REPORTABLE
CASE NO.: SA 16/2008

IN THE SUPREME COURT OF NAMIBIA

In the matter between

THE PERMANENT SECRETARY OF THE MINISTRY OF FINANCE	**FIRST APPELLANT**
THE MINISTER OF FINANCE	**SECOND APPELLANT**
THE PRIME MINISTER OF THE REPUBLIC OF NAMIBIA	**THIRD APPELLANT**

And

DR. CORNELIUS MARTHINUS JOHANNES WARD	**RESPONDENT**

Coram: Shivute, CJ, Strydom, AJA *et* Chomba, AJA.

Heard on: 2008/10/24
Delivered on: 2009/03/17

APPEAL JUDGMENT

STRYDOM, AJA:

[1] The respondent is a medical practitioner who practised at KATIMA MULILO, in the Caprivi Region, for his own

account. On or about the 10th of May 2004 he entered into a written agreement with the second appellant, represented by the first appellant, to become a service provider to the Public Service Employees' Medical Aid Scheme (PSEMAS). PSEMAS is the medical aid scheme, set up by the third appellant under the control of the first appellant, for employees of the Government.

[2] The scheme provided for by the agreement is that a service provider will render his professional services to members of PSEMAS at a prescribed professional tariff for which services the service provider shall then be remunerated by the administrator of the scheme on behalf of the second appellant. (Clause 3 of the agreement).

[3] Clause 2.2.10 of the agreement further provides that a professional tariff means the agreed tariff calculated by the Ministry based on the tariffs of the Namibian Association of Medical Aid Funds, less a levy of 5% part payment by the member of PSEMAS.

[4] The effect of this is that, apart from the levy of 5%, which the service provider must collect from the patient, payment of his account was virtually guaranteed by the second appellant. In contrast thereto a medical practitioner who was not a service provider contracted with PSEMAS, was dependent for payment of his fee on the patient who could only then claim 95% of his account from the medical scheme.

[5] By letter dated the 13th May 2005 the respondent was informed by the first appellant that his agreement as a service provider to PSEMAS was terminated in terms of clause 11.5 of the agreement. This occurred after a report was received from the administrator of the scheme concerning the practice of the respondent. It seems that on certain days the respondent saw and treated as many as 99 patients a day. It was also reported that the accounts sent in by the respondent did not comply with what was undertaken by him in terms of his agreement. There can be little doubt that a scheme, where service providers are contracted, is open to abuse by

all role-players involved and for that reason the service provider also undertakes to act as a gatekeeper to prevent, as far as possible, instances of fraud and theft. The report also charged the respondent with not fulfilling his duties in this regard.

[6] As a result of the letter of 13th May various consultations between the first appellant and the respondent, and the legal representatives of the parties, took place. This was further followed up with correspondence between the parties.

[7] During one of the meetings it was pointed out that in terms of clause 11.5 the first appellant was not able to terminate the agreement summarily and that it could only do so after a further investigation by the Ministry was launched and if such investigation confirmed a breach or breaches of the contract. The clause, however, provided for an automatic suspension of the service provider pending the outcome of the second investigation. The termination of the agreement

was then changed to one of suspension of the respondent and further negotiations took place. In my opinion nothing turns on this issue. Both parties accepted the situation and acted in terms thereof and no reliance was placed on this issue by counsel for the respondent in this Court or in the Court *a quo.* This was also accepted by the Court *a quo.*

[8] Subsequent to the suspension of the respondent the same private firm, namely Pinnacle Management Consultants (Pty) Ltd. which was involved in the first investigation, was appointed by the first appellant to launch the investigation. A Ms. Du Toit, together with an official of the Ministry, Mr. Coetzee, visited the respondent and conducted an investigation.

[9] A report was duly filed by Pinnacle Management Consultants which was in line with the findings previously concluded, and on the 6th September 2005 the respondent was informed in writing that his agreement as a service

provider with PSEMAS was cancelled.

[10] The letter of termination stated that the agreement was cancelled in terms of the provisions of clause 11.5 thereof and on the grounds that he committed fraud and/or dishonesty and/or that he had engaged in a dishonest business practice.

[11] It seems that the investigations into the practice of the respondent were sparked off by the claims for payment submitted by the respondent to the administrator of the scheme. It is common cause that for the period January 2004 to December 2004 a total amount of N$ 7,058,589.64 was claimed. This amount represented claims for medicine dispensed as well as consultations.

