THE POSITION OF MAGISTRATES IN TERMS OF SOUTH AFRICAN LABOUR LAW

by

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ABSTRACT

The fundamental pillar any democratic society is founded on is the impartiality of the judiciary. The judiciary should exercise their responsibilities impartially without fear, favour and prejudice. The concept of an independent judiciary solely rests on the doctrine of separation of powers and in South Africa this is of the utmost importance.

The issue of whether magistrates are considered to be employees in terms of the Labour Relations Act is pivotal to the discussion of this dissertation. It investigates the question whether they employees since measures are not put into place to conclusively clarify whether or not magistrates should be employees in terms of the Labour Relations Act.

This dissertation will therefore investigate whether or not magistrates do in fact have the power to utilise labour law remedies and what other remedies there will be entitled to pursue.

There is no clear distinct answer to the question posed but inferences are made from research indicating why the independence of the judiciary should not allow for magistrates to be considered as employees.

The contract of employment and the existence of an employment relationship will clarify why on the face of it magistrates should be considered as employees but why the independence of the judiciary serves a greater purpose.

This dissertation concludes by making recommendations as to how the issue of grievances of magistrates can be made appropriate through the use of a Code of Conduct working hand in hand with the Magistrates Act.

LIST OF ABBREVIATIONS

CCMA	Commission for Conciliation Mediation and Arbitration
COIDA	Compensation for Occupational Injuries and Diseases Act
JA	Judge of Appeal
MEC	Member of the Executive Council
PDA	Protected Disclosures Act
PSA	Public Services Act
LRA	Labour Relations Act

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CHAPTER 1
THE EMPLOYER-EMPLOYEE RELATIONSHIP

1.1 Introduction and problem statement

The question whether magistrates are employees in terms of the Labour Relations Act[1] (LRA) has never been answered conclusively. They are not specifically excluded from the definition of 'employee'[2] or from the scope of protection under the LRA[3] and yet there is uncertainty around their status as employees as is evident from the matter of *President of South Africa & others v Reinecke*[4] *(Reinecke).* In this matter the Supreme Court of Appeal failed to clarify whether they qualify as employees and at the same time held they are not altogether without protection. The facts of the case as well as the reasoning of the court are discussed in detail in Chapter 2 below.

In summary, *Reinecke* was appointed as a relief magistrate for the district of Germiston in 1996. In October 2000 the Magistrates Commission advertised a number of posts for magistrates throughout the country including one at Randburg described as a 'magistrate (relief)'. *Reinecke* applied for this post and made it clear at the interview process that he did not want the post if it meant that he would only be performing relief duties in Gauteng. He was then appointed as a magistrate in Randburg on 10 May 2001 and on 2 January 2002 he resigned giving a month's notice. He alleged that his resignation was due to discrimination and victimisation by the Chief Magistrate (Mr Booi) who made his working environment intolerable. He claimed that this was a constructive dismissal which also amounted to a repudiation of his employment contract by his employer which he accepted by resigning.

[1] 66 of 1995.
[2] s 213 of the Labour Relations Act defines an 'employee' as any person, excluding and independent contractor, who works for another person or for the State and who receives or is entitled to receive any *remuneration*; and any other person who in any manner assists in carrying on or conducting the business of the employer.
[3] Members of the South African National Defence Force and Members of the State Security Agency are excluded from the scope of protection of the Labour Relations Act and Basic Conditions of Employment Act 55 75 of 1997 in terms of section 2 of the Labour Relations Act 66 of 1995, as substituted by section 53 of the General Intelligence Laws Amendment Act 11 of 2013.
[4] 2014 3 SA 205 (SCA).

Reinecke initially brought his claim before the Commission for Conciliation Mediation and Arbitration (CCMA) but later abandoned this forum as it was held in *L D M du Plessis*[5] that magistrates are not employees. He then proceeded with a case to the High Court based on breach of contract, wherein he was awarded a large amount of contractual damages. The matter was then referred to the Supreme Court of Appeal on the basis that no contract of employment existed as alleged by *Reinecke*. This was due to the fact that he was a judicial officer occupying a constitutional and statutory office. The Supreme Court of Appeal failed to address the issue whether magistrates are employees or not albeit that the LRA has extensive scope for application. The Supreme Court of Appeal instead focussed only on the position of magistrates during the period between 1996 and 2002 and held that nothing in the judgement affects the constitutional position of magistrates as part of the judiciary and judicial authority of our country.

1.2 Historical development

Historically the employment relationship has distinct features and can be described as follows:

> "*In the typical case, the servant devotes his full time to the master's business works at a set pace, normally under the master's control, during regular hours, either for a fixed length of time, or probably more usually for an indefinite period. He is normally remunerated by a wage or salary, and is entitled to holidays during which he is paid. The master owes certain duties to the servant and the servant equally owes duties to the master, most if not all of which arise out of the express or implied terms of the contract".*[6]

An employee in the typical sense would be someone that works for another. In order to understand this more fully the essence of the relationship has some features to make that relationship distinctive encompassing some form of control, integration in a

[5] CCMA case no GA 26670 (C) unreported. See discussion in Chapter 2 below.
[6] Atiyah *Vicarious Liability in the Law of Torts* (1967) 36.

specific organisation as well as subordination.[7] An employee must be under an obligation to perform work for another and if this is not the case the employment relationship will cease to exist as the obligation to work creates an idea of a contract of service.[8] Control by an employer over an employee is a key element to the employment relationship which relates not only to the manner of control but the manner in which the control is exercised.[9]

Control over the employee was seen as the main determining factor to determine whether an employment relationship existed, until the decision in *Smit v Workmen's Compensation Commissioner*[10] where the court had to deal with whether an insurance agent was an employee - and the Appellate Division indicated that he was not. What is of relevance in this case is the analysis of the nature of the employment relationship. The court highlighted the fact that the purpose of a contract of service is the execution of personal services by the employee to the employer. The services or the labour as such is the objective of the employment contract.[11]

This differs from the objective of the contract of work[12] (independent contractor contract) which is the presentation of certain specified work or the assembly of a certain specified result. It is the product or the result of the labour which is the purpose of the contract of work.[13] Therefore the court should characterize the employment relationship on the basis of the underlying reality between the parties.

The common law indicates that the identity of the parties and the nature of their relationship rest solely on the contract that is concluded between them.[14] In the interest of fairness it is necessary to elevate substance over form to identify the true nature of the employment relationship.[15] This reflects a clear indication that the court

[7] Brassey "The nature of employment" 1990 *ILJ* 889.
[8] Ibid 903.
[9] Ibid 907.
[10] 1979 1 SA 51 (A).
[11] In Roman-Dutch law referred to as the *locatio conductio operarum* (*Colonial Mutual Life Assurance Society v MacDonald* 1931 AD 412 par 56D-E.)
[12] In Roman-Dutch law referred to as the *locatio conductio operis* (n 11 par 57C-D.)
[13] *Smit v Workmen's Compensation Commissioner* (n 10) par 61A-B.
[14] *CMS Support Services (Pty) Ltd v Briggs* 1998 19 271 (LAC) 278.
[15] Cohen "Placing substance over form- identifying the true parties to an employment relations" 2008 *ILJ* 889.

should characterize the employment relationship on the basis of the underlying reality between the parties.[16]

1.3 The Constitution and classification of employees

Section 23 of the Constitution of the Republic of South Africa 1996 (The Constitution) guarantees "everyone" the right to fair labour practices. The scope of this provision has been shaped by many statutory instruments, judicial interpretation, contract of employment and public policy as to include members of the South African Police Service, public servants, school teachers and university lecturers, who have all been brought under the protective reaches of South Africa's primary labour statues.

When addressing the issue of an employee and looking closely at the employment relationship a distinction must be drawn from a contract that has unlawful terms, rendering a contract void *ab initio*[17] and a contract of employment that is legally enforceable.[18] The matter of *Discovery Health Limited v CCMA*[19] dealt with the termination of a foreigner's employment when the company had realised that he did not have a valid work permit. The Labour Court confirmed that the definition of "employee" does not solely depend on a contract that is recognised in terms of the common law as valid and enforceable.

The court found that the definition of "employee" in section 213 of the LRA is not necessarily rooted in a contract of employment. It was reiterated that a person who renders work on a basis other than what is recognised as employment in terms of the common law may be an employee for purposes of the definition. Van Niekerk J stated the following:

[16] Benjamin "An accident of history: who is (and who should be) an employee under South African labour law" 2004 *ILJ* 797.
[17] A contract is *void ab initio* when a contract is invalid from the outset, effectively there is no contract to terminate as it is unlawful and against public policy.
[18] Van Niekerk et al *Law@work* (2015) 78.
[19] 2008 *ILJ* 1480 (LC).

