IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JA103/2015

In the matter between:

MINISTER OF LABOUR **First Appellant**

NTLEKI, MALIXOLE **Second Appellant**

and

PUBLIC SERVICES ASSOCIATION

OF SOUTH AFRICA **First Respondent**

CROUSE, JOHANNES THEODORUS **Second Respondent**

Coram: **Waglay JP, Ndlovu *et* Coppin JJA**

Heard: 20 September 2016

Delivered: 25 January 2017

Summary:-- Minister's reversal of designation of official as registrar of labour relations appointed in terms of S108(1) of the Labour Relations Act,no.66 of 1996 administrative action and reviewable in terms of the Promotion Of Administrative Justice Act, no.2 of 2000, Alternatively, the principle of legality in the constitution—not established that registrar had duty to brief minister concerning specific matter registrar was dealing with in exercise of

functions—Registrar nevertheless found to have adequately briefed minister----Reversal of designation In circumstances confirmed to have been irrational and invalid—Decision also confirmed to have been procedurally unfair—Reinstatement to position of registrar appropriate remedy---Appeal of Minister against judgment and order of labour court dismissed with costs.

JUDGMENT

COPPIN JA

[1] This is an appeal against the judgment of the Labour Court (Myburgh AJ) in terms of which the first appellant's revocation of the second respondent's designation as Registrar of Labour Relations was set aside and an order was made directing the first appellant ("*the Minister*") to reinstate the second respondent ("*Mr Crouse*") as Registrar of Labour Relations ("*Registrar*") with immediate effect and directing the Minister to pay the legal costs of the application for such relief (excluding the costs of a particular day). The second appellant ("*Mr Ntleki*") was appointed by the Minister as "Acting Registrar of Labour Relations" after Mr Crouse was removed from that position.

[2] The following facts are common cause or not particularly disputed. Some years ago, the Minister designated Mr Crouse, who was at the time employed as a Deputy Director in the National Department of Labour, as Registrar in accordance with section 108(1) of the Labour Relations Act[1] ("*the LRA*").

[3] Section 108(1) of the LRA provides:

> '*The Minister must designate an officer of the Department of Labour as the registrar of labour relations to perform the functions conferred on the registrar by or in terms of this Act.*'[2]

[4] Mr Crouse, in his capacity as Registrar, launched an urgent application in the Labour Court on 12 April 2015 in terms of which he sought to place a trade

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[1] Act No 66 of 1995.
[2] The duties and functions of the registrar are dealt with later in this judgment.

union - the Chemical, Energy, Paper, Printing, Wood and Allied Workers' Union ("*CEPPWAWU*") - under administration in terms of section 103A of the LRA, alternatively to wind-up the trade union as envisaged in section 103 of the LRA.

[5] At the time CEPPWAWU had a membership of about 66 000 as well as substantial assets, inclusive of funds exceeding R4 billion.

[6] The application was, according to Mr Crouse, necessitated by the following: (i) CEPPWAWU's failure to prepare and submit audited financial statements to the Registrar for a period of about five years; (ii) CEPPWAWU's failure to hold meetings in compliance with the provisions of its constitution; (iii) CEPPWAWU's failure to keep records of its income, expenditure, assets and liabilities since 2010; (iv) the internal conflict and strife amongst CEPPWAWU's elected office-bearers; (v) the concerns raised by some of its members concerning CEPPWAWU's management of funds in excess of R4 billion; and (vi) the failure (caused in turn by the strife between its office-bearers) of CEPPWAWU to keep to a plan so as to ensure that it complied with the LRA and became viable.

[7] It is further common cause that the Minister sought a briefing from Mr Crouse concerning the CEPPWAWU matter, in particular the section 103A application which Mr Crouse had brought. There was a dispute about whether Mr Crouse briefed the Minister as the Minister requested. Mr Crouse contends that he did. The Minister maintained that he did not.

[8] Of significance though, is the fact that the Minister, by letter dated 5 June 2015, informed Mr Crouse that she was deeply concerned that Mr Crouse, as the Minister's designated official in terms of section 108 of the LRA, did not brief her on the CEPPWAWU matter before invoking section 103A of the LRA. The Minister goes on to state in the letter:

> '*Accordingly, I call on you to suspend the Labour Court application in question until such time that you have briefed me fully on this matter. My PA will liaise with you on the suitable date when you can brief me in this regard.'*

[9] Mr Crouse avers that he sent an e-mail to the Minister's office on 9 June 2015, indicating his willingness to meet with the Minister and that he would be awaiting a date for their meeting, but he received no response to his message from the Minister's office. Notwithstanding, it is common cause that Mr Crouse did not suspend the section 103A application and that, together with the Deputy Director-General ("*the DDG*") of the Department, he made a ministerial submission, *inter alia*, furnishing reasons for not doing so.

[10] The section 103A application brought by Mr Crouse was to be heard in the Labour Court on 18 June 2015. On the day before that date, CEPPWAWU brought an application to postpone the hearing of the application. At the time CEPPAWAWU had not filed answering papers in respect of the application. On 18 June, the Labour Court postponed the application subject to time limits for the filing of subsequent sets of affidavits and heads of argument. The latter were to be filed by 30 July 2015.

[11] It is common cause that the Director-General ("*the DG*") of the Department sent a letter dated 10 July 2015 to the DDG (who was supportive of Mr Crouse's actions) and to Mr Crouse, in his capacity as Registrar, regarding the section 103A application, in which the DG, *inter alia,* contends that Mr Crouse has failed to comply with and ignored the Minister's instruction to suspend the application and to brief the Minister as instructed by her. The DG registers his concern about how Mr Crouse had dealt with the matter and then goes on to "*instruct*" the DDG and Mr Crouse to suspend the application immediately and to inform the DG's office accordingly; further to avail themselves to fully brief the Minister on the matter on a date which the Minister's PA would notify them of, and to give a detailed report why the Minister's instructions were not complied with.

[12] The DG also informed the DDG and Mr Crouse that any legal costs incurred in connection with the section 103A application would be regarded as "*irregular expenditure*" and will be recovered "*from all officials of the Department of Labour involved in the matter*", and, further, that the Department of Labour would not be responsible for any costs and will not be paying any legal or other costs relating to the section 103A application. The DG further instructed

the Chief Financial Officer not to pay any legal or other costs pertaining to the application, pending further instructions.