[12] The respondent denied that he had committed fraud or that he had acted in any dishonest way in compiling and claiming the fees.

[13] Faced with this final decision the respondent launched, by Notice of Motion and as a matter of urgency, an application for relief by way of an interdict pending the review of the

decision taken by the first appellant to cancel the agreement. The two applications were rolled into one and in respect of the interdict the Court was asked to issue a Rule *nisi* with certain paragraphs operating as an interim interdict.

[14] The application for an interdict heard by the Court *a quo* (Mtambanengwe, AJ) and was dismissed by the learned Judge on the basis that it did not comply with the requisites necessary for an interdict. Nothing further turns on these proceedings.

[15] In regard to the review proceedings the respondent claimed as follows:

> "1. Reviewing and correcting or setting aside the decision taken by the First and/or Second Respondents on 13 May 2005, "terminating" (suspending) the agreement with the Applicant in terms whereof the Applicant was appointed as Service Provider to the Public Service Employees' Medial (sic) Aid Scheme with effect from 20 May 2005.
>
> 2. Reviewing and correcting or setting aside the decision taken by the First and/or Second Respondents on 6 September 2005, terminating the agreement with the Applicant in terms whereof the Applicant was appointed as Service Provider to the Public Service Employee's (sic) Medical Aid Scheme with immediate effect.

3. Declaring the aforesaid decisions unconstitutional and in conflict with Articles 12 and 18 of the Constitution and/or null and void.

4. Ordering the First and/or Second Respondents to pay the costs of this application.

5. Granting such further and or alternative relief as this Honourable Court deems fit."

[16] In the affidavit supporting the Notice of Motion the respondent has set out the grounds on which the review was based which, to a certain extent, widened the scope as foreseen in the Notice of Motion.

[17] The application for review was heard in the normal course of the Courts business. After the interdict was dismissed the parties further exchanged affidavits dealing with the review application. Then, after the appellants replying affidavits were filed, the respondent filed an amended notice of motion in the following terms:

"1. Reviewing and correcting or setting aside the decision taken by the First Respondent on 13 May 2005 to terminate the agreement in terms whereof Applicant was appointed as Service Provider to the Public Service Employees' Medical Aid Scheme (PSEMAS), with effect from 20 May 2005.

2. Reviewing and setting aside the decision taken by the First Respondent on 30 May 2005 to alter the *termination* to suspension of the agreement in terms whereof Applicant was appointed Service Provider to PSEMAS.

3. Reviewing and correcting or setting aside the decision by the First Respondent on 6 September 2005 to *terminate* the Service Provider agreement dated 10 May 2004 with the Applicant with immediate effect.

4. Reviewing and correcting or setting aside the decision by the First Respondent on 6 September to demand repayment of N$5,773,886.31 (as amended) from Applicant.

5. Reviewing and setting aside the decision of the first Respondent to withhold payment in amount of N$1,323,181.39 due and owing to Applicant in respect of professional services rendered in terms of the Service Provider agreement against an amount allegedly owing by Applicant to PSEMAS.

6. Declaring the aforesaid decisions of First Respondent unconstitutional and/or null and void.

7. Ordering the First Respondent to pay the Applicant his arrear claims for professional services in terms of the Service Provider agreement until 20 May 2005 amount to N$1,323,181.39, plus interest *a tempore morae*, as well as the applicant's claims subsequent to 20 May 2005 until 6 September 2006.

8. Ordering the Respondents to pay the costs of the applicant.

9. Granting such further and/or alternative relief as the Honourable Court deems fit."

[18] In his amended Notice of Motion the respondent now also asked that the decision of the first appellant to re-claim from him an amount of N$ 5,773,886.31 be reviewed and set

aside as well as the decision of the first appellant not to pay the amount, due to the respondent, namely N$1,323,181.39. The former amount was claimed by the first appellant on the basis that the dispensing of medicine by the respondent was illegal as a result whereof the first appellant denied that the amount of N$ 5,773,886.31 is owed to the respondent. In addition the respondent now also claims payment of amounts which he alleged are fees and payment for medicine dispensed from the period 20 May 2005 till 6 September 2005.

[19] The respondent was successful in the Court *a quo* and the prayers set out in his amended Notice of Motion were substantially granted by the Court. As a result the first and second appellants now appeal against the entire judgment and orders handed down by the Court *a quo.*

[20] Mr. Smuts appeared for the appellants and Mr. Oosthuizen for the respondent. The Court wishes to express

its appreciation for the full and interesting arguments presented by both counsel.