> *"A contract of employment is not the sole ticket for admission into the golden circle reserved for "employees", the fact that the contract was contractually invalid only because he was employed in breach of section 38(1) of the Immigration Act did not automatically disqualify him from that status".*[20]

The court in this matter found that the contract of employment was valid and that the purpose of the Immigration Act[21] was to punish the employer or person who employs illegal immigrants.[22]

In *Kylie v CCMA*[23] the court did not reach the same conclusion as the applicant was a prostitute. Although the contract is not valid and enforceable due to the nature of employment, the applicant could not rely on protection under labour legislation as the court cannot encourage illegal activity but, based on public policy prostitutes are entitled to protection in terms of section 23 of the Constitution.[24]

The identification of an employee is assisted by the rebuttable presumption in section 200A of the LRA that characterises determining factors that are indicative of an employment relationship. An employer however is not specifically defined in the LRA, but by using the definition of employee the parallel can apply to an employer in a sense that an employer is any person who employs or provides work for an employee and remunerates him or her for such services or permits such employee to assist him or her for such services or permits such employee to assist him or her in the carrying on or conducting of his business.[25]

The rights and interests of an employee is safeguarded by legislation put in place for employees to assert their rights that flows from legislation. All that an employee is required to secure legislative protection, is to demonstrate the existence of an employment relationship. On the face of it, it seems an easy task. However taking into account that we have disguised employment relationships as well as complicated

[20] *Discovery Health Limited v CCMA* (n 19) par 49.
[21] 13 of 2002.
[22] (n 19) par 29.
[23] 2010 7 BLLR 705 (LAC).
[24] *Kylie v CCMA* (n 23) par 54.
[25] Cohen (n 15) 864.

working relationships in our labour market the identification of parties to the employment relationship is an extremely difficult.[26]

Bringing workers within the realm of labour law protection has also been apparent in situations where administrative and labour law overlap.[27] In *Gcaba v Minister for Safety & Security & Others*[28] the Constitutional Court reiterated that it is preferred that labour disputes should be resolved by means of tailor-made labour law remedies rather than by relying on administrative law remedies.[29]

In *Old Mututual Life Assurance Co SA Ltd v Gumbi*[30] the Supreme Court of Appeal held that the common-law contract of employment had been developed in accordance with the Constitution to include the right to a pre-dismissal hearing. Following this decision in *Boxer Superstores Mthatha & others v Mbenya*[31]the court confirmed this decision and went further by finding that the High Court could grant declaratory relief to find that a disciplinary hearing conducted in breach of an employee's employment contract was unlawful and that if the employer wished to proceed further, it would have to hold a further enquiry. Both these cases were brought by persons who were employees and were entitled to protection in terms of the LRA.

However in *Murray v Minister of Defence*[32] *(Murray)* a military policeman who resigned from the navy in December 1997 issued a summons in the High Court claiming R2, 97 million for lost income as a result of constructive dismissal.[33] The alleged constructive dismissal was a result of conflict between members of his unit while holding a position in the Simonstown military police station as a senior policeman.[34] The basis for claim being founded as a constructive dismissal was due to the grievances that he had experienced during his employment. It encompassed him being subjected to an investigation conducted by a board of enquiry which he believed was continuously

[26] Benjamin (n 16) 794-795; Cohen (n 15) 876-877.
[27] *Chirwa v Transnet* 2008 4 SA 367 (CC).
[28] 2010 1 SA 238 (CC); 2009 12 BLLR 1145 (CC).
[29] *Gcaba v Minister for Safety & Security & Others* (n 28) par 29-57.
[30] 2007 8 BLLR 699 (SCA).
[31] 2007 8 BLLR 693 (SCA).
[32] 2008 6 BLLR 513 (SCA).
[33] *Murray v Minster of Defence* (n 32) par 4.
[34] (n 32) par 2-3.

delayed and executed arbitrarily without him being experienced in relation to his rights.[35] He further indicated that as an employee of the South African National Defence Force he had no disciplinary record.

He stated that he was removed from his post as senior policeman in Simonstown and then placed in a position where he had been without a desk and was not given any task or function that was consistent with his rank as a senior policeman and was further not given reasons for the above mentioned actions and according to *Murray*, rendered continued employment intolerable.[36] The claim was dismissed by the High Court on the basis that employment relationship had not broken down irretrievably in that he failed to prove that any of the above incidents mentioned above triggered a resignation.[37]

The matter went on appeal to the Supreme Court of Appeal where the court reiterated, that the LRA does not grant protection to members of the South African National Defence Force.[38] This meant that the broad scope for protection did not cover Murray in his employment with the South African National Defence Force. The court however indicated that the LRA is a derivative of section 23 of the Constitution in that it provides that "everyone has the right to fair labour practices" which makes provision for members of the defence force to be included.[39] *Murray* was therefore entitled to rely directly on this right as well the right to dignity[40] which the court viewed as being closely associated with the right to fair labour practices.[41]

Murray contains the broadest statement of the impact of the Constitution on the contract of employment where Cameron JA stated the following:

[35] *Murray v Minister of Defence* (n 32) par 3.
[36] (n 32) par 3-4.
[37] *Murray v Minister of Defence* case no 8985/98 (C) (unreported).
[38] (n 3).
[39] As applied in *South African National Defence Union V Minister of Defence* 1999 4 SA 469 (CC) and *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC).
[40] s 10 of the Constitution stipulates that "Everyone has inherent dignity and the right to have their dignity respected and protected".
[41] (n 32) par 5.

"However it is in my view best to understand the impact of these rights on this case through the constitutional development of the common-law contract of employment. This contract has always imposed mutual obligations of confidence and trust between employer and employee. Developed as it must be to promote the spirit, purport and objects of the Bill of Rights, the common law of employment must be held to impose on all employees- even those the LRA does not cover".[42]

Cameron JA went on to discuss that in South African law, constructive dismissal represents a victory of substance over form.[43] This means that when an employee resigns, as a result of the employer's conduct, the employer remains responsible for the consequences.[44] This means that there is an implied term[45] that is read into any contract of employment in terms of which an employer would not without reasonable and proper cause conduct itself in such a manner that is likely to destroy or damage the relationship between an employer and employee.[46]

If this implied term of the contract is breached it would amount to a contractual repudiation which would justify an employee resigning and being entitled to claim compensation for the dismissal as a result thereof.[47] The court therefore held that the constitutional guarantee of the right to fair labour practices extends to employees not covered in terms of the LRA. *Murray* therefore fell within this bracket and was essentially entitled to claim damages for his constructive dismissal.

In *State Information and Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & Others*[48] the Labour Appeal Court concluded that the

[42] *Murray v Minister of Defence* (n 32) par 5.
[43] (n 32) par 8.
[44] (n 32) par 8.
[45] See Freedland *The Personal Employment Contract* (2003) 129-194 in which he refers to the mutuality and reciprocity as framework for interpreting contracts of employment. He indicates that the principle of care and co-operation must be used to oblige parties, to work together to fulfil each other's interests. This he believes can be achieved outside the scope of the common law by making use of the "officious bystander test" where the courts evaluate the expectations of the parties at the time of the dispute as opposed to the expectations at the conclusion of the contract.
[46] (n 32) par 8.
[47] (n 32) par 8.
[48] 2008 29 *ILJ* 2234 (LAC).

existence of an employment relationship (rather than a contract of employment) should be the determinative factor regarding the protection afforded by labour law.[49] The question before the court in this matter was what was the nature of the contract and who was the employer. The court found that the substance of the employment relationship was crucial as opposed to the legal form and the appeal was consequently dismissed.

From these cases it is evident that the courts are willing to extend protection to workers beyond the mere scope of the LRA or employment relationship. However this approach has not been accepted without criticism. Professor Rochelle Le Roux also commented on the diverse forms in which labour law presents itself in the economy. She indicated that using the contract of employment as the basis for the employment relationship is relatively easy.

