**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Reportable

Case no: J1511/15

**PUBLIC SERVANTS ASSOCIATION OF SOUTH AFRICA** — **First Applicant**

**CROUSE, JOHANNES THEODORUS** — **Second Applicant**

and

**MINISTER OF LABOUR** — **First Respondent**

**NTLEKI, MALIXOLE** — **Second Respondent**

**Heard:** 24 August 2015

**Delivered:** 5 October 2015

**Summary:** Application in terms of section 158(1)(h) to review decision of the Minister of Labour removing the second applicant as Registrar of Labour Relations – decision set aside on review and second applicant reinstated as Registrar

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**JUDGMENT**

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**MYBURGH, AJ**

Introduction

[1] On 23 July 2015, the first respondent ("the Minister") revoked the designation of the second applicant ("Mr Crouse") as the Registrar of Labour Relations ("the Registrar"). Together with his union, Mr Crouse has brought a review application, with the principal relief sought being that the Minister's decision should be reviewed and set aside, and that he be reinstated as the Registrar.

[2] At the hearing of this matter on 24 August 2015, an order was granted joining the current acting Registrar as the second respondent.

[3] The structure of this judgment is as follows: (i) the statutory provisions in the LRA[1] relating to the Registrar are analysed; (ii) the relevant factual matrix is sketched; (iii) an analysis of the legal basis of Mr Crouse's case is undertaken; (iv) the preliminary points raised by the Minister are addressed; (v) the principle of legality and legality review is discussed; (vi) the merits of the review application are evaluated; (vii) certain remaining issues are dealt with; and (viii) a summary of my main findings is provided.

The Registrar under the LRA

[4] In terms of the preamble to the LRA, amongst its purposes is to provide for a simplified procedure for the registration of trade unions and employers' organisations, and to provide for their regulation to ensure democratic practices and proper financial control. The office of the Registrar is central to this legislative aspiration.

[5] In terms of section 108(1), the Minister must designate an officer of the Department of Labour ("the department") as the Registrar to perform the functions conferred on the Registrar by or in terms of the LRA. Section 109

[1] Labour Relations Act 66 of 1995. Unless otherwise indicated, all references to sections herein are to the LRA.

sets out certain functions of the Registrar, with subsection (4) providing that the Registrar "must perform" all the other functions conferred on the Registrar by or in terms of the LRA. Amongst the Registrar's other functions are the registration of trade unions and employers' organisations (sections 95-96), the cancellation of their registration (section 106), and the placing of them under administration (section 103A). In terms of section 111(3), any person who is aggrieved by a decision of the Registrar may appeal to this court against that decision.

[6] Given its significance in this matter, the operation of section 103A warrants mention. Section 103A was introduced into the LRA by way of the 2014 amendments, which came into operation on 1 January 2015. Subsection (1) provides that this court may order the appointment of a person to administer a trade union or employers' organisation if: the court is satisfied that it is just and equitable to do so; and either the trade union / employers' organisation has resolved to be placed under administration and applied to court to give effect to the resolution, or the Registrar has applied to court to appoint an administrator. Without limiting the generality of the circumstances under which it will be just and equitable for the court to place a trade union under administration, subsection (2) provides that it may be just and equitable to grant such an order if the trade union materially fails to perform its functions or there is serious mismanagement of the finances of the trade union.

[7] In essence, the appointment of an administrator may be compared to the appointment of a business rescue practitioner in the case of an ailing company. It is a mechanism that can be resorted to before a trade union or employers' organisation is deregistered and wound up, and attempts to avoid this in the interests of all concerned.

[8] For present purposes something should also be said about section 208A. In terms of this section, the Minister may delegate to the DG[2] or other officer of the department any power, function or duty conferred or imposed upon the Minister in terms of the LRA (save for a few exceptions), and may withdraw

[2] Director General.

such a delegation at any time. But it is important to emphasise that the Registrar's powers, functions and duties are not derived from any delegation by the Minister in terms of section 208A. Instead, they are original statutory powers, functions and duties vested in him or her by the LRA.

The factual matrix

[9] CEPPWAWU,[3] an affiliate of COSATU,[4] has 66 000 members and funds of in excess of R4-billion. For some time now, the department together with the Registrar have been seeking to ensure compliance by CEPPWAWU with the provisions of the LRA dealing with the regulation and administration of trade unions. The steps taken in this regard up to that point are set out in a ministerial submission made by the acting DG to the Minister dated 9 May 2014.

[10] On 1 August 2014, and after CEPPWAWU had failed to comply with the agreed "road map", Mr Crouse caused to be published in the Government Gazette a notice of his intention to cancel the registration of the union in terms of section 106. The reasons provided were that the union had failed to comply with the provisions of sections 98, 99 and 100, and had ceased to function in terms of its constitution. The union and interested parties were invited to make written representations as to why the registration should not be cancelled.

[11] Amongst the written representations that were received was a detailed set of representations by Mr Seatlholo, the deputy general secretary of CEPPWAWU. These submissions, which are date stamped 30 September 2014, concluded as follows:

> "In the light of all the material factors detailed above, it is our concerted view, as representatives of the majority of members within CEPPWAWU, that the only meaningful mechanism to salvage the union and secure its future would be to seek the assistance of an administrator in respect of the union."

[3] Chemical, Energy, Paper, Printing, Wood and Allied Workers' Union.

[4] Congress of South African Trade Unions.

[12] On 13 April 2015, Mr Crouse is said to have made the following formal decision ("the decision of 13 April 2015"):

> "In the light of the aforementioned information, it is recommended that the Registrar approach the Labour Court to apply to put the union under administration in terms of section 103A. However if administration fails, or the application is opposed at the Labour Court, then this office will proceed to cancel the registration of the union."

[13] On 24 April 2015, Mr Crouse launched an urgent application in this court to place CEPPWAWU under administration in terms of section 103A, alternatively to wind it up pursuant to section 103 and place it in liquidation ("the CEPPWAWU application"). The application was enrolled for 18 June 2015. In bringing the application, the State Attorney (Johannesburg) acted as Mr Crouse's attorneys of record.

[14] It is not in dispute that Mr Crouse brought the CEPPWAWU application for, *inter alia*, the following reasons: (i) CEPPWAWU had failed to prepare and submit audited financial statements for 2010, 2011, 2012 and 2013 to the Registrar; (ii) the existence of internal conflict and strife amongst elected office bearers which has resulted in litigation amongst them; (iii) the failure to hold a meeting of office bearers and of the national executive committee as required by the union's constitution; (iv) the failure since 2010 by the union to keep records of its income, expenditure, assets and liabilities; and (v) the fact that it is in the interests of justice that the union's funds (of some R4-billion) are safeguarded.

[15] In his founding affidavit, Mr Crouse goes on to state that he seeks to place CEPPWAWU under administration on the basis that it has materially failed to perform its functions and "my suspicions that there might be serious mismanagement of its finances underway to the prejudice of its members". In corroboration of this, Mr Crouse attached a letter from the attorneys of CEPPWAWU Investments (Pty) Ltd, an investment company established for the benefit of CEPPWAWU members. If this letter is anything to go by,

Mr Crouse's concerns about serious financial mismanagement are well founded.

[16] Although the date thereof is not clear from the papers, it is common cause that six office bearers or officials of CEPPWAWU applied to intervene in the CEPPWAWU application and were ultimately joined as respondents ("the intervening parties"). The intervening parties, who include Mr Seatlholo, support the union being placed under administration. (The joinder was effected before 18 June 2015.)