[21] A most important issue, which was raised by the first appellant in his affidavit, was the denial by the first appellant that his decision to cancel the agreement between the parties was reviewable. First appellant said that he acted purely in terms of the agreement between the parties and that in the circumstances the cancellation thereof was the exercise of a contractual right which was not reviewable.

[22] I therefore agree with the learned Judge *a quo* that the question whether the decision by the first appellant to cancel the agreement was reviewable or not goes to the crux of the main dispute between the parties. The basis on which this distinction is drawn depends on whether the functionary's decision amounts to administrative action or, as was alleged in this instance, he acted purely in terms of his contractual rights. To decide whether a decision by a functionary amounts

to administrative action is not always easy and a reading of the cases on this issue bears out this difficulty. Certain guidelines have crystallized out of judgments of the Courts in Namibia, and also in South Africa, but it is clear that the Courts are careful not to lay down hard and fast rules and each case must be judged on its own facts and circumstances. There is also no doubt that in deciding the issue Courts must have regard to constitutional provisions which, in certain instances, have broadened the scope of reviewable action.

[23] In regard to Namibia Article 18 of the Constitution deals with administrative action. The Article provides as follows:

> "**Article 18 Administrative Justice.**
>
> Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal."

[24] Article 18 is not open ended and does not affect every act by administrative bodies and administrative officials.

Apart from the subject with which the Article is dealing, namely administrative justice by administrative bodies and administrative officials, the words "such acts" refer, in the context of the Article, to decisions taken and compliance by such bodies and officials in terms of the common law and relevant legislation and in my opinion denotes administrative acts.

[25] The Article incorporated the common law principles of administrative law which have crystallized over many years but are not necessarily limited to those principles. (See *Minister of Health and Social Services v Lisse,* 2006 (2) NR 739 (SC).)

[26] Also in the Namibian context the Constitution distinguishes between the introducing of statutes, the implementation thereof, policy matters and executive action, which is a clear indication that Article 18 therefore deals with decisions taken by officials or administrative bodies

exercising administrative action.

[27] The duty of administrative bodies and administrative officials to act fairly and reasonably, when exercising these functions, is, in terms of the provisions of Article 18, now constitutionally guaranteed.

[28] It was further laid down by this Court that the words which enjoin officials and administrative bodies to "act fairly and reasonably" are not restricted to procedure only but also apply to the substance of the decision. (See *Minister of Health and Social Services, supra,* at para. [25] p. 772).

[29] In order to determine whether the first appellant, when he cancelled the agreement with the respondent, did so purely in terms of the agreement or whether it was an administrative act, is, as was previously stated, not always easy. The cases suggested various guidelines and principles which, applied on their own or cumulatively with

other guidelines and/or principles, may determine on which side of the dividing line a particular decision or action may fall.

[30] In the case of *President of the Republic of South Africa v South African Rugby Football Union,* 2000 (1) SA (CC) (the Sarfu case) it was stated what matters was not the functionary but the function performed by him or her. In the same case it was stated that the implementation of legislation would ordinarily constitute administrative action in contrast to policy matters which would ordinarily not be administrative action. Although this was said in connection with sec. 33 of the South African Constitution the same would also apply to Article 18 of our Constitution.

[31] To distinguish between policy matters and implementation of legislation regard should be had to the source of the power, the subject matter thereof and whether it involves the exercise of a public duty. (See in this regard also

Pharmaceutical Manufacturers of South Africa: In Re Ex Parte President of the Republic of South Africa, 2000 (2) SA 674 (CC); *Cape Metropolitan Council v Metro Inspection Services CC,* 2001 (3) SA 1913 (SCA) and *Chirwa v Transnet Limited and Others,* 2008 (3) BCLR 251 (CC)).

[32] In the *Chirwa*-case, *supra,* Paragraph [186], Nqcobo, J, stated in regard to whether a function or duty was public as follows:

> "[186] Determining whether a power or function is "public" is a notoriously difficult exercise. There is no simple definition or clear test to be applied. Instead, it is a question that has to be answered with regard to all the relevant factors, including (a) the relationship of coercion of power that the actor has in its capacity as a public institution. (b) the impact of the decision on the public; (c) the source of the power; and (d) whether there is a need for the decision to be exercised in the public interest. None of these factors will necessarily be determinative, instead, a court must exercise its discretion considering their relative weight in the context."

