IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

CASE NO. J1584/05

In the matter between:

SOUTH AFRICAN POLICE UNION **First Applicant**

POLICE AND PRISON'S CIVIL RIGHTS UNION **Second Applicant**

and

THE NATIONAL COMMISSIONER OF THE
SOUTH AFRICAN POLICE SERVICE **First Respondent**

THE MINISTER FOR SAFETY AND SECURITY **Second Respondent**

J U D G M E N T

MURPHY A J:

1. This case raises the important question of whether the Commissioner of Police, when acting as an employer, is under a constitutional, statutory or contractual duty to consult with members of the South African Police Service, or their representatives, about the amendment or alteration of their terms of employment or labour practices. It is a matter of some importance and one which might have profited from a fuller examination of the case law and academic writings touching upon the issues involved. Unfortunately the need to render a quick decision has denied me the opportunity to do the review I would have preferred. So be it. One can only express the hope that the line of reasoning which follows has not been impoverished as a result.

2. The applicants, the South African Police Union (SAPU) and the Police and Prisons Civil Rights Union (POPCRU), to whom I will refer jointly as "the

unions", seek urgent interim relief in the form of an order interdicting the first respondent, the National Commissioner of the South African Police Services, ("the Commissioner"), from introducing a new 8-hour shift system in respect of members of the SAPS engaged in line activity duties across the entire country. The interim interdict is sought pending either the final determination by the Labour Court of a review of the Commissioner's decision in terms of section 158(1)(h) of the Labour Relations Act ("the LRA"), which confers upon the Labour Court the power to review decisions or acts of the State in its capacity as employer on such grounds as are permissible in law, or the resolution of the dispute through the procedures of the Safety and Security Sectoral Bargaining Council ("the SSSBC"), whichever is the sooner.

3. In terms of section 24(1) of the South African Police Service Act of 1995 the Minister of Safety and Security is empowered to make regulations regarding the exercising of policing powers and the performance by members of their duties and functions; conditions of service of members; the general management, control and maintenance of the service; and labour relations. On 14 April 2000 the Minister, acting in terms of the provision, enacted GNR389 of GG21088 containing the "South African Police Service Employment Regulations" ("the regulations"), which regulate the working conditions of employees of the SAPS. Chapter VI of the regulations deals with the "Working Environment." Regulations 30 and 31 are of particular importance and provide as follows:

> **30. Principles**
>
> Working hours of the service and conditions must support effective and efficient service delivery while, as far as reasonably possible , taking into account the personal circumstances of employees including those of employees with disabilities.
>
> **31 Working Hours**
>
> The National Commissioner must determine-
>
> (a) the work week and daily hours of work for employees; and
> (b) the opening and closing times of places of work under her or his control, taking into account-
>
> (i) the needs of the public and the service delivery improvement programme of the service; and
> (ii) the needs and circumstances of employees, including family obligations and transport arrangements.

4. Before the adoption of a fundamental constitution in 1994, and also prior to the making of the regulations, the SAPS implemented an 8-hour shift system, consisting of three 8-hour shifts, namely morning (06h00-14h00), afternoon (14h00-22h00) and night (22h00-06h00), that were worked in various cycles by all employees engaged in line activity duties. The SAPS has approximately 140 000 employees, of whom approximately 115 000 to 120 000 are engaged in line activity duties in Community Service Centres, Crime Prevention Units, Crime Investigations Units and Protection

Services Units.

5. During 1994 employees in the SAPS began working 12-hour shifts as a means of compensating for staff shortages. As far as I am able to ascertain from the papers, this entailed employees rendering services for 12 hours per shift, on average three or four times per eight-day cycle. By far the majority of employees performing line activity duties began to render services in accordance with the 12-hour shift system and continued to do so until mid 2005. Hence, a survey conducted by SAPU of 121 police stations in Free State Province revealed that 107 utilized 12-hour shifts. Employees apparently prefer the 12-hour shift system because it provides them with a balance between their work and family duties. By 2002 more than 90% of employees worked a 12-hour shift.

6. Before the promulgation of the regulations in 2000 the terms and practices of employment in the SAPS were regulated by legislation, standing orders and various collective agreements. With the enactment of regulation 31 the Commissioner acquired the duty to determine working weeks and hours as well as the opening and closing times of places of work under his control.

7. On 8 May 2002, acting as parties to the SSSBC, and after extensive negotiations, the Commissioner and the unions concluded collective agreement 5/2002. The purpose of agreement 5/2002 was to delineate the work week and daily hours of work for employees of the SAPS and to set the opening and closing times of their places of work. The agreement commences by noting that the provisions of Chapter 2 of the Basic Conditions of Employment Act 1997 regulate working time and that regulation 31 obliges the Commissioner to determine the work week and daily hours of work, as well as the opening and closing times of the places of work.

8. Clause 1 of agreement 5/2002 governs the ordinary hours of work. It reads:

> The ordinary hours of work of any employee shall not be more than 40 hours per week. The daily hours of work shall not be more than 8 hours per day for those employees who render administrative duties. Shifts duties will be performed in either 8 hour or 12 hour shifts.

9. Clause 2.2 regulates the shift system applicable to offices that render line activity duties on the basis that such offices as far as possible be operative on a 24 hour a day/7 days a week basis. The relevant part of this clause states:

> For this purpose the following operating hours can be utilized:
>
> **2.2.1 Eight hour shift system**

Employees render services for eight hours per shift, on avarege five times per week.

2.2.2 Twelve hour shift system

Employees render services for twelve hours per shift, on average three or four times per eight-day cycle.

2.2.3 Forty hour flexi system

In order to enhance service delivery it will be necessary for certain work stations not to operate within a fixed shift system, but rather according to service delivery needs. Employees may be utilized to render services for a period of between eight and twelve hours per day (normal working hours) provided that:

- any flexi system must solely be based on enhanced service delivery;
- any service arrangement must first meaningfully be consulted with the employees and their recognized employee organizations of a particular workstation before the introduction thereof. A written record of the said consultation must be kept;
- the daily hours of work do not exceed twelve hours (excluding overtime);
- the weekly hours of work do not exceed forty hours (excluding overtime);
- the employee must perform those duties on not less than four occasions per week and not more than five occasions per week;
- a daily rest period of at least six consecutive hours between ending and recommencing work and a weekly rest period of at least 24 consecutive hours, which does not necessarily include a Sunday, are granted;
- these services be rendered uninterruptedly until completion of the shift.

10. Clause 7 of agreement 5/2002 provides for dispute resolution as follows:

> If there is a dispute about the interpretation or application of this agreement any party may refer the matter to the Council (SSSBC) for resolution in terms of the dispute resolution procedure of the Council.