[17] In a letter from the Minister to Mr Crouse dated 5 June 2015 (which was received on 8 June 2015), the Minister recorded the following:

> "It has come to my attention that you have filed papers in the Labour Court of South Africa wherein you seek an order to place … CEPPWAWU under administration. I am deeply concerned that you have not had the courtesy as my designated official in terms of section 108 of the LRA, to brief me on this matter prior to invoking this new provision of the Act. Accordingly, I call on you to suspend the Labour Court application in question until such time that you have briefed me fully on this matter. My PA will liaise with you on the suitable date when you can brief me in this regard."

[18] On Mr Crouse's version (which appears from the annexures to the founding affidavit), in response to this letter from the Minister, he sent an email to the office of the Minister on 9 June 2015, in which he stated that he was willing to meet with the Minister and that he would wait to be advised of the date of the meeting. But no further communication was received from the Minister's office. (See further below.)

[19] Save as aforesaid, it is common cause that Mr Crouse did not formally respond to the Minister's letter of 5 June 2015, and that he did not "suspend" the CEPPWAWU application, which was due to be heard on 18 June 2015.

[20] On 17 June 2015, CEPPWAWU brought an application to postpone the hearing of the CEPPWAWU application – this in circumstances where it had yet to deliver an answering affidavit.

[21] On 18 June 2015, this court (per Lagrange J) granted an order postponing the CEPPWAWU application to 6 August 2015, and setting out a timetable for the filing of affidavits and heads of argument. In terms of the order, CEPPWAWU was required to file its answering affidavit by 9 July 2015, Mr Course was required to file his replying affidavit by 23 July 2015, and all the parties (including the intervening parties) were required to file their heads of argument by 30 July 2015.

[22] On 10 July 2015, the DG addressed a letter to the DDG[5] and Mr Crouse relating to the CEPPWAWU application.

a) With reference to the Minister's letter of 5 June 2015, the DG recorded:

> "I am advised that the office of the Minister attempted to schedule a date as indicated by the Minister; however the Registrar failed to avail himself to brief the Minister. It has come to my attention that the Registrar did not suspend the Labour Court application as instructed by the Minister, instead he ignored the Minister's instruction and went ahead with the application on 18 June 2015. I am advised that the matter was postponed to be heard on 6 August 2015."

b) The DG went on to issue these "further instructions":

> "I am deeply concern[ed] with the manner in which [the] Labour Policy and Industrial Relations Unit, specifically the Registrar handled this matter and ignored the Minister's clear instructions. Therefore your office and the Registrar are instructed to do the following:
>
> - Suspend the Labour Court application … immediately; thereafter advise my office accordingly;

[5] Deputy Director General: Labour Policy and Industrial Relations.

- Avail yourselves to fully brief the Minister and myself on a date, which will be forwarded to you by the personal assistant of the Minister;
- Provide a detailed report in a ministerial submission stipulating reasons why the Minister's instructions were ignored by the Registrar. The submission should reach my office before the close of business on 15 July 2015."

c) Under the heading "important notice", the DG further recorded:

"Please take note further and be advised that:

- Any legal costs and / or any other costs already incurred as the result of this application will be regarded as irregular expenditure and will be recovered from all officials of the Department of Labour involved in this matter;
- Any further costs and / or any other costs related to this matter will not be for the account of the Department of Labour. Our Legal Services Unit has been instructed to advise the State Attorney's office accordingly;
- The Chief Financial Officer [CFO] has also been instructed not to pay any legal costs and / or any other costs related to this application."

[23] Also on 10 July 2015, the DG directed a letter to the CFO reiterating and instructing his office not to pay any legal costs or any other costs related to the CEPPWAWU application, pending further instructions.

[24] On 14 July 2015, Mr Crouse responded in detail to the DG's letter quoted above. For present purposes, the following aspects of Mr Crouse's letter are material.

a) In relation to the statement by the Minister in her letter of 5 June 2015 that he had not had the courtesy to brief her on the matter before launching the CEPPWAWU application, Mr Crouse recorded that this was incorrect. Amongst the reasons given by him were that in the

ministerial submission of 9 May 2014 (see above), the Minister had been fully briefed on the non-compliance of CEPPWAWU and the possible outcome thereof, including that this could result in the union being placed under administration.[6] Further reasons provided by Mr Crouse were that the Minister had herself facilitated a meeting with, *inter alia*, COSATU in an attempt to resolve the impasse,[7] and that she had received written representations on behalf of the majority of the regions of CEPPWAWU, which reflected the conclusion that "the only meaningful mechanism to salvage the union and to secure its future was to appoint an administrator". (It would appear that these representations included those of Mr Seatlholo dealt with above.)

b) In relation to the call by the Minister in her letter of 5 June 2015 for him "to suspend" the CEPPWAWU application, Mr Crouse recorded that: (i) the instruction was ambiguous and difficult to understand; (ii) if "to suspend the application" meant that the application would have had to be withdrawn from the urgent roll and placed on the ordinary court roll, this would be to the detriment of the 66 000 workers, could potentially be regarded as fruitless expenditure, and would cause embarrassment to the department and the Registrar; (iii) there was no direct instruction by the Minister to withdraw the CEPPWAWU application, nor was any reason provided as to why it should be suspended; and (iv) he had responded to the Minister's letter in an email on 9 June 2015 to the effect that he was willing to meet with the Minister and that he would wait to be advised of the date of the meeting, but no further communication was received from the Minister's office.

[6] Para 4.3 of the ministerial submission recorded in part as follows: "The letter stressed that if the road map is not implemented in its entirety by not later than end of May 2014, the department could approach the Labour Court to request that the union be put under administration, or the Registrar will proceed to publish a notice of intention to cancel the registration of the union."

[7] In this regard, the Minister annotated the following comment on the ministerial submission of 9 May 2014: "I have requested a meeting with NOBs [national office bearers] of CEPPWAWU and COSATU president and my office together with acting DDG … ."

c) In relation to the DG's instruction to immediately suspend the CEPPWAWU application, Mr Crouse recorded that this was "with respect a repetition of an unclear instruction", and that "the legal service programme and the state attorney's office are not entirely clear on what this instruction means". He went on to record that it "would in any case be to the detriment of the workers and could encourage ongoing mismanagement of the union by its officials". Furthermore, both the Minister's letter and the DG's letter "do not contain clear legal instructions that can be executed and do not provide reasons for the sudden change of course", and "no valid reason has been provided to this office".

d) With reference to the 13 April 2015 decision, Mr Crouse went on to state that he was "*functus officio* and cannot reverse his decision". As far as he was concerned, the remedy for an aggrieved person was to appeal the decision in terms of section 111.

e) Mr Crouse then set out a detailed explanation as to why he had decided to seek to place CEPPWAWU under administration instead of proceeding with the cancellation of its registration. He went on to state that a withdrawal of the CEPPWAWU application would result in the status *quo* within the union applying, "which is untenable and chaotic". As he put it, this would be tantamount to the department "granting officials of the union a license to continue mismanaging the union", and "condoning the union's non-compliance with the law". In the same vein, Mr Crouse stated that to stop him from proceeding with the application "without a single valid reason" would result in irregular expenditure having been incurred, would "be inexplicable to the public at large and illogical", and "may be interpreted as political interference".

f) Reflecting on the history of the matter, Mr Crouse recorded that he had wanted to cancel the registration of CEPPWAWU in October 2014 already (which would have had more severe implications for the union), and that this could have been done without any intervention by the

Minister's office. According to Mr Crouse, it was at the request of the then acting DDG that he delayed the decision to cancel, and considered the administration option (which was to be signed into law).

g) Having expressed surprise at having been called upon by the DG to brief him on the matter, Mr Crouse recorded the following:

> "In the 20 years of being Registrar he has never been called upon by a [DG] or higher official to brief him / her on any matters of this nature. It is not clear what makes the CEPPWAWU matter different from the other cases that have been dealt with. (Over the past 5 years the Registrar has cancelled the registration of 81 trade unions without involvement from senior management.)"

h) Mr Crouse also took issue with the DG's instructions regarding the issue of costs, stating that they were "unreasonable and contrary to the PFMA"[8].

i) Mr Crouse also reaffirmed that he "will avail himself to further elaborate on any aspect relating to this matter as already indicated in the email to the PA of the Minister of 9 June 2015".