[13] It is not in issue that Mr Crouse responded in a letter to the DG and in a ministerial submission in which he gave his version of his engagement with the Minister concerning the CEPPAWWU matter; as well as his reasons for bringing the section 103A application. Mr Crouse also explained the reasons why the application was not suspended as instructed by the Minister. He *inter alia* mentioned that the instruction was ambiguous and presented practical difficulties. In addition to mentioning that the Minister's office did not respond to his e-mail in which he indicated a willingness to meet with the Minister, he states that the section 103A application was necessary and that a delay in finalising that application would be "*to the detriment of the workers and could encourage ongoing mismanagement of the union by its officials*". Concerning the instruction that he suspends the application, he stated that he was *functus officio* and could not reverse the decision to bring the application and that any person aggrieved by his decision could appeal it in terms of section 111 of the LRA. Mr Crouse took issue with the request for a briefing and with the DG's instructions regarding the costs pertaining to the CEPPWAWU matter.

[14] The DDG co-signed the ministerial submission with Mr Crouse. In the submission, issue is taken with the implication by the Minister and the DG that the Registrar had to obtain the Minister's prior approval before executing the duties imposed on the Registrar in terms of the LRA. Mr Crouse also disavowed any knowledge of a formal request to avail himself for a meeting with the Minister, but indicated that he was willing to make himself available for such a meeting. This submission also *inter alia* deals with the request that the application be suspended and the reasons why the request could not be complied with. The reasons given are the very same reasons Mr Crouse gave in his response to the DG.

[15] The DG, or an official from his Department, had also sent a letter to the State Attorney requesting a suspension or withdrawal of the section 103A application. The State Attorney had responded to the request indicating the difficulty in executing such request. The State Attorney confirmed having

informed the official that Mr Crouse had expressed an intention to continue with the application even if he had to do so personally. The State Attorney had also suggested that due to the conflicting instructions, one option was for the State Attorney to withdraw as attorney of record. On 20 July 2015, an official of the Department of Labour instructed the State Attorney to withdraw as attorneys of record. The State Attorney complied the next day. The Registrar (Mr Crouse), consequently bereft of legal representation, nevertheless, pursued the section 103A application on his own.

[16] The next development in the saga was the catalyst for these issues coming before the Labour Court. On 23 July 2015, the Minister in a letter to Mr Crouse revoked his designation as Registrar. The relevant portion of the Minister's letter reads:

> '*Kindly be advised that your designation as the Registrar of Labour Relations in terms of section 108 of the LRA is hereby in terms of section 208A of the Act revoked with immediate effect on the grounds of gross insubordination. Please note that you will be assigned new responsibilities by the [DDG] in liaison with the Head of Department.'*

[17] The Minister then went on to designate Mr Ntleki as the Acting Registrar of Labour Relations in the place of Mr Crouse.

[18] Having unsuccessfully demanded his reinstatement to the position of Registrar, Mr Crouse brought the application which is the subject of this appeal, on an urgent basis in the Labour Court. His application is founded on section 158(1)(a)(iii) read with section 158(1)(h) of the LRA, alternatively, on the latter section. In terms of section 158(1)(a)(iii), the Labour Court is empowered to make any appropriate order, including "*an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of this Act*". In terms of section 158(1)(h) the Labour Court is empowered 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".*

[19] Mr Crouse contended that even though the Minister's power in terms of section 108, to designate an officer of the Department of Labour as the Registrar of Labour Relations, also implied the power to revoke such designation, the Minister's latter power was constrained by the constitutional principle of legality. A decision to revoke, in order to be valid and effective, had to be based on rational grounds, failing which, it fell to be reviewed and set aside.

[20] Mr Crouse averred that the Minister's demand, in effect, that he performs his statutory functions in consultation with her, amounted to "*unlawful interference and/or usurpation*" of his powers. He further contended that before revoking his designation, the Minister failed to give him a hearing and that her decision was irrational. He submitted that the Minister failed to take into account that once he had made the decision to proceed against CEPPWAWU for deregistration, alternatively for an order placing it under administration, he (i.e. in his capacity as Registrar) was *functus officio* and that the only remedy an aggrieved party, with an interest in the matter, had, was to appeal to the Labour Court in terms of section 111 of the LRA.

[21] Mr Crouse submitted that the Minister's decision was based on a misinterpretation and/or a misapplication of the LRA. He further averred that the impugned decision of the Minister was reviewable under the Promotion of Administrative Justice Act[3] ("*PAJA*") because it was unlawful and constituted an unlawful interference with the statutory functions of the Registrar. Mr Crouse submitted that the independence of the Registrar's office was being interfered with. The relief he sought was to be reinstated in his position as Registrar.

[22] The Minister opposed the application in the Labour Court and deposed to an answering affidavit in which she raised a jurisdictional point – arguing, essentially, that the remedy of reinstatement was provided by the LRA and that Mr Crouse had to follow the procedures laid down in the LRA. According to the Minister, unless a finding of an unfair dismissal or of an unfair labour practice was made, the remedy of reinstatement was not available.

[3] Act No 2 of 2000.

Elaborating on this point, the Minister averred that "*conciliation by the relevant forum is a prerequisite to clothe*" the Labour Court with jurisdiction and since there has been no conciliation, the Labour Court lacked jurisdiction. The Minister also challenged the urgency and in effect averred that the order sought by Mr Crouse was moot and had been overtaken by events, as the Minister had already designated Mr Ntleki as Acting Registrar.

[23] In respect of the merits, the Minister denied the averments of Mr Crouse and gave her version. The Minister disputed Mr Crouse's entitlement to rely on PAJA, firstly, because, according to the Minister, it was the personal interest of (Mr Crouse), as an employee of the Department, that is at stake and, secondly, that Mr Crouse had not complied with the provisions of PAJA, in that he had failed to exhaust the internal remedies and has not sought exemption from doing so.

