IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: C934/2008

In the matter between:

ANDRE JOHANN DE VILLIERS **Applicant**

and

HEAD OF DEPARTMENT: EDUCATION
WESTERN CAPE PROVINCE **Respondent**

JUDGMENT

VAN NIEKERK J

Introduction[1]

[1] This application has its origins in a decision by the respondent, made under section 14 (2) of the Employment of Educators Act (EEA), refusing to reinstate the applicant after his deemed discharge in terms of s 14 (1) of that Act. The applicant claims that the conduct of the respondent constituted administrative action, and seeks to have the decision reviewed and set aside.

The facts

[2] The respondent employed the applicant in 1979. At the time of the termination of his employment, the applicant was the principal of Van Riebeeckstrand Intermediate School, Melkbosstrand, a post that he had occupied for some 10 years. The applicant was dismissed in November 2004 on

[1] I am indebted to both counsel for their comprehensive heads of argument, both in respect of the merits of the application and in supplementary heads on the issue of jurisdiction. I have drawn liberally on these heads in preparing this judgment.

three counts of misconduct. After an unsuccessful appeal to the Minister of Education, Western Cape in March 2005, the applicant referred an unfair dismissal dispute to the Education Labour Relations Council. On 28 February 2008 the arbitrator ruled that the applicant's dismissal was substantively and procedurally unfair, and reinstated him on the same terms and conditions on which he was employed prior to his dismissal. Since another person had in the interim been appointed principal of the Van Riebeeckstrand school, the arbitrator's award stated *inter alia* that if the respondent, after consulting the principal of the school, the applicant and any other relevant party considered it "intolerable and inappropriate" that the applicant should be reinstated into his previous post, the respondent should in consultation with the applicant redeploy him to another suitable school with the same seniority. The arbitrator ordered that any consultation process be completed by the end of March 2006 so that the applicant could resume his employment by no later than the start of the second quarter of that year. This did not happen. Meetings were held in which the applicant and later an official of the trade union of which he was a member met with the respondent to discuss a number of options, including the applicant's early retirement and the prospect of his appointment at various other schools.

[3] On 1 August 2006, the respondent addressed a letter to the applicant requiring him to report for duty on 2 August 2006 at the Elswood Secondary School. This position had not previously been discussed with the applicant. The applicant's trade union took the view that he should not report for duty, since the respondent's instruction failed to comply with the terms of the arbitration award. The applicant did not report at the Elswood School. The respondent regarded the applicant's failure to report as absence from work without permission and on 21 August 2006, the respondent wrote a letter to the applicant advising him that in terms of s 14(1) of the EEA, he was deemed to have been discharged from service on account of misconduct.

[4] After further fruitless discussions with the respondent, in November 2006, the applicant's union referred a dispute to the bargaining council in relation to the applicant's discharge under s 14 (1). On 18 April 2007, an arbitration award was issued in which the arbitrator found that the bargaining council lacked jurisdiction to arbitrate the dispute since the applicant's discharge did not constitute a 'dismissal' for the purposes of the Labour Relations Act (LRA). On 23 April 2007, the applicant's union made representations in terms of s 14 (2) of the EEA, requesting that the applicant be reinstated. On 18 June 2007, the respondent wrote a letter to the applicant advising him that his application for reinstatement had been refused. On 21 August 2007 a further application under s 14(2) was made, this time with the assistance of the applicant's attorneys of record. On 25 October 2007, the respondent decided that the applicant should not be reinstated. This decision, which was communicated to the applicant in a letter dated 5 November 2007, is the subject of these proceedings.

[5] The applicant thereafter instituted proceedings in the High Court, seeking to review and set aside the respondent's decision not to reinstate him. That application was dismissed, on the basis that this Court had exclusive jurisdiction to determine the outcome of the application. The judgment of the High Court (under case no 18733/07), was delivered on 28 October 2008, and is referred to below.

The issues

[6] Three main questions are raised in this application. The first is whether the respondent's decision to refuse to reinstate the applicant constituted a 'dismissal' for the purposes of the LRA. If it did, the applicant had a range of alternative remedies available to him, including the referral of an unfair dismissal dispute to the relevant bargaining council, and a right ultimately of review in this Court under s 145 of the LRA. In these circumstances, it might be argued, as the respondent has sought to do, that any application for review is premature, even

misguided. The second question, which may stand independently of the first, is whether respondent's conduct in failing to reinstate the applicant constituted administrative action, and whether it stands to be reviewed on that basis. Finally, assuming the answer to the second question is answered in the negative, does it nevertheless remain open to the Court to review and set aside the respondent's decision and if so, on what grounds?

