# A CRITICAL REVIEW OF THE JUDGEMENT OF ***PERMANENT SECRETARY OF MINISTRY OF FINANCE AND OTHERS V WARD (SA 16/2008) [2009] NASC 3 (17 MARCH 2009)***

A RESEARCH SUBMITTED IN PARTIAL FULFILLMENT OF THE LLB DEGREE AT THE UNIVERISTY OF NAMIBIA

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## DECLARATION

I the undersigned, hereby declare that the work contained in this dissertation for the purpose of obtaining my degree of LL B is my own original work and that I have not used any other sources than those listed in the bibliography and quoted in the references.

Signature……

Date……

Supervisor's certificate

I, Nico Horn hereby certify that the research and writing of this dissertation was carried under my supervision.

Signature……

Date……

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***Abstract***

*Contracts are viewed by our courts as part of private law, unless there is a "public law" element involved. Contracts where there is a public law element i.e. contracts where a state or its branches or any entity offering public service are involved are referred to as administrative contracts. Our Courts use two distinct approaches to solve contractual cases where the State is a party. These approaches are the pure contractual approach and the public-law approach. The purely contractual approach is based on the contention that the parties involved are contracting on an equal basis, based on consensus therefore contract and common law contract principles should apply. Whereas the public law approach does not dispute the existence of a contractual relationship, however advocates that constitutional principles should apply to a contract where a public body is involved. This approach advocates for the application as well as recognition of constitutional principles, it further entails questioning what constitutional principles require of a given situation. This paper will discuss which approach is more favourable with regard to WARD I and WARD II. The paper further highlights numerous cases in which the court refused to review cases because there was not the necessary "public law" element, and will further show as to the unfavourable results of this approach. Moreover, it will critically review the Supreme Court decision of WARD juxtaposed to the High Court decision of the same case. In this case both these approaches were used by the High Court and the Supreme Court of Namibia respectively. In conclusion the paper explore whether there is a need for law reform in this area.*

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## Chapter 1

### 1.1 Introduction

Administrative law in Namibia is generally under developed. This lack of development includes the area of administrative agreements. There is confusion as to which law applies to administrative agreements, is it contract law (the purely contractual approach) or is it administrative law particularly the public law approach with constitutional principles? This problem was mainly caused by the transition from the apartheid system which was governed by parliamentary sovereignty to a constitutional supremacy jurisdiction. How did this influence interpretation of administrative agreements? The apartheid political dispensation made cruel laws which were to be applied to some segments of the nation. This influenced the interpretation and decisions of judgments in South Africa, which in turn was adopted in the Namibian system through the precedence and statute law.

This research paper will focus on administrative agreements, particularly the public law approach. These two approaches were applied by the High Court in the case of *Cornelius Marthinus Johannes WARD v The Permanent Secretary of the Ministry of Finance, the Prime Minister of the Republic of Namibia*[1](hereinafter WARD I) and the Supreme Court in the case of *Permanent secretary of Ministry of Finance and other v WARD*[2] (hereinafter WARD II). The High Court of Namibia in WARD I took the public law approach, whereas in an appeal of the same case the Supreme Court took the purely contractual approach.

This research paper will establish that WARD I was the correct decision, as it will be shown in the next chapters that the public law approach which applies constitutional principles offers better protection to parties in administrative

[1] Case no [P] A 272/2005.
[2] (SA 16/2008) [2009] NASC 3.

agreements, where the government or its organ unilaterally terminates the agreement.

Usually contracts are regulated by private law, because this relationship is deemed to be an equal relationship between two private individuals with full capacity to act. While on the other hand, contracts where there is an unequal relationship are regulated by legislation. For example, when a party contracts with a company for a loan (credit agreement) such a contract is regulated by the Credit Agreements Act[3]. A contract or an agreement where the state is involved is usually not regulated by the credit agreement act (the Namibian situation at present). The question then is how are such agreements regulated, when there is a state involved (usually a powerful institution) and another party who is in a subordinate position to the state in terms of power, authority and resources? How do we ensure that the subordinate party is protected? Should such contracts not be subjected to judicial review? In English law the courts have adopted the approach that judicial review does not apply unless there is some special element of "public law" involved.[4] Burns[5], contends that courts appear to have been influenced by abstract consideration such as the concept of freedom to contract, the idea of contract as a consensual relationship and the perception that contracts are purely "private law" in nature.

The Australian Seddon, is of the view that government contracts are unique, for the following reasons;[6]

- Governments are expected to be exemplary and therefore are required to exercise control in exercising power. The government may be equated to a trustee because it deals with public funds; but unlike a trustee it does

[3] Act 75 of 1980.
[4] Burns, Y. (2003) *Administrative Law under the 1996 constitution*. 2nd edition. NexisLexis Butterworths: Durban p.173.
[5] Ibid.
[6] Quoted in Burns. *Administrative Law under the 1996 constitution,* p 174, ibid.

not only look after the interest of the beneficiary (the people), but must also look after the interest of the contractor (the citizen).

- Government contracts where citizens are involved must be carefully monitored to ensure that citizens have equal opportunities to secure government business, because the government has the duty to preserve public resources. It is understood that it is the government's quest to fulfill its role as trustee/guardian/custodian of the people's resources, hence the government must obtain the best value for money when buying, and the best price when selling. Seddon assumes that government or its officials always act in the best interest of the society, if this is the case; it is possible that a state official can be misdirected even if it was not his intention to do so.

Seddon implies that government contracts should be subject to review, that government contracts should be carefully monitored. There is always an assumption that the state will act in the best interest of an individual. However, it is possible that a state official maybe misdirected even if s/he does not intend to do so. That is why judicial review is important in this instance.

Currently the position in Namibia is that a government organ contracting with a major enterprise is contracting on an equal basis. Therefore, private law of contract governs the relationship. A contract between the state or its organ and a person in a less powerful economic position is or should be subject to review, due to the unequal relationship of power. The courts use different methods to determine equality between the parties to an administrative agreement and this is where the problem lies.