[24] The Minister further denied that she had intended to "*frustrate further prosecution of the CEPPWAWU matter*". She averred that it was a matter of national importance and that it required "*careful handling and proper communication within the Department which* [Mr Crouse] *was not prepared to do*".

[25] The Minister also averred that as cabinet member responsible for the labour relations portfolio she had "*a duty to maintain and enhance good labour relations between employers and the labour forces within the country*"; that she "*simply*" required a proper briefing from Mr Crouse, which he refused to give; and that the revocation of Mr Crouse's designation as Registrar was precipitated by Mr Crouse's conduct which amounted to "*gross insubordination*".

[26] In respect of the instruction regarding the payment of legal costs for the CEPPWAWU matter, the Minister averred that the DG, as an accounting officer of the Department, was within his rights to warn Mr Crouse of such costs in order to prevent irregular or wasteful expenditure. The Minister further contended that even though Mr Crouse was the Registrar, he was still an employee of the Department and was accountable to the Department; and

that Mr Crouse "*could not, as Registrar operate in total disregard*" of her office or that of the DG. The Minister further averred that even though Mr Crouse's designation as Registrar had been revoked, it was still the intention of the Department to charge him with "*gross insubordination*", but the matter was still under investigation. I shall, in due course, deal with the other aspects raised in the affidavits insofar as they might be necessary or relevant for the decision of this appeal.

[27] The court *a quo* dismissed all the preliminary points taken by the Minister. In respect of the first, on jurisdiction, it ruled that Mr Crouse's claim was based on "*administrative law and the principle of legality*" and that the Labour Court had jurisdiction to entertain it in terms of section 158(1)(h) of the LRA. In respect of the second, the court *a quo* held that even though Mr Crouse sought to be reinstated in his position as Registrar it was not reinstatement in terms of section 193(1) of the LRA that was being sought, but reinstatement "*as an adjunct to an order setting aside the impugned decision*".

[28] In respect of the third point, namely, that the Minister's revocation of Mr Crouse's designation as Registrar, did not constitute administrative action, as envisaged in PAJA, the court *a quo* held that it did indeed constitute administrative action and that PAJA was applicable.[4]

[29] In respect of the fourth preliminary point, relating to the exhaustion of internal remedies if PAJA was applicable, the court *a quo* held that no internal remedy provided for in law had been adequately identified which Mr Crouse was required to have exhausted. According to the court *a quo,* vague references to possible remedies were insufficient to sustain the Minister's argument.

[30] The court *a quo* further held that if the Minister's impugned decision was not "*administrative action*" as contemplated in PAJA and if PAJA did not apply the decision was still reviewable on the basis of the constitutional principle of legality; Further, that the principle had various aspects (or requirements) one of which was rationality. Against that background the court *a quo* dealt with

[4] The ruling on this third preliminary point was the *crux* of the court *a quo's* judgment on the merits. I will discuss it in greater detail in due course.

the merits of the application and with each of the grounds relied upon by Mr Crouse. The court *a quo,* ultimately, only upheld one ground of review.

[31] The one ground of review upheld by the court *a quo* is summarised as follows:

> '*In summary, I have found that:*
>
> *(i) The impugned decision constitutes administrative action and that a PAJA review is thus available to Mr Crouse; alternatively, the impugned decision constitutes the exercise of a public power and is subject to legality review;*
>
> *(ii) In arriving at the impugned decision, the Minister ignored materially relevant facts, namely the ministerial submission of 15/16 July 2015;*
>
> *(iii) The consequence of this is that the impugned decision was unreasonable, alternatively irrational; and procedurally unfair; and*
>
> *(iv) The impugned decision thus falls to be set aside on review and Mr Crouse reinstated into the position of Registrar of Labour Relations.'*

[32] The court *a quo* then went on to make an order setting aside the Minister's decision revoking Mr Crouse's designation as Registrar of Labour Relations; directing the Minister to immediately reinstate Mr Crouse as Registrar of Labour Relations; and ordering the Minister to pay the costs of the application (including the costs of 7 August 2015).

[33] On application the court *a quo* granted the appellants leave to appeal to this Court. Several grounds are relied upon which will be dealt with in turn. The appeal raises the following issues *inter alia*: Is PAJA applicable? And, more particularly, is the impugned decision "*administrative action*" as contemplated in PAJA, and as part of that issue the main prominent questions are firstly, whether the impugned decision, *inter alia*, had "*a direct, external legal effect*", as contemplated in the definition of "*administrative action*" in section 1 of PAJA and whether the impugned decision was the product of the exercise of "*executive powers or functions*" as contemplated in paragraph (aa) of the definition. Other issues are whether the conduct of the Minister was in breach

of PAJA and if the Minister's impugned decision was reviewable in terms of the principle of legality, whether it was in breach of that principle.

[34] I now deal with the grounds of appeal. The first ground of appeal briefly was that the court *a quo* erred in finding that the impugned decision was an "*administrative action*" as contemplated in PAJA and that PAJA was applicable. The submissions briefly in support of that point were that the Minister had taken the impugned decision in terms of section 108 of the LRA, which is national legislation, and that by virtue of section 85(2)(e) of the Constitution of the RSA (1996) the Minister was performing "*an executive function provided for in national legislation*" (i.e. the LRA); that section 1 of PAJA expressly excludes executive powers or functions from the definition of "*administrative action*"; that, in any event, the impugned decision could not have had "*a direct and external effect on*" Mr Crouse's appointment. Mr Ntleki had been appointed to act as Registrar. Further, it was alleged that Mr Crouse had no legal basis to complain that in his absence the official duties of the Registrar were not discharged properly.

[35] In argument before us counsel for the appellants elaborated on this ground and added new arguments, namely, that if PAJA was applicable then Mr Crouse was obliged to first exhaust internal remedies. Counsel emphasised that the impugned decision had no "*direct, external legal effect*" as required by the definition of "*administrative action*" in section 1 of PAJA. He further submitted that section 108 of the LRA only involves a conferment of the title of Registrar of Labour Relations in respect of an existing employee of the Department of Labour and did not result in the conferment upon such employee of "*any additional benefits and advantages from what he or she had sans such designation*". Further, that the revocation of the designation, similarly, did not result in such an individual losing any benefits or advantages. Counsel added to this that such an employee is not prejudiced by the revocation. Reference in that regard was made to a passage in the judgment in *Liquor Web (Edms) Bpk v Voorsitter, Drankraad en Andere*[5] to the effect that the rationale for the judicial review of decisions of bodies such as the

[5] 2001 (1) SA 1069 (T) at 1075B-D.

