ of state when-
 - (i) exercising a power in terms of the Constitution or a provincial constitution;
- or
- (ii) exercising a public power or performing a public function in terms of any legislation'.

Paragraph (b) applies to 'natural or juristic persons other than organs of state'. The decisions under review in this comment, however, all deal with organs of state. The provisions of paragraph (b), as well as the exclusions listed in the remainder of the definition, are therefore of no concern here.

It is not difficult to determine in each case whether an employer is an organ of state. The definition assigned to the term in section 1 of PAJA is the same as that given to the term in section 239 of the Constitution, and includes any department of state or administration in the national, provincial or local sphere of government as well as any other functionary exercising a public power or performing a public function in terms of any legislation. Whether an employer is a department of state, part of national administration, or another functionary exercising powers in terms of legislation is easily ascertainable. The troublesome part of the definitional inquiry is whether the employment power exercised or employment function performed by a public sector employer is 'public'. There are two bases on which courts have held that public sector employment decisions do not amount to administrative action. The first of these is that employment decisions do not affect the public, are purely private in nature and lack the public characteristic of administrative action. The second basis that courts have refused to apply PAJA to employment decisions is that, even if a public-sector employment decision is the exercise of a public power, the application of comprehensive labour legislation ousts the application of PAJA.

(a) *A decision of a purely private nature? SA Police Union & Another v National Commissioner of the SA Police Service & Another*² (SAPU) concerned a challenge to the

² (2005) 26 *ILJ* 2403 (LC).

National Police Commissioner's decision to unilaterally change the arrangement of working hours of members of the South African Police Service. In the judgment, Murphy AJ acknowledged that section 24(1) of the South African Police Service Act 68 of 1995 (the SAPS Act) empowers the Minister of Safety and Security to make regulations relating to the conditions of service of members of the SAPS.³ In making regulations the Minister conferred on the National Commissioner the authority to determine working hours, which prerogative could be exercised unilaterally or bilaterally in terms of existing contracts of employment or collective agreements. The Commissioner's decision to change working hours was taken in terms of this legislative framework, but the change in working hours itself was in terms of a collective agreement concluded between the SA Police Union and the National Commissioner.⁴ Although the decision-making power had its source in legislation, Murphy AJ held that the agreement, as 'a contract concluded on equal terms between equal parties "without any element of superiority or authority" deriving from the SAPS's public position',⁵ meant that the decision was private, rather than public in nature. Murphy AJ relied on the principle enunciated by the Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Union and Others (SARFU)* that the source of a power is not dispositive of the question of whether it is public or not.⁶ Murphy AJ thus focused on the nature of the power exercised by the Commissioner:

'There is nothing inherently public about the setting of working hours of police officers. Nor is there any public law concern here, the matter falls far more readily within the domain of contractual regulation of private employment relations. The nature of the power exercised and the function performed in the setting or agreeing of shift times does not relate to the government's conduct in its relationship with its citizenry to which it is accountable in accordance with the precepts of representative democracy and governance. The powers and functions concerned derive from employment

law and are circumscribed by the constitutional rights to fair labour practices and to engage in collective bargaining. One is instinctively drawn to the conclusion that the concept of administrative law action is not intended to embrace acts properly regulated by private law.⁷

In reaching this conclusion Murphy AJ explicitly disagreed with two earlier decisions. *Mbayeka & another v MEC for Welfare, Eastern Cape*⁸ concerned an application to the High Court seeking a declaration that suspension from employment without emoluments was unconstitutional. The respondent argued that the High Court had no jurisdiction to hear the matter since the dispute fell within the exclusive jurisdiction of the Labour Court in terms of the LRA. Jafta J held that the MEC's power to suspend the applicants was derived from section 22(7) of the Public Service Act (Proc 103 of 1994), and that failure to afford the applicants a hearing prior to their suspension constituted procedurally unfair administrative action.⁹ In *Simela & others v MEC for Education, Eastern Cape & another*,¹⁰ Francis AJ held that a decision to transfer an employee in the absence of a hearing or any consultation prior to the transfer was both an unfair administrative act and an unfair labour practice.¹¹

Murphy AJ's reason for disagreeing with these two decisions in the *SAPU* matter was that neither of the judgments paid attention to the definition of administrative action or the comment of the Constitutional Court in *SARFU* that the source of the power is not decisive:

'To the extent that these judgments confirm the proposition that transfers or suspensions in contravention of the audi alteram partem principles violate the constitutional right to fair labour practices I am in respectful agreement with them. Where I differ is with the conclusion that a transfer or a suspension constitutes administrative action. Neither judgment gives full consideration to the definition of "administrative action" in PAJA. Both, it would seem, assume that because the power to suspend or transfer is sourced in legislation it axiomatically follows that the power or function involved is a public one.¹²

³ Ibid at paras 51-2.