[25] On 15 or 16 July 2015, and as he had been instructed to do, the DDG submitted a ministerial submission to the DG, which was co-signed (and apparently drafted) by Mr Crouse. The purpose of the submission is recorded as being as follows: (i) "to explain to the Minister, in the Registrar's view, the reasons why the Minister's call to suspend the Labour Court application could not be adhered to"; (ii) "to indicate to the Minister that the Registrar by no means ignored the Minister's instructions, but that there was no clear instruction on which the Registrar could act"; and (iii) "to explain to the Minister the implications of not placing CEPPWAWU under administration".

[26] To a large extent this ministerial submission repeats the contents of Mr Crouse's letter to the DG of 14 July 2015 (with those submissions not

[8] Public Finance Management Act 1 of 1999.

being repeated below in the present context). Amongst the additional points made (or materials referred to) in the ministerial submission (which runs to a total of some six pages, excluding annexures) that warrant highlighting are the following.

a) In relation to the contention that Mr Crouse had failed to brief the Minister before launching the CEPPWAWU application, issue is taken with it on the basis that "this statement implies that the Registrar must obtain prior approval from the Minister to execute any of his duties outlined in terms of the LRA".

b) In relation to the contention that the Minister attempted to schedule a date for the briefing after her letter of 5 June 2015 but that Mr Crouse failed to avail himself to brief the Minister, the following is recorded:

> "It should be brought to the attention of the Minister that the Registrar is not aware of any formal request to avail himself for a meeting. The Registrar did however avail himself by email on 9 June 2015 (annexure DD) in response to a request by the Chief of Staff in the Minister's office."

c) The submission also records the following:

> "What makes 'suspension' impossible to execute is the fact that the Registrar has already made the following decision on 13 April 2015 [see above]. The Registrar's decision is *functus officio* and he cannot reverse his decision. The Act prescribes a specific procedure that must be followed once the Registrar has made a decision. Section 111 of the LRA stipulates that any person who is aggrieved by a decision of the Registrar may appeal to the Labour Court against that decision."

d) Having provided an explication of the implications of appointing an administrator to rescue CEPPWAWU, the negative results that the cancellation of the registration of the union would produce, and the

implications of not appointing an administrator or withdrawing the CEPPWAWU application, this additional point is made:

> "The majority of the regions have successfully applied to court to join the application by the Registrar to appoint an administrator … . In the event of the withdrawal it appears that the matter will in any case be heard as the regions have indicated that they are in support of an appointment of an administrator and would be able to proceed with the matter."[9]

e) Importantly, amongst the eight annexures that appear to have been attached to the ministerial submission were Mr Crouse's letter to the DG of 14 July 2015, and a copy of the entire CEPPWAWU application.

[27] Although I deal with the issue in more detail below (there being a dispute of fact here), for present purposes it warrants mention that the ministerial submission contains the following handwritten annotation made (presumably by the DG) in the section reserved for "comments":

> "DG's letter only requires a response as to why the Registrar ignored the Minister's request for a briefing before proceeding."

[28] On 17 July 2015, an email was sent by an official of the department to the State Attorney reading (in part) as follows:

> "We confirm our instruction … that the application must be withdrawn / suspended with immediate effect. We confirm that such an instruction was given due to the fact that a letter from the [DG] to Legal Services mentioned interchangeably both suspension and withdrawal of the application. We further confirm that your office has indicated that the instruction is not clear in that there is no provision in the Court Rules to the effect of a suspension of an application, and if then the instruction is to withdraw the application, that must

[9] As stated above, in terms of section 103A, a trade union can itself resolve to be placed under administration and apply to court to give effect to the resolution. In such an event, the Registrar need not play any role.

> be spelt out. You indicated that a letter will be addressed to the [DG] setting this out."

[29] The letter from the DG to Legal Services mentioned in this email is not part of the papers. The Minister and DG had required Mr Crouse to "suspend" the application in their letters of 5 June 2015 and 10 July 2015, respectively. On the face of this email, the DG had sent a letter to Legal Services requiring the withdrawal / suspension of the application, with the State Attorney having indicated that the meaning of this was unclear, and that one cannot suspend a court application.

[30] On 20 July 2015, the State Attorney responded to the email quoted above in the following terms (in part):

> "I still do not understand the instruction in this matter as you still [say] we must withdraw / suspend the application. We pointed out to you that we cannot suspend an urgent application. We can only withdraw the application. If the instruction to suspend was given prior to the arrangement[s] that were made before the judge, we could perhaps have requested that the matter should be removed from the urgent roll and be placed in (sic) the normal motion court roll. However it is late to suggest that at this stage as you have maintained the urgency of the matter on 18 June 2015. The only option is to withdraw the matter.
>
> During the meeting that we held with you on Wednesday, I informed you that Mr Crouse expressed his intentions to proceed with the application even if it means arguing the matter on his own. He said so in light of the fact that he is the applicant in this matter and also to uphold his role in terms of the [LRA]. In the light of the conflicting instructions that we are receiving from you as well as from Mr Crouse, we have suggested that the other option could be to withdraw as attorneys of record."

[31] Later on 20 July 2015, and in response, the official from the department advised the State Attorney to withdraw as attorneys of record.

[32] On 21 July 2015, the State Attorney formally withdrew as Mr Crouse's attorneys of record. (There is a dispute about whether this was done at the request of the Minister.) In effect, Mr Crouse was thus left with having to pursue the CEPPWAWU application without the benefit of legal representation.

[33] It was in these circumstances that, on 23 July 2015, the Minister revoked Mr Crouse's designation as Registrar on the grounds of "gross insubordination" ("the impugned decision"). The letter addressed by the Minister to Mr Crouse reads as follows:

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

[34] Also on 23 July 2015, the Minister appointed the second respondent (Mr Ntleki) as the acting Registrar.

[35] On 25 July 2015, Mr Crouse caused a letter of demand to be addressed to the Minister, in which he demanded his reinstatement by 27 July 2015.

[36] On 30 July 2015, after no response had been received, Mr Crouse launched the present application on an urgent basis, with the application being enrolled for 4 August 2015.

[37] On 4 August 2015, the matter was postponed to 7 August 2015 – this so as to afford the applicants the opportunity of joining Mr Ntleki.

[38] On 6 August 2015, and in circumstances connected with Mr Crouse's designation as the Registrar having been revoked, the CEPPWAWU application was again postponed. The application is in the process of being case managed.