11. On 31 May 2002 the Commissioner issued a circular addressed to all senior officers and functionaries throughout the SAPS across the country explaining the context and purpose of agreement 5/2002. In it the agreement is described as “a ground-breaking agreement regarding working hours” in the SAPS. The circular offers a justification for the change in the system in the following terms:

> The arrangement regarding working hours that has been in existence for the past number of years has been found to neither enhance current service delivery needs, nor take the personal needs of employees into account. The framework agreement that has been entered into makes it possible for customised working hours to be implemented at every workplace, based on the demands and needs experienced at the particular workplace.

12. This collective agreement has governed working hours in the SAPS since

its conclusion. From February 2005 to May 2005, the unions and the Commissioner participated in a process for the rationalization, review and consolidation of the various collective agreements concluded in the SAPS during the period 1994 to 2004, which process yielded another collective agreement repealing some agreements and retaining others. It is clear from the provisions of this latter agreement that agreement 5/2002 was retained and is accordingly current and of full force and effect.

13. On 29 June 2005 the Commissioner issued a second circular, addressed to the same persons as that issued on 31 May 2002, also concerning working hours in the SAPS. In it the Commissioner communicated that he had decided "to terminate the use of the current twelve hour system" and to introduce a new shift system known as the "adapted eight hour shift system"

14. Clause 6.2 of the second circular deals with the proposed new shift regime with regard to the offices that render line activity duties. It is re-iterated that such offices must, as far as possible, be operative 24 hours a day, seven days a week. In order to achieve this, two operating systems are available: the adapted 8-hour shift system and the 40-hour flexi system. The latter system is in most respects the same as that set out in agreement 5/2002. The adapted 8-hour shift comprises four reliefs working two morning, two night and two afternoon shifts, with three rest days granted between shift cycles.

15. Clause 3 of the second circular repeals and replaces the circular of 31 May 2002. Clause 12 proclaims that the circular will be implemented with immediate effect but allows a grace period for the introduction of the adapted 8-hour shift system until 1 September 2005. In this regard it states:

> The contents of this circular will be implemented with immediate effect. However, the adapted eight hour shift system for all shift workers may be implemented immediately but by no later than the 1st September 2005.

16. The Commissioner contends that the reason the adapted 8-hour shift system was to be phased in over a period of two months was in order to allow the employees and the union time to raise concerns and give their inputs which could be taken into consideration.

17. It is clear from the circular that the Commissioner considered the abolition of the 12-hour shift and the introduction of the adapted 8-hour shift as being in the best interests of service delivery. Thus, by 2005 it had become apparent to the management of the SAPS that the 12-hour shift was not optimal, efficient or effective. It is felt that employees do not perform optimally after 8 hours because of the deleterious physical effects of working 12 hours resulting in a less efficient and effective workforce more prone to mistakes and accidents. The unions dispute this.

18. On 8 July 2005 SAPU addressed a letter to the management of the SAPS submitting that implementation of the changes to working hours contemplated in the second circular would be in breach of section 23(4) of the LRA, clause 16.9 of the SSSBC constitution, an order of the Labour Court dated 28 March 2005 and agreement 5/2002. The union demanded withdrawal of the circular failing which it would take "the necessary legal action to protect its member's rights".

19. On the same day the SSBC addressed a letter to the management of the SAPS including a letter from POPCRU dated 7 July 2005 setting out its position that the second circular amounted to "a unilateral change to terms and conditions of employment because the SAPS have never consulted organized labour with regard to the changes". POPCRU requested the SSSBC "to write a letter to management in this regard and request them not to implement the change until the matter has been discussed in the council".

20. Management responded to SAPU in a letter dated 13 July 2005 in which it argued that agreement 5/2002 provided for shift duties to be performed in either 8 hour or 12 hour shifts and that a decision had been taken to opt exclusively for 8 hour shifts in the interests of optimal efficiency. It further contended:

> The implementation of the 8 hour shift system does not impact on the hours of work that may be performed by employees, neither does it deviate from Agreement 5/2002; *either* the 8 or 12 hour shift system may be applied.

21. Without any elaboration, management went on to say that the SAPS was of the opinion that the circular was not in the breach of any provisions of the LRA, the SSBC constitution or the order of the Labour Court. It accordingly refused to withdraw the circular.

22. In response to POPCRU's letter of 7 July 2005, management wrote a letter dated 18 July 2005 in which it repeated the comments it had made to SAPU, but additionally specifically denied that the circular amounted to a unilateral change to terms and conditions of employment.

23. Thereafter the management of the SAPS made a proposal that a workshop be convened under the auspices of the SSSBC to enable it to deal with the unions' concerns about the implementation of the new shift system. However, it held consistently to the view that the decision to introduce the new system fell within the scope of the managerial prerogative permitted by agreement 5/2002.

24. Some time in early July 2005, SAPU referred a dispute to the SSSBC. In the referral form the dispute is identified as one about a unilateral change to terms and conditions of employment. Under the paragraph headed "outcome required" the

union recorded that it wanted the SAPS to be interdicted from implementing the 8-hour shift system. In the *pro forma* space provided, it recorded (with reference to section 64(4) of the LRA) that it required the employer not to implement unilaterally the proposed changes for 30 days and demanded that it restore the terms and conditions of employment that applied before the change. The particulars of the dispute were set out in an annexure to the referral form and repeated verbatim the contentions made in SAPU's letter dated 8 July 2005 addressed to management.

25. On 12 July 2005 the unions' attorneys addressed a letter to the management of the SAPS contending that the SAPS was not entitled to proceed with the "unilateral implementation of the changed conditions of service pending the outcome of the referral". They sought confirmation before 12h00 on 13 July 2005 that the SAPS would not proceed with the implementation failing which they would approach the Labour Court for relief. The next day they wrote another letter including the referral to the SSSBC and requested a response to the letter of the previous day "on a very urgent basis".

26. On 25 July 2005 the management of the SAPS addressed a letter to the unions and the SSSBC recording its view that the change in the shift system did not amount to a unilateral change to the terms and conditions of employment because agreement 5/2002 provided for such a shift.

27. Around about this time, attempts were made to convene workshops with the unions under the auspices of the SSSBC to discuss the implementation of the adapted 8-hour shift system. However, in a letter dated 22 July 2005, addressed to the Secretary of the SSSBC, SAPU indicated that it was not prepared to engage in a workshop about implementation of the decision when a dispute process was under way in relation to the validity of the decision itself. It made the point that the dispute had been set down for "conarb" on 12 August 2005 and that the SAPS had not restored the *status quo* pending the determination of the dispute. It concluded:

> The fact of the matter is therefore that as far as the SAPU is concerned SAPS is still proceeding with the implementation and has not given any undertaking that it would not proceed with the implementation or restore the *status ante quo*. In those circumstances SAPU cannot be expected to attend a workshop to consult on the issue of implementation if SAPS is not prepared to confirm that it would not proceed with the unilateral implementation.