(See also *Grey's Marine Hout Bay (Pty) Ltd. v Minister of Public Works,* 2005 (6) SA 313 (SCA)).

[33] It further seems that decisions taken in regard to tenders and disciplinary matters are ordinarily regarded as administrative acts which would attract the constitutional principles set out in Article 18. (See in this regard *Administrator, Transvaal, and Others v Zenzile and Others,* 1991 (1) SA 21 (AD) and *Logbro Properties v Bedderson NO and Others,* 2003 (2) SA 460 (SCA).)

[34] The application of these principles, set out above, is also not free from difficulty. For instance the source of power acted upon by a functionary can almost always be traced back to some statutory enactment which, in practical terms, and if applied indiscriminately, will mean that every decision or act by a functionary could be classified as administrative action. If that was correct the burden on the State would be tremendous and would put naught to the State's freedom to enter into contracts like any private individual.

[35] This dilemma was recognised by the learned Judge-President in the case of *Open Learning Group v Secretary, Ministry of Finance,* 2006 (1) NR 275 HC where he succinctly stated in para. [114] as follows:

> "[114] Reading the cases and the literature it becomes very clear that it is important to appreciate the need for the State to be allowed sufficient space (what is sometimes referred to as the 'freedom of play in the joints of the executive') to operate in the business environment and to be governed by the ordinary rules of contract and private law generally, assuming the risks and enjoying the benefits available in private law."

[36] Mr. Smuts referred the Court to the cases set out hereinbefore and submitted that the cancellation of the agreement by the first appellant was a purely commercial act which did not amount to administrative action. Counsel analysed the agreement between the parties and submitted that the termination of the agreement did not amount to the

exercise of public power. However, with reference to the *Chirwa*-case, *supra*, counsel pointed out that even if the Court should find that the first appellant, in this instance, exercised a public duty, it does not follow that the action whereby the agreement was cancelled amounted to administrative action.

[37] In regard to the money claims, belatedly formulated and claimed by the respondent at the time when he filed his replying affidavit, counsel first of all submitted that those claims did not constitute administrative action which could be granted in terms of review proceedings. Counsel furthermore submitted that because of the time of its filing, the appellants had no opportunity to reply thereto. In any event, so counsel submitted, these claims are disputed, as was also found by the Court *a quo*, and the granting of those prayers was therefore not in order.

[38] Mr. Oosthuizen, in turn, submitted that because all

service providers were required to sign the same agreement this amounted to administrative regulation. Counsel also analysed the agreement and submitted that in terms of its provisions payment of claims can be withheld under certain circumstances. I understood this to mean that the parties, when they entered into the agreement, did not do so on an equal basis but that the first appellant acted from a position of superiority in regard to his position as a public authority.

[39] Counsel further submitted that the agreement between the parties was an administrative agreement and thus the first appellant, when he cancelled the agreement, was enforcing a public duty. The cancellation in terms of clause 11.5 was wrong and unwarranted as the tenets of natural justice applied as a result whereof the first appellant should have acted fairly, as required by Article 18 of the Constitution, and should have given the respondent an opportunity to be heard. He should also have informed him of any prejudicial information in his possession.

[40] Mr. Oosthuizen also argued that the common law principles of contract, particularly where the State is concerned, are subject to various articles of the Constitution such as Articles 5, 12, 18 and 25. According to counsel clause 11.5 of the agreement is *contra bonos mores* because it ousted the jurisdiction of the Courts. This must be seen together with the denial by the first appellant that Articles 12 and 18 are applicable in the present instance.

[41] I will immediately deal with the submission that clause 11.5 ousted the jurisdiction of the Courts. This submission is without substance. If Mr. Oosthuizen is correct and the cancellation of the agreement constituted administrative action then the respondent was entitled to take the decision of the first appellant on review. This was in fact done by respondent. If the decision did not constitute administrative action then the respondent is entitled to his remedies in terms of the common law of contract. Clause 11.5 is therefore also

not *contra bonos mores.*

[42] The statutory source of PSEMAS is the Public Service Act, Act 13 of 1995 (the Act). Sec. 34(1) of the Act, dealing with the mandating of regulations by the Prime Minister, provides in sub. sec. (d) for "the establishment and management of and control over a medical aid scheme for the Public Service."

