AUDI ALTERAM PARTEM RULE, PROMOTION OF ADMINISTRATIVE JUSTICE ACT AND THE LABOUR RELATIONS ACT: PRECAUTIONARY SUSPENSION FROM DUTY

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1. Introduction

The main purpose of this article is to investigate whether *audi alteram partem* principle finds application when a decision to place an employee on suspension is taken. The provisions of the *Promotion of Administrative Justice Act* 3 of 2000[1] as well as the *Labour Relations Act* 66 of 1995[2] shall be considered in the course of the investigation. It suffices to mention that in the present constitutional era, the principle of *audi alteram partem* found recognition in section 33 of the *Constitution of the Republic of South Africa*, 1996[3] as well as in the *LRA* and *PAJA*. Section 33 of the *Constitution of the Republic of South Africa,* 1996 guarantees everyone a right to an administrative decision that is lawful, reasonable and procedurally fair. In the context of this article, it is arguable that emphasis must be placed on procedural fairness given its relationship to the right to be heard before an adverse decision is taken.

Section 33(3) provides that national legislation must be enacted to give effect to rights guaranteed in section 33(1). *PAJA* is an offshoot of the rights guaranteed in section 33(1) of *the Constitution of the Republic of South Africa*, 1996. Section 33(2) entitles everyone whose rights have been adversely affected by administrative action the right to be given written reasons. This right to reasons implies that an affected party must be heard. Reasons are adequate if they are given after a hearing. Hoexter argues that rights in section 33(1) and (2) are designed to promote efficiency.[4] Also Klaaren argues that promoting an efficient administration can be read in at least two ways. It can be read downwards to mandate the reduction of legal burdens on

1 *Promotion of Administrative Justice Act* 3 of 2000 (hereafter the *PAJA*).
2 *Labour Relations Act* 66 of 1995 (hereafter the *LRA*).
3 *Constitution of the Republic of South Africa,* 1996
4 Currie *et al The Bill of Rights Handbook* 650.

the administration and promote cost-effectiveness or upwards to require an administration that is accountable and participatory, promoting rational, effective and responsive decision making.[5] Section 3(1) of *PAJA* imposes a duty that an administrative action must be procedurally fair.[6] Giving effect to the right to procedural fairness includes amongst others a reasonable opportunity to make representations.[7]

Key and central in this article is the question of whether a suspension from duty amounts to an administrative action as defined in section 1 of the *PAJA*.[8] Once a suspension from duty meets the definitional requirements set out in section 1, then in light of its adverse effect on the rights of an employee as a person, the right to make representations is obligated.[9] Section 185(b) of the *LRA* guarantees every employee the right not to be subjected to unfair labour practices.[10] In terms of section 186(2)(b) of the *LRA*, it is an unfair labour practice to be subjected to an unfair suspension. Unfairness in this regard includes failure to effect suspension in accordance with a fair procedure.[11] This article analyses the right to lawful, reasonable and procedurally fair administrative action and its further advancement in the *PAJA*. Additionally, the relevant provisions of the *LRA* are assessed and analysed in order to demonstrate that the principle of *audi alteram partem* has been endorsed in the *LRA*. There is a view held in the *Long v South African Breweries (Pty) Ltd and others* 2019 40 ILJ 965 (CC)[12] and the *Democratic Alliance and Another v Public Protector of South Africa and Others* 2023 11 BCLR 1281 (CC)[13] that in a suspension from duty situation, an employee is not entitled to procedural fairness rights. The

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5 Currie *et al The Bill of Rights Handbook* 650 and Klaaren "Constitutional Authority to Enforce the Rights of Administrative Justice and Access to Information" 1997 *SAJHR* 549, 561.

6 Section 3(1) of *PAJA* provides that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

7 Currie *et al The Bill of Rights Handbook* 677.

8 Section 1 provides amongst others that an administrative action means any decision taken by an organ of state or a natural or juristic person when exercising constitutional powers, exercising public power or performing public function in terms of any legislation or empowering provisions, which decision has direct, external legal effect.

9 Woolman *et al Constitutional Law of South Africa* 63-70. *Union of Refugee Women v Director: PRISA* 2007 4 SA 395 (CC) para 70 (hereafter *The Refugee Women* case), where Kondile referred to an unsuccessful application as 'an adverse determination of the applicant's rights'.

10 Stemming from section 23(1) of the *Constitution of the Republic of South Africa,* 1996 is that every employee has the right not to be subjected to unfair labour practice.

11 Molahlehi J in the *Baloyi v Department of Communications and others (2010) 31 ILJ 1142 (LC)* at para 26. Baxter *Administrative Law*, 1984 indicated that in order to enjoy a proper opportunity to be heard, an individual must be properly appraised of the information and reasons which underlie the impending decision to take action against him (page 546, 547).

12 *Long v South African Breweries (Pty) Ltd and others (*2019) 40 ILJ 965 (CC) at para 24 *(*hereafter *Long* case).

13 *Democratic Alliance and Another v Public Protector of South Africa and Others* 2023 11 BCLR 1281 (CC) at para 95 (hereafter *DA* case).

assessment and analyses in this article reveal the shortcomings of the views held in these cases.

2. The right to a lawful, reasonable and procedurally fair administrative action and the applicability of *PAJA*

The question of whether a suspension of a public servant amounts to an administrative action has not been resolved by a South African Court. This article shall demonstrate that the *Chirwa v Transnet Limited* 2008 2 BLLR 97 (CC)[14] and *Gcaba v Minister of Safety and Security and others* 2009 12 BLLR 1145 (CC)[15] did not pertinently resolve the question. Klaaren and Penfold argue that the *Chirwa* decision came as somewhat of a surprise when it held that the dismissal of an employee did not amount to an administrative action.[16] The two authors extensively examined the reasoning of all the judges involved in *Chirwa* and ultimately remarked that the approach taken by Ngcobo J that the administrative action must have an external effect is not entirely convincing. As a result, they held a view that the disciplining of a public servant can be seen to have a direct, external effect on the relevant person.[17]

In order to consider the question whether public servants enjoy a right to be heard before being placed on a precautionary suspension, the starting point should be the *Constitution of the Republic of South Africa,* 1996. Prior to the introduction of the *LRA* in its current form, the employment relationship between public servants and the State as an employer was regulated by the principles of Administrative law.[18] For that reason, the rules of natural justice easily found application. The current position is that public servants fall under the fair labour practice regime, which for many years regulated private sector employees. In due course, other legislation like the *Public Services Act*, 1994[19] shall be considered, with regard to its application to public service employees. Section 33(1) of the *Constitution of the Republic of South Africa*, 1996 provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Section 33(2) provides that everyone whose rights have been adversely affected by administrative action has the right to be given reasons. Section 33(3) provides that national legislation must be enacted to give effect to these rights and must (a) provide for the

14 *Chirwa v Transnet Limited* 2008 2 BLLR 97 (CC) (hereafter *Chirwa* case).

15 *Gcaba v Minister of Safety and Security and others* 2009 12 BLLR 1145 (CC) (hereafter *Gcaba* case).

16 Woolman *et al Constitutional Law of South Africa* 34.

17 Woolman *et al Constitutional Law of South Africa* 37.

18 Stacey *Administrative law in public sector employment relationships* (2008) *SALJ* 307-330 and Hoexter *Administrative Law in South Africa* (2007) Juta 194-199.

19 *Public Services Act* 103 of 1994 (hereafter *PSA*).

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) to promote an efficient administration. These sections are a codification of the *audi alteram partem* principle.[20] Thus, everyone has a right to *audi alteram partem* which equates to procedural fairness. Additionally, everyone has a right to be given reasons once the administrative action adversely affects their rights. Importantly, the State has a duty to give effect to the right to *audi alteram partem* and the right to reasons once rights are adversely affected.[21] Accordingly, section 33 guarantees these two rights namely, (a) *audi alteram partem* – procedural fairness and (b) the right to be given reasons upon demonstrating adverse effects on a right.[22] These two rights are separate and distinct.[23] They may be connected to each other because both are affected by an administrative action.[24]

In its broadest and simplest terms, an administrative action is the exercise of public power by any organ of the state or a person, juristic or natural.[25] Prior to the coming into operation of the *PAJA*, section 33 was operating as if it were section 24 of the *Interim Constitution of the Republic of South Africa*, 1993. Section 24 provided for *audi alteram partem* as well. Once the *PAJA* was ushered in, it provided a statutory definition of what an administrative action is. Key to this article is the argument that the suspension of a public servant amounts to an administrative action. Section 1 of the *PAJA* defines an administrative action to mean any decision taken by (a) an organ of state when – (i) exercising power in terms of the Constitution; or (ii) exercising public power or performing a public function in terms of any legislation; (b) natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect. The Constitutional *Court* gave meaning to parts of this definition.[26] A number of contrasting and conflicting approaches were taken with regard to the meaning of parts of the definition of an administrative action by the

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20 Currie *et al The Bill of Rights Handbook* 672, Hoexter argues that at a minimum the right in section 33(1) entrenches the common-law entitlement to natural justice without being necessarily confined to it. *Bel Porto* case para 14.

21 Section 33(3)(b) of the *Constitution of the Republic of South Africa*, 1996. De Ville Judicial Review of Administrative Action in South Africa and Currie *et al The Bill of Rights Handbook* 29.7 at 683 Hoexter *Administrative Law in South Africa* 672.