28. Despite this a special meeting of the SSSBC was held on 26 July 2005 attended by POPCRU and the representatives of the SAPS management, but not by SAPU. POPCRU took the position that SAPS had amended agreement 5/2002 without following the proper procedures of the SSSBC and without consulting labour. Management took the view that it had not amended agreement 5/2002 but had acted in terms of it. Management further expressed a willingness for workshops to be held at both provincial and area levels to engage in discussions over the implementation of the adapted 8-hour shift. POPCRU indicated its intention not to engage unless

the circular of 29 June 2005 was withdrawn. SAPS said that the refusal to engage over implementation was unjustified.

29. Having reached deadlock, SAPS then went ahead and by the time papers were filed had phased in the adapted 8 hour shift throughout the country. It is presently operating in the majority of areas in the country.

30. On 27 July 2005 POPCRU referred a dispute to the SSSBC for conciliation. It too categorized the dispute as a unilateral change to terms and conditions of employment and sought to invoke the provisions of section 64(4) of the LRA to restore the *status quo ante* pending the conciliation process.

31. A conciliation hearing evidently consolidating the dispute referred by both unions was held on 12 August 2005. The dispute could not be resolved and the SSSBC issued a certificate of outcome confirming that a dispute concerning an "alleged unilateral change to conditions of employment" remained unresolved.

32. In his founding affidavit in these proceedings, the general secretary of SAPU averred that the Commissioner's attitude necessitated urgent relief. He stated:

> The conciliation meeting was the applicants' final attempt to avoid resorting to litigation against the Commissioner over these issues. The Commissioner's obstinate refusal to comply with his legal obligations has necessitated this application.

33. Ten days after the conciliation hearing, on 22 August 2005, the applicants filed their urgent application seeking an interim interdict pending the review of the Commissioner's decision by this court or the resolution of the dispute by the SSSBC. The parties are in dispute about whether the matter is indeed urgent. For reasons which will become apparent I do not propose to deal with the question of urgency now, but will do so later in this judgment.

34. At different stages in the dispute process the unions have challenged the Commissioner's decision on various grounds. As we have seen, in the conciliation process the unions categorised the decision to introduce the adapted 8-hour shift as a unilateral amendment of the terms and conditions of their member's employment contracts. SAPS, on the other hand, saw the change as an alteration of a work practice, permitted in terms of the collective agreement. The full significance of the different interpretations will appear later. For the purposes of the immediately ensuing discussions I allow for either possibility when speaking of the change by referring generically to "the decision" of the Commissioner.

35. It is common cause that the decision of the Commissioner was made without any prior consultation with the unions or the employees. The Commissioner, we have seen, is of the opinion that he was under no duty

to consult in regard to the taking of the decision, but remained willing to do so in relation to the issues of implementation. His final position is clearly articulated in a letter written on his behalf to senior officials in the SAPS on 16 August 2005 where he states:

> This directive of the National Commissioner is in line with all the relevant legislation and agreements. Rumours are doing the rounds that the implementation of the adapted 8 hour shift system constitutes a unilateral change in the conditions of service of employees. The changing of work hours constitutes a change in the work practice rather than a change in conditions of service. The National Commissioner is within his rights to change any work practice.

36. In these proceedings the unions have challenged the decision on three grounds, namely: that it is in violation of an order of this court; that it breaches the collective agreement; and that it should be set aside under the Promotion of Administrative Justice Act of 2000 (" PAJA) as procedurally unfair, unreasonable or irrational administrative action.

37. Turning first to deal with the court order: On 18 March 2005 my colleague Broster AJ made a settlement agreement concluded by the SAPS, Western Cape and SAPU an order of court. The agreement arose out of an urgent application for an order to stay the enforcement of the instructions issued by the Area Commissioner: Southern Cape dated 17 February 2004 and 9 March 2005 pertaining to flexi-hours and weekend duties. Paragraph 3 of the settlement agreement reads:

> Any new service arrangement regarding working hours of employees will only be introduced after meaningful consultation with the employees and their recognized employee organizations in accordance with Agreement SSSBC 5 of 2002.

The applicants contend that the Commissioner agreed in terms of this clause not to introduce any new service arrangements regarding working hours without meaningful consultation and hence that the decision of 29 June 2005 contravenes the court order.

38. The submission is unsustainable when assessed against a proper reading of the entire agreement. Paragraphs 1 and 2 of the settlement agreement make it clear that the order relates to an instruction introducing the flexi 40-hour shifts in *support services* in a limited geographical area. It has no application to the switch from the 12-hour shift to the adapted 8-hour shift in respect of employees rendering *line activity duties* throughout the country. By virtue of its limited scope and application the court order imposed no duty on the Commissioner to consult with the unions before taking the decision of 29 June 2005.

39. The principal thrust of the unions' challenge before this court was that based on the right to just administrative action. It was contended that because the SAPS is an organ of state, the decision to scrap the 12 hour shift system in favour of the adapted 8 hour shift constituted administrative action. Consequently, the action was reviewable under section 6 of PAJA

because relevant considerations were not taken into account, it was procedurally unfair, arbitrary or capricious and irrational. The allegation of procedural unfairness flows from the Commissioner's admitted failure to consult, whereas the allegations of unreasonableness and irrationality arise from the contention that the Commissioner neglected to give proper and sufficient consideration to the needs and circumstances of the employees including their family obligations and transport arrangements, as he was required to do in terms of regulations 30 and 31 of GNR389 of GG21088 of April 2000.

40. In order for the unions to succeed on this ground they require to show that their complaint falls within the purview of protection afforded by the right to just administrative action.

41. Since the introduction of a fundamental constitution in 1994 there is no longer any doubt that judicial review of administrative action is part of our constitutional law. Section 33 of the Constitution enshrines the fundamental right to just administrative action. It reads:

> (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
>
> (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
>
> (3) National legislation must be enacted to give effect to these rights, and must-
>
> (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
>
> (b) impose a duty on the State to give effect to the rights in subsections (1) and (2), and
>
> (c) promote an efficient administration.