[39] On 7 August 2015, in circumstances where Mr Crouse's case for urgency was to a large extent based on him having to secure his reinstatement in order to further prosecute the CEPPWAWU application set down for the previous day, the issue of urgency became somewhat moot in the light of the postponement of the CEPPWAWU application. In the circumstances, by agreement between the parties, the matter was postponed to the motion roll on 24 August 2015, and heard that day on an expedited basis. Costs of both 4 and 7 August 2015 were reserved.

The legal basis of Mr Crouse's case

[40] The review application is brought in terms of 158(1)(h) of the LRA, which establishes a "jurisdictional footprint"[10] for this court to review conduct by the State in its capacity as employer "on such grounds as are recognised in law".[11]

[41] The grounds of review relied on by Mr Crouse are certain of those set out in section 6 of PAJA,[12] with the contention being that the impugned decision constituted "administrative action". The specific grounds pleaded by Mr Crouse that are found in section 6 of PAJA include that: the Minister was not authorised to revoke his designation in terms of section 208A; the Minister was biased or reasonably suspected of bias; the action was procedurally unfair; the action was materially influenced by an error of law; the Minister failed to consider materially relevant facts; the action was taken for an ulterior purpose or motive; and the action was unreasonable.



[10] *Building Industry Bargaining Council (Southern and Eastern Cape) v CCMA* [2011] 4 BLLR 330 (LC) at para 13.

[11] In *Hendricks v Overstrand Municipality and another* [2014] 12 BLLR 1170 (LAC) at para 29, the LAC found that "permissible grounds in law" for the purposes of section 158(1)(h) comprise "(i) the grounds listed in PAJA, provided the decision constitutes administrative action; (ii) in terms of the common law ...; or (iii) in accordance with the requirements of the constitutional principle of legality … ."

[12] Promotion of Administrative Justice Act 54 of 2002.

[42] In the alternative, and insofar as the impugned decision does not constitute administrative action, Mr Crouse seeks to review it on the grounds of an infringement of the principle of legality. In this regard, Mr Crouse pleads that the revocation of his designation as the Registrar was unreasonable, irrational, disproportionate and procedurally unfair.

The preliminary points raised by the Minister

[43] In argument, Mr Skosana SC (who appeared together with Mr Mojapelo for the Minister) advanced the following four main preliminary points.

a) Firstly, this court lacks jurisdiction because Mr Crouse's complaint falls within the ambit of section 186(2)(b) (unfair disciplinary action short of dismissal), which must be referred to conciliation and then arbitration by the bargaining council.

b) Secondly, Mr Crouse seeks reinstatement, which is a remedy that can only be obtained in terms of section 193(1) following a finding of an unfair dismissal or unfair labour practice, and Mr Crouse cannot obtain such relief without first following the dispute-settlement mechanism provided for in the LRA.

c) Thirdly, the impugned decision does not constitute administration action, with the result that a review under PAJA is not available to Mr Crouse.

d) Fourthly, even if PAJA does apply, Mr Crouse failed to exhaust "any internal remedy provided for in any other law", with the result that, in terms of section 7(2)(a) of PAJA, this court should refuse to entertain the review application.

*The first preliminary point*

[44] The first preliminary point would have been a good one if Mr Crouse had framed his claim as an unfair labour practice. But instead his claim is based in

administrative law and on the principle of legality, with this court having the jurisdiction to entertain the review in terms of section 158(1)(h). This is a classic case of where the same conduct on the part of an employer may give rise to different causes of action and remedies in law.[13] The fact that Mr Crouse could have constructed his case as an unfair labour practice (but did not), has no bearing on the jurisdiction of this court to entertain an administrative law or legality review.[14]

*The second preliminary point*

[45] The second preliminary point is also without merit effectively on the same basis as the first one. Reinstatement in terms of section 193(1) is a remedy that flows from a finding of an unfair dismissal. Mr Crouse has not brought an unfair dismissal (or labour practice) claim, and does not seek reinstatement in terms of section 193(1).[15] Instead, he seeks such relief as an adjunct to an order setting aside the impugned decision on review on administrative and constitutional law grounds.

*The third preliminary point*

[46] Turning to the third preliminary point, the question is whether the revocation by the Minister of Mr Crouse's designation as the Registrar constitutes "administrative action" as defined in section 1 of PAJA. For present purposes, the relevant portion of the definition is as follows:

> "any decision taken … by … an organ of state, when … exercising a public power or performing a public function in terms of any legislation … which adversely affects the rights of any person and which has a direct, external legal effect."



[13] *Gcaba v Minister for Safety and Security & others* [2009] 12 BLLR 1145 (CC) at para 53.

[14] *Fedlife Assurance Ltd v Wolfaardt* [2001] 12 BLLR 1301 (SCA) at para 27.

[15] *Fedlife Assurance (supra)* at para 27.

[47] In addressing this issue, counsel for both parties relied on the following passage from the Constitutional Court's judgment in *Gcaba*:[16]

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

[48] In *De Villiers*, Van Niekerk J, having referred to the relevant authorities, summed up the considerations relevant to determining whether a particular decision constitutes administrative action as follows:[17]

> "In summary: as a general rule, conduct by the state in its capacity as an employer will generally have no implications or consequences for other citizens, and it will therefore not constitute administrative action. Employment related grievances by state employees must be dealt with in terms of the legislation that gives effect to the right to fair labour practices, or any applicable collective agreements concluded in terms of that legislation. Departures from the general rule are justified in appropriate cases. An assessment must be conducted on a case-by-case basis to determine whether such a departure is warranted. The relevant factors in this determination (following *SARFU*[18]) are the source and nature of the power being exercised (this would ordinarily require a consideration of whether the conduct was rooted in contract or statute …, whether it involves the exercise

[16] *Gcaba (supra)* at para 64.

[17] *De Villiers v Head of Department: Education, Western Cape Province* (2010) 31 *ILJ* 1377 (LC) at para 19.

[18] *President of the Republic of South Africa and Others v South African Football Union and Others* 2000 (1) SA 1 (CC) ("*SARFU*").

> of a public duty, how closely the power is related to the implementation of legislation (as opposed to a policy matter) and the subject-matter of the power). I venture to suggest that the existence of any alternative remedies may also be a relevant consideration - this was a matter that clearly weighed with the court in both *Chirwa* and *Gcaba*, who it will be recalled, were found to have had remedies available to them under the applicable labour legislation."

[49] As appears from the above, *Gcaba* establishes as a general rule that employment issues in the public sector do not constitute administrative action, but acknowledges that the rule is not invariable. One potential exception appears to be the dismissal of high-ranking public servants who hold statutory offices in the public interest.

a) In *Gcaba*, the Constitutional Court commented as follows:

> "The situation might be different where, for example, the appointment or dismissal of the National Commissioner of the SAPS is at stake. This decision is taken by the President as head of the national executive and is of huge public import."[19]

b) Consistent with this, Langa CJ (dissenting) held as follows in *Chirwa*:[20]

> "It is important to note, however, that my reasoning does not entail that dismissals of public employees will never constitute 'administrative action' under PAJA. Where, for example, the person in question is dismissed in terms of a specific legislative provision, or where the dismissal is likely to impact seriously and directly on the public by virtue of the manner in which it is carried out *or by virtue of the class of public employee dismissed*, the requirements of the definition of 'administrative action' may be fulfilled." (Emphasis added.)

c) Further support for this can be found in Hoexter,[21] where the dismissal of the CEO of the Commission for Gender Equality is given as an

[19] *Gcaba (supra)* at para 68, fn 7.