Did the termination of the applicant's employment constitute a 'dismissal'?

[7] Mr Joseph, who appeared for the respondent, submitted that the respondent's decision not to reinstate the applicant amounted to a 'dismissal' as defined by s186 of the LRA, and that the application for review was thus premature, at least in the sense that the applicant had available to him remedies including an internal appeal, a referral of any dispute to arbitration and ultimately a right of recourse to this Court under s 145 of the LRA. The basis for this submission lies in the wording of s 14 (2) of the EEA, which states that if an educator who has been discharged in terms of s 14(1) at any time reports for duty:

> "…the employer may, on good cause shown and notwithstanding anything to the contrary contained in this Act, approve the reinstatement of the educator in the educator's former post or in any other post on such conditions relating to the period of the educator's absence from duty or otherwise as the employer may determine."

In support of his submission that when an employer decides in terms of s 14(2) that any educator deemed to have been discharged has failed to show good cause for his or her absence and refuses to reinstate the educator, that decision amounts to a dismissal for the purposes of s 186(1)(a) of the LRA, Mr Joseph referred to the judgment by Davis and Allie JJ in *De Villiers v Minister of Education Western Cape Province and another* (*supra*). In paragraph [20] of the judgment, the Court expressed the view that a deemed discharge in terms of s 14(1), being a deemed dismissal on account of misconduct, ought to be treated

in the same way as a dismissal on account of misconduct as in s 18(2). That section provides that when an educator commits an act of misconduct, the employer must institute disciplinary proceedings in accordance with the disciplinary code and procedures contained in Schedule 2 to the Act. At paragraph [21], the Court concludes:

> 'In our view, therefore the employer's conduct in exercising his or her discretion in a manner which failed to prevent a sanction of dismissal as provided by section 14(1) ought to be subjected to the same scrutiny as conduct in terms of section 18(3)(i). Such conduct is therefore capable of being tested against the Code of Good Practice contained in section 8 of the LRA.'

That may be so, but it does not necessarily follow that a decision to refuse to reinstate an employee whose discharge has been statutorily deemed to have occurred constitutes a 'dismissal' as defined by s 186(1) of the LRA. On the contrary, the prevailing authority is that it is not. In *MEC Public Works, Northern Province v Commission for Conciliation Mediation and Arbitration & others* (2003) 24 *ILJ* 2155 (LC), Freund AJ held:

> In my view, a decision not to reinstate an employee whose employment has been terminated by operation of law is not a 'dismissal' for the purposes of s 186 of the LRA. In particular, s186 (a), which provides that 'where an employer has terminated a contract of employment with or without notice there is a 'dismissal', does not in my view apply. If the employer exercises his discretion in terns of s 17 (5) (b) (i) not to reinstate, the contract of employment remains terminated by law and is not terminated by the employer.[2]

It does not seem to me that this ruling is either clearly wrong, or that it is at odds, as Mr Joseph submitted, with the SCA's decision in *Phentini v Minister of Education & others* (2006) 27 *ILJ* 477 (SCA). The ratio of that judgment is that s14 of the EEA is constitutionally valid and that a discharge effected in terms of the section is not the consequence of any discretionary decision rather than a

[2] At 2158 H-J.

statutory result; hence it is not a 'dismissal' for the purposes of the LRA nor is it susceptible to review. The *Phentini* judgment does not address the nature of a refusal to approve the reinstatement of an educator, nor whether that refusal constitutes a 'dismissal'. Section 186 (1) (a) of the LRA refers to a "termination of a contract of employment by an employer, with or without notice." An employer who receives an application in terms of s 14(2) is faced with a contract that has terminated by operation of law independently of any act or decision on the part of the employer. Therefore, the employer does not terminate the employment contract when electing not to resuscitate it - at that point, the contract has ceased to exist. Nor is there, as Mr Joseph suggested, any repudiation of the contract by the employee who fails to report for duty that the employer accepts when exercising an election not to reinstate, thereby bringing that election within the ambit of the statutory definition. This is not to say that the obligations imposed on an employer contemplating the dismissal of an employee in the normal course are entirely irrelevant to the exercise of the discretion established by s 14 (2) - I address these below in the context of a consideration of whether the respondent's decision is reviewable.

[8] For these reasons, the respondent's decision not to reinstate the applicant did not constitute a 'dismissal' for the purposes of the LRA.

Did the conduct of the respondent in failing to reinstate the applicant in terms of s 14 (2) of the EEA constitute administrative action?