⁴ Ibid at para 53.

⁵ Ibid. The quote is taken from *Logbro Properties CC v Bedderson NO* 2003 (2) SA 460 (SCA), para 10.

⁶ 2000 (1) SA 1 (CC), para 143, relied on by Murphy AJ in *SAPU* at para 51.

⁷ *SAPU*, para 51.

⁸ [2001] 1 All SA 567 (Tk).

⁹ Ibid, para 29.

¹⁰ [2001] 9 BLLR 1685 (LC).

¹¹ Ibid, para 54-55 and 59.

¹² *SAPU*, above note 2, para 60.

This approach was followed in *Hlope & others v Minister of Safety and Security & others*,¹³ a case where members of the South African Police Services challenged a decision to transfer them to another unit. The view that employment decisions in the public service do not constitute exercises of public power and are therefore not administrative action was again endorsed in *Greyvenstein v Kommissaris van die SA Inkomste Diens*,¹⁴ where the decision to institute disciplinary proceedings was held not to be the exercise of a public power.

Some judgments have held that employment powers exercised in terms of contracts are inherently private. The recent case of *Transnet Ltd & others v Chirwa*¹⁵ gave the Supreme Court of Appeal (SCA) the opportunity to address the relationship between public sector employment law and administrative law for the first time. Three judgments were filed, with a plurality of three judges holding for different reasons that the procedure leading to a dismissal need not comply with the requirements of administrative justice. Mthiyane JA (Jafta JA concurring) held that although Transnet is an organ of state as defined in section 239 of the Constitution and derives its authority to enter contracts from statute, its power to terminate contracts does not come from the same source.¹⁶ In this respect at least, Mthiyane JA is correct: the Legal Succession to the South African Transport Services Act 9 of 1989, the statute that establishes Transnet and sets out its powers, does not confer on Transnet the power to dismiss employees. The power to terminate contracts must be found entirely in the terms of the contracts themselves. Mthiyane JA concluded that

'the nature of the conduct involved here is the termination of a contract of employment. It is based on contract and does not involve the exercise of any public power or performance of a public function in terms of legislation.'¹⁷

When Transnet dismissed Ms Chirwa it was acting, in Mthiyane JA's view, on the basis of contract in its capacity as an employer and not in terms of legislation in its capacity as a public authority.¹⁸ The same conclusion was reached in the Johannesburg High Court in *Louw v SA Rail Commuter Corporation Ltd & another*.¹⁹

(b) Contractual public power

The conclusions presented in the judgments so far are at odds with the Appellate Division's view in *Administrator, Transvaal, and Others v Zenzile and Others*.²⁰ The case concerned the dismissal for misconduct of three employees of the Natalspruit Hospital. The employees had participated in a two day strike in support of a demand that another employee who had been dismissed a month previously be reinstated. The employees had not been granted a hearing prior to their dismissal. Although decided before PAJA or even the constitutionalisation of a right to procedurally fair administrative action, the question before the court was whether the failure to observe the principle of audi alteram partem in the circumstances was unfair. The employers' argument was that the relationship between the hospital and the employees was established by the contract of employment, and regulated by the common law of contract. Hoexter JA rejected this argument, focussing rather on the nature of the functions of the hospital:

'I am unable to accept that argument. One is here concerned not with mere employment under a contract of service between two private individuals, but with a form of employment which invests the employee with a particular status which the law will protect. Here the employer and decision maker is a public authority whose decision to dismiss involved the exercise of a public power. The element of public service injected by statute necessarily entails, so I consider, that the respondents were entitled to the benefit of the application of the principles of natural justice before they could be summarily dismissed for misconduct.'²¹

The Appellate Division's approach here is consistent with jurisprudence beyond the specific

¹³ [2006] 3 BLLR 297 (LC).