22 Woolman *et al Constitutional Law of South Africa* 63 at 267.

23 De Ville Judicial Review of Administrative Action in South Africa 3.

24 Woolman *et al Constitutional Law of South Africa* 69.

25 Section 1 of *PAJA.*

26 For instance, the *Union of Refugee Women and Others v Director Private Security Industry Regulatory Authority and Others (2007) 28 ILJ 537 (CC) para68-70,* gave meaning to the phrase adversely affects the rights of a person.

High Courts, the Supreme Court of Appeal and the Constitutional Court.[27]Klaaren and Penfold argue that the *Union of Refugee Women and others v Director, Private Security Industry Regulatory Authority and others* 2007 4 BCLR 339 (CC)[28] case endorsed the determination theory in the context of the *PAJA*'s definition of administrative action.[29] Arguably, when an employee is suspended, an employer determines his or her right to work as opposed to strictly depriving them of the right to work. Hoexter argues that the deprivation theory creates an unacceptably high threshold for admission to the category of administrative action.[30]

Flowing from the *Minister of Defence and Military Veterans v Motau and others* 2014 (5) SA 69 (CC)[31], in order to establish whether a suspension is an administrative action, it is required to ask a number of questions. The first question is (a) does a suspension amount to a decision? Thankfully, section 1 defines a decision to mean any decision of an administrative nature made under an empowering provision. It is unfortunate that the *PAJA* does not define 'administrative nature'. Collins English Dictionary defines administration to mean amongst others (1) management of the affairs of an organisation, such as a business or institution; and (2) the conduct of the affairs of government.

According to Klaaren and Penfold, the first element of 'a decision of an administrative nature' embraces all exercises of public power other than legislative action, judicial action, broad policy-making decisions and certain decisions in the context of public sector employment relations.[32]In *Motau*, the Court suggested that if a decision is not related to formulation of policy it is administrative irrespective of the functionary[33]. In summarising the approach, the Court in *Motau* stated that formulation of policy and implementation of legislation differentiates administrative action from an executive action. Also, it pointed out that the source of power and the extent of discretion of the functionary are ancillary in the determination[34]. The approach taken in *Motau* correlates with what *Evans v Friemann* 1981 35 ALR 428[35] did in an attempt of a definition of the term but arrived at a classification of government functions.

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27 *POPCRU v Minister of Correctional Services* 2006 2 All SA 175 (E); *South African Police Union v National*; *Commissioner of the South African Police* 2005 26 ILJ 2403 (LC); *Transnet Ltd & others v Chirwa* 2007 2 SA 198 (SCA); and *Chirwa v Transnet Ltd* 2008 2 BLLR 97 (CC).

28 *Union of Refugee Women and others v Director, Private Security Industry Regulatory Authority and others* 2007 4 BCLR 339 (CC) at para 51-54 (hereafter *Refugee Women* case).

29 Woolman *et al Constitutional Law of South Africa* 70 fn390.

30 Hoexter 'Future of judicial review' SALJ (2000) 484 at 516.

31 Para 33 *Motau* case.

32 Woolman *et al Constitutional Law of South Africa* 61.

33 Para 38 *Motau* case.

34 Para 44 of *Motau* case.

35 *Evans v Friemann* 1981 35 ALR 428 at 432 (hereafter the *Friemann* case).

The Supreme Court of Canada in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall* 2018 SCC 26[36] had the following to say:

> Not all decisions are amenable to judicial review under a superior court's jurisdiction. Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character. Even public bodies make some decisions that are private in nature – such as renting of premises and hiring of staff – and such decisions are not subject to judicial review… In making these contractual decisions, the public body is not exercising 'a power central to the administrative mandate given to it by Parliament' but rather exercising private power… Such decisions do not involve concerns about the rule of law insofar as this refers to the exercise of delegated authority. Second, while it remains true that 'almost all powers exercised by public authorities today have a statutory basis', it is important to recognise that public authorities can function based on powers that do not owe their existence to enactments. The Crown has powers of a natural person and can conduct some of its affairs without relying on statutory powers. Indeed, even some fairly sophisticated administrative regimes have operated without any comprehensive statutory framework. Where a public authority is operating under powers that do not arise from an enactment, remedies under section 2(2) (b) of the Judicial Review Procedures Act will not be available, though remedies under section 2(2) (a) will remain available if the public authority's activities have sufficient public character.[37]

In *Paine v University of Toronto et al*[38] it was said:

> [I]t is not enough that the impugned decision be made in the exercise of a power conferred by or under statute; it must be made in the exercise of a "statutory power of decision", and I think that must be a specific power or right to make the very decision in issue[39].

As a point of departure, a suspension of a public servant is a decision. Such a decision would

36 *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall* 2018 SCC 26 (hereafter the *Highwood* case).

37 *Highwood* case 26.

38 *Paine v University of Toronto et al* 1982 34 O.O (2d) 770 (hereafter *Paine* case).

39 *Paine* case 770.

be sourced from an empowering provision as defined in section 1 of PAJA[40]. As it was stated in *Motau*, an implementation of legislation (an empowering provision) may be involved as opposed to formulation of a policy. It is indeed correct that where the power is sourced from a contract, even if the power is exercised by a public body, it does not become administrative by virtue of that fact. For an example if a renting of premises does not involve an implementation of an empowering provision, then the action is not administrative in nature. As it was confirmed in *Motau*, PAJA contemplates that an administrative power may derive from a number of sources[41]. It should not be difficult to observe that when a public servant is suspended, there is a decision taken. The grammatical meaning of the word decision is 'a conclusion reached after consideration, though that is not always the case'[42]. The word 'decide' as a verb means to 'come or bring to a resolution in the mind as a result of consideration'.[43]

The second question is whether it amounts to an exercise of public power or the performance of a public function. It has been accepted by Langa CJ in *Chirwa* that the question of whether the exercise of public power is involved is a difficult pony to ride. Arguably, once a function and or power is contained in a legislation or a statutory document it is bound to be a public power or function.[44] In the context of English law, De Smith, Woolf and Jowell argue that a body is performing a public function when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies, therefore, exercise public functions when they intervene or participate in social or economic affairs in the public interest.[45] Olivier[46] argues that the suspension of public servants was seen by South African Courts as one area that attracted the application of *audi alteram partem*. In his view, our Courts adopted what he termed a chequered approach. Some decisions held that *audi alteram partem* rule applied whilst others held a

[40] Empowering provision means law, a rule of common law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken.

[41] Para 40 *Motau* case.

[42] Collins English Dictionary: Complete and Unabridged

[43] Collins English Dictionary: Complete and Unabridged.

[44] Klaaren and Penfold argue that the most important factor is whether the actor has a duty to act in the public interest rather than for his own private advantage. (Woolman *et al Constitutional Law of South Africa* 56). The majority in the *Chirwa* case stated that what makes the power in question public is the fact that it has been vested in a public functionary who is required to exercise the power in the public interest (*Chirwa* case para 138 and 186). Craig What is Public Power in Corder and Maluwa *Administrative Justice in Southern Africa* (1997) 25 (Public Power) 27.

[45] De Smith, Woolf and Jowell *Judicial Review of Administrative Action* 5th ed 1995 167 quoted with approval in *Mittalsteel South Africa Ltd v Hlatshwayo* 2007 1 SA 66 (SCA) (hereafter the *Mittalsteel* case).

[46] Olivier *Public Sector employment law: recent case law developments in South Africa* 1994 SA Public Law 50 page 68.

diametrically opposed view. Olivier[47] further argued, with reference to *Van Coller v Administrator, Transvaal* 1960 (1) SA 110 (T),[48] that where a dismissal took place in terms of notice provisions contained in regulations, it did not exempt the public sector employer from the duty to observe the rules of natural justice.

The third question is, if taken by a natural person, does the exercise of the function arise from an empowering provision? Section 1 defines empowering provision to mean a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which the administrative action was purportedly taken. Self-evidently, the definition is wide enough to include collective agreements or any agreement. Section 213 of the *LRA* defines a collective agreement to mean any written agreement concerning terms and conditions of employment concluded by an employer(s) and registered trade unions. Section 23 of the *LRA* gives collective agreements legal and binding effect.

Senior managers in the public service are regulated by a Senior Management Services (SMS) Handbook.[49] Section 42 of the *PSA* authorises the Minister of Public Administration to cause appropriate determinations to be included in a handbook to be used in the public service. Section 3(5) of the *PSA* empowers the Minister to make any determinations regarding any conditions of service for categories of employees. The SMS Handbook is such a determination. In *Mokgothle v Premier of the North-West Province and another* 2009 30 ILJ 605 (LC),[50] it was stated that on the papers before the court, it was not clear whether the SMS Handbook was a statutory or other regulatory measure, a collective agreement or both.[51] Nevertheless, since the SMS Handbook is issued in the exercise of statutory powers, it is an exercise of public power. To the extent that the SMS Handbook is used to effect a suspension, arguably it is an empowering provision as defined in section 1 of the *PAJA*. Clause 2.7(2)(a) of the SMS Handbook empowers the employer to suspend a member of the SMS. Therefore, in using powers emanating from these empowering provisions, an employer is exercising public power or function. As the *Mokgothle* case found, '*audi alteram partem* is applicable when this power

47 Olivier Legal Update *The Supreme Court and the Protection of Employment: Some important Developments (continued) De Rebus* 1991.

48 *Van Coller v Administrator, Transvaal* 1960 (1) SA 110 (T) at 115A-D.

49 Chapter 1 of the SMS Handbook provides that it incorporates all determinations, directives and guidelines issued by the Minister for the Public Service and Administration. It incorporates all future amendments to the policies, advice and guidance that pertain to the employment and conditions of service of the SMS (Senior Management Service).