[9] The LRA confers broad review powers on this Court in relation to conduct by the state as employer. Section 158(1) (h) empowers this 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.*" Whether employment-related conduct by the state as employer constitutes administrative action and the intersect, if any, between administrative law and labour law is a current and controversial topic. A good starting point in any consideration of this issue is the judgment by

Chaskalson CJ in *President of RSA v SARFU* 2000 (1) SA 1 (CC)[3] where the Court formulated the following test to determine whether an action should be characterised as administrative action:

> 'Determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will, as we have said, depend primarily on the nature of the power. A series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. So, too, is the nature of the power, its subject matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. While the subject-matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of s 33. Difficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of s 33. These will need to be drawn carefully in light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration. This can best be done on a case by case basis.'

[10] The applicable principles were later summarised as follows in *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA):[4]

> '(a) Administrative law is an incident of the separation of powers under which courts regulate and control the exercise of *public* power by other branches of Government.

[3] At paragraph 143, cited with approval by Ngcobo J in *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC) 414G-415A. In *Chirwa*, Ngcobo J held that although the power to dismiss was public power, it did not amount to administrative action because it did not involve the 'implementation of legislation' rather than the terms of the employment contract between the parties.

[4] At para 34 (see also *Pennington v Friedgood* 2002 (1) SA 251 (C) 259A-B).

(b) The question relevant to s 33 of the Constitution is not whether the action is performed by a member of the executive arm of Government, but whether the task itself is administrative or not and the answer to this is to be found by an analysis of the nature of the power being exercised.

(c) What falls to be considered is, *inter alia*, the source of the power exercised, the nature of such power, its subject-matter, whether it involves the exercise of a public duty, and how closely it is related on the one hand to policy matters which are not administrative, and on the other to the implementation of legislation, which is.'

[11] In the employment context, the question has been complicated by two factors. The first is the jurisdictional debate generated by section 157 (2) of the Labour Relations Act and in particular, the extent to which the jurisdiction of the High Court is limited by that section; the second is a related policy-driven debate on the relationship between sections 23 and 33 of the Constitution and in particular, whether administrative law remedies ought to be available to public sector employees. An analysis of the various judgments in *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC) demonstrates just how difficult these questions are. I do not intend to consider the judgments in any detail, except to mention the judgment by Ngcobo J (as he then was), who delivered the majority judgment on the question of whether the employer's conduct in dismissing Ms Chirwa amounted to administrative action, and determined that it did not. Ngcobo J accepted, however, that Transnet's conduct amounted to the exercise of "public power":

> "In my view, what makes the power in question a public power is the fact that it has been vested in a public functionary, who is required to exercise the power in the public interest. When a public official performs a function in relation to his or her duties, the public official exercises public power."

Ngcobo J concluded, however, that the power was not "administrative" in nature, for the following reasons:

> "The subject-matter of the power involved here is the termination of a contract of employment for poor work performance. The source of the power is the employment contract between the applicant and Transnet. The nature of the power involved here is therefore contractual. The fact that Transnet is a creature of statute does not detract from the fact that in terminating the applicant's contract of employment, it was exercising contractual power. It does not involve the implementation of legislation which constitutes administrative action."

This passage is referred to, with apparent approval, in the recent judgment of *Gcaba v Minister for Safety and Security* (CCT 64/08 [2009] ZACC 7 October 2009), in which the Constitutional Court had an opportunity to revisit and clarify *Chirwa.*

[12] In *Gcaba*, the Court (per Van der Westhuizen J) unanimously stated the applicable principle in the following terms:

> 'Generally, employment and labour relationship issues do not amount to administrative action within the meaning of PAJA. This is recognised by the Constitution. Section 23 regulates the employment relationship between employer and employee and guarantees the right to fair labour practices. The ordinary thrust of section 33 is to deal with the relationship between the state as bureaucracy and citizens and guarantees the right to lawful, reasonable and procedurally fair administrative action. Section 33 does not regulate the relationship between the state and its workers. When a grievance is raised by an employee relating to the conduct of the state as employer and it has few or no direct implications or consequences for other citizens, it does not constitute administrative action'.[5]

[5] At paragraph [64]