Liquor Board was to prevent prejudice to individuals and that in the absence of such prejudice the review could not succeed.

[36] The court *a quo* referred to what was held in *Gcaba v Minister for Safety and Security and Others* ("*Gcaba*")[6] in respect of the question whether the decision (in that case not to promote the litigant) constituted administrative action, namely, that:

> '*Generally, employment and labour relationships do not give rise to administrative action as contemplated by the PAJA. Section 23 of the Constitution regulates the relationship between employer and employee but section 33 does not. A grievance raised by employees relating to the conduct of the state as employer has few if any direct implications or consequences for other citizens. Employment disputes are therefore not to be equated with matters such as tenders*.'[7]

[37] The court *a quo* then referred to the decision of the Labour Court in *De Villiers v Head of Department: Education; Western Cape Province*[8] (*De Villiers*)to the effect that the general rule that employment-related grievances by state employees may in certain instances have implications or consequences for other citizens (as held, *inter alia,* in *Gcaba*) and that an assessment had to be conducted on a case-by-case basis to determine whether a departure from the rule was warranted. Further, that, following decision of the Constitutional Court in *President of the Republic of South Africa and Others v South African Football Union and Others* ("*SARFU*"),[9] the relevant factors to be taken into account in making the assessment were "*the source and nature of the power being exercised; how closely the power is related to the implementation of the legislation (as opposed to a policy matter)*" and "*the subject matter of the power*". Another factor which the court *a quo* suggested was to be taken into consideration was "*the existence of any alternative remedies*" which the

[6] [2009] 12 BLLR 1145 (CC).
[7] See particularly at 1163 para 64.
[8] (2010) 301 ILJ 1377 (LC) para 90.
[9] 2000 (1) SA 1 (CC).

Labour Court held, was a factor that "*weighed*" with the Constitutional Court in both *Chirwa v Transnet Limited and Others*[10] *(Chirwa)* and *Gcaba*.

[38] The court *a quo* found further support for this exception to the general rule in the minority (dissenting) view of Langa CJ in *Chirwa*[11] where the Chief Justice stated *inter alia* that his reasoning did not suggest that "*the dismissal of public employees will never constitute 'administrative action' under PAJA"* and gave examples where, according to his view, such dismissals may fulfil the requirements of the definition of 'administrative action' in PAJA. One instance being where the person is dismissed in terms of a particular legislative provision and another being where the dismissal is likely to "*impact seriously and directly on the public by virtue of the manner in which it was carried out*" or "*by virtue of the class of public employee dismissed*". The court *a quo* also cited, in support of its view that the general rule stated in *Gcaba* had exceptions, a reference in Hoexter[12] where the dismissal of the Chief Executive Officer of the Commission of Gender Equality was regarded as administrative action. The court *a quo* further referred to the decision of the Labour Court in *De Villiers*, where the decision refusing to reinstate an employee deemed to be dismissed in section 14(2) of the Employment Educators Act[13], was held to constitute "*administrative action*". The key consideration for that conclusion was that the power to refuse reinstatement was not sourced from contract but from the applicable statute and that the employee had no alternative remedy. A further reference was the decision in *Hendricks v Overstrand Municipality and Another*[14] ("*Hendricks*") where it was held that the decision of a presiding officer not to dismiss a senior municipal police official on corruption charges was "administrative action" within the meaning of PAJA.

[39] Drawing on those authorities, the court *a quo* concluded, with reference to the facts of this case, that this was one of those exceptional instances where an

[10] [2008] 2 BLLR 97 (CC).
[11] See at 160 para 194.
[12] See Cora Hoexter "*Administrative Law in South Africa*" 2nd ed (Juta 2011) at 218 (Hoexter).
[13] Act No 76 of 1998.
[14] [2014] 12 BLLR 1170 (LAC).

employment-related decision in the public sector did amount to "administrative action". The reasons for this conclusion, briefly, were the following:

[40] Firstly, the Minister's power to revoke the designation of Mr Crouse as Registrar was derived, or sourced, from statute, i.e. section 108 of the LRA, and not from a contract.[15]

[41] Secondly, Mr Crouse had no alternative remedy under the LRA. According to the court *a quo,* the revocation of his designation as Registrar did not affect his conditions of employment. He would have had no claim to having been demoted, because his position was similar to that of a senior executive whose secondment is recalled but whose terms and conditions remain unaffected and, further, that Mr Crouse did not have any claim based on unfair disciplinary action short of a dismissal, since the Minister did not take disciplinary action against Mr Crouse and the purported misconduct was still being investigated.

[42] Thirdly, according to the court *a quo*, "*in the context of labour relations in general, the impact of the removal of the Registrar is of huge public import*". There is no merit in the argument of the Minister that the appointment of Mr Ntleki as Acting Registrar has nullified or neutralised any impact of the impugned decision.

[43] Fourthly, the court *a quo* was of the view that it could not be disputed that the impugned decision "*adversely affected Mr Crouse's rights*". As for the definitional requirements that the decision must have "*a direct, external legal effect*", the court *a quo* relied on what was held by the Constitutional Court in, *inter alia, Joseph and Others v City of Johannesburg and Others*[16] namely that the finding that the rights of the applicants were materially and adversely affected for the purposes of section 3 of PAJA would necessarily imply that the decision had a "*direct, external legal effect*" on the applicants.

[15] That being the Minister's own contention, and in accordance with the decision in *Masetlha v President of the RSA and Another* 2008 (1) SA 566 (CC) para 68, to the effect that the power to dismiss was an essential corollary of the power to appoint.

[16] 2010 (4) SA 55 (CC) para 27. See also *Union of Refugee Women and Others v Director: Private Security Regulatory Authority and Others* 2007 (4) SA 395 (CC) para 70.