[43] Regulations under the Act were promulgated under Government Notice No. 211 published in the Government Gazette of 1 November 1995 No. 1187. Reg. 26 of the regulations provides that the Ministry of Finance shall manage the medical aid scheme and that its objective shall be to make provision for the granting of assistance to members in defraying expenditure incurred by them in regard to various instances connected with medical care. It did not specifically provide for agreements with service providers or contracts to be concluded, nor did it prescribe in any way how

the scheme was to be set up.

[44] The medical aid scheme was set up in terms of rules published under Chapter DIX which in turn was issued in terms of sec 35 of the Act. Paragraph 9(5) thereof provided for the following payment options open to members:

> "(a) The contracted service provider claims from PSEMAS at 95% of the agreed tariff.
>
> (b) The member settles the account with a non contracted-in service provider and with proof of receipt claims 95% of the agreed tariff from PSEMAS.
>
> (c) …"

[45] The above rules applied to and bound members of the medical scheme who are public service employees. The choice whether to become a service provider or not was that of the respondent. I accept that there was some coercion to enter into the agreement but this coercion, to a great extent in my opinion, stemmed from the fact that it would have been extremely beneficial to medical practitioners to enter into such

an agreement. Patients would choose a medical practitioner who is a service provider over one who is not because they only needed to pay 5% up front of the fees charged. Compare that with the instance where a medical practitioner is not a contracted-in service provider and a patient has to pay 95% of the fees charged. Seen from the side of the service provider all accounts go to one institution, the Administrator of the scheme, who, in terms of the agreement, must pay within 30 days, instead of sending accounts to all patients individually and then having to wait until they decide to pay. Last but not least the medical practitioner, who is a service provider, only looks to one institution for payment, namely the Administrator of the scheme who in turn is backed by the Ministry of Finance. All this enabled the respondent to have an income in excess of N$ 7 million for the year 2004, seemingly without bad debts. The respondent himself stated that he could not afford to practise any other way.

[46] Those instances where the agreement required of the

respondent to perform certain duties such as to determine whether the patient was a member of PSEMAS and to ensure that the patient was issued with a membership card and to determine the identity of the patient were mostly, if not all, measures necessary to combat fraudulent or dishonest claims. Strict compliance with these duties was therefore as much in the interest of the respondent as it was in the interest of the PSEMAS. PSEMAS, disavowed specifically liability for claims based on the fraudulent or dishonest use of membership cards by its members or third parties.

[47] The agreement also deals with the processing of claims, the validity of claims, fees, the change in the status of the service provider and membership cards. All these subjects contain measures to combat fraud and dishonesty and in my view contain nothing that is out of the ordinary. In my opinion it does not contain anything which would not have formed part of similar agreements if concluded with a private medical scheme.

[48] Clause 11 provides for investigations, suspensions and related matters and clause 11.5 is the clause under which the respondent's agreement was suspended and finally cancelled. The grounds on which suspension and cancellation could follow are fraud, dishonesty, false representations and engagement in dishonest business practice. These are all common law grounds for cancellation of an agreement and which could, in any commercial agreement between private individuals, lead to cancellation of the contract summarily and that without being a specific term of such agreement.

[49] In general the provision of suspension may not form part of normal commercial agreements between private individuals, but even that is to the benefit of the service provider, as it allows for a time span during which negotiations could take place, as was indeed the case in this instance.

[50] For these reasons I am therefore of the opinion that at most it is doubtful whether the respondent, when he

concluded the agreement, acted from an inferior position and, bearing in mind what was said in the *Chirwa*-case, *supra,* pa. [180], the relative weight of this principle against the overall picture cannot be of great importance.

[51] Mr. Oosthuizen's further submission that other medical practitioners were required to sign similar agreements and that that is an indication that the first appellant acted from a position of authority is not valid in the particular circumstances. That is so because the subject matter of the agreements is in each instance the same, calling for the same measures and terms to be implemented. Furthermore the agreements are concluded with members of the same profession who provide services related to their profession.

[52] In order to determine whether a particular action amounts to administrative action, the following was stated in the *Cape Metropolitan*-case, *supra*, at para. [17], namely:

> "[17] It follows that whether or not conduct is 'administrative action' would depend on the nature of the power being exercised (*SARFU* at para. [141]) Other considerations which may be relevant are the source of the power, the subject matter, whether it involves the exercise of a public duty and how closely related it is to the implementation of legislation (*SARFU* at para. [143]).