50 Hereafter the *Mokgothle* case at para 43.

51 The *Mokgothle* case para 4.

is exercised'.[52] The Court in *Mokgothle* did not consider the matter before it under the *PAJA*.[53] However, Clause 7.2 of Public Service Co-ordinating Bargaining Council (PSCBC) Resolution 2 of 1999, a collective agreement within the meaning of section 213 of the *LRA*, also empowers a State employer to effect a precautionary suspension[54].to suspend. There is of course a raging debate as to whether exercising powers emanating from a contract is public or private power[55]. In *South African National Parks v MTO Forestry (Pty) Ltd* 2018 5 SA 177 (SCA),[56] Dambuza JA writing for the majority pointed out that:

> Already, in the pre-constitutional era, this court acknowledged that in a contractual context, circumstances may be such as to compel notions of fairness and the application of the principle of legitimate expectation… Professor Hoexter warns against the dangers of formalism in that an exclusive focus on the concept of a contract might distract from the reasons why fairness ought to be observed in a particular case, whether it be of a private or of public nature.[57]

In support of the point made in this article, Voultsos[58] argues that almost all acts by the State in its capacity as an employer are regulated by statute. He further argued that in light of *Fedlife Assurance Limited v Wolfaardt* 2001 12 BLLR 1301 (SCA),[59] there can be no doubt that any contemplated development should give effect to the relevant rights and values in the Constitution. Any development in this regard may take place in isolation from other overlapping constitutional rights as was correctly pointed out by Froneman J that 'fairness is required in administrative law, in labour legislation and, yes, in the contract too'.[60] Voultsos also argued that since the *Chirwa* case, public servants can no longer invoke administrative review to challenge the validity of dismissals. However, the court held that this does not mean that parties cannot incorporate administrative law requirements into their employment agreement.[61] Undoubtedly, as confirmed in *Motau*, where the suspension decision amounts to

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52 The *Mokgothle* case para 43.

53 The *Mokgothle* case para 5. Importantly, Van Niekerk concluded that he did not consider it necessary to determine whether the applicant has a remedy under *PAJA*, and considered only that part of the applicant's claim that is founded in contract.

54 Clause 7 of Resolution 2 of 1999.

55 Woolman *et al Constitutional Law of South Africa* 56, The *Chirwa* case.

56 *South African National Parks v MTO Forestry (Pty) Ltd* 2018 5 SA 177 (SCA) (hereafter *SANP* case).

57 Para 27 *SANP* case.

58 Voultsos *Fairness of a dismissal from a contractual and administrative law perspective* 2010 Nelson Mandela Metropolitan University LLM Dissertation 432.

59 *Fedlife Assurance Limited v Wolfaardt* 2001 12 *BLLR* 1301 (SCA) (hereafter the *Fedlife* case).

60 Voultsos *Fairness of a dismissal from a contractual and administrative law perspective.*

61 Voultsos *Fairness of a dismissal from a contractual and administrative law perspective.*

an implementation of legislation, same fits the definitional requirements of an administrative action.

The statement that 'generally, employment matters do not amount to administrative action', made in the *Gcaba* case requires edification. Murphy AJA in *Hendricks v Overstrand Municipality and Another* 2015 36 ILJ 163 (LAC)[62] disagreed with a submission that in terminating an employee's contract, the State employer exercises a contractual power rather than an administrative one. In substantiating the disagreement, Murphy AJA stated that the submissions of the appellant rested in his opinion, on too narrow an interpretation of the decision of the Constitutional Court in *Gcaba*. In expatiation, the erudite Acting Judge of Appeal stated that the court there expressly qualified its pronouncement that employment issues do not amount to administrative action 'within the meaning of *PAJA*' by adding that such would 'generally' be the case. He continued and stated that the Constitutional Court was careful to observe that the 'ordinary thrust' of the right to administrative justice is to deal with bureaucratic relationships and not relationships between the State as an employer and its workers[63]. However, the Constitutional Court has also recognised that deciding what is and what is not administrative action is a difficult task to be done on a case-by-case basis[64]. Regard must be had to the source of the power, the nature of the power, its subject matter and how closely it is related to policy matters or the implementation of legislation. It is the nature of the power and the context of its application which are usually decisive[65]. A municipality is an organ of the state as defined in section 239 of the *Constitution of the Republic of South Africa*, 1996. When such a body acts to discipline a senior employee who holds a public or *quasi*-public office in law enforcement, it can be seen to be exercising a public power or performing a public function in terms of local authority legislation and any applicable statutory collective agreement. The power of the disciplinary tribunal in this instance arises from the provisions of a statutory collective agreement. Such agreements are not entirely or exclusively contractual in nature, especially when concluded in a bargaining council between an employer's organisation and trade unions. The manner of their conclusion and the application of their terms to non-parties impart a *quasi*-legislative quality to them.[66] Regard being had to the sentiments expressed by Murphy AJA, it cannot be said that the *Gcaba* case authoritatively concluded that

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[62] *Hendricks v Overstrand Municipality and Another* 2015 36 ILJ 163 (LAC) at para 18 (hereafter the *Hendricks* case).

[63] Para 18 *Hendricks* case.

[64] Para 18 of *Hendricks* case and *President of the RSA v SARFU* 2000 (1) SA 1 (CC).

[65] Para 18 *Hendricks* case.

[66] Para 18 *Hendricks* case

all employment issues fall outside the exercise of public power and cannot be challenged under *PAJA*. It is more apparent than not that the guiding force is not the area within which the administrative action is actioned but the decision meeting the definitional requirements of an administrative action. It remains unconvincing to simply state that employment matters are generally not administrative actions.

Learning from *Motau*, implementation of empowering provisions as opposed to policy renders a decision to be administrative. Undoubtedly, suspending an employee in terms of clause 7.2 of Resolution 2 of 1999, equates implementation of empowering provisions and an exercise of public power. Then, the better approach must be one that states that if an employment decision of any nature meets the definitional requirements of an administrative action within the contemplation of section 1 of *PAJA*, it is an administrative action. Arguably, when the state in its capacity as an employer suspends a public servant, it is taking administrative action. Axiomatically, the decision to suspend a State employee must be preceded by procedural fairness. In summary, procedural fairness within the contemplation of *PAJA* is nothing but a codification of the common law *audi alteram partem* principle. As indicated above, it is argued that a suspension of a public servant constitutes an administrative action, section 3(1) of *PAJA* requires that an administrative action which materially and adversely affects the rights of any person must be procedurally fair.[67] In *Mkumatela v Nelson Mandela Bay Metropolitan Municipality* [2008] JOL 21686 (SE), it was held that a municipality as a state organ in promoting employees it exercises a public power and it performs public function in doing so. It clearly performs an administrative act when acting in terms of its policies and implementing them.[68] The *audi alteram partem* principle entitles persons to participate in the decision-making process in relation to administrative decisions that affect them. Minimally, it entrenches the common law rules of natural justice.[69] In its purest form, *audi alteram partem* is concerned with existing rights and adversity – the extent to which rights may be affected. In *Joseph v City of Johannesburg* 2010 4 SA 55 (CC),[70] the Court understood materiality to simply mean that the administrative action must have a significant and not trivial effect. Certainly there is a link between the right to work and the right to dignity. A suspension from duty affects those

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67 *Mere v Tswaing Local Municipality and others* unreported (2017/2024) [2024] ZANWHC 124 (9 May 2024) para 18 and the authorities cited therein; and *Mokgothle* case.

68 *Mkumatela* case para 12. *Simvumile Mambafula v Alfred Nzo District Municipality* unreported (2715/2024) dated 29 May 2025, followed *Mkumatela* in dealing with a case of failure to appoint a Director of Corporate Services.

69 Woolman *et al Constitutional Law of South Africa* 80.

70 *Joseph v City of Johannesburg* 2010 4 SA 55 (CC) at para 31 (hereafter *Joseph* case).

linked rights. It is not a neutral act. Thus, it is no triviality to be without work albeit for a specific period and with pay. Indisputably, a suspension from duty implicates rights in sections 10 (human dignity), and 22 (freedom of trade, occupation and profession) of the *Constitution of the Republic of South Africa*, 1996. The only time exercise of these rights can be limited is when the provisions of section 36 of the *Constitution of the Republic of South Africa*, 1996 are satisfied. Absent that, any action that implicates those rights requires adherence to procedural fairness. A limitation contemplated in section 36 is one to be effected by a law of general application. PAJA is such a law. For instance section 3(4)(a) of PAJA justifies departure. Such departure is a limitation to procedural fairness and it may derive justification from section 36, since section 33(1) of the Constitution guarantees procedural fairness.

The primary rationale for the right to procedural fairness is that it improves the quality of administrative decision-making by ensuring that all relevant information, interests and points of view are placed before the administrator's disposal.[71] Ngcobo J remarked that it is a fundamental element of fairness that adverse decisions should not be made without affording a reasonable opportunity to make representations[72]. He also said that a hearing can convert a case that was considered to be open and shut to be open to some doubt, and a case that was considered to be inexplicable to be fully explicable.[73] The second rationale for procedural fairness is that it gives a person potentially affected by a decision a chance to influence a decision.[74] At least two benefits do arise from this rationale. Those are feelings of non-resentment which encourage acceptance of a decision, even if it goes against the affected person. Also, it affirms a person's worth and human dignity.[75] It is of first importance in a democracy that when public bodies make decisions affecting the rights, liberties, interests, or legitimate expectations of individuals, they are obliged to treat such individuals with respect, and as participants in, rather than as mere objects of, the administrative process[76]. In a relationship between citizens and state thus conceived lie the seeds of a healthy polity, in which public bodies earn the trust of individuals; in which individuals are paid the respect due to them

[71] *Van Rensburg NO and another v Minister of Trade and Industry & Another* 2001 1 SA 29 (CC) at para 17-26 (hereafter the *Van Rensburg* case).