Discussion

[44] In light of the decisions of the Constitutional Court, culminating in *Gcaba,* what has to be determined is, firstly, whether the impugned decision, even though it inarguably involves an employee/employer relationship, is nevertheless not a labour practice as envisaged in section 23 of the Constitution and the LRA and, secondly, whether it is "*administrative action*" as envisaged in section 33 of the Constitution and ultimately in PAJA.

[45] In respect of determining whether it is "*administrative action*", it is reasonably established since, at least, the Constitutional Court's decision in *Minister of Health v New Clicks SA (Pty) Ltd and Others* ("*New Clicks*")[17] that the starting point in determining whether any particular action constitutes "*administrative action*" is not to analyse whether the action contains all the elements of the definition of the term "*administrative action*" in section 1 of PAJA – but to determine what constitutes administrative action for the purposes of section 33 of the Constitution. The definition in terms of PAJA must be construed consistently with section 33 of the Constitution.[18]

[46] The definition in PAJA cannot be used to define the term in the Constitution. It can merely refine that provision.[19]

[47] Having determined that the action in question is administrative action within the meaning of section 33 of the Constitution, one then refers to the exclusions in the definition of the term in PAJA to ascertain whether PAJA excludes the action from its scope.

[48] Ngcobo J (as he then was) states the approach succinctly as follows:[20]

> '*The starting point in determining whether PAJA is applicable to the exercise of the power confirmed by s 222G is s 33(1) of the Constitution. The meaning of administrative action must be determined by reference to s 33 of the Constitution and not PAJA. Once it is determined that the exercise of the*

[17] 2006 (2) SA 311 (CC).
[18] See *inter alia* the judgments of Chaskalson CJ paras 100 and 128; Ngcobo J (as he then was) para 446 and that of Sachs J para 586.
[19] See Sachs para 586 and Ngcobo J para 446.
[20] See: paras 446 and 449 – *New Clicks*.

executive power authorised by s 22G(2)(a)(c) is administrative action within the meaning of s 33, the next question to consider is whether PAJA nevertheless excludes it. The answer to this question must be sought, in the first place, in the exclusionary provisions of PAJA. Reference to these provisions of PAJA is not for the purpose of determining whether the process involved here is administrative action, but whether PAJA excludes the exercise of this specific power from its ambit. It follows therefore that the provisions of PAJA cannot be used as an aide to determining the meaning of administrative action in the Constitution. At best they can be used to fortify the inference that PAJA excludes the exercise of this specific power from its ambit …'

[49] In respect of the first point, the cases illustrate that at times there is a fine line between administrative action under section 33, public and employment relationship issues in the public sector.[21]

[50] The general distinguishing feature between the two is that section 23 of the Constitution deals purely with employment relationships and related issues and does not serve to protect persons outside that context, whereas section 33 of PAJA, principally, provides protection against unfair administrative action.

[51] What was established in *Gcaba* is a general principle that employment relationship issues do not amount to administrative action within the meaning of PAJA (i.e. as construed consistently with section 33 of the Constitution).[22] The clear implication being that there could be exceptions to the principle and that certain employment relationship issues (i.e. actions) may amount to "administrative action" within the meaning of PAJA, properly construed. For

[21] See *inter alia SAPU and Another v National Commission of the South African Police Service and Another* [2006] 1 BLLR 42 (LC); compare *POPCRU and Others v Minister of Correctional Services and Others* [2006] 4 BLLR 385 (E); and *Nxele v Chief Deputy Commissioner Corporate Services, Department of Correctional Services and Others* [2006] 10 BLLR 960 (LC) and see also *Fredericks and Others v MEC for Education and Training Eastern Cape and Others* [2002] 2 BLLR 119 (CC) and *Chirwa v Transnet Ltd and Others* [2008] 2 BLLR 97 (CC).

[22] See: para 64 of the judgment of Van der Westhuizen J.

example, there might be instances where grievances by State or public sector employees have implications or consequences for other citizens.[23]

[52] Features that serve to distinguish the exception from the general are, *inter alia,* the source and nature of the action, whether the action involves, or is closely related to the formulation of policy, or to the initiation of legislation and/or whether it has to do with the implementation of legislation.[24] In *De Villiers* the Labour Court added the existence of alternative remedies as another factor to be considered, due to the importance attached to that aspect in both the *Chirwa* and the *Gcaba* decisions.

[53] Turning to the facts of this case: it involves the revocation by the Minister, a public official, of an employee's designation as Registrar of Labour Relations. In terms of section 108 of the LRA the Minister has a duty and is empowered to that end to "*designate*" (or "*appoint*") an officer in the Department of Labour as Registrar of Labour Relations.

[54] It is common cause and the Minister's own version that she revoked the designation on the strength of that very statutory provision since the power to revoke, although not expressly stated in that section, is an implied corollary of her power to designate or appoint.[25]

[55] The designation by the Minister is further undoubtedly an exercise of a public power and the revocation of the designation is no less so. The Minister is required in either instance to exercise the power in the public interest. The Registrar's office is a public office, and the exercise of the registrar's functions does not only impact trade unions, employers' organisations, their members, and the like but has implications for the broader public.

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[23] For example see *POPCRU and Another v Minister of Correctional Services and Others (supra)*; *Nxele v Chief Deputy Commissioner Corporate Services, Department of Correctional Services and Others (supra)* and see also *De Villiers v Head of Department: Education Western Cape Province* (2010) 31 ILJ 1377 (LC).

[24] These principles have been derived from the Constitutional Court's decisions in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* ("*SARFU*") (*supra*) paras 141 - 143 and have been restated in *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA) and also see *De Villiers v Head of Department, Education Western Cape Province (supra)* paras 9 - 10.

[25] See *Masetlha v President of the RSA and Another (supra)* para 68.

[56] The designation contemplated in section 108 does not involve the formulation of policy or the initiation of legislation but is squarely about the implementation of legislation (i.e. the LRA). The designation is essential for putting into effect the provisions that require a Registrar of Labour Relations and for the performance of the functions given to the Registrar.

[57] In light of the above stated facts the revocation (i.e. the impugned decision) is in my view "*administrative action*" within the meaning of section 33 of the Constitution.