[20] *Chirwa v Transnet Ltd & others* [2008] 2 BLLR 97 (CC) at para 194.

[21] Hoexter *Administrative Law in South Africa* (2nd ed) ("Hoexter") at 218.

example of a case that might still qualify as administrative action post-*Gcaba*.

[50] In two important judgments after *Gcaba*, this court and the LAC have found that certain employment decisions in the public sector do constitute administrative action (and thus departed from the general rule).[22] The judgments underscore the fact that *Gcaba* does not establish an invariable rule.

a) The first is the judgment of Van Niekerk J in *De Villiers* referred to above, in which it was found that a decision in terms of section 14(2) of Employment of Educators Act[23] refusing to reinstate an employee deemed to be dismissed under section 14(1) constituted administrative action.[24] Central to Van Niekerk J's finding of administrative action was that the power enjoyed by the employer to refuse reinstatement was sourced in the statute (and not contract), and that the employee concerned had no alternative remedy.[25]

b) The second important judgment is that of the LAC in *Hendricks*, which dealt with the review of a decision of a presiding officer not to dismiss a senior municipal police official on (in effect) corruption charges. Murphy AJA concluded that:[26]

> "… the decision of the presiding officer, looked at in context, was indeed administrative action within the meaning of PAJA, it being the exercise of a statutory public power or the performance of a public

[22] The LAC did, however, follow *Gcaba* in *Public Servants Association of South Africa obo De Bruyn v Minister of Safety and Security and another* [2012] 9 BLLR 888 (LAC).

[23] Act 76 of 1998.

[24] The judgment was referred to and not overruled by the LAC in *MEC for the Department of Health, Western Cape v Weder; MEC for the Department of Health, Western Cape v Democratic Nursing Association of SA on behalf of Mangena* (2014) 35 *ILJ* 2131 (LAC) ("*Mangena*") at paras 31-32.

[25] *De Villiers (supra)* at paras 19-20.

[26] *Hendricks (supra)* at para 20.

function which has a direct, external legal effect in its consequences for ratepayers and citizens in general."

[51] To my mind, the present matter is one of those exceptional cases where (like in *De Villiers* and *Hendricks*) an employment-related decision in the public sector does constitute administrative action. This for the following reasons.

a) There is no controversy between the parties that the Minister is an organ of state, and that she exercised a public power or performed a public function in terms of the LRA in revoking Mr Crouse's designation as the Registrar (see the text of the definition of "administrative action" quoted above). It will be recalled that in doing so, the Minister expressly relied on section 208A, although she now contends that this was an administrative error and that the correct reference ought to have been section 108 (see further below). Although section 108 does not expressly provide for the revocation of the designation of a person as the Registrar, Mr Skosana submitted that the power of revocation must be read into section 108(1) and that the power of revocation is implied in that section.[27] I am in agreement with these submissions. Consistent with the authorities dealt with above, the fact that Mr Crouse's designation as the Registrar was revoked in terms of a specific statutory provision (as opposed to a contractual provision) is indicative of the decision constituting administrative action.

b) Equally important is the fact that it is by no means clear to me that Mr Crouse has an alternative remedy under the LRA. In terms of section 108(1), the Minister designates the Registrar from amongst the officers of the department. Following his designation being revoked, Mr Crouse thus continues to be an officer of the department and is to be reassigned, with it being common cause that none of his conditions of employment have been altered. While it might appear that he could pursue an unfair demotion dispute in terms of section 186(2)(a), insofar

[27] See *Masetlha v President of the RSA and Another* 2008 (1) SA 566 (CC) at para 68 (dealing with the power to dismiss being an essential corollary of the power to appoint).

as he retains the same grade and level of remuneration, it does not follow that he has been demoted. It seems to me that Mr Crouse's position is roughly comparable to a senior executive whose secondment is recalled, but whose terms and conditions of employment remain intact. Such an employee would not have an unfair demotion claim. In a similar vein, it does not seem to me that Mr Crouse has any claim based on a complaint of unfair disciplinary action short of dismissal in terms of section 186(2)(b). This because in revoking his designation, the Minister did not purport to take disciplinary action against Mr Crouse, with this being borne out by the fact that, according to the Minister's answering affidavit, charges of misconduct are still going to be brought against Mr Crouse.

c) Regarding the public impact requirement set in *Gcaba* (see the emphasised sentence in the quotation in para 47 above), to my mind, it is met given the class of public employee involved. The Registrar occupies an independent office (albeit accountable to the Minister) and performs a critically important function under the LRA in the interests of, *inter alia*, hundreds of thousands of trade union members. In the words of the preamble to the LRA, he is responsible for the regulation of trade unions (and employers' organisations) "to ensure democratic practices and proper financial controls". In the context of labour relations in general, the impact of the removal of the Registrar is of huge public import. The facts of this case give some insight into this. As Mr Nxumalo (who appeared for Mr Crouse) submitted, on a conspectus of the facts, the fate of the CEPPWAWU application, which has implications for 66 000 members, probably lies in Mr Crouse's ability (or otherwise) to review the impugned decision. In all these circumstances, I cannot agree with Mr Skosana that simply because an acting Registrar has been appointed to replace him, the impugned decision affects only Mr Crouse, and has no wider consequences. Quite clearly, a broader constituency is affected.[28]

[28] *Mangena (supra)* at para 30.

d) Reverting to the text of the definition of administrative action, there can be no dispute that the impugned decision "adversely affects the rights" of Mr Crouse, with the remaining issue being whether the decision has "a direct, external legal effect".[29] In *Joseph*, the Constitutional Court endorsed an interpretation that the phrase "serves to emphasise that administrative action impacts directly and immediately on individuals", and went on to find that "a finding that the rights of the applicants were materially and adversely affected for the purposes of s 3 of PAJA would *necessarily* imply that the decision had a 'direct, external legal effect' on the applicants" (emphasis added).[30] On this approach, the requirement in question is met in this case, in that the impugned decision impacted directly and immediately on Mr Crouse and materially and adversely affected his rights under PAJA.

[52] In conclusion, having found that the impugned decision constitutes administrative action (from which it follows that a PAJA review is available to Mr Crouse), the third preliminary point is also dismissed.

*The fourth preliminary point*

[53] Turning now to the fourth preliminary point, when Mr Skosana was pressed to identify precisely what "internal remedy provided for in any law" Mr Crouse ought to have exhausted before approaching this court, he made mention of an internal grievance procedure and possible recourse to the Public Service Commission. I am in agreement with Mr Nxumalo that these vague references (which are not pleaded) are an insufficient basis upon which to sustain the fourth preliminary point, which is accordingly dismissed.



[29] This requirement was not mentioned at all in *Gcaba (supra)*, with the public impact requirement set by it being something different and apparently additional.

[30] *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) at para 27. See also, *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* 2007 (4) SA 395 (CC) at para 70.

The principle of legality and legality review

[54] If I am wrong that the impugned decision constituted administrative action, given that it clearly involved the exercise of a public power, the ground of review of legality can still be invoked by Mr Crouse. The ground stems from the rule of law in section 1(c) of the Constitution.

[55] Recently, in *NDPP*, the SCA described reviews based on the legality principle as follows:[31]

> "The legality principle has by now become well established in our law as an alternative pathway to judicial review[32] where PAJA finds no application. Its underlying constitutional foundation appears, for example, from the following *dictum* by Ngcobo J in *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) … para 49:
>
> > 'The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution.'
>
> As demonstrated by the numerous cases since decided on the basis of the legality principle, the principle acts as a safety net to give the court some degree of control over action that does not qualify as administrative under PAJA, but nonetheless involves the exercise of public power."