[53] The facts in the *Cape Metropolitan*-case, in my view, closely resemble the facts in this appeal. In that matter the first respondent was successful in the Cape Provincial Division which set aside a decision by the Metropolitan Council to terminate a contract between the parties. On appeal the decision of the High Court was reversed. The Metropolitan Council was an Organ of State created by Statute. In terms of its statute it was empowered to enter into agreements with any person in terms of which that person undertook to exercise certain powers, on behalf of the Metropolitan Council, as agreed to between the parties.

[54] In terms of the agreement between the parties the first respondent was to register people liable to pay regional

services levies and to collect arrear levies. The respondent was paid a commission for its work. After allegations of fraudulent claims were brought to the attention of the Metropolitan Council an investigation was launched by it after which the agreement was summarily cancelled. In the letter of cancellation the first respondent was informed that the cancellation was based on a material breach of the agreement.

[55] Before the High Court and the Supreme Court of Appeal the argument was that the cancellation amounted to administrative action. The argument raised by the first respondent was very similar to the argument raised before our High Court and before this Court in the appeal now before us.

[56] In the *Cape Metropolitan*-case, it was contended that the decision to terminate the agreement should be set aside on the grounds that the first respondent's constitutional right to

lawful, procedurally fair administrative action and administrative action which was justifiable in relation to the reasons given for it, was violated by the summarily termination of the agreement. As is the case in the appeal before us, the first respondent contended that there should have been full disclosure of the reasons on which the termination was based and that it should have been given a reasonable opportunity to be heard, either orally or in writing.

[57] Also in that case the Court *a quo* concluded that the issue was not whether the appellant had sufficient reason to terminate the agreement but rather whether the procedure adopted by the appellant in terminating the agreement was correct.

[58] Dealing with these issues the Court of Appeal concluded as follows:

> "[18] The appellant is a public authority and, although it derived its power to enter into the contract with the first

> respondent from statute, it derived its power to cancel the contract from the terms of the contract and the common law. These terms were not prescribed by statute and could not be dictated by the appellant by virtue of its position as a public authority. They were agreed to by the respondent, a very substantial commercial undertaking. The appellant, when it concluded the contract, was therefore not acting from a position of superiority or authority by virtue of its being a public authority, and in respect of the cancellation, did not, by virtue of being a public authority, find itself in a stronger position than the position it would have been in had it been a private institution. When it purported to cancel the contract it was not performing a public duty or implementing legislation; it was purporting to exercise a contractual right founded on the *consensus* of the parties in respect of a commercial contract. In all these circumstances it cannot be said that the appellant was exercising a public power."

[59] In the present instance there can be no doubt that the first appellant is a public authority and that the power to enter into the agreement was derived form statute. However, the terms of the agreement are not statutorily prescribed, in fact nowhere is there even any direct mention of an agreement. Clause 11.5, in terms whereof the first appellant had

cancelled the agreement, contained only common law grounds on which the agreement could be cancelled. Correctly, in my view, the respondent did not deny the right of the first appellant to cancel the agreement if such grounds in fact existed. These grounds existed in the common law and the fact that they were contained in the agreement did not alter that fact. These were therefore not terms which the first appellant imposed by virtue of one or other superior position in which he found himself vis-à-vis the respondent. In canceling the agreement the first appellant was also not implementing legislation.

[60] Furthermore the subject-matter of the agreement between the parties was the rendering of medical services to members of the medical aid scheme. Seen in this context the subject matter of the agreement was a service agreement and purely commercial.

[61] For the above reasons I conclude that the first appellant, when he

cancelled the agreement, was not performing a public duty or implementing legislation but was acting in terms of the agreement entered into by the parties and that it could not be said that the first appellant, in doing so, was exercising a public power.

[62] In the *Chirwa*-case, *supra*, and notwithstanding the fact that the Court concluded, (Nqcobo, J, at paras. [138] to [142]), that Transnet was exercising public powers when it terminated the contract of its employee, that that finding was not decisive to determine that the termination of the contract was administrative action. In this regard the learned Judge stated in para. [142] as follows:

> "[142] The subject-matter of the power involved here is the termination of a contract of employment for poor work performance. The source of the power is the employment contract between the applicant and Transnet. The nature of the power involved here is therefore contractual. The fact that Transnet is a creature of statute does not detract from the fact that in terminating the applicant's contract of employment, it was exercising its contractual power. It does not involve the implementation of legislation which

> constitutes administrative action. The conduct of Transnet in terminating the employment contract does not in my view constitute administration. It is more concerned with labour and employment action. The mere fact that Transnet is an organ of State which exercises public power does not transform its conduct in terminating the applicant's employment contract into administrative action."