42. PAJA is the legislation referred to in section 33(3) of the Constitution.

43. In *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) the Constitutional Court held that under our new constitutional order the control of public power is always a constitutional matter. The implications of that finding were usefully and succinctly explained by the court in *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs* 2004 (4) SA 490 (CC) @ para 22 as follows:

> There are not two systems of law regulating administrative action- the common law and the Constitution. The courts' power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself. The grundnorm of administrative law is now to be found in the first place not in the doctrine of *ultra vires,* nor in the doctrine of parliamentary sovereignty, nor in the common law itself, but in the principles of our Constitution. The

> common law informs the provisions of PAJA and the Constitution, and derives its force from the latter. The extent to which the common law remains relevant to administrative review will have to be developed on a case-by-case basis as the courts interpret and apply the provisions of PAJA and the Constitution.

44. Section 6 of PAJA identifies the circumstances in which the review of administrative action may take place. In this regard the Constitutional Court stated that the provisions of section 6 divulge a clear purpose to codify the grounds of judicial review and that a cause of action for the judicial review of administration action now ordinarily arises from PAJA, not from the common law as in the past. The causes of action prescribed in PAJA are in the main those derived from the common law doctrine of *ultra vires*, natural justice, legality and rationality.

45. Judicial review under PAJA and the Constitution is dependent upon the action qualifying as "administrative action". In giving meaning to that term under section 33 of the Constitution the court has distinguished between it and other forms of governmental or state action, such as action of a constitutionally empowered legislature (*Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC)) or judicial action *(Nel v Le Roux NO and Others* 1996 (3) SA 562 (CC)).

46. In *President of the RSA and Others v SARFU and Others* 1999 (10) BCLR 1059 (CC) the court emphasised that not all conduct of state functionaries entrusted with public authority will fall to be classified as "administrative action". In that instance it drew a distinction between the constitutional responsibility of cabinet ministers to ensure the implementation of legislation and their responsibility to develop policy and to initiate legislation, the former being justiciable administrative action, the latter not. The court concluded:

> It follows that some acts of members of the executive in both the national and provincial spheres of government will constitute "administrative action" as contemplated by section 33, but not all acts by such members will do so.

Determining whether an action should be characterised as the implementation of legislation on the formulation of policy may be difficult. It will…. depend primarily upon 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 excise 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 purpose of section 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 section 33. These will need to be drawn carefully in the 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.

47. In relation to determining the meaning of "administrative action" under PAJA the requirements of the task have acquired a more specific focus,

though I doubt have been made much easier, by the inclusion of a definition of "administrative action" in section 1(i) of PAJA.It reads:

> any decision taken or any failure to take a decision, by-
>
> a) an organ of state, when-
> (i) exercising a power in terms of the Constitution or a provincial constitution, or
> (ii) exercising a public power or performing a public function in terms of any legislation, or
>
> b) a natural or juristic person, other than an organ of state, when exercising a public power a performing a public junction in terms of an empowering provision,
>
> which adversely affects the rights of any person and which has a direct, external legal effect.

Thereafter follow various specific exclusions including inter alia legislative, judicial and prosecutorial decisions.

48. As I have said, the primary question in this case is whether the decision of the Commissioner to introduce the adapted 8-hour shift constituted administrative action. This must be determined with reference to the directions of the Constitutional Court and the provisions of PAJA.

49. It is common cause that the SAPS is an organ of state within the meaning of section 237 of the Constitution. Mr. Watt-Pringle, who appeared on behalf of the applicants, submitted that the Commissioner's decision was taken when "exercising a public power or performing a public function" in terms of the regulations enacted under section 24(1) of the South African Police Service Act of 1995 and hence fell within the ambit of paragraph (a) (ii) of the definition of administrative action.

50. Mr Bruinders, who appeared on behalf of the respondents, countered that when the Commissioner made the decision he did not exercise a public power or perform a public function. Regulation 31, he argued, has dual purposes. Regulation 31(a) empowers the Commissioner to determine the work week and daily hours of work for employees. Regulation 31(b) empowers him to determine the opening and closing times of the places of work under his control. Mr Bruinders submitted that the determination of the opening and closing times of police stations is clearly the exercise of a public power or the performance of a public function, while the determination of daily hours of work or shift times is not, primarily because it derives from the managerial prerogative in the conduct of labour relations, and, as he saw it, an authority seated in the collective agreement.

51. I agree with Mr.Bruinders, but for reasons somewhat at variance with the submissions he made. Unlike Mr Bruinders, I do not see the source of the Commissioner's powers as vested in agreement 5/2002. I agree rather

with Mr. Watt-Pringle that the source of the Commissioner's powers in regard to labour relations is in the express terms of section 24(1) of the South African Police Service Act of 1995, which empowers the Minister to make regulations in relation to the conditions of service of members and labour relations. Acting in terms of these powers, the Minister has bestowed the prerogative upon the Commissioner to determine working hours, which prerogative he may exercise unilaterally, or bi-laterally, in terms of existing contracts of employment or collective agreements, depending on the circumstances. Hence the power is indeed derived from a public source, but, as the Constitutional Court has indicated, the source of the power, while relevant, is not necessarily decisive. Equally, if not more, important are the nature of the power, its subject matter and whether it involves the exercise of public duty. There is nothing inherently public about setting the working hours of police officers. Nor is there any public law concern here, the matter falls more readily within the domain of contractual regulation of private employment relations. The nature of the power exercised and the function performed in the setting or agreeing of shift times does not relate to the government's conduct in its relationship with its citizenry to which it is accountable in accordance with the precepts of representative democracy and governance. The powers and functions concerned derive from employment law and are circumscribed by the constitutional rights to fair labour practices and to engage in collective bargaining. One is instinctively drawn to the conclusion that the concept of administrative action is not intended to embrace acts properly regulated by private law. To render every contractual act of an organ of state a species of administrative action carries the risk of imposing burdens upon the State not normally encountered by other actors in the private sphere.

52. In reaching this conclusion I appreciate that the distinction between administrative action and acts regulated by private law will be difficult to sustain in practice not least because organs of state frequently contract out public functions to private actors. Additionally, the Supreme Court of Appeal recently has held that the consideration and award of tenders constitutes administrative action, and although the rights involved in the tendering process are essentially contractual in nature, administrative action in the tendering process must be procedurally fair, reasonable and rational - *Logbro Properties CC v Bedderson N.O. and Others* 2003 (2) SA 460 (SCA). However, to my mind, there is considerable contextual difference between tendering and employment. Tendering serves the public interst in promoting competition in the provision of services to government and advances equality in business development. Decision-making in this area impacts upon the rights, interests and expectations of parties external to government. Employment relationships, on the other hand, are conducted internally in service of the immediate objectives of the organ of state and are premised upon a contractual relationship of trust and good faith.