[13] This approach both formalises the separation of sections 23 and 33 of the Constitution, and introduces a 'public impact' requirement as determinative of administrative action.[6] The impact of the *Gcaba* judgment on administrative law claims filed by public sector employees has been immediately felt by public sector employees - see *Tshavhunga v NDPP* (328/09 and 593/08) [2009] ZASCA 136 (2 November 2009) and *Mkumatela v The Nelson Mandela Metropolitan Municipality* (454/2008) [2009] ZASCA 137 (6 November 2009). In the former case, Nugent JA held that *Gcaba* made it clear that the dismissal of an employee in the public sphere does not constitute administrative action, and that a claim by a public sector employee for a declaration that his dismissal breached the right to fair administrative action was consequently bad in law. Similarly, in *Mkumatela*, Brand JA held that the finding by the court *a quo* that a municipality had performed an administrative act when it made a decision to appoint one candidate for a vacant post as opposed to another could not survive the *Gcaba* judgment - in the absence of any conduct that constituted administrative action, there was no basis on which to review the employer's conduct.[7]

[14] It is tempting to read the *Gcaba* judgment to suggest that public sector employees may pursue their employment-related grievances only through the processes established by the LRA and other labour legislation, and that in this respect at least, the door to administrative review has finally and irrevocably been closed to them. Such a reading would resonate with the majority judgments in *Chirwa* and their concerns with the implications of the emergence of a dual system of law, the need to prevent forum shopping in labour disputes and the desire to treat private and public sector workers equally.

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[6] See Prof Hoexter's criticism of the judgment "The Intersection of Administrative Law and Labour Law from an Administrative Lawyer's Point of View", a paper delivered to the annual conference of the South African Society for Labour Law, Johannesburg, November 2009.

[7] At paragraph [15] of the judgment.

[15] However, I do not understand the judgment in *Gcaba* to suggest that the conduct of a state employer can never be categorised as administrative action. To read the judgment in this manner would be to elevate a single factor in the *SARFU* test to a determinative and overriding consideration, something that the Court in *Gcaba* does not expressly do. The wording of the dictum quoted above regarding the relationship between sections 23 and 33 of the Constitution clearly acknowledges the existence of exceptions to the general rule, however limited those might be.

[16] Nor do I think that the fact that the impact of a decision made by a functionary is felt only by a confined class of employee (or, for that matter, as in the present case, by a single employee) necessarily deprives a public sector employee of a right of review. As Prof Hoexter points out, the notion of 'public impact' has traditionally been employed for the purpose of establishing whether, in relation to an apparently private body or transaction, the power being exercised is a public power - a necessary condition for administrative action. She continues:

> "It seems strange, then, that the Constitutional Court should apply this factor of public impact to a decision involving an avowedly public power (given the reasoning of Ngcobo J in *Chirwa*), and conclude from the absence of such impact that the decision is not administrative action.

[17] Prof Hoexter refers to *POPCRU v Minister of Correctional Services (No 1)* 2008 (3) SA 91 (ECD) (*"POPCRU"*), where Plasket J was faced with the question of whether the decision to dismiss correctional services officers constituted administrative action, in circumstances where the power to dismiss was founded in statute.[8] It was argued that this function was not administrative action, since it did not affect the public as a whole. Plasket J rejected this submission in the following terms:

[8] Section 3(5)(g) of the Correctional Services Act 111 of 1998

> "In my view, 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 administrative action that would only have a significant impact on the arrestee and, perhaps, the complainant. Another example would be a decision by the erstwhile Amnesty Committee of the Truth and Reconciliation Commission to grant a person 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."

In other words, many incontrovertibly administrative actions do not have an impact on the public, and very often it is only an individual who is affected by administrative action.[9]

[18] Plasket J emphasised *inter alia* that the fact that the power had a statutory basis was significant, because it placed the existence of public power largely, if not completely, beyond contention[10]. Ultimately, an important function of the courts was to ensure:

> "… that when statutory powers (and other public powers sourced in common law or in customary law) are given in trust to public functionaries for the purpose of furthering the public interest, those public functionaries do not abuse the trust reposed in them, remain within the bounds of their empowerment and exercise their powers reasonably and in a procedurally fair manner."[11]

As Prof Hoexter concludes:

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[9] Hoexter (supra), in section 2.1 of her paper.
[10] At 116 footnote 55
[11] At 115C-F.