In 2004 Professor Cora Hoexter wrote an article - *Contracts in Administrative Law: Life after formalism?*[7] In which she dealt with the purely contractual approach and the public law approach to solve disputes in administrative

[7] Hoexter, C. 2004. "Contracts in Administrative Law: Life after formalism?". *The South African Law Journal,* 121: 595,605, accessed at **http://search.sabinet.co.za/480726C6-4E48-4154-A91B-9D9CC65557CD/FinalDownload/DownloadId-906242707D4725585216C82CF1AB564D/480726C6-4E48-4154-A91B-9D9CC65557CD/images/ejour/ju_salj/ju_salj_v121_n3_a11.pdf** accessed on 26 May 2011.

agreements. In other jurisdictions the question of whether administrative agreements should be subject to review, or should be dealt with under administrative law and not private law is a settled matter. However, in Namibia as indicated by case law, we are still grappling with this issue.

The purpose of this research paper is to give a critical review of the judgment in the case *Permanent Secretary of Ministry of Finance and Others v WARD (SA 16/2008) [2009] NASC 3 (17 March 2009) (*hereinafter WARD II), comparing it to the judgment of the High Court (hereinafter WARD I) on the same case. The paper aims to investigate as to what law was applicable before the WARD II case, and the law applicable now in Namibia with regard to administrative agreements. With regarding to the two approaches i.e. private law and public law approach, this research paper will indicate that the public law approach which give consideration to Constitutional principle is the correct approach which offers better protection to parties in administrative relationships. The paper further intends to investigate if there is a need for law reform.

The importance of this research paper is that it will contribute to the Administrative Law jurisprudence specifically the area of Administrative agreements as it is underdeveloped. The methodology used for this research paper is case and text study.

## Chapter 2

### 2.1 Introduction

The WARD II[8]and WARD I[9] cases dealt with the division between administrative law and private law, in the narrow sense it dealt with the division between the public law approach and the purely contractual approach. Cases supporting the contractual approach portray the relationships between the parties as a matter of 'pure contract', a matter of consensus governed by private law alone. The legislative structure for the relationship between the parties is belittled, and the public nature of one of the parties is ignored. The duties of the parties are all seen to be limited in expressed or implied terms of the contract. Therefore, they are only applicable if and to the extent that the parties saw it fit to include them in the contract, expressly or impliedly.[10] Whereas under the public law approach, the courts do not deny the existence of a contract but they refuse to separate that contract from its public-law framework.[11] Additionally, the public law approach points to the public nature of one of the contractual parties and specifically to the statutory source of that party's contractual powers.[12] Therefore, the contractual relationship is subordinated to the rules of administrative law,[13] and these rules may include the application of constitutional principles and the long-standing applicable common law rules. This Chapter will state the facts in WARD. It will further state what the legal position was before WARD, by looking using the South African jurisprudence as yardstick

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[8] *Permanent Secretary of Ministry of Finance and Others v WARD (SA 16/2008) [2009] NASC 3.*
[9]Cornelius Marthinus Johannes WARD v The Permanent Secretary of the Ministry of Finance, The Prime Minister of the Republic of Namibia case no.: [P] A 272/2005.
[10] see Hoexter, C. 2004 . "Contracts in Administrative Law: Life after formalism?". *South African Law Journal,* 121: 585, p 599.
[11] Hoexter, C. 2004 . "Contracts in Administrative Law: Life after formalism?". *South African Law Journal,* 121: 585, p 605.
[12] ibid.
[13] Ibid.

## 2.2 Background of the issue

WARD was a medical practitioner in Katima Mulilo. He entered into a written agreement with the Ministry of Finance, represented by the Minister of Finance, to become a service provider to the Public Service Employees' Medical Aid Scheme, hereinafter PSEMAS. PSEMAS is the medical aid scheme, set up by the office of the Prime Minister under the control of the Ministry of Finance, for Government employees.

The Ministry of Finance suspected WARD of fraudulent activities regarding his dealings with patients. As a result the Ministry contracted a private body to conduct investigations into WARD's alleged fraudulent activities. After two investigations, the body appointed by the Ministry confirmed that WARD was engaged in fraudulent activities. The Ministry as a result of the investigation unilaterally terminated the contract based on clause 11.5 which provided for the unilateral termination of the contract in cases of fraud.

Faced with this final decision WARD launched a Notice of Motion as a matter of urgency, an application for relief by way of an interdict pending the review of the decision taken by the Ministry of Finance 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.

WARD was awarded an order in the Court *a quo* and the prayers set out in his amended Notice of Motion were substantially granted by the Court. He prayed for the correcting or setting aside of the decision taken by the Ministry of Finance to terminate the contract. He further prayed for the decision of the Ministry of Finance to be declared unconstitutional and in conflict with Article

12[14] and 18[15] of the constitution and thus null and void. He further prayed for costs to be paid by the Ministry of Finance, or any further or alternative relief as the Court deemed fit. As a result the Minister of Finance appealed against the entire judgment and orders handed down by the Court *a quo.*

**2.3 The issue**

The most important issue, which was raised by the Ministry of Finance, was the denial that its decision to cancel the agreement between the parties was administrative in nature and therefore reviewable. The Ministry of Finance argued that it acted purely in terms of the agreement; therefore, the cancellation was the exercise of a contractual right. The court was tasked with determining whether the relationship between the two parties was one governed by administrative law (public law) or was governed by contract law (private law). Based on the answer the court was further to determine whether the action taken by the Ministry of Finance, i.e. to terminate the contract due to findings of fraud without offering WARD a hearing, was an administrative action, or not.

Before discussing the precedence set by the two WARD cases, it is important at this point to discuss the legal position before the High Court judgment of WARD I. This discussion will give a clear understanding as to why some precedence were laid by the courts and further it will show as to why such reasoning persists to date.