¹⁴ (2005) 26 ILJ 1395 (T).

¹⁵ (2007) (2) SA 198 (SCA).

¹⁶ *Ibid.*, para 14. See also *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA) at paras 37-38.

¹⁷ *Chirwa*, above note 15 para 15.

¹⁸ *Ibid.*

¹⁹ (2005) 26 ILJ 1960 (W).

²⁰ 1991 (1) SA 21 (A).

²¹ *Ibid.* at 34B-D.

context of employment law. In *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange and Others*, for example, the High Court relied on the fact that the Johannesburg Stock Exchange, although a private body exercising power over its members in terms of contract, was required by the legislation establishing it to carry on its business 'with due regard to the public interest', to make rules that safeguard and further the public interest and list securities only if that was in the public interest.²² The Constitutional Court recently considered the question of public power within the context of contract in *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another*.²³ The Micro Finance Regulatory Council was recognised by the Minister of Finance in terms of legislation as the regulatory body for the micro lending industry. In terms of the applicable legislation, companies wishing to participate in the micro lending industry had to register with the Council and comply with its rules. AAA Investments, a company engaging in micro lending, challenged the rules made by the Council on the basis that they were exercises of public power, had therefore to comply with the doctrine of legality, and had failed to do so. In the SCA, the court focused on the contractual relationship between the Council and its members including AAA Investments:

'The Council is not, and does not purport to be, a public regulator with authority unilaterally to exercise powers over outside parties. It is a company that conducts business as a private regulator of lenders who choose to submit to its authority by agreement. In regulating micro-lenders who agree to such regulation, it does not purport to be exercising legislative or other public powers that require a constitutional or legislative source. It purports only to regulate those who are willing to submit to its regime and the source of its authority to do so is their consent.'²⁴

²² 1983 (3) SA 344 (W) at 361F and 364C-D. See also *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* 1988 (3) SA 132 (AD) at 152E-I, and *R v Panel on Take-overs and Mergers, ex parte Datafin plc and Another (Norton Opax plc and Another Intervening)* [1987] 1 All ER 564 (CA).

²³ 2006 (11) BCLR 1255 (CC).

²⁴ *Micro Finance Regulatory Council v AAA Investments (Pty) Ltd and Another* 2006 (1) SA 27 (SCA) para 24.

The Constitutional Court rejected this approach, however, stating that whether the Council is subject to the controls of legality and the principles of administrative justice depends on whether the functions it exercises are public in character.²⁵ In the same way that a power should not axiomatically be considered 'public' only because it has its source in legislation, a power should not be considered private or 'non-public' only because it has its source in contract. The *SARFU* principle that the nature and character of the power must be examined applies equally whether the source of the power is legislative or contractual.

On this basis it is hard to argue that the *Zenzile* decision is no longer binding in cases involving public sector dismissals. Indeed, this was the view taken by Plasket J in *Police and Prisons Civil Rights Union and others v Minister of Correctional Services and others*²⁶ (*POPCRU*). The case concerned the dismissal for misconduct of several members of the applicant union from their employment as correctional officers at Middeldrift Prison. The judge stated in the judgment that he considered himself bound by the 'general proposition for which *Zenzile* is authority, namely that the decision of a public authority to dismiss an employee is an exercise of public power.'²⁷ Plasket J took account of similar factors as Hoexter JA in *Zenzile* to conclude that the power exercised by the Minister was public:

'It was argued...that the decisions were not administrative actions as defined because they did not constitute the exercise of public power, and this was so because they did not affect the public as a whole.

...

In my view, however, the elusive concept of public power is not limited to exercises of power that impact on the public at large. Indeed, many administrative acts do not. The exercise of the power to arrest is a good example of an administrative action that would only have a significant impact on the arrestee and, perhaps, the complainant. Another example would be a decision by the Amnesty Committee of the erstwhile Truth and Reconciliation Commission to grant a person

²⁵ Above note 23, para 41.

²⁶ [2006] 2 All SA 175 (E).