> "In a general sense, however, every act of every public official has consequences for us all and for the type of society we live in. That is why we have administrative law in the first place."[12]

[19] In summary: as a general rule, conduct by the state in its capacity as an employer will generally have no implications or consequences for other citizens, and it will therefore not constitute administrative action. Employment-related grievances by state employees must be dealt with in terms of the legislation that gives effect to the right to fair labour practices, or any applicable collective agreements concluded in terms of that legislation. Departures from the general rule are justified in appropriate cases. An assessment must be conducted on a case-by-case basis to determine whether such a departure is warranted. The relevant factors in this determination (following *SARFU*) are the source and nature of the power being exercised (this would ordinarily require a consideration of whether the conduct was rooted in contract or statute (see *Cape Metropolitan Council v Metro Inspection Services cc* 2001 (3) SA 1013 (SCA)), whether it involves the exercise of a public duty, how closely the power is related to the implementation of legislation (as opposed to a policy matter) and the subject matter of the power. I venture to suggest that the existence of any alternative remedies may also be a relevant consideration - this was a matter that clearly weighed with the Court in both *Chirwa* and *Gcaba*, who it will be recalled, were found to have had remedies available to them under the applicable labour legislation.

[20] Applying these considerations to the facts of the present matter, it is common cause that the applicant's contract of employment was terminated in terms of section 14(1) of the EEA, i.e. by operation of law and independently of any action by the respondent. It is also common cause that the discretion exercised by respondent in refusing to reinstate the applicant did not flow from the applicant's contract of employment, but directly from its powers under the

[12] Hoexter, supra.

EEA. In short, on the facts of this case, the Court is faced with a straight-forward exercise of statutory power vested in the respondent, at a time when the applicant's contract of employment was already at an end. In so far as the relative positions of power are concerned, the respondent was clearly in a position of power, and the inequality in status of the parties could not have been more pronounced. By virtue of being an organ of state, regulated by the EEA, the respondent was in a special position not accorded to employer in the private sector. The employees of no other employer can be "discharged" *ex lege*, without a prior hearing.[13] No other employer is legislatively immunised from an unfair dismissal referral in circumstances where an employee fails to report for work for a continuous period of 14 days. No other employer enjoys the right to consider reinstatement of its employees within its sole discretion. What weighs particularly heavily in the applicant's favour is that unlike the employee parties in *Chirwa, Gcaba, Tshavhungwa* and *Mkumatela*, the applicant has no alternative right of recourse - in the absence of a dismissal as defined by the LRA, the option of a referral of an unfair dismissal dispute to the bargaining council is not open to him. If this Court were to adopt a 'hands-off' approach to its oversight functions over the exercise of a discretion such as that established by s 14 of the EEA, the respondent's power would effectively be unchecked, and the applicant would be left without a remedy.[14]

[21] For these reasons, I consider that the respondent's conduct in deciding in terms of s 14(2) of the EEA to refuse to reinstate the applicant constituted administrative action, and that this Court is entitled to exercise its review jurisdiction on this basis.

[22] Even if I am incorrect in coming to this conclusion I have that the respondent's conduct amounted to administrative action, in my view, the

[13] I refer here to the state as employer in general terms - there are other statutes applicable to public sector employees that contain provisions similar to those contained in s 14 (1) of the EEA.
[14] In this regard, the applicant has already found himself non-suited in both the relevant bargaining council and the High Court.

respondent's action remain open to review under s 158 (1) (h) of the LRA on the ground of legality. It will be recalled that s 158 (1) (h) empowers this Court to review any conduct by the state in its capacity as employer, *on any grounds that are permissible in law.*

[23] Section 1(c) of the Constitution stipulates that the Republic is founded on values which include the supremacy of the Constitution and the rule of law. In all of its conduct and at all levels, the state must observe the rule of law and ensure that its actions are clothed with legality.[15] In *Pharmaceutical Manufacturers of SA: In Re Ex Parte President of the RSA* 2000 (2) SA 674 (CC), it was held that the conduct of the President in deciding to bring a law into operation did not constitute administrative action. However, that was not the end of the enquiry. The conduct of a public official must not be *mala fide* or exercised from ulterior or improper motives. If the official does not apply his mind or exercise his discretion at all, or if he has disregarded the express provisions of a statute, the Court would intervene on review (at 707G, citing *Shidiack v Union Government (Minister of the Interior)* 1912 AD 642 at 651).

[24] In addition, the Constitution places further restraints on the exercise of power by public officials:

> "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. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, <u>at least</u>, comply with this

[15] In *Minister of Local Government, KZN v Umlambo Trading 29 CC* 2008 (1) SA 396 (SCA) para 17, it was confirmed that:

> "It is a fundamental principle of the rule of law that the exercise of public power is only legitimate where it is lawful."