Namibia inherited its Administrative Law principles from South Africa through the enactment of Proclamation 21 of 1919. This proclamation provided that Roman Dutch law was to be applied in the territory as existing and applied in the Province of the 'Cape of Good Hope'. The proclamation remained the legal

[14] Article 12 of the Namibian Constitution (Act 1 of 1990) grants the right to fair trial.
[15] Article 18 of the Namibian Constitution deals with Administrative justice, this Article will dealt in detain in the next chapters.

basis for the application of the common law of the Cape as a source of law in South West Africa until the declaration of the Namibian Constitution.[16] After the independence of Namibia as to not create a legal vacuum, Article 140(1) of the Constitution provides for the continued application of laws existing before the date of independence. Furthermore, Article 66(1) of the Constitution specifically stipulates for the application of common law and customary law which was in existence before independence. The continued application of these laws; laws stipulated by Article 140(1) and 66(1) are subject to the repeal of such laws by an Act of parliament or such laws being declared unconstitutional by a competent court of law. Having said that, the major source of administrative law specifically administrative agreements is mainly case law. Thus the law applicable before the decision of WARD I will be examined through cases.

In South Africa the contractual approach was used in the majority judgment of *Mustapha v Receiver of Revenue, Lichtenburg*[17]. The facts in this case were that the appellants (Mustapha and others) were issued with a permit under the Trust and Land Act of 1936[18]. This statute governed land held for the exclusive use and benefit of 'native' but allowed for an exception to 'non-natives'. Appellants who were Indians obtained permission under the Act to occupy a piece of trust land for trading purposes and paid rent for the piece of land. The permission to occupy was recorded in a document headed 'permission to occupy', the document set out the conditions of the permission. One of the conditions in the document was that the trustee could withdraw permission and resume possession of the land if the occupiers do not comply with the terms of the document. Later, the permission to occupy was withdrawn primarily because the occupiers were Indians. The majority of the Court of Appeal of South Africa refused to set the eviction notice aside, as they

[16] See Amoo S.K. (2008) *Introduction to Namibian Law. Materials and cases.* Macmillan Education Namibia Publishers (Pty) Ltd: Windhoek, p 60.
[17] 1958 *(3) SA 343 (A).*
[18] 18 of 1936.

saw the relationship between the parties 'in its essentials' as a contractual one which have its origin in offer and acceptance'. The Court further held that the application for the permit was issued on terms that either had to be accepted or rejected by the applicant whether these terms were expressed or implied. In giving the notice, the trustee exercised a contractual right and not statutory power.

This decision illustrates the unpleasant results of following the purely contractual approach only, without having consideration to the public nature of the functionary. In this instance the contractual approach gave way to the enforcement of a discriminatory clause which if administrative law principles were to apply will not stand. If the Court allowed for a review, the appellants would have been afforded a chance to be heard and this might have changed the outcome of the decision. The Court held that the non-discrimination rule laid down in *R v Abdurahman*[19] applied only in the sphere of statutory powers, and not in the sphere of contract. Therefore the Minister's motives were irrelevant, just as motives for cancellation in a contractual relationship between two private individuals will be. The rule laid down in the *Abdurahman* case was that the reservation of railway coaches for whites only could not stand on the basis that no coaches were equally reserved for other races.

Another strong example of the purely contractual approach was in *Scholtz v Cape Divisional Council*[20], in this case the Cape Divisional Council entered into a contract of lease with the appellant in terms of statutory powers to provide housing for underprivileged people. Both parties could cancel the lease on seven days' notice in writing. The appellant challenged his eviction from a low-rent cottage, disputing that the council had to exercise contractual powers in accordance with the requirements of administrative law; particularly, the council was not entitled to act arbitrary and capriciously. The court decided that the appellant's rights derived 'purely from contract' and not from any,

[19] *1950 (3) SA 136 (A).*
[20] *1987 (1) SA 68 (C).*

statute. The court further held that as long as council did not breach any express term of the contract, it could evict the appellant for any reason to none. Held further that it might be possible to imply a term that contractual rights would be exercised lawfully and reasonably, but this would depend on the existence of a statutory duty, as opposed to mere power, to provide cheap accommodation. In the absence of such a duty, this was an ordinary commercial contract. It is noteworthy at this juncture that this case seems to suggest that it is possible to exclude the application of certain principles of the law to the contract. In that parties can include in the contract that contractual rights would not be exercised fairly and reasonably. Probably not in so many words, but a provision to that effect nonetheless.

The contractual approach was also used in *Sibanyoni v University of Fort Hare 1985 (1) SA 19 (Ck)*[21]. In this case the students were instructed to attend lectures on certain days or be 'regarded as having elected to discontinue their studies'. From the students' point of view, this was expulsion, a disciplinary matter. Hoexter argued that it is well known that disciplinary matters have always attracted natural justice, even when private rather than public bodies make them.[22] However, the court saw things differently in this case, in its view this was a case of misconduct amounting to material breach of the contract between the students and the university. The university's termination of the contract was held to be fully justified, and the rules of administrative law were excluded; the contract between the parties said all there was to say about the matter.

In the case of *Mkhize v Rector, University of Zululand*[23], a student was refused readmission to the university because he previously disobeyed hostel rules. The strong disciplinary aspect in this case was also ignored. Instead the court held that the decision of a person not to accept an offer to enter into a contract

[21] Hoexter, C. 2004 . "Contracts in Administrative Law: Life after formalism?". *South African Law Journal,* 121: 585, p 603, ibid.
[22] Ibid.
[23] *1986 (1) SA 901 (D).*

with another is normally not a reviewable decision and not one which has to be arrived at after the application of the rules of natural justice. Another case is *Naran v Head of the Department of Local Government, Housing and Agriculture (House of Delegates)*[24], which concerned a lease of a shop to the appellant by a Community Development Board. The lease could be terminated by either party on six months' notice. Years later the Board gave notice of termination, and was granted an eviction order by the Court *a quo* when the lessee failed to vacate the premises after the notice period. The lessee argued before the Appellate Division that he should have been heard before the decision was made to terminate the lease. The court dismissed the appeal because when he terminated the lease, the lessor had exercised only 'purely contractual rights' and not any 'statutory right' which would have attracted the *audi alteram partem* principle. This was the decision although there was an Appellant Division authority[25] establishing that procedural fairness applies to the termination of a contract by a public body exercising statutory powers. The decision in this case was on the basis that the Board did not allege to rely on any statutory power in terminating the contract. The court also noted that there was no punitive or disciplinary element in the case. Each party was free in terms of its contractual powers to terminate the contract on six months' notice, and the lessor has simply exercised this choice. There is a lot of inconsistency in the contractual approach. This might be because of the discretion given to the court to decide each case on the facts before it, and not following set steps which if followed blindly might lead to absurdity. In Mkize above the disciplinary element was ignored the court contending that the decision was mainly based on contract. However, in *Naran v Head of the Department of Local Government, Housing and Agriculture (House of Delegates)*[26]