²⁷ *Ibid*, para 55.

amnesty from the civil and criminal consequences of his or her politically motivated crimes. In these instances what makes the power involved a public power is the fact that it has been vested in a public functionary who is required to exercise it in the public interest, and not in his or her own private interest or at his or her own whim. This is articulated in the dissenting judgment of Schreiner JA in *Mustapha and another v Receiver of Revenue, Lichtenburg and others* [1958 (3) SA 343 (A)], now considered to be correct.

...

In my view, 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 and the attainment of the purposes specified in section 2 of the Correctional Services Act 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.²⁸

Writing in the *Chirwa* matter in the SCA, Cameron JA (Mpati DP concurring) endorsed Plasket J's view. Cameron JA stated that the reasoning of *Zenzile* is as compelling today as it was a decade and a half ago.²⁹ Cameron JA referred to the SCA decisions of *Cape Metropolitan Council v Metro Inspection Services*³⁰ and *Logbro Properties CC v Bedderson NO*³¹ for the 'general principle' that

'where a public body is empowered by statute to contract, the principles of administrative justice frame the parties' contractual relationship, and, in particular, they govern the public body's exercise of the rights it derives from the contract. That applies to the employment contract here.'³²

The response or counter-argument to Plasket J's and Cameron JA's conclusion is that *Zenzile*, although correct at the time it was decided, is no longer relevant, and that public sector employment decisions, even if they are exercises of public power and do amount to administrative action as defined, they should nevertheless be regulated by the provisions of labour law alone.

²⁸ Ibid, paras 52-54, footnotes omitted.

²⁹ Above note 15, para 52.

³⁰ 2001 (3) SA 1013 (SCA).

³¹ 2003 (2) SA 460 (SCA).

³² Above note 15, para 55.

(c) Ousting the application of administrative law

Three judgments stand out as having rejected the precedent of *Zenzile*: Conradie JA's judgment in *Chirwa*, Murphy AJ's judgment in *SAPU*, and Pillay J's judgment in *Public Servants Association obo Haschke v MEC for Agriculture & others*.³³ The primary reason for this finding is that the *Zenzile* decision is no longer justified since its 'doctrinal underpinnings'³⁴ find no resonance in the constitutional era. The predecessor to the LRA, the Labour Relations Act 28 of 1956, did not apply to public sector employees.³⁵ State employees thus had less protection than ordinary employees to whom the provisions of the 1956 Labour Relations Act applied. In order to offer state employees some protection, then, the decisions of the state as an employer were subjected to the requirements of administrative law and natural justice. As Pillay J said, '[h]istorically, recourse had been had to administrative law to advance labour rights where labour laws were inadequate'.³⁶ The 1995 LRA, on the other hand, applies to public sector employees.³⁷ Murphy AJ held that the extension of the benefits and protections of labour legislation to public sector employees meant that there is no longer any reason to extend the protections of administrative law to public sector employees:

'It follows from this line of thought that the progressive decisions of our courts, extending labour rights to public sector employees by categorizing employer conduct as administrative action, have lost their force following the codification of our administrative law and labour law, and the extension of full labour rights to public sector employees by the LRA. Courts might therefore justifiably be expected to reconsider previous doctrine in the light of the new constitutional and statutory framework.'³⁸

This approach was supported by Conradie JA in *Chirwa* when he stated that the answer to

³³ [2004] 8 BLLR (LC).

³⁴ *SAPU* above note 2, para 67.

³⁵ Section 2 of that act explicitly excluded state employees from its protections.

³⁶ *Public Servants Association obo Haschke* above note 33 para 11. See also *SAPU* above note 2 para 64.

³⁷ Section 2 of the LRA does, however, exclude members of the armed forces and members of the national intelligence agencies from the ambit of the Act.

³⁸ *SAPU* above note 2, para 66.

the question whether dismissals in the public domain should be treated as administrative acts must, since the coming into operation of the 1996 LRA, be no.³⁹

The fact that dismissals or other employment decisions in the public sector are now governed by labour legislation does not on its own, however, imply that administrative law does not apply. The courts have added another step to their reasoning. They have held that since labour relationships exist between private individuals, they should be regulated by private law. Employment relationships are not appropriately governed by public law principles such as those of administrative law. Pillay J drew this line between the two realms of law quite distinctly:

'Labour law is not administrative law. They may share many common characteristics. However, administrative law falls exclusively in the category of public law, whereas labour law has elements of administrative law, procedural law, private law and commercial law.'⁴⁰

Murphy AJ added that administrative action does not embrace acts that are properly regulated by private law,⁴¹ while Conradie JA held that in extending the provisions of the LRA to employees of the state and organs of state the legislature 'took dismissals out of the realm of administrative law'.⁴²

These decisions have therefore accepted that even though an employment decision on the public sector - a dismissal, transfer or suspension, for example - might meet all the requirements of administrative action, the application of labour legislation shields such decisions from the controls of administrative law.