However, due to the new and diverse forms of work that is available in the country the constant reliance on the contract of employment will render labour law less relevant.[50] This statement reflects that the statutory definition for 'employee', does not provide a framework for modern work.[51] This suggests that we need to take a diverse approach when dealing with labour legislation and shift away from the sole concept of the contract of employment.[52]

1.4 The State as the employer

The relevance of the State as an employer is important due to the fact that *Reinecke* brought a claim against the President of South Africa (the President) and the Minister of Justice and Constitutional Development (the Minister) for damages founded on the repudiation of a contract of employment giving rise to financial loss in the form of loss

[49] *Kylie v Commission for Conciliation Mediation & Arbitration & Others* (n 23) and *Discovery Health v Commission for Conciliation Mediation & Arbitration* (n 19).
[50] Le Roux "The meaning of worker and the road to diversification: reflecting on Discovery, Sita, and Kylie" 2009 *ILJ* 49.
[51] Le Roux (n 50) 57.
[52] (n 50) 54.

of income.[53] Due to the nature of the claim, the question then arose whether *Reinecke* was an employee of either the President or the Minister. Counsel for the Appellants denied that he was an employee of either of them and pleaded that he was a judicial officer occupying a statutory office. The narrow question in *Reinecke* was whether during the period between 1996 and 2002 magistrates were considered to be employees of the State in terms of contracts of employment.[54]

Public service employees are appointed by a specific government department and are answerable to such department for the rendering of their services. Even though they are appointed by a specific department they are still remunerated by the State.[55]

In *Member of the Executive Council for Transport: Kwazulu-Natal & others v Jele*[56]*(Jele)* the court dealt with the issue as to whether a provincial department or the State was the correct employer to be cited in the dispute that arose when *Jele* applied for a higher position in the Department of Transport which was unsuccessful.[57] The Labour Appeal Court concluded that, in terms of section 197(3) of the Constitution provincial governments have the power to promote, transfer and appoint members of the public service in their administrative functions and that, a department in a provincial administration, will be classified as an "organ of state" in terms of the definition in section 239 of the Constitution.[58] The respondent was employed in a provincial government department which forms a part of the State and that, if he had been appointed to a post the State would still be the continued employer.[59] Therefore the court held that the State was the true employer and is the employer of everyone in the public service in terms of terms section 8 of the Public Service Act[60] (PSA).

[53] *President of South Africa & others* (n 4) par 5.
[54] (n 4) par 7.
[55] Cohen (n 15) 870.
[56] 2004 25 *ILJ* 2179 (LAC).
[57] The MEC for Transport was cited as the employer in this matter.
[58] "Organ of State means any department of state or administration in the national, provincial or local sphere of government".
[59] *Member of the Executive Council for Transport: Kwazulu-Natal & others v Jele* (n 56) par 17.
[60] 103 of 1994 and *Member of the Executive Council for Transport: Kwazulu-Natal & others v Jele* (n 56) par 17-26.

However, in *Minister of Defence and Military Veterans v Liesel-Lenore Thomas*[61] *(Thomas)* a medical doctor was employed by the Western Cape Provincial Government (provincial government) in its health department. She was injured in an accident while being transferred to another position to a military hospital under the control of the Minister of Defence and Military Veterans (the Minister). In terms of the Compensation for Occupational Injuries and Diseases Act[62] (COIDA) she was entitled to claim compensation for injuries sustained during the course of work activities in terms of this Act.

In the High Court she instituted a claim for delictual action against the Minister and in the alternative against the hygiene company for providing hygiene services to the hospital.[63] Thomas fell down a flight of stairs in a stairwell of the hospital in which she sustained injuries to her ankle, wrists, thighs and she alleged that she suffered emotional trauma as a result of the fall. At the time of this incident she was under the control of the Minister, who was the suitable representative of the national government.

Thomas simultaneously lodged a claim against the provincial government under COIDA for injuries sustained during the course of employment. In addition she also claimed delictual workplace damages from the Minister for the so called negligence of the employees of the hospital. The Minister in turn opposed the workplace damages arguing that Thomas was prohibited from claiming against the Minister in terms of section 35(1) of COIDA.[64] The Minister indicated further that for purposes of determining who the employer of Thomas was, did not matter, as the provincial government and national government are both, arms of government. It did not matter that they were part of different spheres of government but that her employer is the overall entity encompassing all spheres of government which in this situation would be the State.[65]

[61] 2016 1 SA 103 (CC).
[62] 130 of 1993.
[63] *Minister of Defence and Military Veterans v Liesel-Lenore Thomas* (n 61) par 5.
[64] (n 61) and s35 (1) "No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of disablement or death".
[65] (n 61) par 6.

The core issue in the *Thomas* matter was whether the State was the employer as a sole entity or whether the State was the employer encompassing different individual components, in this case the provincial government.[66] The High Court upheld the Ministers claim in that Thomas was an employee of the State represented as a single entity, even though it was provincial level. The High Court further found that the State cannot be regarded as identical to that of the national or provincial government but rather as an amalgam of all three spheres.[67]

The matter was then taken on appeal to the Supreme Court of Appeal in which the Supreme Court of Appeal found that the national and provincial government are separate employers indicating that the State is not a single entity.[68] Therefore this meant that Thomas could sue the Minister for workplace damages.

The Constitutional Court was then tasked with clarifying with what the responsibility of the different spheres of government were under COIDA for workplace damages.[69] The Constitutional Court found that there is nothing in the Constitution or other legislative enactments that indicates that the State is a single employer for all employees working in the three different spheres of government.[70] The Constitutional Court held further, that Thomas has a right to bodily integrity and security of person which underlies her common law claim for workplace damages.

The court was of the view that the arguments raised by the Minister relating to Thomas being prohibited from claiming workplace damages would deprive her from her full common law entitlement and therefore the Minister's argument could not be upheld.[71] The Constitutional Court therefore indicated that the decision by the Supreme Court of Appeal indicating that the State is not a single entity was correct and that Thomas was entitled to claim from COIDA and claim for workplace damages.[72]

[66] *Minister of Defence and Military Veterans v Liesel-Lenore Thomas* (n 61) par 7.
[67] (n 61) par 8.
[68] (n 61) par 9.
[69] (n 61) par 10.
[70] (n 61) par 37.
[71] (n 61) par 39.
[72] (n 61) par 37-39.

Members of parliament assist the legislature in law making and in the matter between *Charlton v Parliament of the Republic of South Africa*[73] *(Charlton)* the Labour Court was required to deal with a dispute relating to an alleged protected disclosure made by *Charlton*.

Before analysing the decision of the various courts in this matter, it must be noted that at the outset, that Parliament of the Republic of South Africa (Parliament) raised exceptions[74] to claims made by *Charlton*. These exceptions are not of relevance to this discussion, save for the fact that it relates to whether or not members of Parliament are employers or employees in terms of the Protected Disclosures Act[75] (PDA). The discussion, in relation to *Charlton* will deal only with the former.

Charlton was a Chief Financial Officer employed by Parliament. He made certain disclosures relating to the improper travel benefits claimed by members of Parliament. In order for a disclosure to be protected it must be made in good faith by an employee regarding the conduct of an employer or an employee of the employer.[76] This then raises the question as to whether members of Parliament are employers. The Labour Court stated that members of Parliament occupy a position which is *sui generis*.[77] Parliament is a body constituted by the National Assembly and the National Council of Provinces of which both these bodies have certain defined functions. It consists of members of Parliament as well as support staff and together these two bodies form what is known as Parliament.

The Labour Court therefore expressed that "Parliament exists as a result of its members".[78] This statement justifies that for members of Parliament to be employers in terms of the PDA, they are not required to employ or provide payment to support staff as they satisfy the definition of being an "employer" by providing work and

[73] 2007 28 *ILJ* 2263.
[74] The Uniform Rules of Court: High Court Rule 23 makes provision for an exception to be taken when a pleading is "vague and embarrassing, lacks averments to sustain a cause of action and is bad law", meaning that law does not recognise such a claim".
[75] 26 of 2000.
[76] Protected Disclosures Act (n 75) s6.
[77] *Charlton v Parliament of the Republic of South Africa* (n 73) par 24.
[78] (n 73) par 24.

allowing other persons to assist in carrying out their functions.[79] The Court therefore reasoned that members of Parliament are not excluded from the definition of "employer" in terms of the PDA.[80]

In addition the Labour Court stated that members of Parliament make legislation and the PDA in particular provides a definition for who the employer is. Moreover it does not expressly indicate that members of Parliament are not employers or that they made law which is essentially does not apply to them.[81] Therefore the court viewed the definition of "employer" in terms of the PDA to include members of Parliament.[82]

The matter was then taken to the Labour Appeal Court[83] by members of Parliament after their exception had been dismissed. The Labour Appeal Court held that members of Parliament are essentially excluded from the LRA and which makes it logical that they should be excluded from the PDA as well. The reason for this is that members of Parliament must continuously be in a position to focus on law making rather than having the responsibility of being an employer as this would affect the performance of their duties and functions.[84] Therefore, the Labour Appeal Court found that members of Parliament are not considered to be "employers" in terms of the PDA.