53. Moreover, the categorization of tendering as administrative action is justified by its public nature. The eventual conclusion of the tender

contract is preceded by purely administrative acts and decisions by officials in the sphere of the spending of public money by public bodies in the public interest - *Logbro* @ para 19. By contrast, the adjustment of shifts in terms of a collective agreement ought not to be considered as administrative action, for, amongst other reasons, in this instance it was done under a contract concluded on equal terms between equal parties "without any element of superiority or authority" deriving from SAPS's public position. The organized power of the unions, bestowed upon them by the constitutional labour rights in section 23 of the Constitution and the Labour Relations Act, puts them on an equal contractual footing to the SAPS - *Logbro* @ para 10. The present matter does not involve a situation where the state is enforcing a contract on another party on a "take it or leave it" basis, where consensus is more apparent than real. The very purpose of collective bargaining is to bring equality to the relationship. Collective bargaining organizes and distributes contractual power by means of the power play inherent in the process.

54. Allowing that such a distinction may be seen by some to be a fine one, even strained or artificial, it must be kept in mind that our Constitution draws an explicit distinction between administrative action and labour practices as two distinct species of juridical acts, and subjects them to different forms of regulation, review and enforcement. Labour relations in our system are regulated primarily through collective bargaining, minimum standards legislation and contextually sensitive dispute resolution which takes account of the policy prescriptions and values of a constitutionally sanctioned pluralist model, underpinned by organizational rights, majoritarianism and a preference for negotiated solutions and outcomes.

55. Many might be inclined to discount such reasoning as formalistic. However, the analysis cannot be said to comprise pigeonholing the issue, for the sake of it, with reference to its superficial or outward characteristics. On the contrary, there are important underlying substantive principles or policy concerns at play here, namely that the resolution of employment disputes in the public sector should be accomplished by identical mechanisms and in accordance with the same values as in the private sector: that is, through collective bargaining and the adjudication of unfair labour practices, as opposed to judicial review of administrative action. And additionally that our constitutional prescriptions in that regard ought to be consistently maintained.

56. On that basis alone I agree with Mr Bruinders that the powers and functions involved in switching the shift arrangements are not of a public nature. They reside within the commercial or private domain of labour relations.

57. What is more, before a decision can fall within the definition of administrative action it has to be one "which adversely affects the rights of any person and which has direct, external legal effect." An argument might be made that the SAPS

employees at most had an expectation of procedural fairness and no right to work a 12-hour shift and were thus not adversely affected in their rights. So narrow a construction of the term "rights" in this context would not accord with the balance of authority favouring a more extensive interpretation - see JR de Ville: *Judicial Review of Administrative Action in South Africa* (Butterworth, 2003) @ 51-54. More difficult for the applicants though is getting past the threshold requirement of a "direct, external legal effect". A decision has direct legal effect when it is a legally binding determination of someone's rights, possessed of the quality of finality. In order to have an "external" effect it must affect outsiders and should not be a purely internal matter of departmental administration or organization - De Ville @ 58. The person affected must be someone other than a person in government - *Greys Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2004 (3) All SA 446 (C) @ 458. The members of the South African Police Service are not persons outside of the organ of state. They are insiders. And the Commissioner's decision is an internal matter of departmental organization. On this ground too, then, the decision is not administrative action.

58. Not being administrative action, the applicants are not entitled to seek review of the Commissioner's decision in terms of section 6 of PAJA or directly under section 33 of the Constitution. PAJA has been enacted to give effect to the rights in section 33 of the Constitution and hence there is no difference between the administrative action within contemplation of both provisions.

59. My conclusions on this point are at odds with decisions of other courts of equal standing. In *Mbayeka and Another v MEC for Welfare, Eastern Cape* [2001] 1 All SA 567 (Tk) an urgent application was brought by the applicants for an order declaring their suspension from duty without emoluments to be unconstitutional. The respondent argued that the High Court had no jurisdiction to hear the matter as the dispute concerned an alleged unfair labour practice falling within the exclusive jurisdiction of Labour Court in terms of the then applicable provisions of the LRA. The applicants argued that the dispute fell within the ambit of section 157(2) of the LRA, which provides that the Labour Court and the High Court have concurrent jurisdiction in respect of alleged violations of constitutionality guaranteed rights arising from employment and from labour relations or any dispute over the constitutionality of an executive or administrative act or conduct by the State in its capacity as an employer. Section 157(2) of the LRA reads:

> The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from-
>
> a) employment and from labour relations;
> b) in respect of any dispute over the constitutionality of any executive or

administrative act or conduct by the State in its capacity as an employer;

c) the application of any law for the administration of which the Minister is responsible".

Jafta J (as he then was) held that the High Court had jurisdiction in respect of any alleged violation of the constitutional right to fair labour practices. The learned judge held further that when the MEC suspended the applicants she exercised a public power derived from section 22(7) of the Public Service Act and that the failure to afford the applicants a hearing prior to doing so constituted unconstitutional administrative action falling under the jurisdiction of the High Court. Similarly, in *Simela and Others v MEC for Education Eastern Cape and Another* [2001] 9 BLLR 1685 9 (LC) Francis AJ (as he then was) held that a decision to transfer an employee without prior consultation amounted to both unjust administrative action and an unfair labour practice.

60. To the extent that these judgements confirm the proposition that transfers or suspensions in contravention of the *audi alteram* principle violate the constitutional right to fair labour practices I am in respectful agreement with them. Where I differ is with the conclusion that a transfer or a suspension constitutes administrative action. Neither judgement gives full consideration to the definition of "administrative action" in PAJA. Both, it would seem, assume that because the power to suspend or transfer is sourced in legislation it axiomatically follows that the power or function involved is a public one. For the reasons elaborated above, the source of the power though relevant is not decisive. Equally important is the nature of the power and the subject matter. Disciplinary or operational transfers and suspensions are employment or labour relations matters, not administrative acts.

61. Moreover, section 157(2) of the LRA, which confers constitutional jurisdiction on the Labour Court, and which was discussed by Jafta J in *Mbayeka,* explicitly draws a distinction between conduct viloating fundamental rights "arising from employment and from labour relations" and the violation of any fundamental right arising from "any dispute over the constitutionality of an executive or administrative act….by the State in its capacity as an employer." The delineation leads to an ambiguity. Either the classification contemplated is broadly one between the private sector and the public sector in which private sector employer conduct towards employees is considered to be employment or labour relations conduct, while all conduct by the State in the public sector towards its employees is deemed to be administrative action. Or, alternatively, more narrowly, that all conduct in the employment sphere in both the private and public sector is either employment and labour relations conduct or administrative acts or conduct.