(d) Conclusion

Three SCA judges in the *Chirwa* matter held that public sector employment decisions are administrative action (Conradie JA, Cameron JA and Mpati DP), while two held that such decisions are not administrative action as defined because they do not amount to exer-

cises of public power (Mthiyane JA and Jafta JA). Conradie JA agreed with judges in the lower courts that the extension of labour legislation to public sector employees precluded the application of administrative law. There is this no clear authority from the SCA on the issue. This was recognised by the SCA, per Farlam JA, in *Legal Aid Board v Jordaan*,⁴³ where, dealing with the jurisdiction of the High Court in regard to an employment dispute, the court said:

'In the present case it goes without saying that the High Court will have jurisdiction to decide what I understand will be one of the issues arising in the main application, viz whether the disciplinary enquiry instituted by the applicant constituted administrative action under the Promotion of Administrative Justice Act 3 of 2000. To answer that question the High Court will have to decide which of the divergent views expressed in the recent decision of this Court in *Transnet Ltd and Other v Chirwa*...was correct.'⁴⁴

The Constitutional Court is currently seized with this matter. Its decision will clarify the position immensely. If the Constitutional Court does not decide outright whether employment decisions are or are not administrative action so defined, its judgment will at least highlight the factors and considerations to be taken into account when determining whether a public sector employment decision is administrative action and when it is not.

2 The application of PAJA to decisions of the CCMA

The SCA held recently in *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* that decisions of commissioners of the CCMA are administrative action as defined in PAJA and reviewable as such.⁴⁵ The case revolved around the dismissal of a security guard, one Sidumo, from the employ of the appellant. He had been found guilty during a disciplinary inquiry of misconduct and of neglecting his

³⁹ *Chirwa* above note 15, para 27.

⁴⁰ *Haschke*, above note 33 para 11.

⁴¹ *SAPU* above note 2, para 51.

⁴² *Chirwa* above note 15, para 29.

⁴³ 2007 (3) SA 327 (SCA).

⁴⁴ *Ibid*, para 6 (emphasis added).

⁴⁵ 2007 (1) SA 576 (SCA), para 25.

duties.⁴⁶ Sidumo referred his dismissal to the CCMA in terms of the LRA. Section 188(1)(a)(i) of the LRA provides that a dismissal for misconduct is unfair unless the employer can prove that the dismissal was for a fair reason.⁴⁷ The CCMA found that dismissal was inappropriate in the circumstances.⁴⁸ The Mine then approached the Labour Court to review the CCMA decisions in terms of the LRA. Revelas J agreed with the CCMA that dismissal was an inappropriate sanction in the case.⁴⁹ The Labour Appeal Court then heard the matter, and although critical of the reasons both the CCMA and Revelas J had given for their conclusions, found that there were other reasons justifying the CCMA's decision.⁵⁰

The issue the SCA was asked to decide was whether standards of administrative review can be relied on in reviewing decisions of the CCMA. Section 145(1) of the LRA allows review of a CCMA decision on grounds of a 'defect'. A defect is in turn defined in section 145(2) to mean:

- '(a) that the commissioner-
 - (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
 - (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
 - (iii) exceeded the commissioner's powers; or
- (b) that an award has been improperly obtained.'

Section 158(1)(g) of the LRA, however, allows review 'on any grounds that are permissible in law' subject to section 145. Whether section 158(1)(g) expanded the grounds of review to include administrative law grounds was first considered in *Carephone (Pty) Ltd v Marcus NO and Others*.⁵¹ The Labour Appeal Court (LAC) held in that case that in reviewing decisions of the CCMA courts were entitled to ask whether there was 'a rational objective basis' justifying the commissioner's decision.⁵² The *Carephone* test investigates particularly whether there is a rational connection between

the material and facts before the commissioner and the substance of his decision. Section 6(2)(f)(ii) of PAJA sets out similar grounds of review:

- '(2) A court or tribunal has the power to judicially review an administrative action if-
 - (f) the action itself-
 - (ii) is not rationally connected to-
 - (aa) the purpose for which it was taken;
 - (bb) the purpose of the empowering provision;
 - (cc) the information before the administrator;
 - (dd) the reasons given for it by the administrator'.