[72] Para 113 *Zondi* case.

[73] *Zondi v MEC for Traditional and Local Government Affairs and others* 2006 (3) SA 1 (CC) at para 112.

[74] The *Masethla* case para 75.

[75] De Ville *Judicial Review of Administrative Action in South Africa* 217; Hoexter *Administrative Law* 326-327; Allan *Procedural Fairness and the Duty of Respect* 1998 Oxford Journal of Legal Studies 497.

[76] *De Ville ibid*

by state bodies; and in which the chances of good decisions are enhanced.[77] Arguably, affording procedural fairness has the potential to enhance the rule of law. Individuals tend to respect the law if the law operates in a manner that does not disrespect their worth and dignity.

To simply accept that employers are licenced to adversely affect the rights of individual employees – determine their right to work – without affording them a right of participation purely because it is unprejudicial because of being paid remuneration agitates the core of the rule of law. As Beatson and others[78] put it, the seed of healthy polity will struggle to grow in such circumstances. Agreeably, section 3(2)(a) of *PAJA* creates some flexibility in terms of the application of the right to procedural fairness. The section provides that a fair administrative procedure depends on the circumstances of each case. In order to gain a full understanding of the flexibility, it is important to first consider the provisions of section 3(2)(b). This subsection directs how the right to procedurally fair administrative action can be given full effect. It obligates five steps; namely; (i) adequate notice of the nature and purpose of the proposed administrative action; (ii) a reasonable opportunity to make representations; (iii) a clear statement of the administrative action; (iv) adequate notice of any right of review or internal appeal, where applicable; and (v) adequate notice of the right to request reasons in terms of section 5. There may be cases where some of the steps become impracticable or impossible to follow. The provisions of subsection (2)(a) may be invoked in such cases. Arguably, subsection (2)(a) cannot be interpreted to mean freedom not to give effect to procedural fairness. Such an interpretation would render the provisions of subsection (1) nugatory. Lord Mustill aptly puts it, 'the principles of fairness are not to be applied by rote identically in every situation'.

Administrative decision-makers and those affected by administrative decisions would not know what procedural fairness demands.[79] Usage of the words 'adequate' and 'reasonable' in subsections 3(2)(b)(i) and (ii) leaves much room for flexibility as to the precise content of the notice and the opportunity given to make representations.[80] For all the above reasons, arguably, it is unlawful to suspend a public servant without complying with the procedure that is fair as outlined in section 3 of *PAJA*. Flexibility does not mean complete non-compliance with procedural fairness. The Supreme Court of Appeal (SCA) of South Africa had an occasion to

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77 Elliot *Beatson, Matthews and Elliott's Administrative law*: Text and Materials 3rd Ed Oxford Press (2005) 391.

78 *Elliot Ibid.*

79 Woolman *et al Constitutional Law of South Africa* 96.

80 Woolman *et al Constitutional Law of South Africa* 96.

give content to procedural fairness in *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A).[81] In explaining the concept it referred to the English concept of the duty to act fairly. It concluded that the requirements of natural justice oblige a functionary to act fairly whenever a decision which is likely to prejudice another is taken by the functionary.[82]A suspension from duty is more than likely to cause severe prejudice in an employee. Undoubtedly, a suspension impacts on the right to work, dignity and freedom of trade. Undeniably, where fundamental rights are impacted, severe prejudice or adverse effects are more than likely to occur. In *Minister of Home Affairs v Watchenuka and another* 2004 (4) SA 326 (SCA), the freedom to engage in productive work was linked to dignity[83]. Loss of dignity is a serious prejudice to an employee.

A suspension is not a neutral act, it has consequences. In the *Mokgothle* case, Van Niekerk J agreed with Cheadle[84] who observed that suspension in the employment sphere is an equivalent of arrest with the consequence that an employee suffers palpable prejudice to reputation, advancement and fulfilment.[85] Grogan[86] accepted that a suspension pending disciplinary hearing is arguably disciplinary in nature in so far as it forms part of the procedure leading to disciplinary action.[87] A CCMA Commissioner[88] cited with apparent approval by Van Niekerk *et al*,[89] found that suspension usually prejudices the alleged offender psychologically and in terms of future job prospects. The Commissioner supported the view echoed by Cheadle that a suspension is the employment equivalent of an arrest.[90] Cohen,[91] took the view that while the *audi alteram partem* principle should be observed prior to a suspension pending a disciplinary inquiry, the circumstances will determine the manner in which that should be done. A formal hearing is not required, written representations shall suffice, she argues.[92] Grogan[93] is in

[81] *Du Preez and Another v Truth and Reconciliation Commission* 1997 3 SA 204 (A) at 233A. (Hereafter *Du Preez* case).
[82] *Du Preez* case 233B-C.
[83] Para 27 *Watchenuk*a case.
[84] Cheadle: Regulated Flexibility and Small Business: Revisiting the LRA and the BCEA (2006) 27 ILJ 663 para 71.
[85] *Mokgothle* case para 31.
[86] Grogan *Workplace Law* 9th Ed. (Juta Cape Town 2007).
[87] Grogan *Workplace Law* 270.
[88] *Burger and Post Office Ltd* 2008 29 ILJ 2305 (CCMA) (hereafter the *Burger* case) at 216 Law@work.
[89] Van Niekerk *Law@work* at 216.
[90] Van Niekerk *Ibid.*
[91] Du Toit *et al Labour Relations Law: A Comprehensive Guide* 6th ed (LexisNexis Butterworths 2006).
[92] Du Toit *et al Labour Relations Law: A Comprehensive Guide* 566.
[93] Grogan *Employment Rights* 3rd ed (Juta Cape Town 2019).

agreement with the Labour Court[94] when it accepted that a suspended employee suffers harm to his dignity and freedom to work.[95]

3. The right to fair labour practices in terms of the *LRA* – precautionary suspension

Section 23(1) of the *Constitution of the Republic of South Africa*, 1996 guarantees everyone the right to fair labour practices. Section 1(a) of the *LRA* provides that one of the purposes of the *LRA* is to give effect and regulate the fundamental rights conferred by section 23 of the *Constitution of the Republic of South Africa*, 1996. It is key to observe that section 1 implies that the *LRA* is there to serve a purpose. Its main purpose is to provide effect to fundamental rights. Grogan[96] contends that, fundamentally, the LRA seeks to give statutory form to innovations crafted through private arrangements between progressive employers and trade unions; to codify some of the guidelines and principles evolved by the Labour Courts under the previous dispensation; and to resolve issues that had previously remained unsettled. The dictionary meaning of the phrase "give effect to" is to put into practice, or to make operative.[97] This implies that the *LRA* cannot add or subtract from the content of the fundamental rights. The primary constitutional mandate of the *LRA* is to put into practice and/or operation the fundamental rights encapsulated in section 23. Its secondary constitutional mandate emerges from sections 23(5) and (6) of the *Constitution of the Republic of South Africa*, 1996. It is to regulate, and in a regulated and circumscribed manner, limit fundamental rights. The extent of the regulation and the limitation must emerge from the *LRA* itself. Van Niekerk *et al*[98] argue that section 8 of the *Constitution of the Republic of South Africa*, 1996 is important in ensuring compliance with fundamental rights. The Constitution binds natural and juristic persons[99]. Section 8(3) requires that when applying a provision of the Bill of Rights to a natural or juristic person, a Court in order to give effect to a right must apply or if necessary, develop the common law to the extent that legislation does not give effect to the right. Cheadle[100] argues that constitutional rights have the potential to affect labour law in three ways. These are (a) testing the validity of legislation that seeks to give effect to fundamental rights;[101] (b) interpreting

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94 In *SAMWU obo Matola v Mbombela Local Municipality* 2015 26 ILJ 1341 (LC) (hereafter the *Matola* case).

95 Grogan *Employment Rights* 183.

96 Grogan *Employment Rights* 184.

97 Collins English Dictionary.

98 Van Niekerk *et al Law@work* 41.

99 Section 8(2) of the Constitution.

100 Cheadle: *Impact of the Constitution on Labour Law* 1994 Current Labour Law 94.

101 For instance, In *SA National Defence Union v Minister of Defence & another* 1999 20 ILJ 2265 (CC) (hereafter *SANDU* case) the Constitutional Court considered whether the absence of a justiciable duty to

legislation enacted to give effect to fundamental rights;[102] and (c) developing the common law.[103] Ngcobo J gave content to the provisions of section 23(1) of the *LRA* in *NEHAWU v University of Cape Town & Others* 2003 24 ILJ 95 (CC)[104] and said that the section applies to employers and employees.[105] Section 3 of the *LRA* provides an on interpretation of the LRA.