[24] *1993 (1) SA 405 (T).*
[25] The case of *Administrator, Transvaal v Zenzile 1991 (1) SA 21 (A).*
[26] 1993 (1) SA 405 (T).

the court noted that there was a strong punitive or disciplinary element in the case; therefore each party was free in terms of the contract to terminate the contract on stipulated notice.

As illustrated above the purely contractual approach dominated case law up to the 1990s, however with a few minor exceptions.[27] Therefore, it can be concluded that most precedence laid down before independence took the purely contractual approach. Therefore the law applicable before independence was mainly the purely contractual approach. However, it is important to acknowledge the political element in some of the cases above, and how this influenced the judgments in such cases.

South Africa was governed by parliamentary sovereignty, although this was not the most significant aspect of the South African legal jurisprudence as parliamentary sovereignty is not necessarily the cause of repression. Britain is an excellent example of a country governed by parliamentary sovereignty but without a history of oppression like South Africa. The most significant influence on decisions made by judges before independence was contributed by the apartheid system. Before independence judges were under a lot of pressure to interpret apartheid laws whose main objectives were to suppress and repress the black majority. In parliamentary sovereignty the judge's job is to apply the law as is, unlike in a constitutional dispensation were such laws can be measured against the constitution and be repealed if they do not conform to the constitution. Durgard[28] and Dyzenhaus criticized judges who adjudicated during the apartheid era for not using the common law to soften apartheid laws. They contended that they had a choice to interpret such laws using the common law, but they chose not to. Forsyth further supported this contention by stating that where judges had a choice they instead chose the harsher and more pro-executive interpretation of statute with little protest and any sign of

[27]Hoexter, C. 2004 . "Contracts in Administrative Law: Life after formalism?". *South African Law Journal,* 121: 585, p 599.
[28]See J Dugard. 1971 "The Judicial Process, Positivism and Civil Liberty". South *African Law Journal,* 88:181-200.

regret. The hypocrisy of judges during the apartheid era is superbly illustrated by the quotation below by Professor Corder[29]

> […] there can be little argument that the picture of the Appellate judiciary, as a body of fearless fighters for the less-privileged and unrepresented majority, is a myth whose perpetuation serves the cause of inequality. In truth members of the AD, while formally independent from political influence, manifestly incorrupt, and consciously impartial where integral parts of the very structure which had created and now maintained injustice, from which they made little effort to extricate themselves with.

Forsyth[30] agreed with the above quotation by Prof Corder. After researching thirty years of the Appellate division's activities; he revealed that the courts hardly associated themselves directly with government policy. However, the courts' decisions revealed that since the appointment of LC Steyn as a chief justice the implementation of government policy has substantially facilitated a failure to keep the executive within the law.

Finally, in looking at the facts of the cases analysed above, these are cases where there is an element of racial division. The political dispensation of that time had segregated laws which applied to different races. The laws that applied to blacks were harsher and very unfair compared to the laws applied to whites then.[31] The application of the laws involved the use of the contractual approach in most cases as illustrated above. The contractual approach was applied very early on and by the majority of the judges as illustrated. It seems as though this approach was used to meet the discriminatory ends of the apartheid system. This is probably why the purely contractual approach in solving administrative disputes should be used with caution in a Constitutional Supremacy. The next chapter will show the application of the public law

[29] See DH Van Zyl 'The judiciary in a changing South Africa'. Obtained from **http://www.sabar.za/law-journals/1994/april/1994-april-vol007-no1-pp16-21.pdf**, accessed on 5 July 2011.

[30] DH Van Zyl. 'The judiciary in a changing South Africa', p 17, ibid.

[31] See Dyzenhaus, D. (1991) *Judging the Judges, Judging ourselves. Truth, reconciliation and the apartheid legal order.* Hart Publishing: Oxford, and Dyzenhaus, D. (1991) *Hard cases in Wicked legal systems. South African law in the perspective of legal philosophy.* Clarendon Press: Oxford.

approach as an approach taken after the advent of the Constitution in South Africa.

## Chapter 3

### 3.1 Introduction

In the matter between *Cornelius Marthinus Johannes WARD v The Permanent Secretary of the Ministry of Finance, The Minister of Finance, The Prime Minister of the Republic of Namibia (*hereinafter referred to as WARD I)[32], the judge in the High Court held that the relationship between Dr WARD and the Ministry of Finance was an administrative one. Therefore, the decision taken by the Ministry of Finance was subject to review. Whereas the Judges in the Supreme Court held otherwise, in that the relationship was a private one and not a public one, and it was therefore governed by the rules of private law, and that Dr WARD should find his remedies in private law and not under Administrative law. The purpose of this chapter is to explain the legal rules as it pertained before and after the final decision of the Supreme Court with regard to WARD's case. In this chapter, the two schools of thoughts i.e. the contractual approach and the public law approach, will be discussed in detail. This chapter will further deal with the courts' decisions and the reasons given for the decisions.

### 3.2 Legal rules before the decision of the Supreme Court (WARD)

The position before *WARD II* judgment was that an administrative agreement must be subject to the rules of administrative law. Therefore, Article 18 of the Namibian constitution should apply, the authority for this proposition is the decision of *WARD I*[33], *and Open Learning Group Namibia Finance cc v Permanent Secretary of the Ministry of Finance & 3 others* [34]. The facts in these two cases were slightly similar and the High Court came to the same conclusion in both cases. The contributions and relevance of the cases are discussed in detail below.