62. There seems to me to be no logical, legitimate or justifiable basis upon which to categorise all employment conduct in the public sector as

administrative action, if only because of the principle of equality, and especially in the light of the express provisions of the definition of administrative action in PAJA. Besides, a distinction can and should be drawn between contractual and labour practices of an employer, on the one hand, and administrative acts or conduct of an employer on the other. Administrative acts of an employer include: the collection and payment of PAYE and SITE taxes; the appointment of employer representatives to the board of an occuptional pension fund; the distribution of a pension or group life benefits to the dependants or beneficiaries of deceased employees; the administrative functions associated with unemployment and occupational disease and injury social insurance schemes; and so on. It is in respect of constitutional issues arising from such acts that section 157(2)(b) of the LRA confers constitutional jurisdiction upon the Labour Court in relation to the State in its capacity as employer and for the purposes of which jurisdiction the power of review is granted to the Labour Court in terms of section 158(1)(h) of the LRA. This interpretation, as intimated earlier, is supported by the structural demarcation drawn by the Constitution between administrative action and labour practices, as well as prudential or cost-benefit arguments preferring voluntarist collective bargaining and appropriate dispute resolution to judicial review as the means of regulating employer conduct. Accordingly, the constitutional framework favours the narrower interpretation of section 157(2)(b) of the LRA.

63. However, it must be conceded, the narrower interpretation suffers two defects: the one logical, the other historical and doctrinal. The narrower interpretation of section 157(2)(b) means that the Labour Court will have jurisdiction over employer administrative acts violating constitutional rights only where the employer is the State. Administrative acts of employers in the private sector violating constitutional rights will be reviewable by the High Court. There is no apparent good reason for this anomaly. However, the dichotomy is not resolved by adopting the broader interpretation that all State employer conduct is administrative action. Private employer administrative acts, unlike unconstitutional employer conduct arising from employment and labour relations reviewable under section 157(2)(a), would still fall outside the Labour Court's jurisdiction. The fact that, under either interpretation, section 157(2) confers extensive jurisdiction upon the Labour Court to review on constitutional grounds both the employment practices and employer administrative acts of the State, but only the employment practices of private employers does not justify the conclusion that all employer conduct in the public sector constitutes administrative action. A badly crafted jurisdictional structure does not permit the collapsing of the constitutional differentiation between labour practices and administrative action.

64. The second and perhaps more challenging difficulty in accepting the narrow interpretation of section 157(2) of the LRA is that our courts in the fairly recent past have held that employment relationships in the public

sector cannot be viewed as purely contractual or private. Prior to the extension of the protection in the Labour Relations Act to State employees in 1995, our courts began to develop the common law to grant protection to State employees against unfair employer conduct. In order to do so, it became necessary to regard the State's conduct as an employer as being administrative action. In *Administrator, Transvaal and Others v Zenzile and Others* 1991(1) SA 532 (A) the then Appellate Division held that the existence of a contractual relationship does not make the relationship between the State and its employees a purely contractual one. The court held that the power to dismiss was disciplinary or punitive in nature, had been exercised by a public authority in terms of a statute, adversely affected the rights of employees and thus attracted the rules of natural justice, irrespective of the contractual nature of the relationship. Having accepted such employer conduct to be administrative action the courts soon extended the scope of protection to decisions to retrench, suspend, transfer, promote and deprive of benefits - *Administrator, Natal and Another v Sibiya and Another* 1992 (4) SA 532 (A); *Bula v Minister of Education* 1992 (4) SA 716 (TkA); *Hlongwa v Minister of Justice, Kwazulu* 1993 (2) SA 269 (A); and *Foster v Chairman, Commissioner for Administration and Another* 1991 (4) SA 403(C).

65. All these decisions were handed down before the adoption of a fundamental constitution in 1994 and the subsequent codification of our administrative law and labour law respectively in PAJA and the LRA consciously to give effect and content to the constitutional rights to just administrative action and fair labour practices. I accordingly agree with the sentiment expressed by Pillay J in *Public Servants Association obo Haschke v MEC for Agriculture and Others* (2004) 25 ILJ 1750 (LC) @1775 D-H when she observed :

> Labour law is not administrative law. They may share many common characteristics. However, administrative law falls exclusively in the category of public law, whereas labour law has elements of administrative law, procedural law, private law and commercial law. Historically, recourse has been had to administrative law to advance labour rights where labour laws were inadequate….However, pursuant to the affirmation of the interim Constitution and the final Constitution that everyone has a right to fair labour practices, the LRA, the EEA (Employment Equity Act) and the Basic Conditions of Employment Act 75 of 1997 (the BCEA) codified labour and employment rights……."

66. It follows from this line of thought that the progressive decisions of our courts, extending labour rights to public sector employees by categorising employer conduct as administrative action, have lost their force following the codification of our administrative law and labour law, and the extension of full labour rights to public sector employees by the LRA,. Courts might therefore justifiably be expected to reconsider previous doctrine in the light of the new constitutional and statutory framework. This much was clearly stated by the Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others (supra*) when it directed

that the grundnorm of administrative law is not to be found in erstwhile common law doctrine but in the principles of our Constitution, requiring the relevance of previous doctrine to be re-evaluated on a case by case basis.

67. In so far as the decisions in *Mbayeka* and *Simela* were handed down by courts of equal status *subsequent* to the adoption of the Constitution and the codification of our administrative and labour laws, the doctrine of judicial precedent obliges me to follow them unless I am convinced that they were incorrectly decided. As I have mentioned, neither gave overt or direct consideration to the definition of administrative action in PAJA, both appear to have preferred an interpretation of section 157(2) of the LRA categorising all public sector employer conduct as administrative action and both were premised upon the doctrinal underpinnings of the *Zenzile* line of cases now no longer relevant or authoritative. For such reasons, I respectfully disagree with them and do not consider myself bound by the *ratio decidendi* of both that all State employer conduct constitutes administrative action.

68. Therefore, to repeat the finding made earlier, the Commissioner's decision determining daily hours of work and shift times does not in my view involve the exercise of a public power or the performance of a public function having an external effect and is therefore not administrative action inviting review under PAJA or section 33 of the Constitution.

69. This leads me to a consideration of the dispute within the paradigm of the contractually constituted employment relationship and the constitutional right to fair labour practices.

70. The Commissioner correctly points out that at no stage in the dispute have the unions sourced the alleged obligation to observe the principles of natural justice in the unfair labour practice jurisdiction, constitutional or statutory. They limited themselves to a claim under PAJA. He accordingly submits that the primary source of the rights and duties of the parties should be the collective agreements governing their relationship, and in particular agreement 5/2002.

71. Collective agreements are a unique and special kind of agreement. Section 213 of the LRA defines a collective agreement as a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded between trade unions and employers. Section 23 of the LRA gives statutory force to such agreements including the variation of pre-existing contracts of employment, even those of a non-unionised minority of the workforce.