It must be interpreted primarily in compliance with the *Constitution of the Republic of South Africa*, 1996 and the international obligations of the Republic of South Africa. An interpretation of any section of the LRA must be within the prism of the Constitution.[106] Section 185(1)(b) of the *LRA* guarantees every employee the right not to be subjected to unfair labour practices. Conversely, every employee is to be subjected to fair labour practices. Van Niekerk *et al*[107] suggested that in order to gain an understanding of the phrase 'right to fair labour practice', a close examination of our own jurisprudence and legislation indicates what the drafters of the Constitution envisaged by entrenching the right to fair labour practices. Cooper[108] argues that the right to fair labour practices is incapable of a precise definition. According to Cooper, the right embraces the protection against unfair practices relating to work security amongst other practices.[109] Clearly, suspension from duty is a practice relating to work security. Section 186(2) defines what the phrase unfair labour practice means. Relevant to this article, it means an 'unfair act or omission that arises between an employer and an employee involving – the unfair suspension of an employee'. The above definition is focused on the primary question in this article – suspension without a hearing. What is discernible from the definition of the unfair labour practice is that (a) there must be an act or omission; (b) that arises between an employer and an employee; and; (c) that act or omission must be unfair.

Grogan[110] states that suspension is the term used in the employment context to describe situations in which an employer declines to accept an employee's services but does not

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bargain infringed the constitutional right guaranteed in section 23(5) of the Constitution of the Republic of South Africa, 1996. In *AMCU and others v Chamber of Mines of SA & others* 2017 7 BLLR 641 (CC) the constitutionality of section 23(1)(d) of the LRA was tested.

102 For instance, the *Sidumo* case relied on the provisions of section 23(1) of the Constitution in order to define the role of the CCMA commissioners in relation to decisions on sanction for misconduct.

103 In *Old Mutual Life Assurance Co SA v Gumbi* 2007 8 BLLR 699 (SCA) the common-law contract of employment has been developed to include the right to a pre-dismissal hearing.

104 *NEHAWU v University of Cape Town & Others* 2003 24 ILJ 95 (CC) (hereafter the *NEHAWU* case).

105 *NEHAWU* case para 39.

106 In this regard, *SANDU* and *NEHAWU* cases.

107 Van Niekerk *et al Law@work* 43.

108 Chaskalson *et al Constitutional Law of South Africa* (2007) Cooper *Labour Relations.*

109 Chaskalson *et al* 53-13-53-15.

110 Grogan *Employment Rights* 130.

terminate the contract. He also argues that an employee is suspended in that sense even if the employer calls it something else, for instance, 'special leave'. He accepts that suspension does not cover all situations in which contracts of employment are temporarily suspended.[111] As an example, he referred to a lay off. Recently, the Labour Court drew a distinction between a lay off and a suspension in the matter of *Aminto Precast and Civil Engineering CC v CCMA and Others* 2023 6 BLLR 521 (LC).[112] The Labour Court in drawing the necessary distinction held that what sets a lay off apart is that it only happens in situations where there is a shortage of work, whilst a suspension happens even in instances where there is no shortage of work.[113] Section 186(2)(b) repeats the word 'unfair' when it deals with suspension. Grogan[114] argues that unfair conduct is a wider concept. Given the definition, a suspension is an unfair act only if it is in itself unfair. This appears to be an over-embellishment of the word 'unfair'. Grogan accepts that there is double reinforcement. However, in his view, the repetition is probably a surplusage. He argues that it is impossible to imagine a fair act or omission relating to unfair conduct, suspension or disciplinary action, or *vice versa*.[115] Although Grogan considers the repetition to be a mere surplusage, the question remains as to what then could be an unfair act involving an unfair suspension? Additionally, what then is an unfair suspension? The grammatical meaning of the word 'act', as a noun means a 'thing done or a deed'. Therefore, suspension itself is a deed or a thing done. Grogan[116] expressed concern that the legislature omitted to deal with the onus issue with regard to unfair labour practices. However, he argues that an employee is burdened to prove the unfairness of the dispute after establishing the existence of such a dispute.

Sadly Grogan[117] does not explain the difference between an unfair act and an unfair suspension, if there is any. Instead, he argues that what he terms preventative suspension is not necessarily unfair. According to him, preventative suspension is deemed fair where the employer adduces at least a *prima facie* case that the employee has committed some form of misconduct and that objectively speaking, there is a sound reason to keep the employee away from the workplace. This argument presupposes that it is only when an employer is challenged that it can

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[111] Grogan 130-131.
[112] *Aminto Precast and Civil Engineering CC v CCMA and Others* 2023 6 BLLR 521 (LC) Hereafter the *Aminto* case.
[113] *Aminto* case para 7.
[114] Grogan *Workplace Law* 260.
[115] Grogan *Workplace Law* 130.
[116] Grogan *Workplace Law* 135.
[117] Grogan *Workplace Law* 185.

demonstrate that the suspension is fair. In cases involving unfair discrimination alleged to be on any prohibited grounds, the unfairness is presumed until rebutted by an employer.[118] Could it be that the emphasis on unfair suspension even where it is referred to as an unfair act presumes that any suspension is unfair? Clearly, there is a need for the legislature to clarify this unfortunate position. Van Niekerk *et al*[119] acknowledge that the LRA does not define labour practice. They contend that, based on case law suspension is considered to be fair if (a) the relevant disciplinary code has been followed; (b) the suspension is not used to punish an employee; (c) the employee should be informed of the length (which should not be unreasonable) of the suspension; and (d) the employee should be paid for the period in full.[120] This argument is supported by Cohen.[121] Although Cohen additionally argues that a suspension is unfair if there is no good reason for the suspension, or if the employee is not given an opportunity to be heard.[122] According to Van Niekerk *et al,* a suspension pending a disciplinary inquiry also falls within the scope of section 186 and an arbitrator may determine the fairness of such a suspension.[123] Arguably, even if section 186(2)(b) was not introduced, a suspension as an act would amount to an unfair act, simply because it deprives an employee of his or her right to work and dignity, as such an unfair labour practice.

However, cognisant of the fact that any act in the employment context may fall under an unfair labour practice umbrella, the legislature introduced a divider by employing the word involving. The word 'involves', as a verb means to 'include something as a necessary or integral part or result'. The term involving is a present continuous tense of involve. The suggestion is that the unfair act must be continuing between an employer and an employee. To this assertion, Van Niekerk *et al* state that from the terms of the definition, it seems that specific unfair labour practices mentioned in paragraphs (a) to (d) are a *numerus clausus* and that the list is closed. In particular, the use of the word 'involving' in the preamble to the definition (rather than the word 'including') would suggest that the list is limited to those practices specifically mentioned.[124] In *NUMSA v Vetsak Co-Operative Ltd and others* 1996 6 BLLR 697 (AD),[125] suggested per Smalberger JA that in terms of the unfair labour practice dispensation, it was

[118] *Harken v Lane* 1998 1 SA 300 (CC).
[119] Van Niekerk *Law@work* 200.
[120] Van Niekerk *Law@work* 216.
[121] Du Toit *et al* 566.
[122] In support thereof, Cohen relies on *Mabilo v Mpumalanga Provincial Department* 1998 8 BLLR 821 (LC).
[123] Van Niekerk *Law@work* 216.
[124] Van Niekerk *Law@work* 200.
[125] *NUMSA v Vetsak Co-Operative Ltd and others* 1996 6 BLLR 697 (AD) (hereafter the *Vetsak* case).

accepted that the act (dismissal) to be fair must be both substantively justified and procedurally proper.[126] Smalberger JA took a view that it would be unwise and undesirable to lay down or to attempt to lay down, any universally applicable test for deciding what is fair. In the majority judgment, Nienaber JA suggested that the fairness that is required is one applicable to both the employer and employee and it means the absence of bias in favour of either[127]. Ultimately, the Constitutional Court in the *NEHAWU* case, stated that fairness would depend on the circumstances of a particular case, and it essentially involves a value judgment. The *NEHAWU* case endorsed the view of Smalberger JA that the term fairness is incapable of precise definition[128]. Arguably, the situation in respect of a suspension is not dealt with satisfactorily, precisely because the *LRA* does not suggest, as it did with an act of dismissal, that a dismissal is unfair if the employer fails to prove that the reason for the dismissal is a fair one and that the dismissal was effected in accordance with a fair procedure.

As indicated in the *Vetsak* case, an unfair labour practice under the now-repealed LRA – including dismissal as an act had to comply with proper procedural standards.[129] The ideal situation, arguably consistent with the constitutional mandate, was to insert a provision similar to section 188 of the *LRA* in relation to an unfair labour practice situation. Unfortunately, there is no such provision. What then remains is for the Courts to define what an 'unfair suspension', as employed in section 186(2)(b) means.