[32] Case no.: [P] A 272/2005.
[33] *Cornelius Marthinus Johannes WARD v The Permanent Secretary of the Ministry of Finance, The Minister of Finance, The Prime Minister of the Republic of Namibia, ibid.*
[34] case no.: (p) a 90/2005..

In WARD I, Judge Muller ruled that the termination of the agreement was an administrative agreement, thus it was subject to review. Some of the reasons for the judgment were in agreement with the judgment of Judge-president in the *Open Learning group case,* in that although a contract was at stake in each of these cases the principle of *audi* and the requirements of Article 18 of the Namibian constitution cannot be disregarded. This means that even though there was an agreement the party who was adversely affected by the decision had the right to be heard. Furthermore, because of the presence of a state organ in the agreement, Article 18 of the Constitution was applicable. In support of his contention he further stated that the matter could clearly not be determined purely on a contractual basis.

Judge Muller did not deny the existence of a contractual relationship between the parties. However, he contended that the question that needed to be answered was whether the applicant was prejudiced by the wrongful exercise of the Minister of finance rights derived from a contract. He further stated that the public authority has a duty to act fairly, whether acting in terms of a contract or otherwise. He looked at Dr WARD's right to fair cancellation of the contract as a right guaranteed by the constitution. He used the case of *Napier v Barkhuizen*[35] as authority that the Court's approach in this case was the considerable inference that contractual terms are subject to constitutional rights. The Court emphasized that this general premise was correct. The Court further quoted the case of *Brisley v Drotsky,*[36] the essential principles of which were endorsed in *Afrox Healthcare Bpk v Strydom,*[37] while in *Brisley* the Court admitted that the common law of contract is subject to the Constitution. This means that courts are obliged to take fundamental constitutional values into account while performing their duties to develop the law of contract in accordance with the constitution. This is the situation in South Africa at

[35] *(CCT 72/05) [2009] ZACC 5; 2007 (5) SA 323 (CC) (4 April 2007).*
[36] *2004 2002(4) SA 1 (SCA) at [88] – [95].*
[37] *2002 (60 SA 21 (SCA) (SCA).*

present, which was decided by the highest court in South Africa namely the Constitutional Court. Therefore, the decision in WARD I and Open leaning group was in line with decisions of South Africa's highest constitutional court.

The *Napier v Barkhuizen*[38] judgment supported the statement by the learned Judge-President in the case of *Open Learning Group Namibia Finance cc v Permanent Secretary of the Ministry of Finance & 3 others;*[39] In that,

> It could not be correct that just because the benefit or concession granted by the public authority is not prescribed as a statute, a public authority can act capriciously and whimsically in respect of it.

What the judge meant in this instance was that administrative organs should not be allowed to act without consideration of the affected party's constitutional rights. They should further not act in an unfair manner. Put simply, the public authority granting the benefit must respect the dictates of the constitution; it must act fairly and reasonably. He stated that the Minister of Finance acted from a position of power because it set the terms of the service provider's agreement which allowed no bargaining power by the service provider.

The judges in this case further stated that Article 18 is not open-ended and does not affect every act by administrative bodies and administrative officials. The judges interpreted the words 'such as' in the Article, stating that apart from the subject with which the Article is dealing with, namely administrative justice by administrative bodies and officials, the words 'such acts' refer, in the context of the Article. Decisions taken and compliance by such bodies and officials in terms of the common law and relevant legislation denote administrative acts.[40]

[38] Ibid 20.
[39] *case no.: (p) a 90/2005.*
[40] Ibid.

The authority on which the WARD I case was based was the case of *Open Learning Group v Permanent Secretary of Finance & 2 others*[41]. In citing this case as authority Judge Muller in the WARD I case stated that this judgment should not be relied on as final authority as the case was appealed. Although the final appeal is not out yet.

The facts in the *Open Learning* case were as follows: The applicant was a registered Educational Institution (i.e. Open Learning Group) which allowed registered students to pay off their study fees in installments. Furthermore, the applicant was registered as a micro lender with NAMFISA in terms of the Usury Act of 1968[42]. It entered into a written agreement with the Ministry of Finance, which was known as a deduction code. This agreement enabled the applicant to deduct money from salaries of students most of whom were Public Service employees.

The dispute arose when the respondent revoked the deduction codes on the ground of alleged misrepresentation by the applicant. The applicant was further deregistered as a micro lender on the grounds that it had not fulfilled its obligations in terms of the Usury Act. The applicant wanted the Court to set aside, as well as review the revocation of the deduction codes.

The Court decided that the decision by the first respondent to revoke the deduction codes was reviewable and was set aside because it was unlawful and unconstitutional.

Furthermore, the decision by the fourth respondent to cancel the registration of the applicant as a micro lender, or treating the respondent as if it was not a micro lender was declared to be of no force and effect, and it was further declared *ultra vires* and unlawful.

The principles set by this case were as follows;

[41] [*2006 (1) NR 27 5 (HC)].*
[42] (Act 73 of 1968).

If a public body acts as to create or give a benefit or concession, in circumstances where it is under no statutory obligation to do that, those enjoying such benefits acquired legitimate expectation to be heard before any action adverse to the enjoyment of the benefit is taken.

The public authority granting the benefit must respect the dictates of the constitution, i.e. it must act fairly and reasonably because the person relying on such benefit can then organize his or her affairs relying on the benefit or concession.

The court further held that the solution does not necessarily lie in an approach which embraces the ideology that as long as government's dealings with others was regulated or brought into being by contract, remedies could only lie in contract or private law. For those who have reason to complain about public authority misconduct arising from such a relationship, it equally cannot be right to hold that an approach which assumed that all actions of public authority (including those founded on contract) would always be subject to judicial review, and that a claim that resort to judicial review was inappropriate, as recourse should have been obtained from private law remedies instead, should always fail for that reason. Focus should be on the nature and purpose of the contract rather that the source of the power to terminate the contract. This is the argument on which the decision in WARD I case was based, where the court held that the courts should not only concentrate on procedure but on the substance of the case as well as the facts of the case.