The matter was then taken to the Supreme Court of Appeal[85] where the court held that the matter relating to exception had already been dealt with by the Labour Court and that the Labour Appeal Court should not have entertained the dismissal of Parliament's exception.[86] The matter was remitted the Labour Court to deal with the merits of *Charlton's* claim of which the ultimate outcome had not been reported.[87]

[79] Protected Disclosures Act (n 75) s1 defines an employer "as any person who employs or provides work for any other person and who remunerates or expressly or tacitly undertakes to remunerate that other person or who permits any other person in any manner to assist in the carrying on or conducting of his/her or its business."
[80] *Charlton v Parliament of the Republic of South Africa* (n 73) par 34.
[81] (n 73) par 43-45.
[82] (n 73) par 50.
[83] *Parliament of the Republic of South Africa v Charlton* 2010 10 BLLR 1024 (LAC).
[84] (n 83) par 31-33.
[85] *Charlton v Parliament of the Republic of South Africa* 2011 12 BLLR 1143 (SCA).
[86] (n 85) par 23-25.
[87] Grogan *Workplace Law* (2014) 229.

Members of statutory boards, who are obliged to make autonomous decisions and be impartial, have been held not to be employees of such boards. In *Miskey & others v Maritz NO & others*[88] the applicants had been appointed as members of the Local Road Transportation Board. In order to make the board more representative the National Land Transport Transition Act[89] was passed and the Member of the Executive Council (MEC) of Transport was empowered to appoint new members to the Local Road Transportation Board. Section 78 of the said Act specifically provided that the board had to exercise its powers and functions independently and free from governmental, political or other outside influence. Upon expiry of their tenure, the applicants unsuccessfully applied for appointment to the new board and claimed to have been unfairly dismissed.[90]

In the finding that the applicants were not employees the court held that "an employee cannot operate independently and free from interference and influence by the employer".[91] The employer must exercise control over the actions of its employees and be free to direct and supervise and dictate how the work is to be done.[92]

Further to the abovementioned the applicants had admitted that they acted independently and even when there was interference by another it was strongly resisted. Therefore on this contention the applicants could not be regarded as being employees.[93] Furthermore the court found that in order for the State to be classified as the employer the applicants would have to be appointed in terms of the PSA of which they were not and could therefore not be classified as the employee of the State or the Department of Transport.[94]

In *Chirwa v Transnet Ltd & others*[95] *(Chirwa)* the Constitutional Court has ruled that public sector employees cannot challenge the unfairness of a dismissal on the basis

[88] 2007 28 *ILJ* 661 (LC).
[89] 22 of 2000.
[90] *Miskey & others v Maritz NO & others* (n 88) par 9.
[91] (n 88) par 20.
[92] (n 88) par 20.
[93] (n 88) par 21.
[94] (n 88) par 24.
[95] 2008 29 *ILJ* 73 (CC); 2008 2 BLLR 97 (CC).

that their rights under the Promotion of Administrative Justice Act[96] (PAJA) were violated. The decision brings to an end an era which began when the 1995 LRA came into effect which employees in the public sector could do forum shopping and challenge a dismissal under either the LRA or administrative law.

The employee in *Chirwa* was dismissed for poor work performance by her employer who forms part of the country's public administration. The dispute first went to the CCMA and then she changed course and went to the High Court on the basis that the manner in which the disciplinary hearing had been conducted violated her right to administrative justice in terms of section 33 of the Constitution read together with PAJA.

The Constitutional Court concluded that even though she had altered her case as one concerning the right to administrative justice, the case remained in substance a dispute about unfair dismissal, which was a matter that fell within exclusive jurisdiction of the labour court and she did not have an election to pursue a claim under PAJA as a dismissal by a public sector employer of an employee does not constitute an administrative action in terms of section 33 of the Constitution as labour and employment rights are specifically dealt with in section 23 of the Constitution and has been codified by labour legislation. Furthermore section 33 of the Constitution does not apply within the public sector.

1.5 Conclusion

The employment relationship is typically defined as that of a master and servant encompassing a certain level of control over the person who is rendering services for remuneration. This clearly identifies what the nature of the employment relationship should encompass. The contract of employment is still relevant and still an important factor in determining who the parties are but the employment relationship encompasses so much more than just the parties but identifies and clarifies what the employment relationship generates. We therefore need to look at substance rather

[96] 3 of 2000.

than form[97] in which the employment relationship exists as it carries more weight in identifying the underlying reality between the parties involved. This in turn makes the existence of an employment relationship, rather than the contract of employment, more valuable as the definition of an 'employee' in the LRA is not connected to an employment contract.

However it is evident that the contract of employment is still very relevant and will continue to hold protection for employees and workers through the common law as the contract of employment is unique. The common law will always exist alongside the employment relationship.[98]

Labour legislation has been created and designed to protect employees and those persons in vulnerable situations who are not covered in terms of the LRA as stipulated above. When this occurs it is clear that there will be a reliance on section 23 of the Constitution. It should be borne in mind that certain legislative enactments do not make provisions for who an employee is but makes provisions for who the employer ought to be. This means that even though the LRA excludes certain persons as employers they would still be considered as employers for purposes of the relevant Act.

The case law discussed above indicates that when employees are appointed in terms of the PSA the State will be regarded as the true and sole employer. However, employees employed in the public service, may claim from COIDA for workplace injuries sustained as well as for delictual claims. When this occurs the State is not regarded as a single entity but rather a separate entity as nothing in the Constitution clarifies that the State is a single employer as each sphere of the government is separate. In contrast, the position of Parliament is different.

Although they form part of the State they are not considered to be employers in terms of the LRA but rather only in terms of the PDA. Members of statutory boards can also

[97] Cohen (n 15) 889.
[98] Van Staden and Smit "The regulation of the employment relationship and the re-emergence of the contract of employment" 2010 *TSAR* 718.

not consider their employer to be the State. This allows for the reasoning that the State is only to be considered as the sole employer if employees or persons have been appointed in terms of the PSA.

The definition of employee does not specifically indicate that magistrates are excluded from the LRA. The cases discussed above give an indication why certain persons such as parliamentarians, members of statutory boards as well as magistrates are not employed by the State or why they are considered to be employers rather than employees. In the *Reinecke* case the Supreme Court of Appeal did not clarify the position of magistrates in terms of South African labour law. It should also be noted that the fact that magistrates hold a judicial post, as well as the fact that they have been removed from the PSA was the sole reason for the State not being considered as an employer or *Reinecke* being considered as an employee. The exclusion of the State as the employer will be considered in the chapters below.

CHAPTER 2
ANALYSIS OF THE *REINECKE* CASE

2.1 Introduction

This case is one of the most important cases dealing with the labour law position of magistrates. In 1996 *Reinecke* was appointed as a magistrate for the district of Germiston of which his duties was that of a relief magistrate in which he was sent to other courts both in and outside the Gauteng region to relieve magistrates who were indisposed, absent or assisting with a backlog of cases.[99] He lived in Pretoria and during the period of September 2000 his family relocated to an area outside Rustenburg and it was his intention to join them. He could not do so as he was based in Germiston and performed most of his work in Gauteng and on the East Rand and alternatively moved to Boksburg.

The Magistrates Commission advertised certain posts for magistrates throughout the country and *Reinecke* applied for the post available in Randburg described as a 'magistrate (relief)'.[100] At the time of his application for this post the Randburg court provided relief magistrates the North West province which was close to the Rustenburg area where his family resided. During the interview process *Reinecke* clarified that he was only prepared to accept the position if he was not primarily based in Gauteng. He was then appointed as a magistrate in Randburg on 10 May 2001 and resigned shortly thereafter on 10 May 2002 by giving one month's notice.

His resignation was largely a result of alleged victimisation and discrimination by the Chief Magistrate (Mr Booi) relating to his conduct. This stemmed from the fact that Mr Booi decided, without consulting *Reinecke* that he would no longer perform relief work and would carry out functions only at Randburg Magistrate's Court. This meant that his work would be limited to administrative tasks and no judicial work aside from a few postponements.[101] *Reinecke* said that actions of Mr Booi rendered his continued employment intolerable and claimed constructive dismissal arising from the

[99] *President of South Africa & others v Reinecke* (n 4) par 1.
[100] (n 4) par 2.
[101] (n 4) par 19.

repudiation of his contract of employment[102] and approached the High Court to claim contractual damages as a result of the breach.[103]His contractual damages amounted to R9 460 270 which was calculated based on the difference between the sum he would have earned as a magistrate until the age of retirement as well as his actual earnings for the period of his employment.[104]

2.2 Precedents prior to the decision in Reinecke

Sir Otto Khan Freund defined the main object of labour law as being a

> *"countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship".*[105]

This above statement reflects the position of magistrates so distinctly with reference to the judgment that the Constitutional Court delivered in *Van Rooyen & others v The State*[106] *(Van Rooyen)*. This judgment dealt with the constitutionality of the Magistrates' Court Act[107], the Magistrates Act[108] and Regulations in terms of the Magistrates Court[109] Act in relation to Magistrates Courts being sufficiently independent and able to comply with the doctrine of separation of powers.