[56] As stated by Hoexter, the principle of legality (and legality review) now effectively covers most of the grounds of review in "regular" administrative law as found in PAJA.[33] The following are amongst the primary requirements of the principle of legality.[34]

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[31] *National Director of Public Prosecutions and Others v Freedom under Law* 2014 (4) SA 298 (SCA) at paras 28-29; followed in *Hendricks (supra)* at para 21.

[32] In *Mangena (supra)* at para 33, the LAC described the principle of legality as "a parallel system of review" for action which falls outside of the strict definition of administrative action in PAJA.

[33] Hoexter at 218.

[34] See generally, *Mangena (supra)* at paras 34-35.

a) Firstly, public functionaries are required to act within the powers granted to them by law (i.e. *intra vires*).[35] To this it can be added that functionaries also must not misconstrue their powers.[36]

b) Secondly, the exercise of all public power must be rational, i.e. rationally related to the purpose for which the power was given (otherwise it is arbitrary).[37]

c) Thirdly, the courts developed this concept of rationality requiring the executive and public functionaries to exercise their power for the specific purpose for which it was granted, so that they cannot act arbitrarily, for no other purpose or an ulterior motive.[38]

d) Fourthly, the principle of legality has been expanded by treating procedural fairness as a requirement of rationality.[39]

e) Fifthly, it is a requirement of the principle of legality that reasons must be provided for the impugned decision.[40]

[57] Of these requirements, rationality is the one that is most often invoked in a review based on the principle of legality. From a labour law perspective, the

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[35] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at para 58.

[36] *SARFU (supra)* at para 148.

[37] *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at para 85.

[38] *Gauteng Gambling Board and Another v MEC for Economic Development, Gauteng* 2013 (5) SA 24 (SCA) at para 47.

[39] *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC) at para 34. Hoexter at 123 states as follows: "It is worth pointing out that it is also possible for aspects of procedural fairness to be brought in via the requirement of lawfulness … or indeed for procedural fairness to be acknowledged as a requirement in its own right. Natural justice is, after all, an accepted part of the rule of law."

[40] *Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA) at para 44.

most well-known formulation of the test for rationality is, of course, the *Carephone* test:[41]

> "… is there a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at?"

[58] Rationality does not extend to reasonableness.[42] While there is some overlap between rationality and reasonableness evaluation, the two concepts are conceptually different.[43] Rationality is an element of reasonableness, but reasonableness goes beyond mere rationality, and includes proportionality.[44] A decision that is irrational will be unreasonable, but an unreasonable decision may not necessarily be so because of irrationality.[45] Reasonableness "is a variable but higher standard, which in many cases will call for a more intensive scrutiny of administrative decisions" than rationality.[46]

[59] Although he did not refer to *Carephone*, this passage from the judgment of Van Niekerk J in *De Villiers*, a key judgment on legality review,[47] clearly has shades of *Carephone* about it:[48]

> "In the light of the foregoing, it is evident that the respondent, in dismissing the s 14(2) application, relied on reasons that were fundamentally bad. The respondent's decision not to reinstate the applicant was accordingly irrational in relation to the reasons given, and was based on irrelevant considerations at the expense of relevant ones. Having regard to the full conspectus of

[41] *Carephone (Pty) Ltd v Marcus NO & others* [1998] 11 BLLR 1093 (LAC) at para 37.

[42] *Building Industry Bargaining Council (Southern and Eastern Cape) v CCMA* [2011] 4 BLLR 330 (LC) at para 17.

[43] *Democratic Alliance (supra)* at para 30.

[44] Hoexter at 340.

[45] *Head, Western Cape Education Department and Others v Governing Body, Point High School and Others* 2008 (5) SA 18 (SCA) at para 16.

[46] *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as* Amici Curiae*)* 2006 (2) SA 311 (CC) at para 108.

[47] Although the court found the decision in question to constitute administrative action, in the alternative, Van Niekerk J approached the matter as a legality review.

[48] *De Villiers (supra)* at para 36.

> relevant facts and circumstances, the inference of arbitrariness and irrationality is inescapable. In my view, the respondent's decision to refuse to reinstate the applicant stands to be reviewed and set aside."

[60] Also echoing the *Carephone* test is this conclusion by the LAC in another leading judgment on reviews based on the principle of legality, *Mangena*:[49]

> "In my view, applying the test of legality, insufficient evidence was provided by the appellant as to why the decision to reject the representations made was sufficiently rationally related to the purpose for which that power was given to appellant. In particular, and critical to these disputes, insufficient evidence was provided as to why a continued employment relationship had been rendered intolerable by the conduct of these employees."

[61] In the process of arriving at its conclusion, the LAC referred to this finding by the Constitutional Court in *Democratic Alliance*, where it was found that the failure by a decision-maker to have regard to relevant material may rob the decision of rationality:[50]

> "If in the circumstances of a case, there is a failure to take into account relevant material that failure would constitute part of the means to achieve the purpose for which the power was conferred. And if that failure had an impact on the rationality of the entire process, then the final decision may be rendered irrational and invalid by the irrationality of the process as a whole."

[62] In short, insofar as they attack the rationality of the decision, reviews based on the principle of legality take us back to the *Carephone* test (which was the prevailing law in respect of the review of CCMA arbitration awards up until the judgment of the Constitutional Court in *Sidumo*[51]).



[49] *Mangena (supra)* at para 42.

[50] *Democratic Alliance (supra)* at para 39.

[51] *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC).

The merits of the review application

[63] As often occurs in matters such as this, despite a wide-ranging attack on the impugned decision in the founding affidavit and heads of argument, Mr Nxumalo focussed his efforts more narrowly in oral argument. The main legs of his attack were that the impugned decision was reviewable on the following four grounds.

a) Firstly, the Minister was not authorised by section 208A to revoke Mr Crouse's designation as the Registrar, and committed a material error of law in doing so.

b) Secondly, the instruction issued to Mr Crouse was unlawful because, having brought the CEPPWAWU application in terms of section 103A(1)(c), he was *functus officio* and thus could not suspend the application.

c) Thirdly, the Minister failed to consider relevant material facts in arriving at her decision, namely the ministerial submission of 15/16 July 2015.

d) Fourthly, the Minister unlawfully interfered with or frustrated Mr Crouse's attempt to acquit himself of his statutory function in prosecuting the CEPPWAWU application.

*The first ground of review*

[64] It will be recalled that, in her letter of 23 July 2015, the Minister purported to act in terms of section 208A in revoking Mr Crouse's designation as the Registrar. It is common cause between the parties that this section does not serve as a legal basis for the impugned decision. This because, as explained above, section 208A deals with the Minister's powers of delegation and the withdrawal thereof, but this does not relate to the Registrar, whose powers are original statutory powers vested in him or her by the LRA (as opposed to being delegated powers).