[58] What now has to be determined is whether PAJA nevertheless excludes that action from its ambit? The only exclusion purportedly raised by the Minister is that the impugned decision was the exercise of executive powers or functions as contemplated in section 1(aa) of the definition of "*administrative action*" in PAJA.

[59] Section 1(aa) refers to "*the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79(1) and (4); 84(2)(a), (b), (c), (d), (f), (g), (h), (i) and (k); section 85(2)(b), (c), (d) and (e); section 91(2), (3), (4) and (5); section 92(3), section 93, section 97, section 98, section 99 and section 100 of the Constitution*".

[60] The Minister did not refer to any specific powers or functions listed in section 1(aa) of PAJA. Even though that list is not exhaustive, what is noteworthy is that section 85(2)(a) has not been included in the list and clearly deliberately so. That section lists the function or power of "*implementing national legislation*". Such function or power is obviously or quintessentially administrative action[26] and none of the other exclusions apply in the Minister's case.

[61] On the approach postulated in *New Clicks* it is not necessary to determine whether the other definition or elements are met, in particular whether the action is a "*decision*", and whether it "*adversely affects the rights of any*

[26] See: *SARFU (supra); New Clicks* paras 125 - 126, paras 460 - 461 and para 466; and *Chirwa* para 140.

person", and whether it has a "*direct, external legal effect*". The reason, in all likelihood, is because, as Professor Hoexter states:

> '*Some of the elements of the PAJA definition have no real counterparts in the jurisprudence that has developed in relation to s 33, while other elements are more extreme than their counterparts in their jurisprudence*. *'Direct, external legal effect', the most glaring example, is a German import that fails to resonate with a pre-2000 jurisprudence. The insistence on a 'decision' is an Australian phenomenon and not a requirement that was ever laid down generally either at common law or as part of s 33. As for 'adversely affect the rights of any person', Nugent JA noted in the Grey's Marine case that a literal construction of the phrase was not supported by the court's interpretation of s 33 so far.'*

[62] What is required is that the definition be construed consistently with the meaning which has been given to the term "*administrative action*" in section 33 of the Constitution.[27]

[63] Notwithstanding the approach in *New Clicks,* the Constitutional Court in *Gcaba* regarded the fact that the grievance by a public sector employee against the state had "*few or no direct implications or consequences for other citizens*", as a material indicator that the (state) action complained about there does not constitute "*administrative action*".[28]

[64] On the assumption that one has to, nevertheless, determine whether the aforementioned definitional elements have been satisfied, the following may be concluded. It was seemingly accepted by the parties, and in my view correctly so, that the Minister's reversal of Mr Crouse's designation as Registrar would constitute a decision and that it was final. In *Joseph and Another v City of Johannesburg and Others,*[29] *(Joseph)* the Constitutional Court endorsed the broad definition given by the SCA in *Grey's Marine* to the phrase "*direct, external legal effect*", namely that the phrase "*serves to emphasise that administrative action impacts directly and immediately on individuals*". The Constitutional Court held there that the finding that the rights

[27] See *Grey's Marine Houtbaai (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) para 22.
[28] See para 64 *Grey's Marine (above)*.
[29] 2010 (4) SA 55 (CC) see para 26.

of the applicants were materially and adversely affected for the purposes of section 3 of PAJA would necessarily imply that the decision had a "*direct, external legal effect*" on the applicants.[30] In *Joseph* the Constitutional Court also accepted that the phrase "*materially and adversely affects*" means that the administrative action had a significant and not merely a trivial effect on the applicants.[31]

[65] Mr Crouse's designation as Registrar, even though he was from the ranks of officials in the Labour Department, was an appointment to that position. The position itself is an important one for the efficient and proper implementation of the provisions of the LRA, in particular those provisions which require the involvement of the Registrar in the registration and proper functioning of trade unions and employer's organisations.

[66] The designation is not to be made lightly and without transparency. Hypothetically, if required, the Minister must be able to provide transparent and rational (and justifiable) reasons why a particular official and no other was designated as Registrar and, similarly, in respect of the revocation of such designation, rational (as well as reasonable) reasons for such action is called for. In terms of section 195 of the Constitution all public administration must be governed by democratic values that are enshrined in the Constitution, including the principles listed in that section, which include, accountability, transparency, fairness and equity. The opposites of those values, namely irrationality, inequality, arbitrariness and illegality are anathema.

[67] The position of Registrar of Labour Relations is a public position which impacts on the rights of significant numbers of workers and the public. The reversal of the designation is similarly not to be lightly affected. The Registrar is tasked with important functions and determinations and its decisions, where they are required, have to be final for the sake of certainty. The position

[30] See at para 26.

[31] See: para 31 where reference was made to Hoexter *Administrative Law in South Africa*" (Juta 2007) 358-9; *De Ville Judicial Review of Administrative Action in South Africa* (LexisNexis Butterworths, Durban 2003) 223-4 and Currie *The Promotion of Administrative Justice Act: A Commentary* 2ed (SiberInk, Cape Town 2007) at 100.

imparts a particular status to the designated official which the other officials in the Department of Labour do not have.

[68] Consequently, reversing the designation as Registrar does not merely have a trivial effect, but has a significant impact on the incumbent and beyond. The argument on behalf of the appellants that the effect is not significant, because Mr Crouse merely reverted to his former position in the Department (i.e., that he held prior to his designation as Registrar) and that there is no change in his salary and other conditions, overlooks and ignores the obvious.

[69] It follows that the findings, that the impugned decision adversely affected the rights of Mr Crouse and that it had a direct external legal effect, cannot be faulted.

[70] Similarly, the court *a quo's* finding that the Minister's action in reversing the designation was subject to review in terms of the constitutional principle of legality can also not be faulted. In argument the Minister's counsel submitted that the Minister's decision can only be reviewed on that basis provided that there were grounds of reviewing the decision.