> requirement. If it does not, it falls short of the standards demanded by our Constitution for such action." (emphasis added)

[25] In *Masethla v President of the RSA* 2008 (1) SA 566 (CC), the Court confirmed that the exercise of the power of the President to dismiss the head of the intelligence service:

> "... is constrained by the principle of legality, which is implicit in our Constitutional ordering. Firstly, the President must act within the law and in a manner consistent with the Constitution. He or she therefore must not misconstrue the power conferred. Secondly, the decision must be rationally related to the purpose for which the power was conferred. If not, the exercise of the power would, in effect, be arbitrary and at odds with the rule of law."[16]

[26] In *POPCRU* (*supra)*, the Court concluded that the conduct of dismissing correctional service employees in terms of a statutory provision amounted to administrative action. However, the Court went on to find that, in any event, conduct of public officials that was excluded from the definition of "administrative action" in PAJA was nevertheless reviewable:

> "That does not mean that administrative action that is excluded from the Act's limited definition of administrative action is not reviewable: like all other exercises of power by public officials and public bodies, such actions are reviewable for compliance with the founding value of the rule of law, including the principle of legality, entrenched in s1(c) of the Constitution, at the very least." (footnotes omitted)[17]

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[16] See also: *Kruger v President RSA* 2009 (1) SA 417 (CC) para 98; *Fedsure Life Assurance v Greater Johannesburg TMC* 1999 (1) SA 374 (CC).

[17] The Court referred to the following *dictum* of the SCA in *Grey's Marine* para 20:

> "The [Constitution] is the repository of all State power. That power is distributed by the Constitution – directly and indirectly – amongst the various institutions of the State and other public bodies and functionaries and its exercise is subject to inherent constitutional restraint – if only for legality – the extent of which varies according to the nature of the power being exercised."

After considering the application of PAJA to the decision, Plasket J continued:

> "If I am wrong in this respect, and the decisions are not administrative decisions for purposes of PAJA, they would nonetheless be exercises of public power and thus be reviewable for want of compliance with the founding constitutional value of the rule of law, entrenched in s 1(c) of the Constitution."

[27] In *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) the Constitutional Court established the principle that entities exercising a public power or performing a public function ought to be held accountable for the manner in which that power is exercised or that function is fulfilled. In this regard the Court held that :

> "Institutions which are organs of State, performing public functions and providing a public service of this kind, should be held accountable for the provision of that service. It is for this reason that the constitution affirms accountability as a value governing public administration."[18]

More recently, in *Ntshanagase v MEC: Finance, Kwa Zulu Natal* [2009] 12 BLLR 1170 (SCA) , a case dealing with a decision taken by a person appointed to chair a disciplinary enquiry into allegations of misconduct by a public sector employee, the SCA held:

> "Undoubtedly this section [s158 (1) (h)] provides in explicit terms that a decision taken by Dorkin who acted *qua* his employer can be reviewed on such grounds as are permissible in law. The round relied on by the second respondent for the review of Dorkin's decision is rationality, which is one of the recognised grounds of review. I am therefore of the view that Dorkin's decision can be taken on review under section 158(1) (h) of the LRA"[19]

[18] At para [83].
[19] At 1176H-I.

Even if the decision not to reinstate Applicant did not constitute administrative action, this Court retains review jurisdiction on the ground of legality (at least), which incorporates most, if not all, of the grounds of review relied upon by applicant in his founding affidavit. These would certainly require that functionaries exercise public power[20] in a manner that is not irrational or arbitrary, and that they be accountable for the manner in which that power is exercised.

Is the respondent's decision not to reinstate the applicant reviewable?

[28] Section 14(2) of the Act states that, if an educator who has been discharged in terms of section 14(1) at any time reports for duty:

> "the employer may, on good cause shown and notwithstanding anything to the contrary contained in this Act, approve the reinstatement of the educator in the educator's former post or in any other post on such conditions relating to the period of the educator's absence from duty or otherwise as the employer may determine."

In *MEC for Education and Culture v Mabika & Others* (2005) 26 ILJ 2368 (LC) 2373C, it was held that:

> "In applying its mind to the representations made by the employee in terms of s 14(2), the employer must naturally act fairly, reasonably and justifiably."

[29] In considering a section 14(2) application, in *De Villiers v Minister of Education Western Cape Province and another* (*supra*). Davis and Allie JJ held in the employer should be guided by the ordinary principles applicable to arriving at a decision as to whether an employee should be dismissed for misconduct.

[20] Recall the dictum by Ngcobo J in *Chirwa* quoted in paragraph [12] above.