In consideration of the foregoing the Constitutional Court succinctly stated that judicial officers should not be put in a situation whereby they ought to engage in negotiations with any executive body regarding their salaries. They are in effect judicial officers and not employees and therefore cannot in any way resort to industrial action in order to advance their interests or employment conditions.[110]

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[102] *President of South Africa & others v Reinecke* (n 4) par 3.
[103] *Reinecke v President of RSA* case no 25705/2004 (C) (unreported).
[104] (n 4) par 3.
[105] Davies and Freedland *Kahn- Freund's Labour and the Law* (1983) 18.
[106] 2002 5 SA 246 (CC).
[107] 32 of 1944.
[108] 90 of 1993.
[109] Regulations for Judicial Officers in the Lower Courts 1993 GG 1552 GN R361 (11 Mar 1994) (as amended) and Complaints Procedure Regulations GG 19309 GN R1240 (1 Oct 1998).
[110] *Van Rooyen & others v The State* (n 106) par 139.

The decision in *Van Rooyen* was then used in a subsequent decision of the CCMA on the employment status of magistrates. In *LDM du Plessis obo L Pretorius v Department of Justice*[111] *(LDM du Plessis)* the CCMA took heed of the statement in *Van Rooyen* and affirmed that magistrates are not covered by the LRA nor are they employees for that matter. The applicant in this case referred an alleged unfair labour practice dispute to the CCMA. The respondents in turn raised a technicality based on the fact that the CCMA does not have jurisdiction to hear the matter as the applicant was not an employee and that such claim could not fall within the ambit of the LRA. The main argument dealt with the independence of magistrates in terms of the Magistrate's Act[112] and the Constitution.[113] The CCMA in coming to a decision in *LDM du Plessis* relied on the decision given in *Van Rooyen* in that there exist different legislative enactments govern magistrates and public servants.[114]

The *Van Rooyen* judgment set a precedent for future judgments related to the position of magistrates based on the criteria that magistrates are distinct and separate from employees as they hold a statutory office. This means that they are governed by the Magistrates Act and are subject to their regulations made in terms of the Magistrates Act for the sole purpose of securing that they must act independently and impartially in exercising their duties.[115]

Moreover this judgment highlighted the fact that the Magistrates Commission (the Commission) was established in terms of the Magistrates Act. The significance of the establishment of the Commission is to ensure that the appointment, promotion, transfer or discharge of, including disciplinary steps taken against judicial officers in the lowers occurs without favour or prejudice and that any laws and administrative directions applicable to magistrates are applied equally between them subject to the fact that no manipulation or victimization of magistrates occur.[116] In addition the Commission is to ensure that magistrates act impartially and independent in performing their duties and functions.

[111] *LDM du Plessis obo L Pretorius v Department of Justice* (n 5).
[112] Magistrates Act (n 62) s 2; s 4(a)-(b) and s 10.
[113] s 165(1) of the Constitution.
[114] Magistrates Act (n 62) removed magistrates from the public service.
[115] *Van Rooyen & others v The State* (n 106) par 31.
[116] Magistrates Act (n 62) and (n 112).

In the matter of *Khanyile v CCMA & others*[117] *(Khanyile)* the Labour Court again followed the decision in *Van* Rooyen. This matter concerned an alleged unfair labour practice by the Minister of Justice failing to promote *Khanyile* to the rank of senior magistrate. The Minister's decision was based on the advice given by the Commission.[118] The Minister raised a technicality relating to the fact that *Khanyile* is not an *employee* in terms of the LRA because he is a magistrate appointed in terms of the Constitution and the Magistrates Act.

This gives *Khanyile* the status of being a judicial officer which cannot be equated with an ordinary employment contract and due to constitutional reasons, the relationship between the Minister and *Khanyile* cannot be regarded as one of employment.[119] On the face of it magistrates ought to be classified as employees due the fact that they work for the State and receive remuneration. However, the constitutional nature of a magistrate's position requires that the definition be interpreted within the broader constitutional framework.[120] The Constitution recognises that the courts are independent and impartial and introduces protective measures to ensure that magistrates, like judges, are ensured judicial independence.[121]

Regulation 16 of the Magistrates Act deals with the promotion of magistrates as well the procedure to be followed in the event a dispute arising about such promotion. In terms of this regulation the Minister has the power to promote a magistrate to a higher post, but this power is subject to the recommendation given by the Commission. In the event that the Minister does not accept the recommendation by the Commission the Minister is entitled to provide adequate reasons as to why promotion to a higher post is not justified and such reasons must be capable of constitutional scrutiny by a reviewing court in the higher judiciary.[122]

[117] 2004 25 *ILJ* 2348 (LC).
[118] *Khanyile v CCMA & others* (n 117) par 1.
[119] (n 117) par 4.
[120] (n 117) par 4.
[121] (n 117) par 4.
[122] *Van Rooyen & others v The State* (n 106) par 212-213.

The Labour Court used this assertion as authority that the promotion of magistrates is a matter that falls within the exclusive jurisdiction of the Commission. Consequently, the court held that any issue pertaining to magistrates are to be dealt with by the Commission making it clear that that LRA has no application and that the CCMA cannot be used as a forum for resolution.[123]

2.3 The impact of the preceding cases on Reinecke

At the initial stage of proceedings, *Reinecke* referred the dispute to the CCMA claiming that he had been constructively dismissed and wanted to be restored to his former position as a magistrate in Germiston, alternatively payment of a two year salary. Based on the abovementioned cases (*Van Rooyen, L D M du Plessis and Khanyile*) *Reinecke* then abandoned the proceedings in the CCMA as magistrates are not employees as defined in the LRA.

As a result *Reinecke* then proceeded with a contractual claim in the High Court[124] for damages founded on the repudiation a contract of employment which he accepted by way of resignation. His resignation was a result of victimisation and discrimination by the Chief Magistrate (Mr Booi) resulting in what *Reinecke* alleged to be a constructive dismissal. His employment circumstances became intolerable as a result of Mr Booi failing to consult with *Reinecke* about the fact that he would no longer perform relief work and any functions that he became entitled to as a relief magistrate would only be performed in Randburg Magistrate's Court. In addition, *Reinecke* ended up only performing work of an administrative nature and the judicial aspect of duties were disposed of, save for the allocation of a few postponements.[125]

The High Court held that there existed an employment contract between *Reinecke* and the Minister in that section 23(1) of the Constitution confers that "everyone" has the right to fair labour practices and this right includes magistrates.[126] The High Court's judgment was based on the above constitutional right and accepted that Mr Booi had

[123] *Khanyile v CCMA & others* (n 117) par 4.
[124] *Reinecke v President of South Africa & others* (n 103).
[125] *President of RSA v Reinecke* (n 4) par 19.
[126] (n 4) par 44.

made continued employment intolerable and that his conduct amounted to a breach of contract in the form of repudiation. This repudiation in turn was accepted by *Reinecke's* resignation. As a result of the High Court's finding damages in the amount of R9 460 270 was awarded to *Reinecke* calculated on the difference of earnings he would have received as a magistrate until the retirement age of 65 and his definite earnings from employment during that term.[127]

The matter was then taken on appeal where the Supreme Court of Appeal[128] had to decide whether *Reinecke's* appointment as a magistrate gave rise to "an agreement of employment" subject to the conditions of service determined under section 16 of the Magistrates Act[129] as alleged by *Reinecke*. The appellants argued that *Reinecke* was not an employee of the Minister nor the President and that no contract of employment existed between either of them or the Department of Justice and Constitutional Development based on the fact that he is a judicial officer occupying a statutory office in terms of the Constitution.[130]

2.4 The Judgement in relation to the Magistrates Court Act

Magistrates in South Africa have always been employees of the State and formed part of the public service in terms of the Public Service and Pensions Act[131] and the Public Service Act.[132] However, the Commission of Enquiry into the Structure and Functioning of the Courts, the Hoexter Commission of Enquiry,[133] (Hoexter Commission) was appointed to enquire and make recommendations on changes that may lead to more efficient and expeditious administration of justice.