72. Clause 1 of agreement 5/2002 makes it a term and condition of employment that the ordinary hours of an employee's work "will be performed in either 8 or 12 hour shifts". According to the Commissioner, the unions have agreed, thereby binding both members and non-

members, that employees may work either shift. The choice of which shift should apply is a matter of work practice falling within the Commissioner's managerial prerogative. Moreover, it is further submitted, that neither the unfair labour practice jurisdiction nor agreement 5/2002 confer a right upon the unions to be consulted prior for the Commissioner excising his prerogative to apply the adapted 8 hour shift across the board.

73. The unions argue on the other hand that the decision to switch shifts amounted to a unilateral variation of the employment contracts of the employees, because employees had a right in terms of their contracts to opt to work a twelve-hour shift. There was also a modest suggestion made from the bar in argument that the amendment of a work practice without prior consultation might constitute an unfair labour practice.

74. Once again, the analysis will best be served by commencing with reference to the Constitution. Section 23 of the Constitution entrenches labour relations rights including besides the rights to fair labour practices and collective bargaining, the rights to freedom of association, to strike and various organisational and participatory rights. For present purpose only the rights to fair labour practices (section 23(1)) and collective bargaining (section 23(5)) are of relevance. They are expressed as follows:

> (1) Everyone has the right to fair labour practices.

(5) Every trade union, employers' organization and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

75. The effect of the last sentence of section 23(5), simply put, is that the reasonable and justifiable instruments and products of collective bargaining may limit the right to fair labour practices, equality, freedom of movement and perhaps even the right to just administrative action. Such is in keeping with the voluntarist and pluralist scheme of industrial relations contemplated by section 23 as a whole and enacted into effect by the LRA.

76. The structure and content of the LRA confirm the primacy given to collective bargaining as the preferred instrument of labour relations policy. Chapter VIII of the LRA affords protection against unfair dismissal and unfair labour practices. Unlike previous legislative schemes the protections are specific and detailed, amounting in effect to a codification. The specific protections provide minima, leaving the balance of substantive topics arising in the employment relationship to regulation, resolution and governance by means of collective agreements accomplished through bargaining, and, if need be, protected industrial action.

77. Before the 1995 legislation there was room for bargains to be struck and rights to be conferred through the adjudication of unfair labour practices which were defined broadly to embrace: "any act or omission which in an unfair manner infringes or impairs the labour relations between an employer and employee." Unfair unilateral variations of the terms and conditions of contracts of employment, given their potential to impact negatively upon labour relations, could therefore have been stigmatised as an unfair labour practice, depending also on the circumstances. The 1995 legislation, particularly in its amended form after 2002, dramatically reduced the scope of the unfair labour practice jurisdiction by codifying the concept in section 186(2) of the LRA, restricting its application to unfair conduct related to the provision of benefits, promotion, demotion, probation, training, suspension, disciplinary action short of dismissal, contractual rights to re-engagement and the detrimental treatment of whistle-blowers. Consequently, the current LRA offers no specific protection against unilateral variations of terms and conditions of employment under the unfair labour practice jurisdiction.

78. The outcome of the legislative change is that protection against unilateral variation must be found either in the common law or in the Constitution. There is also a measure of procedural protection afforded by section 64(4) of the LRA, to which I will return presently.

79. Under the common law an employer who unilaterally amends the terms of the contract of employment will be in breach of contract entitling the employees to cancel, seek damages or sue for specific performance. Likewise, disregard by an employer of the terms of a collective agreement which govern terms and conditions of employment can amount to a unilateral breach.

80. More difficult is the question of whether a unilateral variation, though falling outside the statutory code of unfair labour practices, may invite redress under the constitutional right to fair labour practices. In *Mzimnii and Another v Municipality of Umtata* [1998] 7 BLLR 780 (Tk) the High Court held that the upgrading of posts, while not relating to promotion, demotion or the provision of benefits, could entail conduct actionable in the High Court in terms of the constitutional right to fair labour practices. Other courts have taken the approach that the doctrine of avoidance provides that once a constitutional right is regulated in detail by statute, persons seeking to enforce that right are confined to the statutory remedies and may no longer rely directly on the constitutional provision. In other words, there is no residual category of constitutionally proscribed unfair labour practices – see Du Toit et al: *Labour Relations Law* (4th Edition, Butterworths, 2003) @ page 461-462 and especially the authorities cited in fn26. This explains perhaps why the unions have not sought relief on the basis that the Commissioner's decision constituted a constitutional unfair labour practice. And hence I need not decide the issue finally.

81. The sole reference to unilateral variation in the LRA, as indicated earlier, is found in section 64(4), which provides an important clue that the constitutional and legislative scheme treats contractual variations as subjects for collective bargaining. The section permits employers or trade unions who refer disputes over unilateral amendments to a bargaining council or the CCMA to require the employer not to implement or to reverse the unilateral variation for the duration of the period mandated by section 64(1)(a) of the LRA for the purposes of conciliation. If the employer refuses to comply, or the conciliation period lapses, the employer may resort without further ado to industrial action as the means of resisting the unilateral change.

82. The statutory rights to strike and to require a *status quo* order do not preclude employees or unions enforcing their contractual rights for damages or specific performance in the High Court or in the Labour Court in terms of section 77(3) of the BCEA, read with section 158(a)(iii) and (vi) of the LRA. The right to specific performance would also entitle parties to seek urgent relief *pendente lite* under section 158(1)(a)(i) of the LRA -*Monyela and Others v Bruce Jacobs t/a L V Construction* (1998) 19 ILJ 75 (LC); and Grogan: *Workplace Law* (8th Edition, Jutas 2004) @ 274. The difficulty on this score for the applicants in this case is that they seek an interim interdict pending a review of alleged administrative action or the resolution of a dispute referred in terms of section 64(4) of the LRA to the SSSBC. Whereas for the reasons stated they are non-suited in respect of the former cause of action, the SSSBC is indeed likely to have statutory or contractual powers to resolve not only unfair dismissals and unfair labour practices but also disputes about the interpretation and application of collective agreements through arbitration. I do not accept the submission made by Mr Bruinders that this court lacks jurisdiction to issue an interdict because the dispute concerns the interpretation or application of a collective agreement which in terms of section 24 of the LRA is required to be referred to arbitration. While there may indeed be a dispute about the interpretation and application of agreement 5/2002, the terms of the collective agreement are incorporated into the employees' contracts of employment, and hence an alleged breach thereof is also justiciable under section 77(3) of the BCEA. The difficulty though is that in the present instance no such dispute is *pendente lite* before this court. And it is not immediately clear whether one was referred to the SSSBC in terms of section 24 of the LRA. Assuming though for the purposes of argument that such was the case, the enquiry moves to a determination of whether there has indeed been a breach of the employees' contracts as supplemented by agreement 5/2002.