Ultimately, the employer should be satisfied that, on account of the employee's absence from work, the employment relationship has irretrievably broken down. As set out in item 3(4) of the Code, it is generally not appropriate to dismiss an employee, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. As appears from the High Court's judgment, a deemed discharge in terms of section 14(2) should be treated in similar fashion to a dismissal for misconduct as in section 18(2) of the Act. Schedule 2 of the Act accordingly has application, as does the Code of Good Practice contained in Schedule 8 of the LRA, which is incorporated by reference into Schedule 2 of the Act. It was concluded that:

> "… the employer's conduct in exercising his or her discretion in a manner which failed to prevent a sanction of dismissal as provided by section 14(1) ought to be subjected to the same scrutiny as conduct in terms of section 18(3)(i). Such conduct is therefore capable of being tested against the Code of Good Practice contained in section 8 of the LRA."

[30] I do not understand the High Court's judgment to require that an employee (who would bear the onus of showing good cause for the purposes of s 14(2)) is in effect required to show that a refusal to reinstate would amount to an unfair dismissal. The listed purposes of Schedule 2 include support for constructive labour relations in education and the prevention of arbitrary or discriminatory actions by employers towards educators. The governing principles in section 2 of the Schedule expressly state that discipline is a corrective and not a punitive measure, and that discipline must be applied in a prompt, fair, consistent and just manner. It is this context that the requirement of "good cause" referred to in section 14(2) must be read. This would ordinarily mean that unless the employer, having regard to the full conspectus of relevant facts and circumstances, is satisfied that a continued employment relationship has been rendered intolerable by the employee's

conduct, the employer should as a general rule approve the reinstatement of the employee.[21]

[31] The applicant, through his attorneys, submitted a comprehensive section 14(2) application to the respondent on 20 August 2008. As appears from this application, the applicant set out a detailed summary of the relevant background facts giving rise to his discharge. He thereafter set out a full explanation as to why he had not reported to Elswood following the 1 August 2006 instruction. The applicant's personal circumstances and other relevant considerations were then referred to. The applicant's explanation for not reporting to Elswood was exceptionally good. In this regard:

- the instruction to report at Elswood fell foul of the arbitration award in terms of which he was reinstated in a number of respects. Aside from the fact that no consultation had taken place regarding this post as required, the post of educator, reporting to the head of department and the principal, amounted to a demotion;
- although the applicant, through his trade union, had objected to the instruction to report on the same day (1 August 2006), with reasons, it is common cause that Respondent had not at any time warned the applicant that it intended to rely on section 14(1) of the Act, or that Applicant could lose his job if he did not report. The respondent at no stage informed the applicant that the Elswood appointment was temporary in nature;
- The applicant, as a lay person with no legal qualifications, knowledge or experience, relied on the advice of his trade union, which he knew to have both an advocate and an attorney on its panel of advisers. The applicant was also exhausted mentally,

[21] To hold otherwise would amount to a clear breach of an employee's right to fair labour practices and right to equality (since educators who are discharged in terms of section 14(1) would be treated in a manner which grossly departs from the manner in which all other educators charged with misconduct are treated).

emotionally and physically as a result of his lengthy dispute with the department.

- The applicant's trade union advised him that, since the instruction was unlawful, he need not report at Elswood. The union did not advise the applicant that he could lose his job if he did not report for duty. The applicant had no reason to doubt the correctness of the union's advice.

[32] Based on the foregoing, it was apparent that the applicant's failure to report at Elswood was not wilful or deliberate. The applicant, based on the advice received from his union, was of the *bona fide* belief that he was acting within his rights. There can be no doubt that the instruction to report at Elswood fell foul of the arbitration award, and accordingly breached the applicant's right to reinstatement and/or redeployment. Under these circumstances, it is doubtful whether the applicant's failure to report at Elswood could be considered misconduct at all, particularly given the absence of any fault on his part. If it could be categorised as such, the gravity of such misconduct was slight, as opposed to serious. Certainly, the misconduct was not severe enough, in itself, to render a continued employment intolerable.

[33] The applicant furthermore presented a number of personal circumstances that militated against the termination of his employment. The applicant is a well-qualified headmaster and educator with vast experience. *Inter alia*, the applicant pointed out that, over his 28 years' service with the department, he had an unblemished disciplinary record.

[34] In dismissing the applicant's section 14(2) application, it is apparent from the record that the respondent apparently relied solely upon the opinion of a certain Mr. Brandell Turner. In essence, Mr Turner recommended the dismissal of the application on the following grounds:

- The applicant failed to provide evidence that he had relied on the advice of his trade union, i.e. that he need not comply with the instruction to report to Elswood;
- The applicant was familiar with section 14(1) of the Act;
- The applicant had acted in bad faith in his dealings with the department;
- The section 14(2) application did not place any new evidence before the employer (as compared with the trade union's original purported section 14(2) application).