The Hoexter Commission recommended that magistrates be removed from the public service and that the appointment, disciplinary procedures as well as their removal be

[127] *President of South Africa & others v Reinecke* (n 4) par 2-3.
[128] (n 4).
[129] Magistrates Act (n 62).
[130] (n 4) par 5.
[131] 29 of 1912 s 1(2).
[132] 111 of 1984.
[133] Commission of Enquiry into the Structure and Functioning of the Courts, part I of the Fifth Report (1983) para 4.4.1.

dealt with by a body consisting of judicial officers.[134] Magistrates were previously appointed by the Minister of Justice in terms of Magistrates Court Act of 1944.[135] The Magistrates Act[136] was then enacted to give effect to the recommendation of the Hoexter Commission which made provision for the establishment of the Magistrates Commission (the Commission) as an independent body.[137] The Commission was to give effect to ensuring that the:

> *"appointment, promotion, transfer, or discharge of, or disciplinary action takes place without favour or prejudice and that no victimisation or improper influencing of magistrates take place"*.[138]

The Ministers power to appoint magistrates was also subject to the recommendations by the Commission.[139]

In *Government Employees' Pension Fund v Strydom*[140] the Supreme Court of Appeal confirmed the following with regard to the purpose of the Magistrates Act:

> *"What is clear from a study of the Act is that Parliament was concerned to grant to magistrates an independence and freedom from interference which they had not previously enjoyed and to that extent at least to bring their position and conditions of tenure and service closer to that of Judges"*.[141]

The Supreme Court of Appeal in *Reinecke* went on further to indicate that that the terms of the Magistrates Act indicated that the relationship between magistrates and the State (as represented by the Department of Justice and Constitutional Development) is one of employment.[142] The Commission was established to for purposes of ensuring that the promotion, appointment transfer and disciplinary

[134] *Van Rooyen & others v The State* (n 106) par 79.
[135] s 9(1)(a).
[136] Magistrates Act (n 62).
[137] *Van Rooyen & others v The State* (n 106) par 36-74.
[138] (n 62) s 4(a)-(b).
[139] (n 62) s 10.
[140] 2001 3 SA 856 (SCA).
[141] *Government Employees' Pension Fund v Strydom* (n 140) par 20.
[142] *President of South Africa and others v Reinecke* (n 4) par 13.

procedures of magistrates takes place without favour and prejudice.[143] The Supreme Court of Appeal then stated that the word "appointment" has more applicability to an office rather than an employment relationship.[144] Wallis JA, in preparing the judgement of *Reinecke* was furnished with a copy of the contract of appointment by the Commission. The term appointment is used because it indicates that an office will be occupied rather than a contract of employment or an employment relationship coming into existence.[145] In terms of this contract, it stated that when newly appointed magistrates are appointed, their appointment is on a temporary and probationary basis and as stipulated by Wallis JA it is typical of employment.[146]

Furthermore the regulations that cover the promotion, transfer and discharge of magistrates, up to and including the terms and conditions of service as well as their powers and duties are indicative of an employment relationship.[147] As a result Wallis JA believed that there was substance in *Reinecke's* argument that he in fact was an employee of the State.[148]

2.5 The influence of the Magistrates Act

Albeit that that the Supreme Court of Appeal found that there was substance in *Reinecke's* argument the court was inclined to dissect the purpose of the Magistrates Act in that there are statutory elements relating to the manner of his appointment as well as his discharge.[149]

Reinecke's argument was based on the fact that he applied for a position as a relief magistrate in Randburg. During the interview process with the Commission he made it clear that he would not accept the position if it was not a position of a relief magistrate and if that post required him to perform his duties primarily in Gauteng. The Supreme Court of Appeal indicated that *Reinecke* should have used the procedure set out in

[143] Magistrates Act (n 138).
[144] *President of South Africa & others v Reinecke* (n 4) par 13.
[145] (n 4) par 13.
[146] (n 4) and regulation 3(1)(f).
[147] (n 4) par 13.
[148] (n 4) par 15.
[149] (n 4) par 16.

terms of section 9 of the Magistrates Act to object to the appointment as a relief magistrate in Randburg when he realised that his duties did not involve any relief work or that the post was not the post for which he applied. In the event that he objected and his objection was ignored he could challenge the recommendation by the Commission and the decision of the Minister.

This meant that if the grievance procedures were followed in terms of the regulations and the decisions by the Minister and the Commission were unfounded *Reinecke* could have advanced his claim by way of judicial review.[150]

The Supreme Court of Appeal indicated that this in turn would result in public law remedies and not contractual remedies in order to resolve the dispute about *Reinecke's* position as a relief magistrate. This makes it clear that judicial review would be the appropriate remedy in the circumstances as it is a public law remedy derived from the Magistrates Act.

In terms of section 13 of the of the Magistrates Act a magistrate may only be removed or suspended when the Commission makes recommendations to the Minister regarding such suspension or removal of a magistrate. After such recommendations has been made by the Commission the Minister may then suspend a magistrate.[151]

Parliament must then in turn, pass a resolution to confirm or lift the suspension of which the same process applies for the removal of the magistrate.[152] This makes it clear that the appointment as well as the removal of a magistrate for whatsoever reason is a statutory process. The Supreme Court of Appeal indicated that non-compliance with the statutory procedures would result only in public law remedies and not a contractual claim. Therefore, the Supreme Court of Appeal indicated that an interdict should have been utilised to restrain Mr Booi from removing the judicial aspect of *Reinecke's* work.

[150] Regulation 16 of the Magistrates Act (n 62).
[151] (n 62) s13(3).
[152] (n 62) s13(4)(c).

The fact that there was a deduction in his salary, at the request by Mr Booi to recover past payments of any allowances, such as the relocation allowance he was afforded when he was appointed as a magistrate in Randburg, would further not amount to a contractual claim. This entitlement arose in terms of regulations 23(1)(g) and (h) of the Magistrates Act. Therefore the court suggested that an interdict should have been used to restrain Mr Booi from acting in his personal capacity to implement a decision that *Reinecke's* allowances be deducted from his salary and having the judicial aspect of his work removed.

2.6 Conclusion

It is evident that the court in the *Reinecke* matter made it clear that there should have been a statutory process followed by *Reinecke* in relation to claim against Mr Booi. The reasons is therefore based on previous court decisions that has a relevant impact in supporting the contention that magistrates are not employees for the very reason that they a hold a position flows from statute and that they are entitled to exercise all remedies available to them first by the very enactment that regulates their appointment. In turn their removal follows the statutory procedure. The regulations as well the Magistrates Act should have been *Reinecke's* first point of departure.

However I am inclined to believe that it is trite that we follow previous court decisions and develop the law on the basis of what was stated in *Khanyile, L D M du Plessis* as well as *Van Rooyen* as these cases clearly depict the reasons for the exclusions of magistrates from LRA.

Leana Diedricks in her paper entitled "Disciplinary processes for South African magistrates"[153] indicated that she believes that the disciplinary procedures in terms of the Magistrates Act are not as effective as the procedures laid out in the LRA for the sole purpose that the LRA strikes a balance between the rights of the employers and employees to ensure efficiency and certainty in the resolution of disputes arising from

[153] Diedricks "Disciplinary procedures for South African magistrates: reflections on the Magistrates Act 90 of 1993 and the Labour Relations Act 66 of 1995". (http://islssl.org/wp-content/uploads/2015/10/SouthAfrica-leanadiedricks.pdf (30-08-2016)).

the employment relationship whereas the Magistrates Act does not. I disagree with this statement to the extent that the Magistrates Act was designed solely for magistrates with procedures that deal with violations of appointment, promotion and disciplinary steps taken against magistrates without fear, favour and prejudice.[154]

This section of the Act speaks for itself and I cannot see how a person appointed in a judicial or statutory office are without remedy when the Act has been introduced to cover all aspects in relation to magistrates. Of course there will be issues that cannot be resolved by means of the Magistrates Act but the court has indicated that provision is made for public law remedies.

Further to the above we must take head of the Constitutional court judgment in *Van Rooyen* to properly analysis that of the *Reinecke* judgement insofar as it relates to magistrate being excluded as being employees on the very strong basis that it is a hold a statutory office. Nothing in the *Reinecke* judgment suggest otherwise as it is a direct reflection of the cases that dealt with the exclusion of magistrates as employees.

The main contention and reasoning as to why consideration was not given to the LRA was purely based on the doctrine of separation of powers and why there needs to be separate arms of government and separate pieces of legislation regulating specific issues. The LRA applies to employees while the Magistrate Act applies to magistrates regulating every facet that could possibly arise in the conventional employment relations.

[154] Magistrates Act (n 62) s4.

CHAPTER 3
CRITIQUE AGAINST THE EVIDENCE PRESENTED BY COUNSEL

3.1 Introduction

The Supreme Court of Appeal indicated that with regard to the discharge of a magistrate, Mr Booi in his position as chief magistrate, had no bearing on *Reineckes* discharge including the fact that he did not have the power to dismiss *Reinecke* in any way possible. Firstly because Mr Booi is not seen as *Reinecke's* employer and secondly because the removal of any magistrate requires that a statutory procedure must be followed.