[63] The *Cape Metropolitan*-case was criticised in an article which appeared in the SA Law Journal, vol 121. Part 3, p 595, titled *Contracts in Administrative Law: Life after Formalism,* by Prof. Cora Hoexter, and in the *Logbro*-case, also relied upon by Mr. Oosthuizen, it was distinguished on certain grounds. However, in the *Chirwa*-case the Constitutional Court seems to me to have confirmed the reasoning in the *Cape Metropolitan*-case. (See the excerpt referred to in para. [62] above and see also the judgment of Langa, CJ, in the same case paras. [185] to [189]. (The judgment of the learned Chief Justice differed from that of the majority in that he found that Transnet did not exercise a public power when it terminated its contract with its employee).

[64] It was pointed out by Prof. Hoexter, in regard to the *Cape Metropolitan*-case, that legislation, applicable to the contractual relationship of the parties, provided for cancellation of the contract, *inter alia,* on the grounds of fraud or bad faith on the part of the other party to the agreement and that it was therefore possible to find that the source of the cancellation was statutory, which would have meant administrative action. The Court (Streicher, JA, whose judgment was concurred in by Hefer, ACJ, Marais, JA, Cameron, JA and Navsa, JA) also considered the legislation and stated that if the contract were cancelled in terms of the statutory provisions he would not have hesitated to find that it constituted administrative action. (See sec. 22(1) of the Financial Regulations for Regional Services Councils R1524 of 28 June 1991). In regard to the appeal before us I could not find any such or similar regulations in Namibia, nor was any reliance placed by Mr. Oosthuizen on the existence of any such regulations, which could have been considered in

deciding whether the first appellant's action was administrative.

[65] A reading of the above cases shows that each case must be determined on its own facts. In this regard the Court *a quo* referred to the *0pen Learning*-case and applied the principles set out in that case. I have no problem with that. It is the application of those principles to the particular facts of the case that is problematic and in that regard I am of the opinion that the facts of this appeal differ from those in the *Open Learning*-case and that application of the same principles may lead to a different conclusion.

[66] The *Open Learning*-case was argued on appeal and judgment must still be given. However, Mr. Smuts submitted that the case is distinguishable from the present case because the Court found that the agreement in that matter was cancelled in terms of the statutory provisions which governed the relationship and not in terms of the provisions of

the agreement concluded between the parties. I agree with Mr. Smuts. It is clear that the functionary in that case by letter cancelled the agreement and stated that he did so on the strength of the statutory provisions applicable. The functionary later on disavowed his reliance on the statutory provisions and stated instead that he acted in terms of the contract of the parties. However, the Court did not accept this change of attitude and kept the functionary to what was stated in the letter of cancellation.

[67] There is a further significant difference between the two cases in that the Court in the *Open Learning*-case found that the agreement between the parties "also constitutes the vehicle through which NAMFISA was to 'regulate' the applicant (i.e. Open Learning). That much is clear from an analysis of the agreement in para. [20] of this judgment. NAMFISA's regulatory powers are therefore incorporated in it." (para. [120] of the Court's judgment).

[68] NAMFISA is the supervisory authority of financial institutions of Namibia. In the present instance this did not happen and the agreement did not subject the respondent to the regulatory powers of NAMFISA, a statutory body.

[69] A further difference is that because of the above findings it was not necessary for the learned Judge-President in the *Open Learning*-case to consider the effect where cancellation of the agreement was based on the terms of the contract or, as in the present matter, on common law grounds.

[70] I therefore agree with Mr. Smuts that the power to cancel, which was vested in the functionary in that matter, was purportedly derived from statute and not from contract. I also agree that, for the reasons set out above, the same cannot be said of the power of the first appellant to cancel the agreement in the present appeal.