[71] The Minister in designating an official as Registrar, and doing the reverse, was exercising a public power. That is a power given to the Minister as organ of state by national legislation, namely the LRA. The principle of legality requires the holder of such public power to act in good faith and not to misconstrue his or her powers.[32]

[72] In *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa* ("*Pharmaceutical Manufacturers*")[33] the Constitutional Court held that the principle of legality required that public power should not be exercised irrationally or arbitrarily.[34]

[73] Before considering the merits of the review I will briefly consider the question of internal remedies. A PAJA review requires that all internal remedies, if any,

[32] See *President of the Republic of South Africa v South African Rugby Football Union (supra)* para 148.
[33] 2000 (2) SA 674 (CC).
[34] See: para 85.

provided by any other law, be exhausted first.[35] In this particular case, I am not aware of, nor have any of the parties, either in this Court or in the court *a quo,* referred to any specific internal remedy that Mr Crouse was to exhaust before bringing his application in terms of PAJA. In any event, Mr Crouse first, though unsuccessfully, demanded his reinstatement by the Minister and then, only thereafter, brought the court application for review.

[74] As pointed out earlier, the only ground of review in respect of which the court *a quo* found for Mr Crouse was that the Minister failed to take into account the ministerial submission of Mr Crouse and the DDG of 15 or 16 July 2015 which had been sent to the DG.[36] The DG had sent the memorandum back to Mr Crouse with a written note – presumed to be that of the DG – to the effect that the DG only required a response to a question that the Registrar had ignored the Minister's request for a briefing before proceeding with the CEPPWAWU application. The court *a quo* found on the papers before it that the Minister in her averments seemed to imply that she did receive the submission. That finding was not put in issue.

[75] The court *a quo* also found that the Minister's averment, to the effect that Mr Crouse did not deal with the issues as required by the DG -- in particular, that while Mr Crouse sought to explain why he decided to bring the court proceedings against CEPPWAWU – he failed to explain why the Minister's letter to him had been ignored – was wrong and unjustifiable.

[76] According to the court *a quo* "*the ministerial submission addresses Mr Crouse's explanation for not having suspended the CEPPWAWU application and not having briefed the Minister as per her letter of 5 June 2015. Reference is made in this regard to paras 24(b), (c), (d) and (e) and paras 26(a), (b) and (c) above. The contents present as a detailed, cogent and sincere explanation by Mr Crouse*".

[77] The court *a quo* found that the Minister had failed to "*apply her mind to the material content of the ministerial submissions*" and that, consequently, the

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[35] See: section 7(2)(a) of PAJA.

[36] Mr Crouse did not cross-appeal in respect of the other grounds that were not upheld by the court *a quo*.

Minister's decision to revoke Mr Crouse's designation as Registrar was unreasonable and irrational in terms of PAJA and the principle of legality and, secondly, procedurally unfair in terms of both PAJA and the principle of legality.

[78] The court *a quo* did not deal with the complaint raised by Mr Crouse that the Minister sought to interfere with his statutory functions on a technical basis, having concluded that in respect of that issue there was a dispute of fact on the papers that could not be resolved - applying the well-known rule of *Plascon-Evans*.[37] That finding of the court *a quo* is lamentable. The result of it is that the court *a quo* apparently did not deal with the Registrar's position in relation to the Minister – beyond the fact that the Registrar was to be appointed and could be removed by the Minister. The court *a quo* did not deal at all with the legality of the Minister's actions in not only requiring an account from the Registrar about the exercise of his functions (generally), and specifically, concerning the case of CEPPWAWU, but the Minister's and the DG's instructions to the Registrar concerning his decisions and functions as Registrar.

[79] In my view the issue was not irresoluble on the papers as they stood, because all facts were before the court and it was a matter of determining the nature of the Registrar's position as set out in the LRA in relation to that of the Minister and under what circumstances and to what extent the Registrar had a duty if at all to account to the Minister concerning the exercise of his functions as Registrar and specifically in relation to a particular case or matter. In the absence of a cross-appeal by Mr Crouse we need not determine whether the Minister unlawfully interfered with the Registrar's functioning, but it is nevertheless essential to analyse their legislatively intended relationship in order to determine the duty of the Registrar to brief the Minister about a particular matter and whether there was a briefing.

[80] On the face of it, the LRA is silent about those matters. It is only upon a careful consideration of the relevant provisions of the LRA which deal with the

[37] i.e. the principles stated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-635B.

functions of the Registrar and the Public Service Act [38] ("PSA"), that more light is shed on the issue of what their relationship ought to be.

[81] Section 109 of the LRA gives additional functions to and summarises the other functions of the Registrar. In terms of section 109(1), the Registrar must keep registers of the entities specified in paragraphs (a) to (e) (inclusive) of that section. In terms of section 109(2), the Registrar is enjoined to give notice in the Gazette of any entry or deletion he included in the register. In terms of section 109(3), the Registrar has the power to condone late compliance of any time periods stipulated in Chapter VI of the LRA – except the period within which a person may note appeal against the Registrar's decision. Section 109(4) provides that the Registrar must perform all the other functions confirmed on the Registrar in terms of the LRA.

[82] There are various other provisions in the LRA that confer specific functions on the Registrar. Briefly, functions are confirmed in terms of section 29 of the LRA in relation to the registration of bargaining councils; in terms of section 34 in relation to the registration of amalgamated bargaining council; in terms of section 39 in relation to the application for the establishment of statutory councils; in terms of section 40 in relation to the establishment and registration of statutory councils; in terms of section 41 in relation to the establishment and registration of statutory councils in the absence of an agreement between the registered trade unions and registered employers' organisations; in terms of section 42 in relation to the registration of statutory council; in terms of section 48 in relation to the application to change the status of a statutory council; in terms of section 54 in relation to a council's duty to submit to the Registrar the information specified in that section (including financial statements and auditors' reports); in terms of section 57 in relation to the registration of the changed Constitution or name of a council; in terms of sections 95 and 96 in relation to the registration of trade unions and employers' organisations; in terms of section 100 relating to the duties of trade unions and employers' organisations including their duties to provide to the Registrar the information specified in that section.

[38] The Public Service Act of 1994 (Proclamation No. 103 of 1994). In particular, sections 7 and 7B of that Act.