83. As I see it, a breach of contract could possibly have occurred in one or two ways. The first would arise if it were found that agreement 5/2002 expressly or impliedly conferred a right upon the employees to work a 12-

hour shift. Put differently, an option to work a 12-hour shift at his or her discretion might be a term and condition of each employee's employment. The second possibility is that agreement 5/2002 expressly or impliedly conferred a right upon the employees to be consulted prior to any change in work practices related to the shift system.

84. I agree with Mr. Bruinders that clause 1 of agreement 5/2002 expressly grants a right to work 8 hour or 12 hour shifts at the discretion and convenience of the Commissioner. There is no evidence before me, nor has any argument to such effect been made, to support a claim that a tacit term exists conferring the right to work a 12 hour shift. Nor do the regulations imply any such term into the contract. In short, it was not a term of the contract of employment that employees working 12-hour shifts would always be entitled to do so. Without express, implied or tacit contractual rights to such effect, the employees do not have a vested right to preserve their working times unchanged for all time. The alteration of shifts does not result in the employees being required to perform a different job thereby entitling them to claim a material breach or alteration in the supposition of the contract. The change in timing does not amount to a change in the nature of the job. The shift system was accordingly merely a work practice not a term of employment. That this is so is borne out by the description of the shift system as such in an earlier collective agreement. Clause 3 of agreement 2/2000 provides: "the employees who currently perform twelve-hour shifts will continue with this *work practice*". Hence, a change in that work practice was not per se a breach of contract.

85. The next question is whether there was a contractual duty to consult with the employees or the unions prior to changing the work practice. It will be recalled that clause 2.2.3 of agreement 5/2002 specifically included a right to meaningful consultation in relation to the adjustment of arrangements under the 40 hour flexi-system. Clause 2 generally though is silent on the duty to consult when implementing the 12 or 8-hour shift. Clause 2.2 provides simply that in respect of line activity duties any of the shifts can be utilized. The Commissioner contends that the complexity around the flexi-system makes consultation a practical necessity, but that such constraints do not operate in the context of the 12 or 8 hour shifts and hence there was no need to agree to meaningful consultation in relation to them. The structure and text of clause 2 of agreement 5/2002 sustain this interpretation. Accordingly, I again accept that there was no express contractual duty to consult before taking the decision to implement the 8-hour shift across the board.

86. When debating the reasonableness or rationality of the Commissioner's conduct from the perspective of it being administrative action, Mr Watt-Pringle submitted that fulfilment of the Commissioner's duties to take account of the needs and circumstances of employees, in terms of regulation 31(b), by the very nature of the duty necessitated consultation before taking the decision to change the shift system. From this it might also be argued that it would follow that the right to consultation was an implied term. I however do not believe that the obligation to

take account of the needs of employees necessarily requires consultation before scrapping the 12-hour shift. The Commissioner has legitimately subjected his discretion or prerogative in this regard to the constraints and outcomes of collective bargaining, which confer on him the right to change the shift system and to restrict consultation to the practicalities of implementation. It is clear from the papers that very real practical problems and irrationalities are likely to be encountered during implementation. Yet, it is equally evident that the management of SAPS are open to consulting about them and ironing them out. Moreover, the Commissioner's conduct aligns with accepted principle and practice that there is no duty to consult over changes to work practices, which in itself further supports a finding that no implied or tacit term existed obliging consultation – *A Mauchle (Pty) Ltd t/a Precision Tools v National Union of Metalworkers of SA and Others* (1995) 16 ILJ 349 (LAC).

87. In the premises, I am constrained to conclude that the applicants have failed to establish the existence of any clear or *prima facie* established right which the decision of the Commissioner infringes or interferes with. To recap: because the Commissioner's decision is not administrative action, no right or legitimate expectation to procedural fairness arises, nor has any contractual, statutory or constitutional right to a fair process been violated. And, furthermore, there has been no breach of the substantive term of the contract of employment. As a result, absent a clear or *prima facie* right the requirements for an interim interdict have not been met and the application must be dismissed.

88. I have been persuaded to this conclusion with a measure of reluctance. My decision goes not only against the grain of past progressive developments in our law of due process, but against compelling policy and value based arguments, even if superficial, favouring a requirement of consultation prior to changing work practices affecting employees. The solution, it would seem to me, lies in conscientious collective bargaining or the amendment of the statutory code of unfair labour practices to provide for such. It does not lie in straining the concept of administrative action by extending it into the domain of private and internal employment arrangements, collapsing in the process the valid constitutional distinction between administrative action and labour relations on the basis of a social expediency no longer necessary or desirable or, for that matter, doctrinally or textually justified.

89. The idea moreover is not to minimize needlessly the application of the rules of natural justice in the realm of employment law. Rather it is to assert, in the interests of orderly, effective government and entrepreneurship, that the circumscription of the managerial prerogative by the principles of fairness, in the arrangement sanctioned by the LRA, the National Economic Development and Labour Council Act 1994 and the Constitution, is a matter for corporatist regulation and collective bargaining. The debate about a purely contractual or public law approach to state contracts is accordingly of less relevance - see C. Hoexter:

Contracts in Administrative Law (2004) 121(3) SALJ 595. The point is that the organization of social power is not the exclusive preserve of administrative law. No matter how one might perceive the limits of classical contract law, our labour law is constructed upon a voluntarist premise, leaving statutory compulsion as an exception. And even then, statutory intervention is itself a product of corporatist negotiations under the auspices of NEDLAC. There are substantive reasons of policy and principle that oblige maintaining the integrity of that arrangement, which might not be best served by judges incorporating into it (effectively by compulsion) evolving administrative law principles and doctrine.

90. The urgency of the matter was brought into question on account of the union's prevarication. My findings, however, allow for some liberality and I am prepared to regard the matter as semi-urgent and to condone non-compliance with the ordinary rules.

91. Taking into account the national importance and complexity of the matter, as well as the relationship between the parties, I do not consider a costs order to be justified.

92. Accordingly, I make the following orders:

92.1 The application for urgent relief is dismissed.

92.2 There is no order as to costs.

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J R Murphy
ACTING JUDGE OF THE LABOUR COURT

FOR THE APPLICANT: Adv CE Watt-Pringle and Adv J Joyner Instructed by Mmoledi Malokane & Assciates

FOR THIRD RESPONDENT: Adv T Bruinders instructed by the State Attorney

DATE OF HEARING: 5 September 2005
DATE OF JUDGMENT: 5 October 2005