[71] The issue in the present appeal is whether the

termination of the agreement by the first appellant was administrative action which would have entitled the respondent to claim application of Article 18 of the Constitution which requires fair and reasonable action by administrative bodies and administrative officials. Once it is found, as I have, that the termination of the agreement did not constitute administrative action, Article 18 does not apply. Reference to cases such as *Minister of Education v Syfrets Trust Ltd NO,* 2006 (4) SA 205 (CPD) and *Napier v Barkhuizen,* 2006 (4) SA 1 (SCA) may be relevant, as the facts showed, to the particular contractual relationship in which the parties stood in those cases. It does however not deal with administrative action and the application of an Article such as Article 18 of the Constitution. Mr. Oosthuizen nevertheless relied on these cases.

[72] The application of the values of the Constitution, without more, to contractual relationships is not self-evident and in the *Napier-* case, *supra,* the Court pointed out that it is not

immediately obvious how values of human dignity, the achievement of equality and the advancement of human rights and freedoms may affect particular contractual outcomes. It also warned that the fact that a term of a contract is unfair may not by itself lead to the conclusion that it offends against constitutional principles. (paras. [12] and[14]). The Court here clearly dealt with the effect of the values of the Constitution generally on contracts and did not deal with the issue on the basis of a review as was the case made out for the respondent. To apply these cases willy nilly to a different Constitution which does not contain articles similar to sec. 8(3) and 39(2) of the Constitution of South Africa, 1996, whereby the Courts of South Africa are mandated to develop the common law according to the values of that Constitution is not permissible. No argument was presented to us in what way the values of our Constitution should apply to the common law and this is therefore an issue which will have to stand over until proper argument is heard. The warning given by Kriegler, J. in the

case of *Bernstein and Others v Bester NO and Others,* 1996 (2) SA 751 (CC) at para. [133] is also apposite to our situation, namely-

> "Far too often one sees citation by counsel of, for instance, an American judgment in support of a proposition relating to our Constitution, without any attempt to explain why it is said to be in point. Comparative study is always useful, particularly where Courts in exemplary jurisdictions have grappled with universal issues confronting us… But that is a far cry from blithe adoption of alien concepts or inappropriate precedents"

[73] In applying precedents to our Constitution, based on a different Constitution, due regard must be had to any difference in language or context which may exist between the Statutes.

[74] I further agree with Mr. Smuts that the *Logbro*-case is distinguishable from the present appeal. As was pointed out by counsel it relates to a tender process which has consistently been held by Courts in South Africa and Namibia

to constitute administrative action. So too in regard to disciplinary proceedings in employment contracts. (See *Administrator, Transvaal and Others v Zenzile and Others,* 1991 (1) SA 21 (AD)).

[75] In regard to the financial claims of the parties, which were granted by the Court *a quo*, I am of the opinion that these constitute ordinary claims, enforceable in the normal way by action procedure. No administrative action was involved. (See *Smith v Kwanonquobela Town Council,* 1999 (4) SA 947 (SCA).)

[76] In the case of *Eastern Metropolitan Substructure v Peter Klein Investments,* 2001 (4) SA 661 (WLD) the defences raised by special pleas were that the defendant was not afforded a fair hearing before summons was issued and secondly that the common law principles based on natural justice and the constitutional right to administrative justice in terms of sec. 33 of the Constitution of the Republic of South

Africa was not complied with. Exception was taken to these defences and the Court rejected the defences raised by the defendant. In regard to the first the Court found that the issue of summons does not prejudicially impact on any of the defendant's rights. (See para [9].) The reference here to the rights of the plaintiff is clearly a misstatement).

[77] In regard to the second defence the Court concluded that the issue of summons was not an administrative act but was procedural. In the course of its judgment the Court stated that the decision to recover payment is a preliminary or interlocutory step having no determinate effect on the parties' rights. (Para [14].) I respectfully agree with these findings.

[78] I have therefore come to the conclusion that the respondent's application for review was the wrong remedy in all the circumstances. His remedy lies in contract and he should either have enforced the contract or claim damages. I want however to make it clear that this judgment did not

decide the issues of fraud and/ or whether the cancellation of the contract was in all the circumstances justifiable. Those are issues which can only be decided when there is proper ventilation thereof in court proceedings, if so advised.

[79] For the reasons set out above the appeal must succeed and consequently the following orders are made:

1. The appeal succeeds with costs, such costs to include the costs of one instructing and one instructed counsel.

2. The orders of the Court *a quo* are set aside and the following order is substituted therefor:

“The application for review is dismissed with costs.”

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STRYDOM, AJA

I agree.

____

SHIVUTE, CJ

I agree.

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CHOMBA, AJA

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