[83] Other functions are contained in section 101 of the LRA, relating to the changing of the constitution, or name of registered trade unions, or of employers' organisations; in terms of section 102 relating to the registration of amalgamated trade unions or employers' organisations; in terms of section 103 relating to the winding-up of trade unions and employers' organisations; in terms of section 103A relating to the appointment of an administrator to a trade union or employers' organisation; in terms of section 106 relating to the cancellation of the registration of trade unions or employers' organisations; in terms of section 107 relating to the registration of federations of trade unions and employers' organisations; in terms of section 110 in relation to the access to information in the Registrar's office and in terms of section 111 in relation to appeals against the Registrar's decision.

[84] In only two of the sections referred to above the Minister is given power or a function in relation to the same subject matter. Section 40(4) of the LRA provides in relation to the establishment and registration of a statutory council that if an agreement is concluded between the registered trade union and registered employers' organisation for the establishment of such a council – "*the Minister may advise the Registrar to register the statutory council in accordance with the agreement*" if the Minister is satisfied that the specified requirements were met. Subsection (7) provides that if the Minister "*advises*" the Registrar in terms of subsection (4) the Registrar "*must*" register the statutory council.

[85] The second provision is section 41(8) of the LRA which also deals with agreements concluded in respect of the establishment of statutory councils and provides that "*the Minister must notify the Registrar of agreements concluded and decisions made in terms of 'the section' and that 'the Registrar must' do what is required in paragraphs (a), (b) and (c) of subsection (8)*".

[86] What is clearly absent from all of these sections, referred to above, which gives the Registrar functions, or imposes duties upon that official, is an injunction and duty on the Registrar to report or account to the Minister in respect of the exercise of the Registrar's functions. Another point of significance is that the Minister is not empowered to perform the very

functions the Registrar has to perform, not even if the Registrar is unable to do so. The LRA in section 108 merely empowers the Minister to appoint Deputy Registrars to assist the Registrar in the performance of the Registrar's functions, or for them to perform such functions of the Registrar as are delegated to them (section 108(6)). The delegator can only be the Registrar who is the repository of the functions in terms of the LRA and cannot be the Minister, because the Minister has no power to perform the functions of the Registrar.

[87] Of further importance, the Minister is not given any (specific) power or function or role in respect of the sections which were applied by the Registrar in the matter of CEPPWAWU and which (apparently) caused the Minister to call the Registrar to account. The relevant sections are sections 100, 103, 103A and 106 of the LRA.

[88] Section 7B of the PSA contemplates the necessity to establish "Specialised service delivery Units" in, *inter alia*, national departments. The section, *inter alia*, empowers the Minister (the executive authority), in consultation with the Minister for Public Service and Administration, to establish such a unit within a Department and to designate the head thereof. The section envisages, *inter alia*, that such a head would have powers and duties imposed upon, assigned, delegated or transferred to him or her by legislation. The Minister, in terms of that section is required to approve a "protocol" for such a unit (s7B(4)). The protocol is required to list a number of things and, inter alia, and in addition to what it may or must include, "*shall, subject to applicable legislation, determine the reporting requirements to the head of the department, including, but not limited to, to enabling that head to advise the relevant executive authority on the oversight of the unit on policy implementation, performance, integrated planning, budgeting and service delivery (insofar as applicable).*"[39]

[89] While the Registrar's office may not necessarily have been established in terms of s 7B of the PSA, that section illustrates that a matter such as reporting by a head of a specialist service unit, even though the head was designated by the Minister, is not something that ought to be dealt with

[39] Section 7B(4)(c).

haphazardly or arbitrarily. Mr Crouse mentions that in the 20 years, or so, that he has been the Registrar, he had never been required to give a briefing to the Minister (or DG) concerning a matter he was dealing with. He was clearly not aware that he had a duty to do so. The appellants have not referred to any kind of protocol that had been approved in respect of the Registrar's functioning, including, of any duties of reporting, or briefing.

[90] The principle of legality enshrined in the Constitution requires, primarily, that the Minister should not act arbitrarily. It has not been proved that the Minister has the power in terms of the law, to call the Registrar to account to her, or to intervene in, or assume the Registrar's functions.[40] If such power had been given to the Minister then the principle of legality requires that it be exercised rationally, i.e. the exercise of the power must be rationally related to the purpose for which the power was given.[41] If not, the exercise of such power is arbitrary and in breach of the principle of legality.

[91] In my view, the Minister has not established a legally acceptable basis for requiring the Registrar to account and for interfering and dictating to the Registrar how the Registrar's discretion (relevant to this matter), which is very limited, ought to be exercised.

[92] Insofar as the Registrar had a duty to brief the Minister on the matters the Minister required briefing on – which I find has not been established – the Registrar has reasonably and adequately briefed the Minister in the ministerial submission of 15/16 July 2015. The Minister apparently did not take into account the information in the submission and the failure to do so, in deciding to revoke the designation of Mr Crouse as the Registrar, had a negative impact on the rationality of that decision. The decision was rendered irrational and invalid[42] and susceptible to review and being set aside in terms of, either

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[40] See *President of the Republic of South Africa and Others v South African Football Union and Others ("SARFU")* (*supra*) para 148; *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) para 58.

[41] See *Pharmaceutical Manufacturers Association of South Africa and Another : In Re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) para 85.

[42] See *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC) para 39 also referred to in *MEC for the Department of Health; Western Cape v Weder; MEC for the Department of Health; Western Cape v Democratic Nursing Association of SA on behalf of Mangena* (2014) 35 ILJ 21 35 (LAC) para 35.

PAJA, or the Constitutional principle of legality, or both. The decision was also procedurally unfair in terms of either or both of those statutory provisions, because Mr Crouse was not given a fair hearing.

[93] There is no reason in terms of the law and fairness why the costs should not follow the result, given the facts and circumstances in this matter.

[94] In the result, the appeal is dismissed with costs.

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P Coppin

Judge of the Labour Appeal Court

I agree

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B Waglay

Judge President of the Labour Appeal Court

I agree

_____

K Ndlovu

Judge of the Labour Appeal Court

APPEARANCES:

FOR THE APPELLANT:	D T Skosana SC
	MM Mojapelo
	Instructed by the State Attorney
FOR THE FIRST AND SECOND RESPONDENTS	A P S Nxumalo
	Instructed by Thabang Ntshebe Attorneys