[65] In response to this ground of review, Mr Skosana submitted that notwithstanding the error, the Minister had the power to revoke Mr Crouse's appointment in terms of section 108, which Mr Crouse accepts (see para 51(a) above). Building on this, Mr Skosana submitted that the fact that the Minister relied on the wrong section did not serve to invalidate the decision. For this submission, Mr Skosana relied on *Latib*,[52] in which the then Supreme Court held that "provided … the enabling statute grants the power to make the proclamation, the fact that it is said to be made under the wrong section will not invalidate the notice". It seems to me that *Latib* remains good law, provided that the decision-maker did not deliberately (i.e. consciously) act in terms of the particular section, in which case he or she will be bound thereby. But if the wrong reference was "the result of a simple slip up", then the mistake is immaterial.[53]

[66] The question then is whether the Minister consciously opted to rely on section 208A or whether she made a slip up in referring to it instead of to section 108. In her answering affidavit, the Minister states that the incorrect reference "was an administrative error". There exists no basis upon which I can reject this explanation. In the result, the first ground of review fails.

*The second ground of review*

[67] As set out above, Mr Crouse has adopted the position that having lodged the CEPPWAWU application in terms of section 103A(1)(c), he was *functus officio.*[54] Flowing from this, he contends that given that he was *functus officio*,

[52] *Latib v Administrator, Transvaal* 1969 (3) SA 186 (T) at 190J-191A.

[53] *Howick District Landowners' Association v Umngeni Municipality and Others* 2007 (1) SA 206 (SCA) at para 23; *Minister of Education v Harris* 2001 (4) SA 1297 (CC) at paras 17-18.

[54] Baxter *Administrative Law* at 372 says this about the *functus officio* doctrine: "Indeed, effective daily administration is inconceivable without the continuous exercise and re-exercise of statutory powers and the reversal of decisions previously made. On the other hand, where the interests of private individuals are affected we are entitled to rely upon decisions of public authorities and intolerable uncertainty would result if these could be reversed at any moment. Thus when an administrative official has made a decision which bears directly upon an individual's interests, it is said that the decision-maker has discharged his office or is *functus officio*."

the instruction to suspend the application was unlawful, and consequently that his removal as the Registrar for refusing to obey the instruction is reviewable. According to Mr Crouse, if the Minister wanted to suspend the application, she ought to have appealed against his decision to bring it – this in terms of section 111(3).

[68] To my mind, this ground of review is tied up with what the Minister actually meant by her instruction that Mr Crouse should "suspend the … application until such time that you have briefed me fully on this matter". Although I can certainly appreciate the difficulties that the use of the term "suspend" caused in the context of the fact that one was dealing with an urgent application that was before court, it seems to me that what was probably meant was that the matter should be postponed pending the Minister being briefed. From a practical perspective, this probably meant that the urgent application would have had to be removed from the urgent roll on 18 June 2015 and postponed *sine die.* During the course of the debate in court, I understood Mr Nxumalo to accept this interpretation (it having been mooted by Mr Crouse himself in his letter to the DG and in the ministerial submission.)

[69] If Mr Crouse had been instructed by the Minister to withdraw the CEPPWAWU application, I can appreciate that it might be arguable that he was *functus officio* in his decision to lodge the application in terms of section 103A(1)(c) and accordingly that the instruction was unlawful (although I need make no finding on this). But, to my mind, this cannot extend to an instruction to postpone the application pending the Minister being briefed. Put differently, Mr Crouse's decision to enrol the matter for hearing on 18 June 2015 was not an administrative decision that attracts the doctrine of *functus officio* (as Mr Nxumalo was forced to argue). Leaving aside whether it was desirable to do so, there was, in my view, thus no legal impediment to Mr Crouse seeking a postponement of the application on 18 June 2015, which the court would then have had to decide on. (Ironically, the application was in any event postponed on that day, at the instance of CEPPWAWU.) In the result, the second ground of review also fails.

*The third ground of review*

[70] For present purposes, the following facts and circumstances relating to the ministerial submission of 15 / 16 July 2015 ("the ministerial submission") are of particular relevance.

a) In his letter of 10 July 2015, the DG instructed the DDG and Mr Crouse to "provide a detailed report in a ministerial submission stipulating reasons why the Minister's instructions were ignored by the Registrar", and advised that this was to be provided by 15 July 2015.

b) The Minister's instructions in question were those set out in her letter to Mr Crouse of 5 June 2015, namely that Mr Crouse "suspend the Labour Court application until such time that you have briefed me fully on this matter".

c) The ministerial submission was submitted by the DDG and Mr Crouse on 15 / 16 July 2015.

d) The ministerial submission contains the following handwritten annotation (presumably by the DG):

> "DG's letter only requires a response as to why the registrar ignored the minister's request for a briefing before proceeding."

e) Mr Crouse states as follows in his founding affidavit with apparent reference to the above-mentioned annotation:

> "This [ministerial] submission was not sent through to the Minister but was returned by the acting [DG] as the briefing submission appears to go beyond the request by the DG to only explain why the Minister's instruction was ignored."

f) In her answering affidavit, the Minister denies these allegations (but provides no particularity). On the basis of the Minister's denial, it

appears to be her case that she did in fact receive the ministerial submission. In circumstances where the (acting) DG did not file a confirmatory affidavit, I accept Mr Crouse's version that the ministerial submission was later returned to him by the DG. And as appears below, the Minister, in effect, concurs with the content of the handwritten annotation made on the ministerial submission.

g) The Minister goes on to say this about the ministerial submission:

> "The second applicant [Mr Crouse] was given an opportunity by the [DG] to state the reasons why [he] failed to halt the process and to brief me. *Although he filed a ministerial submission, he did not deal with these two issues*" (emphasis added).

h) Along the same lines, the Minister states as follows:

> "The [ministerial] submission sought to explain why the Registrar decided to bring the court proceedings against CEPPWAWU *but failed to explain why my letter was ignored* by [Mr Crouse]" (emphasis added).

[71] The allegation by the Minister in the emphasised lines in paras 70(g) and (h) above are wrong and unjustifiable. The ministerial submission addresses Mr Crouse's explanation for not having suspended the CEPPWAWU application, and not having briefed the Minister as per her letter of 5 June 2015. Reference is made in this regard to paras 24(b), (c), (d) and (e),[55] and paras 26(a), (b) and (c) above. The contents present as a detailed, cogent and sincere explanation by Mr Crouse.

[72] Quite what the objection to the ministerial submission was that caused it to be returned is difficult to understand. From what the Minister says (see para 70(h) above), it seems that this was done because it details why Mr Crouse decided to bring the CEPPWAWU application. But this is highly irrational

[55] As mentioned, the contents of these paragraphs dealing with Mr Crouse's letter to the DG on 14 July 2015 were repeated in the ministerial submission.

because the motivation for bringing the application was interlinked with the explanation that Mr Crouse was asked to provide and provided. On the face of it, the length of the ministerial submission and the fact that it contained what was (wrongly) considered to be extraneous material, caused the Minister (and the DG) not to apply her mind to the material content of the ministerial submission, which contained Mr Crouse's response to the questions posed of him. In effect, while the ministerial submission was called for and was no doubt intended to serve as the basis for the Minister's decision-making in relation to Mr Crouse, it was disregarded.

[73] What then are the implications of the Minister's failure to consider the ministerial submission (in its material respects) before making the impugned decision? To my mind, they are potentially twofold. The first is to potentially render the impugned decision both unreasonable (a PAJA ground of review) and irrational (a PAJA and principle of legality ground of review). The second is to potentially render the impugned decision procedurally unfair (a PAJA and principle of legality ground of review).

[74] Dealing first with the issue of unreasonableness,[56] the LAC has often found that the failure to consider relevant facts will typically result in an unreasonable decision.[57] Recently, in *Mofokeng*,[58] the LAC held that this mode of analysis should be undertaken in the present context:

a) the first enquiry is whether the facts ignored were *material*, which will be the case if a consideration of them would (on the probabilities) have caused the decision-maker to come to a different result;

[56] The test for reasonableness was set as follows in *Sidumo (supra)* at para 110: "Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?"