[35] With regard to the first point, there was no reason to disbelieve the applicant's statement that he had relied on the advice of his trade union in not complying with the instruction to report at Elswood School. Certainly, there was nothing to gainsay the applicant's version to this effect. The union's position in this regard, which doubtless would have been conveyed to the applicant, appears from its letter dated 1 August 2006. Implicit in Turner's opinion is the assumption that the instruction to report at Elswood was lawful and in compliance with the arbitration award. As set out above, and as the department was aware, this was not the case. Regarding the second ground relied on by Turner, the question was not whether Applicant was aware of the existence of section 14(2). Applicant had placed a cogent and acceptable explanation before the department, namely, that he was not aware that section 14(2) could apply in circumstances where an instruction to report was given in breach of a binding arbitration award. It is clear that Turner altogether failed to appreciate this fact. With regard to the fourth ground relied on by Turner, that the application contained nothing new that had not been set out in the trade union's request, it can only be inferred that Turner had not actually read the respective documents. A simple comparative exercise would have revealed Turner's error in this regard. With regard to Turner's claim that Applicant acted in bad faith, heavy reliance was placed on the arbitration award dismissing the applicant's claim for unfair dismissal following his

discharge. At the outset, it was inappropriate for the respondent to rely on (certain) findings contained in the arbitration award in the context of a section 14(2) application, particularly when the relevant allegations were never put to Applicant, and he was never afforded an opportunity to respond thereto. The arbitration award concerned a single issue, namely, whether the ELRC could entertain a claim for unfair dismissal following a section 14(1) discharge. The arbitrator concluded that the ELRC had no jurisdiction. The balance of his findings were strictly *obiter*; the gratuitous findings in regard to the applicant's conduct and the advice proffered by the arbitrator as to the further conduct of the case were entirely unnecessary and irrelevant.

[36] In light of the foregoing, it is evident that the respondent, in dismissing the s 14(2) application, relied on reasons that were fundamentally bad. The respondent's decision not to reinstate Applicant was accordingly irrational in relation to the reasons given, and was based on irrelevant considerations at the expense of relevant ones. Having regard to the full conspectus of relevant facts and circumstances, the inference of arbitrariness and irrationality is inescapable. In my view, the respondent's decision to refuse to reinstate the applicant stands to be reviewed and set aside.

[37] Mr Leslie, who appeared for the applicant, moved that I substitute the respondent's decision with a ruling, as reflected in the Notice of Motion, to the effect that the application for reinstatement be upheld. I am mindful of the general rule that a court will not substitute its own decision for that of a functionary, but will refer a matter back for a fresh decision. An exception to this rule has been recognised where the end result would, in any event, be a foregone conclusion, where further delay would cause unjustifiable prejudice, or where the Court is in as good a position to make the decision itself. In my view, the applicant's case falls within the ambit of these exceptions. The applicant was discharged from service on 2 August 2006, more than three years ago. Further delays in this matter are in neither party's interest. In addition, the applicant has clearly made

out a case for his reinstatement on the papers before me. There is no further evidence or information that could now be placed before the respondent that might lead to a different result. No useful purpose would therefore be served by referring the matter back to the respondent for a fresh decision. The applicant also seeks an order directing the respondent to comply with the provisions of the arbitration award delivered on 28 February 2006. I do not intend to make any order in this regard. This application is concerned only with the respondent's decision taken in November 2007. The enforcement mechanisms established by the LRA are open to the applicant should it become necessary for him to enforce the award. Finally, in regard to costs, there is no reason why costs should not follow the result.

I accordingly grant the following order:

1. The decision by the respondent to dismiss the applicant's application made in terms of section 14(2) of the Employment of Educators Act, 76 of 1998, is reviewed and set aside.
2. The applicant is reinstated in the employ of the respondent on the same terms and conditions as those which governed his employment immediately prior to his deemed discharge in terms of section 14(1)(a) of the Act, save that the applicant shall not be entitled to receive any salary or emoluments in respect of the period 2 August 2006 to 7 November 2007, being the date when the respondent dismissed the applicant's substantive application for reinstatement.
3. The respondent is to pay the costs of these proceedings, including the costs of 28 October 2009, when the application was postponed and the costs reserved.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

Date of hearing 30 November 2009

Date of judgment 4 December 2009

Appearances:

For the applicant : Adv G A Leslie
Instructed by C & A Friedlander

For the respondent : Adv B Joseph
Instructed by the State Attorney