The repudiation of the contract of employment could not take place by a person who had no power or control over the matter in so far as only the Commission and the Minister in terms of statute could to relieve *Reinecke* of his duties. Mr Booi had no power to appoint *Reinecke* and the same applies to his removal. The fact that Mr Booi's conduct pre-empted the actions of *Reinecke* could not justify the claim of constructive dismissal. The appointment of a magistrate and the removal cannot be construed to be subject to a contractual remedy unless there existed no other possible means to rectify the issue if the statutory provisions in terms of the Magistrates Act failed.[155]

The Supreme Court of Appeal went on further and indicated that *Reinecke's* contention relating to the fact that he had no other option but to resign was ill founded. What the court essentially indicated is that employment did not become intolerable insofar that *Reinecke* had available to him the grievance procedures, which are set out in the regulations which could be used as a resolution to the issues that he had encountered with Mr Booi. If he was still unsatisfied with the finding of the Commission in relation to his complaints he would have been entitled to take such a decision on review or if his grievances were ignored.

[155] *President of South Africa & others v Reinecke* (n 4) par 22.

There is substance to the Supreme Court of Appeal's reasoning in that regulation 26 should have been used by *Reinecke* by lodging a complaint against Mr Booi regarding his conduct or misconduct for that matter in relation to the treatment of *Reinecke*. This regulation stipulates that an investigating officer can be appointed by the Commission in which an investigation is done to obtain evidence to establish the grounds for any misconduct by a magistrate. In the event that the magistrate is found guilty of misconduct the Commission can impose certain sanctions.[156] In the circumstances giving rise to Mr *Reinecke's* claim this would have been the appropriate route to follow.

3.2 Reinecke from an international perspective

The question relating to whether magistrates will have remedies available under the LRA was left open as it was indicated by the Supreme Court of Appeal in *Reinecke* that this would raise other issues.[157]

In taking the above mentioned statement into consideration it is important to take heed of developments that has occurred abroad in relation to the position of judicial officers and how these developments can change or clarify the position of magistrates with reference to them being considered as employees in terms of the LRA.

In *Hannah v Government of the Republic of Namibia*[158] the court held that a judge in Namibia was not an employee in terms of the Labour Act.[159] The provisions of this Act are similar to the provisions of the LRA in relation to the definition of an employee. It was argued that the reason for the exclusion of judges in this matter is solely based on the fact that that there should be no interference in the execution of a judge's judicial functions.

Furthermore, there cannot exist an employer employee relationship when judicial officers ought to be independent and impartial. The citizens would lose faith in the

[156] Magistrates Act (n 62) regulation 26 s 17(a)-(d).
[157] *President of South Africa & others v Reinecke* (n 4) par 23.
[158] 2000 4 SA 940 NmLC.
[159] 6 of 1992.

independence of the judiciary and to undermine their independence would be detrimental to society thereby making a judge's position *sui generis*.[160]

In India, the Supreme Court in *Union of India v Pratibha Bonnerjea*[161] was required to consider whether the Constitution in India permitted a master and servant relationship between the government and a High Court judge. The court held that a judge of the High Court has a unique position under the Constitution and would require that his duties in his position as a judge would require that he exercise his duties without fear or favour and acts independently and impartially as judges do not serve the government nor do they take orders from anyone.[162] In the event that there is no separation between the judiciary and the executive High Court, judges would not be independent and they in turn would not stay true to their oath of making decisions without fear or favour.[163]

In Australia the High Court indicated that "judges are not employees of the state"[164] and equally so in New Zealand the judiciary does not form part of the Crown.[165]

In England the matter was dealt with in *Perceval-Price v Department of Economic Development,*[166] where a claim was brought by a full-time female judicial officer on the basis of sex discrimination. In terms of statutory provisions, holders of a statutory office were excluded from bringing such a claim. Sir Robert Carswell LCJ stated that in terms of Equal Pay and Equal Treatment Directives in England persons are to be protected from discrimination and stated the following:

> *"All judges, at whatever level share certain common characteristics. They all must enjoy independence of decision without direction from any source, which the respondents quite rightly defended as an essential part of their work. They all need some organisation of their sittings, whether it be prescribed by the*

[160] *Hannah v Government of the Republic of Namibia* (n 158) par 945F.
[161] 1996 AIR SC 690.
[162] *Union of India v Pratibha Bonnerjea* (n 161) par 696.
[163] (n 161) par 696.
[164] *Re Australian Education Union & others: Ex parte the State* 184 CLR (HCA) par 233.
[165] *Attorney –General v Chapman* 2011 NZSC 110 par 175.
[166] 200 IRLR 380.

President of the Industrial Tribunals or the Court Service. They are expected to work during defined times and periods, whether they be rigidly laid down or managed by the judges themselves with a greater degree of flexibility. They are not free agents to work as and when they choose, as are self-employed persons. Their office accordingly partakes of some characteristics of employment".[167]

However in *O'Brien v Ministry of Justice (Formerly the Department of Constitutional Affairs)*[168] the English Supreme Court dealt with the question whether a judge was entitled to a pension in respect of his part-time non-salaried judicial work.[169] The court indicated that the relationship between judges and the Ministry of Justice is extremely similar to that of the relationship that exist between employers and employees and that judges must be treated as workers in terms of the directives by which judges in England are regulated.[170]

In 1996 Lord Bingham, in a lecture on judicial independence had indicated that:

"After appointment, judges sit in courts provided by the state, they have offices provided, heated and lighted by the state, they have clerks employed by the state, they use books and computers mostly provided by the state, they are themselves paid by the state. In all these respects the position of judges are not very different from that of any other employee of the state. However, the position of judges must out of necessity be different from that of ordinary government employees".[171]

Although there are comparative views regarding the position of judges in relation to them being considered as employees regard must be given to comments made by Wallis JA at a conference held in Australia[172] in which he discussed the issue of judges

[167] *Perceval-Price v Department of Economic Development* (n 166) par 384.
[168] 2010 UKSC 34; and 2013 UKSC 6.
[169] *O'Brien v Ministry of Justice (Formerly the Department of Constitutional Affairs* 2013 UKSC (n 168) par 1.
[170] *O'Brien v Ministry of Justice (Formerly the Department of Constitutional Affairs* 2013 UKSC (n 168) par 42.
[171] Judicial Studies Board Annual Lecture given on 5 November 1996 and reprinted in Bingham *The Business of Judging: Selected Essays and Speeches* (2000) 55-58.
[172] Wallis JA JCA Colloquium on 6 October 2012 "Judges as Employees". (http://jca.asn.au/wp-content/uploads/2013/11/judges-as-employees_paper.pdf.(26-09-2016)).

as employees. The most pertinent point of discussion was the doctrine of separation of powers and an independent judiciary. He indicated that judges are guardians of the law and the only reason that there is success across the spectrum of any court decisions is due to the fact that the judiciary is independent. It is only because of the independence of the judiciary that the public accepts decisions made by them. If the public perceived judges to be public servants there would be a lack of acceptance and confidence in the judiciary.[173]

Wallis JA further emphasised that the notion of judicial independence has been directed from preventing executive interference in the judicial decision-making process. In addition, he indicated that when the courts are required to determine issues that goes to the heart of the state's functions there must be a clear distinction between the state and the public administration. The government must be in a position to accept the decisions of the courts without any complaints making it essential that the public perceive there to be a distinct separation between the judiciary, executive and public administration.[174]

I am inclined to agree with Wallis's JA comments with regard to there being a clear distinction of the different arms of government insofar as this relates to the current state of our country. In the matter of *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*[175] the Constitutional Court had to deal with whether there was an abuse of State power and resources in so far as it related to the conduct of the President and his constitutional obligations. The facts of the case are not of relevance in this particular discussion however it drives the point that Wallis JA had made with regard to the public knowing and accepting that there is a separation of powers insofar as they do not lose confidence in the fact that there is no interference from the executive and that each arm of government is separate.

This means that if judges are to be considered as employees of the State, the Department of Justice and Constitutional Development would be the employer as

[173] Wallis JA (n 172) 1-15.
[174] (n 172) 16.
[175] 2016 3 SA 580 (CC).

alleged by *Reinecke* and the public would not view the judiciary to be free from external interference.[176]

Wallis JA highlighted the fact that judges are not and should not be considered as employees for the very reason that even though on the face of it there possibly exists an employment relationship they are not civil servants and their appointment should not be seen as a career path in the civil service. If judges see themselves as civil servants, their loyalty will no longer be to the public but the government at large. Wallis JA ended off his paper by indicating the following:

> *"For the judiciary to accept that they are part of the public service or employees of the government in any shape or form is constitutionally as well as institutionally, subversive".*[177]

3.3 Conclusion

It must be borne in mind that the position of magistrates is exactly the same as those of judges. When judges and magistrates are appointed as judicial officers the Constitution does make a distinction between the two. However, even though Judges are appointed through procedures involving the Judicial Service Commission[178] other judicial officers of which magistrates are included, must be appointed in terms of an Act of parliament which ensures that their promotion, transfer and discharge takes place without favour or prejudice.[179]

This makes it clear that even though the magistrates and judges have some similarities there is no distinction between them when it comes to judicial independence and impartiality which is a core principle on which our constitution founded.[180] This makes it relatively easy to establish why magistrates cannot be regarded as employees.