[57] See for example: *First National Bank - A division of First Bank Ltd v Language & others* (2013) 34 *ILJ* 3103 (LAC) at para 17; *Gaga v Anglo Platinum Ltd & others* [2012] 3 BLLR 285 (LAC) at para 44; *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2014] 1 BLLR 20 (LAC) at para 21.

[58] *Head of the Department of Education v Mofokeng* [2015] 1 BLLR 50 (LAC) at para 33.

b) if this is established, the (objectively wrong) result arrived at by the decision-maker is *prima facie* unreasonable;

c) a second enquiry must then be embarked upon – it being whether there exists a basis in the evidence overall to displace the *prima facie* case of unreasonableness; and

d) if the answer to this enquiry is in the negative, then the decision stands to be set aside on review on the grounds of unreasonableness (and *vice versa*).

[75] It will be recalled that the Minister revoked Mr Crouse's designation as the Registrar "on the grounds of gross insubordination" on his part. Following the mode of analysis set out above, to my mind, if the Minister had applied her mind to the facts and considerations detailed in the ministerial submission in a fair and objective manner, this would (on the probabilities) have caused her to come to a different decision. The facts ignored by the Minister were thus material and the decision *prima facie* unreasonable.

[76] This is so because, as I have already found, the ministerial submission presents as a detailed, cogent and sincere explanation by Mr Crouse. Without intending to re-traverse the contents, I highlight by way of example the following series of facts mentioned in the ministerial submission that would surely have had a material impact on the Minister's decision:

a) the fact that Mr Crouse considered that the Minister had been sufficiently apprised of the matter;

b) the fact that, according to Mr Crouse, he availed himself for a meeting with the Minister immediately upon having received her letter of 5 June 2015, but no meeting was set up by her office;

c) the fact that, according to Mr Crouse, he was not aware of any formal request to avail himself for a meeting with the Minister;

d) the fact that Mr Crouse had never previously (in 20 years) been required to brief the Minister, and did not consider that he was under an obligation to do so;

e) the fact that the use of the term “suspend” caused confusion, even in the mind of the State Attorney;

f) the fact that Mr Crouse considered himself *functus officio* (which was a critically important fact);

g) the fact that Mr Crouse was motivated by the belief that he was acting in the best interests of 66 000 CEPPWAWU members and acquitting himself of his statutory duties;

h) the fact that the majority of the regions of CEPPWAWU had successfully joined the application to have the union placed under administration;

i) the fact that Mr Crouse considered that the suspension of the CEPPWAWU application would result in wasteful expenditure having been incurred; and

j) the fact that Mr Crouse indicated a repeated willingness to meet with the Minister to discuss the matter.

[77] Turning to the next enquiry, to my mind, there exists no basis in the evidence overall to displace this *prima facie* case of unreasonableness, with the result that the decision stands to be struck down as unreasonable. In short, in my view, on a proper consideration of the facts, a reasonable decision-maker would not have concluded that Mr Crouse was guilty of gross insubordination, such as to warrant his removal as the Registrar. Accordingly, I find the impugned decision to have been unreasonable and thus liable to review.

[78] Insofar as the impugned decision does not constitute administrative action with the result that PAJA does not apply, I am of the view that the failure to

consider the ministerial submission renders the impugned decision irrational and thus liable to legality review. Reference is made in this regard to the quotations from *De Villiers*, *Mangena* and *Democratic Alliance* in paras 59-61 above, which I consider to be on all fours with this matter (read *mutatis mutandis*). In short, the Minister's failure to have regard to relevant material robs the impugned decision of rationality, and is reviewable on this basis.

[79] Turning to the issue of procedural unfairness, while Mr Nxumalo did not pursue in argument the pleaded case that Mr Crouse had not been afforded a hearing before his designation as the Registrar was revoked (this in circumstances where there had been an exchange of correspondence), his attack on the Minister's failure to consider the ministerial submission cannot be divorced from the issue of procedural fairness. The disregarding of the ministerial submission (containing Mr Crouse's explanation) by the Minister constitutes an act of procedural unfairness, and renders the decision liable to review either under PAJA or on the grounds of a breach of the principle of legality.

*The fourth ground of review*

[80] In terms of this ground of review, Mr Crouse contends that the Minister sought to unlawfully interfere with or frustrate his attempt to acquit himself of his statutory function in prosecuting the CEPPWAWU application (for an ulterior motive or purpose). In her answering affidavit, the Minster denies these allegations and explains why she considered it necessary to suspend the application pending receipt of a full briefing. No replying affidavit was delivered by Mr Crouse. In the light of the *Plascon Evans* rule,[59] I hold that this ground of review fails.

<u>The remaining issues</u>

[59] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-635B.

[81] As mentioned at the outset, the acting Registrar (Mr Ntleki) has been joined as a party to these proceedings. Further hereto, the applicants seek to also review and set aside his appointment, principally on the basis that the LRA does not provide for the appointment of an acting Registrar (as opposed to deputy Registrars who are already in place). While it seems to me that it was prudent to join Mr Ntleki as he clearly has a material interest in the outcome of these proceedings, I do not consider it necessary to decide on the challenge to his appointment. This in circumstances where it is my intention to order the reinstatement of Mr Crouse as the Registrar, from which it must follow that Mr Ntleki's acting appointment will terminate.

[82] During the hearing, Mr Skosana contended that it would be inappropriate to order the reinstatement of Mr Crouse as the Registrar, as this would be tantamount to appointing him as the Registrar for life. There is no merit in this, as the order would not prohibit lawful termination in the future.

[83] Regarding the issue of costs, Mr Skosana submitted that if I were inclined to find against the Minister, costs should not include the costs of 4 and 7 August 2015, alternatively, should not include the costs of 7 August 2015. I can find no basis to exclude the costs of 4 August 2015, as it was appropriate for the application to have been brought as a matter of urgency. I do, however, agree that it would be inappropriate to grant costs against the Minister in respect of 7 August 2015, as on that day the parties engaged in a consensual process of mapping out an agreed timetable for the final determination of the matter.

In summary

[84] In summary, I have found that: (i) the impugned decision constitutes administrative action and that a PAJA review is thus available to Mr Crouse; alternatively, the impugned decision constitutes the exercise of a public power and is subject to legality review; (ii) in arriving at the impugned decision, the Minister ignored materially relevant facts, namely the ministerial submission of 15/16 July 2015; (iii) the consequence of this is that the impugned decision was unreasonable, alternatively irrational; and procedurally unfair; and (iv) the

impugned decision thus falls to be set aside on review, and Mr Crouse reinstated into the position of the Registrar of Labour Relations.

Order

[85] In the premises, the following order is made:

1. The decision of the first respondent on 23 July 2015 to revoke the designation of the second applicant as the Registrar of Labour Relations is reviewed and set aside;

2. The first respondent is directed to immediately reinstate the second applicant as the Registrar of Labour Relations;

3. The first respondent shall pay the costs, excluding the costs of 7 August 2015.

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**Myburgh, AJ**

Acting Judge of the Labour Court of South Africa

**APPEARANCES:**

On behalf of the applicants: Adv APS Nxumalo (instructed by Thabang Ntshebe Attorneys)

On behalf of the respondents: Adv DT Skosana SC and Adv MM Mojapelo (instructed by the State Attorney)