Factors whether or not there was an element of coercion or prescription; whether there was equality of bargaining power; whether the agreement was required under statute or was intended to carry out legislation should be considerations to regard, but should not be the defining criteria for the intervention through judicial review. This is an extra-ordinary remedy;

therefore it is important to decide whether the applicant could adequately and effectively have been protected through the pursuit of private law remedies.

Therefore, the law applicable before the decision of WARD II case was decided was the public law approach which advocates for the application of administrative justice as well as constitutional principles to a contract where a state or its organ is involved. This approach does not advocate for the application of these principles across the board, but that the facts of the case should be taken into consideration. This is the position currently in South Africa. The *Napier* Constitutional Court decision was used as persuasive authority in the WARD I case. Why is this decision favourable? This decision is progressive in that it is in line with decisions in South Africa which has a similar legal history to that of Namibia. In addition, the public law approach offers better protection in law to the individual in an administrative agreement because it uses constitutional and administrative law principles as the basis of protection. This approach also advocates for the subordination of purely contractual principles to the Constitution, and rightly so as the Constitution is the supreme law and all laws should be tested against it for their validity. The question that will be answered next is what does the public law approach entail?

### 3.2 Protection of an individual in an administrative agreement under South African law (Public law approach)

This approach was illustrated in the WARD I case above. The courts pointed to the public nature of one of the contracting parties and particularly to the statutory source of its contractual powers, and stated that in deciding whether a decision is to be reviewed or not, the public law element could not be ignored. The contractual relationship was to be subordinated to the rules of administrative law, by operation of law rather than an implied term in the contract. This means the contractual rights of public bodies may be exercised, but only in a way that is lawful, reasonable and fair.

Early on, this approach was used in the case of *S v Mustapha,*[43]in the minority dissent Schreiner JA did not dispute the fact that there was a contractual relationship. However, he took the view that the Minister's powers could only be exercised within the terms of the Native Trust and Land Act and regulations made under it. The judge further contended that the Minister did not act as a private owner 'who need listen to no presentations and is entitled to act as arbitrarily as he pleases', but he acted as a state official. Therefore, the principles of administrative law should apply, for example the right to be heard. He received his power from a statute alone and could only act within its limitations, express or implied. The general rule was that the statutory powers could not be exercised in a discriminatory way unless the power to do so was expressly or impliedly given in the statute. The Minister however, seemed to have an unrestricted power to terminate the permit by three months' notice, and that power rested 'upon no provision that expressly or impliedly authorized its exercise by way of racial discrimination'. The court therefore held;[44]

The fact that there was a contract between the parties should not be allowed to shadow the fact the Minister's powers were provided by a statute and are therefore limited. The fact that the appellant accepted the terms of the permit could not be taken to mean that the appellant has agreed that a discriminatory decision should terminate their rights under the permit.

A modern decision regarding the public law approach was taken in the case of *Administrator, Transvaal v Zenzile*[45]*.* In this case the respondents were temporary hospital workers who were summarily dismissed after participating in a strike. Their contract could be terminated by 24 hours' notice by either party, but the respondents obtained a court order setting aside the decision to dismiss them for a lack of procedural fairness. The appellants appealed against this order. Their main argument was that the matter was one of pure

[43] *1958 (3) SA 343 (A).*
[44] C Hoexter. 2004 . "Contracts in Administrative Law: Life after formalism?". *South African Law Journal,* 121: 585, Ibid.
[45] *1991 (1) SA 21 (A).*

contract falling beyond the reach of administrative law. This argument was rejected; the court unanimously decided that the relationship could not be described as 'purely contractual' and indeed that this was no ordinary contract. The employer was a public authority whose decision to dismiss involved the exercise of a public (that is, statutory power). Therefore any contractual right to dismiss the workers had to be exercised with due regard to the principles of natural justice, and this was necessary in a disciplinary setting, where 'the requirements of natural justice are clamant'.

In *Administrator, Natal v Sibiya*[46], a unanimous Appellate Division extended this reasoning to a decision to retrench workers rather than dismiss them for misconduct on due notice and not summarily. The point was not whether the public body had a contractual right to dismiss or retrench the workers, but whether such a right could be exercised without treating those workers in a procedurally unfair manner, in accordance with the requirements of administrative law. The court reasoned that in this case, as in *Administrator, Transvaal v Zenzile,* the employer was a public authority whose decision to dismiss involved the exercise of a public power. The decision to terminate the contract attracted procedural fairness because it adversely affected the respondent's existing right to receive remuneration and also their property in the broad sense of economic loss consequent on the dismissal.

*Ramburan v Minister of Housing (House of Delegates)*[47][48] involved the lease of a shop and the flat above it by a Community Development Board. Here the facts are said to be stronger that those in *Naran,* in that the applicant lessee was a 'displaced trader' whose land had been expropriated. He repeatedly tried to buy the shop from the Board and was assured that it was not the Board's policy to eject displaced traders like him. The Board sold the shopping complex to a third party, but its decision to terminate the lease with the

[46] *1992 (4) SA 532 (A).*
[47] *1993 (1) SA 405 (T).*
[48] C Hoexter. 2004 . "Contracts in Administrative Law: Life after formalism?". *South African Law Journal,* 121: 585, Ibid.

applicant seemed to be based on allegations of fraud against him. The court held that the applicant ought to have been given an opportunity of defending himself before the Board terminated the lease on notice, and alternatively that the applicant had a legitimate expectation of being heard. In distinguishing *Naran,* the court laid stress on the fact that the Board's decision in the present case had been taken in the course of the implementation of government policy one of privatization, and thus amounted to the exercise by a public body of its public power. As a result of the implementation of the policy, the applicant had acquired a '*Sibiya*-type right' in sense of 'a well-founded belief and expectation . . . that he would be afforded an opportunity to buy the shop and the flat', and he was deprived of that same right by the Board's decision to terminate his lease. Therefore, because of the legitimate expectation that the applicant has because of the respondent's actions, the responded could not terminate the agreement without meeting such a legitimate expectation.