4. An unfair suspension?

Section 186(2)(b) of the *LRA* makes reference to an unfair suspension. However, the *LRA* does not define the phrase as employed in the section. For decades, the bargaining councils, the CCMA and the Labour Court took a view that an unfair suspension means one that is either substantively unfair (one without a fair reason) or procedurally unfair (one without affording *audi alteram partem*) or both.[130] Arguably, the legal position on unfair suspensions with regard to *audi alteram partem* remained unstable. The majority of the Labour Court judgments focused on the lawfulness of the suspension as opposed to the fairness thereof. The jurisdiction to deal with the fairness of a suspension is that of the CCMA and the bargaining councils in

126 *Vetsak* case para 25.
127 *Vetsak* case para 32.
128 *Nehawu* case para 38.
129 *Vetsak* case para 25 of Smalberger JA judgment.
130 *Baloyi v Minister of Communications and Others* 2010 31 ILJ 1142 (LC) and *Dince and Others v Department of Education Northwest Province and Others* 2010 31 ILJ 1193 (LC).

terms of section 191(5)(a)(iv) of the *LRA*. Mainly, the Labour Court jurisdiction was around interdicting the unlawfulness – not affording an employee the *audi alteram partem* rule – and a breach of an employment contract, which would have guaranteed a right to a hearing. However, the most consistent position was that absent *audi alteram partem*, an employer was acting unlawfully. This exercise of jurisdiction of interdicting the unlawfulness of a suspension by the Labour Court was put on halt by the LAC in the case of *MEC for Education, North West Provincial Government v Gradwell* 2012 33 *ILJ* 2033 (LAC).[131] Murphy AJA writing for the majority concluded that:

> The right to a hearing prior to a precautionary suspension arises therefore not from the Constitution, *PAJA* or as an implied term of the contract of employment, but is a right located within the provisions of the LRA, the correlative of the duty on employers not to subject employees to unfair labour practices. That being the case, the right is a statutory right for which statutory remedies have been provided together with statutory mechanisms for resolving disputes in regard to those rights. Disputes concerning alleged unfair labour practices must be referred to the *CCMA* or a bargaining council for conciliation and arbitration in accordance with the mandatory provisions of section 191 (1) of the LRA.[132]

Briefly, the facts of the case are that Mr Gradwell was employed as a Chief Director in the Department of Education. Around June 2010, the Auditor-General raised issues of serious wrongdoing in the department. The MEC for Education laid the allegations of serious wrongdoing at the doorstep of Mr Gradwell and afforded him an opportunity to be heard in terms of clause 2.7(2)(a) of the SMS Handbook. The MEC and Gradwell exchanged correspondence over the allegations. Ultimately on 15 July 2010, Mr Gradwell was placed on a precautionary suspension. Aggrieved thereby, on 26 July 2010, Mr Gradwell launched an urgent application seeking to reverse the suspension. The Labour Court after hearing the application concluded that the suspension of Mr Gradwell was unlawful for reasons that (a) there was no objectively justifiable reason to deny Mr Gradwell access to the workplace; and (b) that Mr Gradwell was not afforded a proper right to be heard prior to his suspension[133]. The LAC accepted that the dictates of fairness (procedural and substance) apply to all suspensions

[131] *MEC for Education, North West Provincial Government v Gradwell* 2012 33 ILJ 2033 (LAC) (hereafter the *Gradwell* case).
[132] *Gradwell* case para 45 and 46.
[133] *Gradwell* case para 23.

(precautionary and disciplinary/punitive) equally[134]. However, the LAC sought to qualify the requirement in respect of procedural fairness. It concluded that when dealing with a holding operation suspension as opposed to a suspension as a disciplinary sanction, the right to a hearing or the standard of procedural fairness may legitimately be attenuated for three principal reasons; namely (a) precautionary suspensions tend to be on full pay with minimal prejudice; (b) the period of suspension is for a limited duration; and (c) the purpose of suspension – protection of the integrity of the investigations is at the risk of being undermined by in-depth preliminary investigation[135]. Before reaching this conclusion, the LAC stated briefly that a Court, in an appropriate case, could legitimately rule that the contemporary constitutional *mores* endorse the incorporation of a right to a hearing before suspension as an implied term in all contracts of employment on account of natural justice being the proven means of producing the correct, legitimate and better decisions.[136]

The LAC also concluded as indicated earlier that the right to a hearing prior to precautionary suspension arises not from the Constitution, *PAJA*, or an implied term of the contract of employment, but is a right located within the provisions of the *LRA*, being a correlative of the duty on employers not to subject employees to unfair labour practice. Based on this finding, the LAC concluded that the right to a hearing is a statutory right, and that statute is the *LRA*. Consequently, the LAC concluded that issues of unfair labour practice are to be dealt with by the council or the CCMA and not the Labour Court under its declaratory powers. There are, for the purpose of this article, two valuable lessons to be drawn out of the *Gradwell* case. Firstly, an employee has a right to be heard before being placed on a precautionary suspension. This article plentifully agrees with this lesson. Secondly, that right is located only in the *LRA* and not in the Constitution and *PAJA*. This article sadly does not share the view that the right to be heard is not located in the Constitution or *PAJA*. Logic dictates that the mandate of the *LRA,* being to put into operation the fundamental rights in section 23, then the right to be heard stems deep from the Constitution. Aptly put, Cohen argues that there is a relationship between the constitutional right and the unfair labour practice provision in section 186(2) of the LRA, particularly because the purpose of the LRA is to give effect to labour rights enshrined in section 23(1).[137]

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134 *Gradwell* case para 43.
135 *Gradwell* case para 44.
136 *Gradwell* case para 42.
137 Du Toit *et al Labour Relations Law: A Comprehensive Guide* 542.

Thus, the right to a hearing, which is a species of fair labour practice, is located in the Constitution. Understandably, on the application of the subsidiarity principle,[138] an employee may not place direct reliance on the constitutional right in the face of the *LRA*. However, it is fundamentally wrong to conclude that the right to be heard is not located in the Constitution as well. Earlier, an argument was made that *PAJA* also contains the right to be heard in section 3. According to this article, a suspension is an administrative action, which adversely and materially affects the rights of an employee. The LAC acknowledged that there is a noticeable lack of clarity in the case law about the basis upon which the *audi alteram partem* rule applies.[139] Based on the *Chirwa* case, the LAC held that it is irrefutable that the Labour Court may not review a suspension on the grounds of procedural fairness in terms of section 6(2)(c) of *PAJA*.[140] Indeed, the jurisdiction of the Labour Court is ousted by section 7(4) of *PAJA*.[141] However, it is contended in this article that the High Court may review a suspension carried out without a hearing. Thankfully for a considerable period of time after *Gradwell*, it remained a firm legal position, irrespective of the origin of the right and its form attenuated or not that the right to be heard is available to an employee to be placed on precautionary suspension. Almost four years later, the aptly named *Long* case, came along and gave the long and short of the right to be heard before being placed on a precautionary suspension. Mr Long was employed as the district manager for the border district of the South African Breweries (SAB).[142] In December 2012, certain irregularities regarding the SAB's vehicle fleet were brought to the attention of Mr Long. For a period of time, the issue was highlighted by other managers and was identified as a serious problem, which negatively impacted the fleet of the SAB. At some stage, Mr Long falsely indicated that the issue was resolved. In May 2013, one of the trailers which was identified on the list as being in a bad state and requiring major repairs was involved in a fatal accident.

As a result, Mr Long was subjected to internal investigations for allegations of dereliction of duties and gross negligence. He was asked to provide a statement for the investigations, and he obliged. An audit of the fleet was undertaken, which revealed problems with the fleet. The SAB resolved to undertake an intensive investigation. In order to avoid hindrance and interference, on 21 May 2013, Mr Long was placed on suspension pending the investigations. Mr Long

138 *Barkhuizen v Napier* 2007 7 BCLR 691 (CC) (hereafter the *Napier* case).
139 *Gradwell* case para 42.
140 *Gradwell* case para 44.
141 *Bon Accord Environmental Forum v The Department of Mineral Resources: Chief Inspector of Mines (Gauteng Region) and others* (unreported judgment) case number J2688/18 of 13 January 2021.
142 The facts of the *Long* case para 5.

protested the suspension and amongst others raised the failure to afford him a hearing before the suspension. Aggrieved by his suspension, on 7 August 2013, Mr Long referred an unfair labour practice dispute to the CCMA in respect of his continuing suspension. Ultimately, Mr Long was charged found guilty and dismissed. He also challenged the fairness of his dismissal. With regard to the unfair labour practice dispute, a CCMA commissioner found that the suspension of Mr Long was unfair because he was not given a proper opportunity to make representations and to show cause prior to suspension. The SAB was aggrieved and approached the Labour Court seeking a review and setting aside of the arbitration award in relation to suspension. The matter, together with another matter relating to the unfair dismissal dispute featured before Acting Justice Snyman in the Labour Court[143]. Acting Justice Snyman placed reliance on *Koka v Director General Provincial Administration North West Government* 1997 18 ILJ 1018 (LC).[144] *Koka* was influenced by the English case of *Lewis v Heffer* 1978 (3) All ER 354 (CA).[145] Having placed reliance on *Koka*, Acting Justice Snyman reached a conclusion that the holding operation suspension is different from the disciplinary suspension as dealt with in *County Fair v CCMA and others* 1998 6 BLLR 577 (LC).[146] Since the holding operation suspension cannot be seen as a disciplinary action, therefore, all the requirements relating to fair disciplinary action under the *LRA* cannot find application, so concluded the erudite Acting Justice.[147] He concluded that it is precisely because of the distinction between suspension as a holding operation and as a disciplinary action that section 186(2)(b) of the *LRA* is worded the way it is worded. It was concluded that what accounts for the distinction is simply that the standards of fairness differ in the two instances. In support of this conclusion, he placed reliance on the attenuation referred to in the *Gradwell* decision.[148] In my view, there are serious fundamental flaws in the Labour Court judgment. The prime foundational difficulty is that as a lower court, the Labour Court was bound by the *Gradwell* decision. Murphy AJA specifically stated the following:

> The prohibition evidently targets unfair disciplinary action. That purpose, however, does not operate to exclude unfair acts or omissions in relation to precautionary

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[143] *SAB (Pty) Ltd v Long; SAB (Pty) Ltd v Sonamzi N.O* unreported (PR 121/16 and PR 122/16) (8 June 2017 (LC)

[144] *Koka v Director General Provincial Administration North West Government* 1997 18 ILJ 1018 (LC) (hereafter *Koka* case).

[145] *Lewis v Heffer* 1978 (3) All ER354 (CA) (hereafter *Lewis* case).

[146] *County Fair v CCMA and others* 1998 6 *BLLR* 577 (LC) (hereafter the *County* case).