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[176] *Justice Alliance of South Africa v President of the Republic of South Africa & others* 2011 5 SA 388 (CC) par 68.
[177] Wallis JA (n 172) 20.
[178] s 174(6) of the Constitution. The composition of the Judicial Service Commission is set out in s178 of the Constitution.
[179] s 174 of the Constitution.
[180] s 1(c) of the Constitution.

Alternatively, the fact that the Supreme Court of Appeal left this question open is largely due to the fact that the argument was not properly pleaded by counsel acting for *Reinecke*. From this perspective I cannot criticise the judgment other than the fact that the court had to decide on these factors in terms of the Magistrates Act and not the LRA as the argument was rooted in a contractual claim rather than that of a dismissal in terms of the LRA.

The courts are obliged to prepare their judgments on the precedents and the arguments presented to them by counsel. As a result there exists a possibility that *Reinecke* was ill advised to focus his proceedings on a contractual claim[181] in the High Court. This resulted in a substantial amount of common law damages that was awarded by the High Court and it could be possible that claim did not succeed on appeal due to the amount claimed albeit that judicial independence played a significant role.

Furthermore it is made clear that all *Reinecke's* remedies stemmed from the statutory provisions in terms of the Magistrates Act and that the appointment of magistrates as well as their removal or suspension remains regulated by statute. This is indicative of that if magistrates were to be considered as employees the enactment of the Magistrates Act and its regulations would not have made provision for their appointment or removal or even the way in which their grievances ought to be handled. The court went further and clarified in no uncertain terms that magistrates are in fact not remediless. Magistrates are entitled to institute action and utilise public law remedies as opposed to relief in terms of the LRA, which clarified the question posed by Professor Van Eck, relating to whether magistrates have remedies in terms of labour law.

[181] Van Eck and Diedricks "are magistrates without remedy in terms of labour law" 2014 ILJ 2710.

CHAPTER 4

CONCLUSION: CLARITY FOR MAGISTRATES AND RECOMMENDATIONS

It is evident that labour legislation has been designed and created to protect employees and those persons subjected to vulnerable positions of employment and even includes, those excluded from the LRA by affording them constitutional protection to enjoy the right to fair labour practices. Our courts have even been open-minded enough to endorse the fact that even though members of the armed forces are excluded from being "employees" in terms of the LRA they are still entitled to join and form trade unions due to their constitutional right to freedom of association.[182]

The fact that clarity was not provided by our courts as to whether or not magistrates are employees has been criticised with great conviction. Professor Van Eck is of the view that excluding magistrates as employees goes against the grain of the Constitutional developments in South Africa[183] insofar that even though they were presumably not considered as employees in terms of the LRA they were entitled to rely on the fundamental right to fair labour practices. I agree with this statement but my reasoning differs in some respects.

It must be noted from the outset that the Supreme Court of Appeal was put in a difficult position to deal with an issue that was so relevant and important to magistrates with little assistance. The issue as to whether or not *Reinecke* was an employee of either the President or the Minister was not clearly dealt with. This was an issue that should have been central in establishing and clarifying any remedies that magistrates could have had in terms of the LRA but, counsel was unprepared to address this issue.

The court was consequently left to deliver a judgment on the basis of what was directed to the court by counsel. What counsel for the parties failed to do is address what the countless possibilities would be if magistrates are to be considered as employees.

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[182] *South African National Defence Union v Minister of Defence & another* 1999 4 SA 469 (CC); 1999 20 ILJ 2265 (CC).

[183] Van Eck and Diedricks (n 181).

Firstly, it must be noted that the principle purpose of labour law, as stated by Sir Otto Khan Freund is to "regulate, support and to restrain the power of management and the power of organised labour".[184] Therefore, indicating that no employment relationship can exist without the power of command and a duty to obey which is the main characteristic of any contract of employment.[185]

Therefore if we put magistrates in a position to be considered as employees in terms of the LRA they would be entitled to engage in collective bargaining, to strike and to join and form trade unions of which the possibilities are endless. Magistrates don't derive their powers from an employer. Their commands are stipulated in the Magistrates Act as well as in the Constitution and this is from where they derive their power and functions - not from and employer but from the supreme law of the country and the legislation enacted to give effect to their powers.

Magistrates should not be given the opportunity to be put in a situation where they are entitled to engage in wage negotiations or resort to industrial action to advance their interests or conditions of service. Society will not respect them or view them as impartial and independent and free from outside influence. Therefore, it is true that

> *"Magistrates tend to shape the impressions of litigants, witnesses and onlookers of the administration of justice. It is in the magistrate's courts that admiration is earned and respect is lost"*.[186]

If they are given such rights or an opportunity to exercise the rights of an "employee" they will be seen as vulnerable and weak law enforcers and operate on the presumption that they pay less attention to their legitimate functions as laid down by the Constitution.

Judicial independence is deeply rooted in our Constitution alongside the doctrine of separation of powers. If magistrates as judges owe accountability to an employer for

[184] Davies and Freedland (n 105) 18.
[185] ibid.
[186] Hoexter and Olivier *The Judiciary in South Africa* (2014) 319.

their actions, they would not freely be able to make unbiased decisions and be the guardians of citizens' rights. If they had to be accountable to the government or to the State there would not exist independence of the judiciary.

Therefore, I am of the view that magistrates are not employees but are rather judicial officers occupying a unique position in terms of the Constitution. They must be able to discharge their duties and responsibilities of office without fear, favour or prejudice to the best of their abilities in order for judicial independence to exist as the inclusion of magistrates under the LRA will undermine judicial independence. Furthermore I believe that if magistrates would be regarded as employees there would be an abuse of the powers entrusted to them by courts insofar as they would be protected not only by the LRA as well as the Magistrates Act and would have the option to choose between the former and the latter putting them in a better position than that of a regular employee as defined in the LRA. This in itself is unfair.

The Supreme Court of Appeal judgment has also being criticised for not providing clarity as to the remedies that magistrates might have as well as the fact that the Magistrates Act does not provide adequate or sufficient remedies as opposed to those mentioned in the LRA.[187]

I believe that that is there is justification in this statement but I believe that because magistrates occupy a unique position the Magistrates Act addresses any issues that may arise during the course of a magistrate's duties. The Constitutional Court in *Van Rooyen* held that nothing in the Magistrates Act as well as in the Regulations are unconstitutional. I believe that if the Constitutional Court had the inclination that the Magistrates Act and the Regulations did not make adequate provisions for the promotion, appointment, transfer victimisation and the like, as set out in section 4 of the Magistrates Act, the court would have dealt with such discrepancies or claims in its judgement.

Therefore *Reinecke* should have used the Magistrates Act together with the regulations to resolve any issues that he might have had with Mr Booi. If he was

[187] Diedricks (n 153).

unsatisfied with any decision taken by the Commission after he lodged his grievances he could then have taken the matter on judicial review. If the matter was still not dealt with to his satisfaction I believe he then should not have been deprived from directly relying on his right to fair labour practices in terms of the Constitution.

Furthermore, this should have been the basis for his claim the moment action had been instituted as I believe that reliance solely on the Constitutional right to fair labour practices would not have limited the scope for magistrates being considered as employees.

I cannot and do not recommend any alterations to the legislation that in effect deals with magistrates in such a detailed manner but I do recommend that magistrates be subject to a Code of Conduct that would regulate any impropriety not covered in terms of the act. This Code should only regulate issues not listed in the Magistrates Act as well as its Regulations provided that it is in accordance with the Constitution the Magistrates Act and the Regulations. This Code would have to be continuously developed as society changes and grows and to deal with constitutional development.

Magistrates are judicial officers and embody the principles of separation of powers and the independence of the judiciary. They are at the same time workers who often perform duties in very difficult circumstances with inadequate remuneration. They are however not employees and do not have a contract of employment but are appointed in terms of legislation. Their position cannot be improved by inclusion under the umbrella of the LRA but by customising their protection in terms of the Magistrates Act, Regulations and the proposed Code of Conduct.

In the event that another matter such as *Reinecke* arises with regards to dismissal, unfair labour practices or any employment issue for that matter, I do believe that all avenues provided for by the Magistrates Act must first be exhausted before there can be reliance on the right to fair labour practices.

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