*In the case of Metro Inspection Services (Western Cape) CC v Cape Metropolitan Council,*[49] the legislation in question s 4(3) (a) of the regional service councils Act 109 of 1985 allowed the council to 'enter into an agreement with a local body or any person or institution' in term of which that body undertook 'to exercise or perform any regional function or part therefore on behalf of the council'. After a successful tender bid, the second applicant agreed that it would collect regional service council levies and regional establishment levies due to the council by levy payer. There was no written agreement between the parties, but the council issued a letter of authority to the second applicant certifying that its appointed inspectors were authorized to perform levy inspections. Immediately after the third applicant took control of the second applicant and from early 1998 Metro Inspection Service, the first applicant stepped into the shoes of the second applicant and took over its functions.

[49] *1999 (4) SA 1184 (C).*

An unsigned agreement between the council and Metro Inspection Service set out the latter's duties. In October 1998 the council summarily terminated its agreement with Metro Inspection Service on the basis of material breach occasioned by certain fraudulent claims for commission, which apparently ran into hundreds of thousands of rands. The applicants argued that the agreement between Metro Inspection Service and council, being founded on statute, was an administrative agreement. Cancellation of the agreement was therefore an administrative action (in terms of s 33 of the South African constitution), and subject to the requirement of lawfulness, procedural fairness and reasonableness imposed by the South African constitution in particular and administrative law in general. The court established that organs of state could enter into private-law contract that will not necessarily constitute administrative action. The court referred to a case authority warning of the dangers of applying public law 'irresponsibly' to private law. Relying on cases such as *Zenzile, Sibiya* and *Ramburan.* The court accepted that where the act complained of is derived from a public power, it will amount to an administrative act. The court could not ignore the fact that the contract was for the supply of services on behalf of an organ of state and the council's authority to conclude the contract was derived from statute. The case concerned a public body whose authority to appoint Metro Inspection Service – as well as its power to terminate the agreement – derived from public power. The Court established that this, together with the content of the agreement, made it an administrative agreement. It further found that the council's failure to observe the requirements of procedural fairness was a fatal irregularity, and to avoid further loss to Metro Inspection Services which stood to be sued by its inspectors, the court ordered reinstatement of the agreement.

The cases above illustrate the public law approach. The public law approach as demonstrated by the cases above is concerned with protecting an individual against the public authority in a contract or an administrative agreement. It emphasizes the protection of the individual by the constitution, or that the

public authority in making decisions with regard to an administrative agreement must take constitutional principles into consideration. South African cases are used to illustrate the approaches used, because in Namibia only a few cases, (mentioned above) were decided on administrative agreements. Thus the Namibian case law does not form sufficient jurisprudence for the purpose of this research paper.

### 3.3 The law applicable presently

The authority on the law applicable in Namibia to administrative agreement at present is the WARD II case. WARD II is the authority that in an administrative agreement the law applicable is the Law of Contract and not Article 18 or Administrative law principles. This case did not set concrete guidance that another judge would find easy to follow in a decision concerning administrative agreements, but it surely can be used as guidance. The case expressed the difficulty experienced by the Courts in deciding cases where an organ of state has entered into an agreement with an individual. It further left room for the application of administrative law principles to administrative agreement where the fact dictates otherwise.

The reasons given by the judges in coming to the decision in WARD II case were as follows;

WARD did not act from a position of inferiority because the rules set out in the agreement between the parties applied 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 WARD. The judges accepted that there was some form of coercion to enter into the agreement but this coercion, to a great extent stemmed from the fact that it would have been extremely beneficial to medical practitioners to enter into such an agreement.

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 measures necessary to combat fraudulent or dishonest activities. Strict compliance with these duties was in the interest of both the respondent and the PSEMAS.

The agreement also dealt 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 the judges' view this was nothing that was out of the ordinary. Therefore, the agreement did not contain anything which would not have formed part of similar agreements if concluded with a private medical scheme.

With regard to Clause 11.5, the judges stated that this could be equated to common law grounds for cancellation of an agreement and which could, in any commercial agreement between private individuals, lead to the cancellation of the contract summarily and that without being a specific term of the agreement.

The Court admitted that in the present instance it was obvious that the first appellant was a public authority and that the power to enter into the agreement was derived from statute. However, the terms of the agreement were not prescribed by a statute. The appellant cancelled the agreement in terms of Clause 11.5, which contained only common law grounds on which the agreement could be cancelled. The Court further stated that these grounds existed in the common law and the fact that they were contained in the agreement did not alter that fact. For these reasons this could not be said to be terms which the first appellant imposed by virtue of one or other superior position in which he found himself. The Court further stated that in canceling the agreement the first appellant was also not implementing legislation.

For Article 18 of the Namibian constitution to apply the court needed to prove whether the act was an administrative act or not; the court decided that the act was not an administrative act for the following reasons;

In strengthening its position, the court quoted the case of Cape *Metropolitan Council v Minister of Provincial Affairs and Constitutional Development and Another ;*[50]
In that to determine whether or not conduct is 'administrative action' would depend on the nature of the power being exercised. 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 implantation of legislation.

The court in the *Metropolitan case* further stated;

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 not acting from a position of superiority or authority by virtue of it being a public authority. In respect of the cancellation, it 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 cancelled the contractual right founded on *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.

[50] *(CCT34/99) [1999] ZACC 12; 2000(1) SA 727*.

In the WARD case, 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.

The court further quoted *Chirwa v Transnet Limited and Others,* [51] in determining whether Transnet was exercising public power when it terminated the contract of its employee. The Court stated that 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 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 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.

### 3.6 Conclusion

The two WARD cases illustrate the purely contractual approach and the public law approach. As mentioned earlier the purely contractual approach was used a lot before the advent of the constitution in South Africa. This position has changed significantly with the introduction of the PAJA and the constitution.[52] The effects that the introduction of PAJA has on South African administrative law is discussed in the final chapter: 'conclusion and recommendations'. In

[51] **[2007] ZACC 23**; **2008 (3) BCLR 251**.
[52] The relevant provisions in PAJA are addressed in detail later in the paper.