[147] Para 21 of the Labour Court judgment.

[148] Para 52 *SAB* Labour Court judgment *Ibid.*

> suspensions. As Grogan rightly points out, insofar as a precautionary suspension invariably forms part of the procedure leading to disciplinary action it is inherently disciplinary in nature. Consequently, the dictates of fairness (procedural and substantive) apply to all suspensions equally, regardless of the form a particular suspension takes, be it employed as a holding operation or as a disciplinary sanction or penalty.[149]

Thus, the Labour Court was, on the application of the *stare decisis et movere* principle,[150] bound by the finding that the dictates of fairness apply to all suspensions. To hold that there is no requirement to be heard contradicts the procedural fairness finding made by the LAC in the *Gradwell* case which applies with equal force to both forms of suspensions. In support of *Gradwell*, Van Niekerk *et al* pointed out that section 186(2) applies to both forms of suspensions.[151] The LAC mentioned attenuation with regard to the form the procedural step takes in relation to the precautionary suspension. The LAC specifically held that:

> Therefore, an opportunity to make written representations showing cause why a precautionary suspension should not be implemented will ordinarily be acceptable and adequate compliance with the requirements of procedural fairness.[152]

The reasoning of the LAC in *Gradwell* illuminates that where section 186(2) refers to an unfair act or omission, such will of necessity include a precautionary suspension. Thus, it seems that the LAC saw a distinction between holding operation and disciplinary suspension arising not in the wording of section 186(2)(b) only but from the wording of section 186(2) read with section 186(2)(b). The Labour Court seem to have read the distinctions in section 186(2)(b) differently to Grogan and the LAC. The Labour Court refers to a distinction in section 186(2)(b). Grogan does not see a distinction in section 186(2)(b) and the LAC sees a distinction in 186(2) and 186(2)(b). In truth, there is no distinction of that nature in section 186. Undoubtedly, subsection (2)(b) makes reference to unfair suspension or other unfair disciplinary action short of dismissal in respect of an employee.[153] The word 'or' may be used to link alternatives; introduce a synonym or explanation of the preceding phrase or word; introduce the consequences of something not being done or not being the case; or introduce an

149 *Gradwell* case para 42.
150 *Bloemfontein Town Council v Richter* 1938 AD 195 para 232 (hereafter the *Richter* case).
151 Van Niekerk *Law@work* 216.
152 *Gradwell* case para 45.
153 The text of section 186(2)(b). Grogan *Employment Rights* 130.

afterthought, usually in the form of a question; or to mean either. Grogan sees the word 'or' as introducing a synonym or explanation of the phrase 'unfair suspension'.[154] There is validity in the argument that the word was used to link alternatives. To demonstrate the alternative, the legislature found it appropriate to use the phrase 'of an employee'[155] in respect of unfair suspension and 'in respect of an employee' for disciplinary action. If the word was not used as a link, this usage of the phrases would be superfluous. Also, the repetition of the word 'unfair' would not have been necessary. The wording of the section would have been 'unfair suspension or disciplinary action short of dismissal in respect of an employee' instead. Arguably, a disciplinary action short of dismissal means a suspension that is imposed as a sanction as opposed to a dismissal; written warnings; and demotion imposed as a sanction. Grogan argues that to fall within the meaning of section 186(2)(b) of the *LRA*, the suspension must be disciplinary both in nature and in intent.[156] Unfair suspension refers to only one that is popularly referred to as holding operation or precautionary suspension.

To that end, Acting Justice Snyman is, arguably correct in stating that the distinction occurs in subsection (2)(b) only. However, it is not only the sanction suspension that is contemplated but warnings and demotions, as long as they are imposed by the employer instead of a dismissal sanction. On application of the *stare decisis* principle, the Labour Court could not overrule *Gradwell* in respect of a hearing requirement. If the matter had ended there, the *Gradwell* principle would have been prevalent that the dictates of fairness (procedural) apply with equal force to both forms of suspension. However, the views of Acting Justice Snyman were confirmed by the Constitutional Court in the *Long* and *DA* cases. That implies that *Gradwell* was overruled by the Constitutional Court. With considerable regret, the Constitutional Court arguably took a short shrift approach on this issue of a hearing before being placed on a precautionary suspension. Arguably, the Constitutional Court needed to give the issue a little bit more attention. Instead, the Court said:

> In respect of the merits, the Labour Court's finding that an employer is not required to give an employee an opportunity to make representations prior to a precautionary suspension, cannot be faulted. As the Labour Court correctly stated, the suspension imposed on the applicant was a precautionary measure, not a disciplinary one. This is supported by *Mogale*, *Mashego* and *Gradwell*. Consequently, the requirements

[154] Grogan *Employment Rights* 135.
[155] Section 186(2)(b) of the *LRA*.
[156] Grogan *Employment Rights* 190.

> relating to fair disciplinary action under the *LRA* cannot find application. Where the suspension is precautionary and not punitive, there is no requirement to afford the employee an opportunity to make representations.[157]

It seems apparent that the Constitutional Court did not find it necessary to reflect on and or reject the views of Molahlehi J in the *Baloyi* case when he said:

> The important principle enunciated in *Mhlauli* and *Muller's* cases is that the principle of *audi alteram partem* rule applies in cases of suspension… I align myself with that approach and wish to emphasise that the prejudice that an employee may suffer in a case of suspension is not limited to financial prejudice in the case where the suspension is without pay. The suspension with pay also has substantial consequences relating to both the social and personal standing of the suspended employee. In my view, any suspension with or without pay has to bring into question the integrity and dignity of the suspended person, particularly where the suspension is based on allegations of dishonesty. Quite often, suspensions attract media attention and thus the standing of the person before his or her colleagues and the community is bound to be negatively affected.[158]

Perspicuously the Constitutional Court did not find value in what Molahlehi J stated in the *Baloyi* case when he said:

> The Court in *Dince* further quoted with approval what was said by the Supreme Court of Appeal… where in emphasising the connection between the freedom to engage in productive work and the right to human dignity…[159]

In the words of the SCA in the *Muller* case, self-esteem and the sense of self-worth the fulfilment of what it is to be a human is most often bound up with being accepted as socially useful. Arguably, this is a very useful connection to agitate the invocation of the *audi alteram partem* principle in any form of suspension. As indicated, *Gradwell* does not find that there is no requirement to be heard in a precautionary suspension. Sadly, the Constitutional Court does not expressly state that *Gradwell* was wrongly decided. On application of the doctrine of

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157 *Long* case para 24.
158 *Baloyi* case para 24.
159 *Baloyi* case para 24.

judicial precedent, which exists to ensure legal certainty, previous court judgments must be followed unless there is a clear indication that the court judgment is wrong. The SCA in *Patmar Explorations (Pty) Ltd v Limpopo Development Tribunal* 2018 (4) SA 107 (SCA)[160] stated that:

> The basic principle is *stare decisis*, that is, the Court stands by its previous decisions, subject to an exception where the earlier decision is held to be clearly wrong. A decision will be held to have been clearly wrong where it has been arrived at on some fundamental departure from principle, or a manifest oversight or misunderstanding, that is, there has been something in the nature of the palpable mistake.[161]

Nowhere in its judgment does the Constitutional Court in *Long* hint that *Gradwell* fundamentally departed from the principles or that it had committed a palpable mistake when it concluded that the right to be heard in an attenuated manner before a precautionary suspension is available. Seemingly, the Constitutional Court reached its decision on the basis that since there was no material prejudice suspension with full pay without a hearing is sound. It is unclear as to what the Constitutional Court mean by ‘sound’. Of course, this view is diametrically opposed to the view expressed by Molahlehi J in *Dince* and *Baloyi*. Certainly the much needed clarity would have been achieved had the Constitutional Court expressly stated that *Dince*, *Baloyi*, *Gradwell* and *Muller* were wrongly decided. In the *Patmar* case, the learned Wallis JA felicitously stated the following:

> The doctrine of *stare decisis* is one that is fundamental to the rule of law. The object of the doctrine is to avoid uncertainty and confusion,[162] to protect vested rights and legitimate expectations as well as to uphold the dignity of the court.[163] It serves to lend certainty to the law …[164]

Arguably, had the *Long* case applied the doctrine of *stare decisis,* it ought to have emerged with a finding that *Baloyi*, *Dince*, *Gradwell* and *Muller* cases were clearly wrong when they held that the right to be heard remains irrespective of whether it is a disciplinary or precautionary

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160 *Patmar Explorations (Pty) Ltd v Limpopo Development Tribunal* 2018 (4) SA 107 (SCA) (hereafter the *Patmar* case).

161 *Patmar* case para 3.

162 *CIR v Estate Crewe* 1943 AD 656 para 680; Kahn 1955 SALJ 652.

163 *Camps Bay Ratepayers' and Residents' Association v Harrison* 2011 4 SA 42 (CC).

164 *Patmar* case para 4 not quoted in full

suspension, with or without any form of financial prejudice. By implications, a finding to the effect that where the suspension is not punitive, there is no requirement to afford *audi alteram partem* in any form, those decisions that stated otherwise have been overruled. This implication does not satisfy the fundamental rule of law. It does not command itself to certainty and avoidance of confusion. Given the fact that suspension not being a neutral act does not depend on the fact that an employee is being paid during the suspension period. If 'sound' means lawful, arguably, that is at odds with the accepted principle of *audi alteram partem*.