The LAC considered squarely PAJA's applicability, over and above the *Carephone* test, to the review of CCMA decisions in *Shoprife Checkers (Pty) Ltd v Ramdaw NO and Others*, but found it unnecessary to decide the issue.⁵³ The court did accept, though, 'the possibility that PAJA may well be applicable to arbitration awards issued by the CCMA'.⁵⁴

Cameron JA, writing for the Court in *Rustenburg Platinum*, was in no doubt that a commissioner's decision in the CCMA amounts to administrative action as defined in PAJA.⁵⁵ The question was thus not whether CCMA decisions fit the definitional requirements of PAJA, but whether the application of PAJA is precluded by the application of the LRA to labour disputes. Cameron JA held that it is not, referring, it appears, to the primacy that PAJA enjoys over the LRA as a piece of legislation:

'[T]he overriding factor in determining the impact of PAJA on the LRA is the constitutional setting in which PAJA was enacted. Parliament enacted PAJA because of a constitutional obligation to give legislative effect to the right to just administrative action embodied in the final Constitution. That obligation did not exempt from its ambit previous parliamentary enactments that conferred rights of administrative review. It extended to all of them. This is so even though the LRA is a specialised statute. According to its preamble it was enacted to give effect to s 27 of the interim Constitution (though, unlike PAJA, it is not the product of an express imperative obliging Parliament to legis-

⁴⁶ Ibid, para 4.

⁴⁷ Ibid, para 7.

⁴⁸ Ibid, para 11.

⁴⁹ Ibid, para 15.

⁵⁰ Ibid, para 17.

⁵¹ 1999 (3) SA 304 (LAC)..

⁵² Ibid, paras 31 and 37.

⁵³ 2001 (4) SA 1038 (SCA).

⁵⁴ Ibid, para 33.

⁵⁵ Above note 45, para 24.

late). It did so by regulating various matters within the labour-relations field. Both the Constitution, which required Parliament to give general legislative effect to the right to administrative justice, and the legislation so enacted, superseded the LRA's specialised enactment within the field.⁵⁶

Cameron JA came to the same conclusion following an additional, different line of reasoning. On the *Carephone* approach, the interim Constitution's requirement of administrative action 'justifiable in relation to the reasons given for it' suffused review in terms of section 145(2) of the LRA. There is no reason that the constitutional standard of review under the final Constitution should not similarly suffuse review now. Section 6(2) of PAJA is the 'legislative embodiment of the grounds of review to which arbitration parties became entitled under the Constitution',⁵⁷ and those grounds of review now infuse review in terms of the LRA.

On the facts of this case, the SCA held that the LAC had applied the incorrect test. It had confined itself to narrow review in terms of section

145 of the LRA, and has asked whether the commissioner's decision was 'capable of sustaining' his findings.⁵⁸ What PAJA and *Carephone* required the LAC to do was inquire whether the commissioner's decision was 'rationally connected to' information before him and the reasons he gave for his decision.⁵⁹ The effect of the LAC's approach, the SCA held, is to give CCMA commissioners 'more leeway than the statute allows, since it insulates their decisions from intervention unless the record is devoid of reasons that are capable of justifying the outcome.'⁶⁰ Applying the appropriate review test as set out in section 6(2)(f)(ii) of PAJA, the SCA held that the commissioner's decision could not be rationally justified and had to be set aside.

The employee in this case, Mr Sidumo, has sought leave to appeal the SCA's decision to the Constitutional Court. Its decision in this matter will, as with the *Chirwa* matter, clarify a problem that has plagued employment law and administrative law in South Africa for some time.

⁵⁶ Ibid.

⁵⁷ Ibid, para 26.

⁵⁸ Ibid, para 30.

⁵⁹ Ibid, para 29.

⁶⁰ Ibid, para 37.