5. Conclusion

Demonstrably, key issues that were investigated in this article relate to the applicability of *PAJA* in employment matters, more specifically the issue of suspension of employees in the public sector. A finding made in the *Chirwa* case and cemented in the *Gcaba* case is that employment matters do not amount to administrative action within the meaning of *PAJA*. This legal statement implies that a suspension of a public servant does not amount to an administrative action such that the requirements of procedural fairness contemplated in section 3 of *PAJA* do not find application. A simplistic approach would lead to a conclusion that the legal statement is legally correct. As demonstrated in this article, an administrative action is involved where there is an exercise of public power or function. Langa CJ confirmed in *Chirwa* that the question whether public power or function is involved is a difficult pony to ride. Thus, in order to answer the question whether employment matters amount to an administrative action satisfactorily, the starting point is section 33 of the *Constitution of the Republic of South Africa*, 1996. Van Niekerk *et al* suggested that the starting point should be section 8(2). If that is accepted to be correct, then section 33 binds persons and all organs of the State[165].

Of significance, section 33 refers to 'every person' as having a right to a lawful and procedurally fair administrative action. Undoubtedly every person must mean every employee. Thus, every employee has a right to an administrative decision that is procedurally fair. The controversy has always and remains that of what an administrative action means. The Constitutional Court in *President of the Republic of South Africa and others v SARFU and others* 1999 1 BCLR 1059 (CC)[166] suggested that although the right to just administrative action was entrenched in the Constitution in recognition of the importance of the common law

165 Section 8(1) read with 8(2) of the *Constitution of the Republic of South Africa*, 1996.

166 *President of the Republic of South Africa and others v SARFU and others* 1999 (1) BCLR 1059 (CC) (hereafter *SARFU* case).

governing administrative review, it is incorrect to see section 33 as a mere codification of common law principles. The Court continued and held that the right to just administrative action is now entrenched as a constitutional control over the exercise of power. It also concluded that principles previously established by the common law, *audi alteram partem* being one of them, will be important in determining not only the scope of section 33 but also its content.[167] More importantly, the Court decreed that the principal function of section 33 is to regulate the conduct of the public administration, in particular, to ensure that where the action taken affects or threatens individuals, the procedure followed complies with constitutional standards of administrative justice. Those standards will be informed by the common law principles developed over decades.[168] The Court in the *SARFU* case did recognise that the opaque question is what the meaning of administrative action is. In an attempt to answer that key question, the Court mentioned a number of considerations ranging from the nature of the power, the source of the power, whether it involves the exercise of public duty, how closely is the action related to policy matters, and the subject matter of the power. Ultimately, the Court accepted that 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. Having acknowledged the difficulty in delineating boundaries, the Court suggested a case by case basis.[169]

In this article, the focal point was *PAJA*. Section 33(3) of the Constitution refers to national legislation which must be enacted to give effect to the rights. For avoidance of doubt, the rights are lawfulness, reasonableness and procedural fairness of an administrative action.[170] As demonstrated in this article, the national legislation is *PAJA*. *PAJA* provides a definition of an administrative action. It is settled law that as definitions are specifically designed to reveal to Courts the meaning preferred by the legislature on particular terms and phrases effect must be given to its intention by means of applying the defined meaning unless strict adherence thereto contradicts a clearly established intention of the legislature.[171] As indicated in this article, an administrative action as defined is first and foremost a decision. That decision is defined to be any decision of an administrative nature taken. The takers of that decision are (a) organ of state

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167 *SARFU* case para 135.
168 *SARFU* case para 136.
169 *SARFU case* para 143.
170 Section 33(1) of the *Constitution of the Republic of South Africa*, 1996.
171 *Orlando Fine Foods (Pty) Ltd v Sun International Ltd* 1994 2 SA 249 (BGD); *Brown v Cape Divisional Council and Another* 1979 1 SA 589 (A) and *University of the North and Others v Ralebipi and Others* (JA20/02) 2003 ZALAC 14 (30 September 2003).

and (b) natural or juristic persons. That decision must affect the rights of any person, and have legal effect. With reference to scholars like De Ville, Hoexter, and others, in this article, the definition of administrative action was dissected. That process emerged with a situation where a suspension of an employee fits the definitional requirements of an administrative action. If a suspension is an administrative action, then the provisions of section 3 of *PAJA* are bound to apply. Section 3 demonstrated that the administrative action that materially and adversely affects the rights or legitimate expectation must be procedurally fair. Various authorities and scholars mentioned in this article gave meaning to what procedural fairness means. Undoubtedly, it means a right to be heard. The form of how the right is afforded demonstrates a fair amount of flexibility. However, as demonstrated in this article, flexibility does not equate to denial.

Another legal principle, which is not the focal point of this article, arises from the source of the power. A public functionary must do only what it is empowered to do.[172] This principle affects the lawfulness of the suspension on application of the principle of legality. Next, this article considered the principle of fairness as provided for in the *LRA*. This article considered and analysed the concept of fair labour practice stemming deeply from section 23 of the Constitution. As demonstrated the *NEHAWU* and the *Vetsak* cases, for instance, provided a valuable understanding of the concept of fair labour practice. Having done that, this article zoomed into the provisions of section 186(2)(b) of the *LRA*. In reiteration, the section referenced unfair conduct which involves an unfair suspension. Grogan took the view that the legislature became involved in a surplusage which is of no consequence. However, this article raised questions about whether unfairness is to be presumed in a suspension as it is a case in unfair discrimination based on prohibited grounds. This article does not see the repetition of unfairness as a mere inconsequential surplusage.

Regard being had to the focal point of this article, authorities before the *Long* case were reviewed in order to establish and confirm the application of the *audi alteram partem* principle in cases involving a suspension. It was demonstrated that the *Gradwell* decision was never averse to the right to be heard before a suspension. Indeed *Gradwell* holds a view that that right does not owe its origin to the Constitution. Regard being had to the discussions of section 33 of the Constitution, it remains arguable that the right also bears its genesis and genealogy from the Constitution. A point was made that the *Long* judgment of the Labour Court, departed from

172 *Fedlife* case, De Ville *Judicial Review of Administrative Action in South Africa* 90.

a higher authority contrary to the established principle of *stare decisis*. This article demonstrated that the principle of *stare decisis* commands itself to certainty and the rule of law. To that extent, the Constitutional Court in the *Long* case was bound by the settled principle in *Gradwell* unless it demonstrated that *Gradwell* was wrong. In this article, it was sufficiently demonstrated that nowhere did the Constitutional Court expressly state that *Gradwell* and other cases like *Baloyi* and *Dince* were wrongly decided. The rule of law and certainty required that express finding.

However, it may be argued that by implications, the principle in *Long* and *DA* overruled *Gradwell* and the other cases. Brickhill[173] argued that the Constitutional Court itself professed its commitment to the doctrine of *stare decisis* in the *Certification of the Republic of South Africa,* 1996 1 BCLR 1253 (CC)[174] where it concluded that there is sound jurisprudential basis for the policy that a court should adhere to its previous decision unless they are shown to be clearly wrong is no less valid there than is generally the case.[175] Brickhill in making his argument referred to Justice Sachs when he alluded to explicit reasoning overturning settled legal principles may alarm the legal community and undermine the Court's attempt to legitimise itself. Brickhill remarked that the Court ought to be more concerned at the impact of legal uncertainty on government officials, business and private citizens.[176] In *Gcaba*, the Constitutional Court opined that it must not easily depart and without coherent and compelling reason deviate from its own previous decisions or be seen to have done so.[177] Clearly, an ideal situation is the return to the *Gradwell* situation unless by implication that situation has been changed by the Constitutional Court in *Long* and *DA* cases. This return as demonstrated in this article ensures that the right to a just administrative action is not unfairly compromised and the right to fair labour practice is championed without any hesitation. Having not provided coherent and compelling reasons in *Long*, arguably, the Constitutional Court in *Long* did not disturb the trite principle in *Gradwell*. When one scours the *Long* judgment, one does not find any reference to the attack on the *Gradwell* case. Arguably, the Court was not properly referred to *Gradwell* regard being had that it confirms the Labour Court judgment on the ticket of soundness as opposed to legal correctness. The ambivalence in this regard seems to ignore what

[173] Brickhill Precedent and the Constitutional Court 2010 3 *Constitutional Court Review* 79.
[174] *Certification of the Republic of South Africa* 1996 1 BCLR 1253 (CC) (hereafter *Certification* case).
[175] Brickhill 93.
[176] Brickhill 109.
[177] *Gcaba* case para 42.

Cockrell called the substantive vision of law when he says that overturning a decision requires rigorous, explicit reasoning that strikes at the very foundational premises of the earlier case.[178]

[178] Cockrell *Rainbow Jurisprudence* (1996) 12 *SAJHR* 1 also Roux *Legitimating transformation: Political resource allocation in the South African Constitutional Court* in S Gloppen *et al* (eds). *Democratisation and the judiciary: The accountability function of courts in new democracies* (2004) 92.

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LIST OF ABBREVIATIONS

ALR	Adelaide Law Report
BCEA	Basic Conditions of Employment Act
BCLR	Butterworths Constitutional Law Reports
BLLR	Butterworths Labour Law Report
CC	Constitutional Court
CCMA	Commission for Conciliation Mediation and Arbitration
ILJ	Industrial Law Journal
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act 66 of 1995
PAJA	Promotion of Administrative Justice Act
PSA	Public Services Act
PSCBC	Public Service Co-ordinating Bargaining Council
SAJHR	South African Journal of Human Rights
SALJ	South African Law Journal
SCA	Supreme Court of Appeal
SMS	Senior Management Services