Namibia the decision of WARD II takes us back to the purely contractual approach. As stated above there are no clear cuts or hard and fast rules which assist the courts to determine whether an action is an administrative action or not. The courts determine these cases according to the facts of the case. Furthermore, the courts have to use their discretion in determining these cases. In WARD I the court used the fact that the other contracting party was a public authority to conclude that its action was administrative and thus article 18 and other constitutional principles should apply. In addition, Judge Muller felt that the source of the contract is the statute (The Public Service Act) which regulated PSEMAS, even though there is no mention of having to conclude a contract in the statute as stated by the Judges in the WARD II case, while the Judges in WARD II decided the case on the fact that there was a contract, and the basis of a contract is consensus. The court further held that the source of the 'power' to terminate the contract was not obtained from the statute which regulated the medical aid scheme but from the contract. It further concluded that administrative law principles could not apply, as there was no implementation of a statute.

**Chapter 4 (Critical review of WARD II juxtaposed to WARD I)**

The judgment of WARD II, which emphasizes the freedom of the State to contract, is not satisfactory. The fact that the State should be allowed 'sufficient room to conduct commercial activities, as well as be allowed to contract like a private person' is not disputed. It is true that the state should be allowed all that, however, it is a fact that the State is not a private person and therefore cannot reasonably be equated to a private person. There should be duties attached to the State's action, whether contractual or administrative, because evidently a State and a private person are not on equal footing. Even if the private person has access to vast economic resources, this cannot be equated to the State's resources. Furthermore, the State is the guardian and protector of the individual's rights and freedoms, and should not be allowed to be the transgressor of those rights or be allowed to act whimsically and capriciously as Judge Muller stated. For example; a state should not be allowed to act irresponsibly and without regard to its subjects, in its actions it must consider the effects its actions will have on its subjects. In this Chapter, the following elements of the decision will be dealt with; the Court's interpretation of Article 18, the concept of freedom of contract, the criticism leveled against the contractual approach and the unfavourable results of formalistic reasoning in the public law approach.

In this case the court interpreted Article 18 in a limiting way, in that it does not affect every act by administrative bodies and administrative officials, because it is not open ended. A narrow interpretation of a constitutional provision is not ideal for the following reasons;

The Courts have adopted a value-oriented or purposive approach to the interpretation of the constitution and have developed a jurisprudence based on value judgment and epistemological paradigm rooted in the values and norms

of the Namibian people.[53] This approach advocates for a wide interpretation of the constitution and not a narrow one.

*Ex Parte: Attorney-General in Re: Corporal Punishment by organs of state,*[54] dealt with an instance where the court was required to make value judgments. This case authoritatively laid down that a court, in coming to its conclusion, should objectively articulate and identify the contemporary norms, aspiration and expectations of the Namibian people and should have regard to emerging consensus of values in the civilized international community. The abovementioned case set the tone for Namibian courts and how they are to interpret the constitution.

What are these values when it comes to state authority? Historically, Namibia was ruled by legislative sovereignty, and there was a lot of state power abuse. This was caused by the enforcement and application of apartheid laws. With the advent of the constitution, the objective was to do away with apartheid laws, as indicated by the preamble of the Namibian constitution.[55] It can be viewed that the courts should not entrench these laws especially if these laws are not in conformity with values of civilized international community and the values of the Namibian people. The court should rather do away with such laws. This can be achieved by the purposive interpretation of constitutional provisions.

In the two *Mwandingi*[56] cases both the High and the Supreme Courts of Namibia accepted the principle that a constitution, more particularly the one containing a bill of rights calls for an interpretation different from that which Courts apply to ordinary legislation. In the Supreme Court's decision on the abovementioned case, the court approved the dictum in *S v Acheson*[57] that 'the

[53] Amoo, S.K. (2008) *An Introduction to law: Materials and Cases.* Windhoek: Macmillan Education.
[54] *(SA 14/90) [1991] NASC 2.*
[55] Act 1 of 1990.
[56] *Mwandinghi v Minister of Defence Namibia 1990 NR 363 (HC), Minister of Defence Namibia v Mwandinghi 1992 (2) SA 355 (NmSC).*
[57] *1991 NR 1 (HR),* at 10 AB.

constitution of a nation is not simply a statute which mechanically defines the structure of government and the relationship between the government and the governed. It is a 'mirror reflecting the national soul', the identification of the ideals and aspiration of a nation; the articulation of the values, bonding its people and disciplining its government. The spirit and tenor of the constitution must therefore preside and permeate the process of judicial interpretation and judicial discretion.' The *Mwandingi* case advocated for a transformative interpretation of the constitution. Transformative in that a constitution should be a living document which grows as a people grows. That it should be interpreted in such a way as to reflect the aspiration of the nation. The Namibian people's aspiration is to move away from oppressive laws, to democracy and constitutional supremacy. The interpretation of Article 18 by the Supreme Court in WARD II should have reflected this, but it did not.

In the *Government of the Republic of Namibia and another v Cultura*[58] the court reiterated the approach to the interpretation of the constitution, by stating that;

> A constitution is an organic instrument. Although it is enacted in the form of a statute, it is *sui generis*. It must broadly, liberally and purposively be interpreted so as to avoid the austerity of tabulated legalism and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and discipline its government.

This means that the constitution should be interpreted in a way that does not allow or lead to structured reasoning. It must not be interpreted as if it was an ordinary statute. As much as it is a statute it is a unique statute. In the interpretation of the Constitution its uniqueness must be taken into account. It must be interpreted in a way that allows evolution, flexibility as well as progress.

[58] *2000 1993 NR 328 (SC).*

The Judges in the WARD II case stated that they accepted that there was some form of coercion to enter into the agreement; however, the coercion largely in their opinion, stemmed from the fact that it would have been extremely beneficial to medical practitioners to enter into such an agreement.[59] The choice whether to become a service provider or not was that of Dr WARD.[60] The fact that there is coercion is sufficient indication that there is a possibility for abuse by the party in a more coercive position. Therefore, greater protection must be afforded to the party in a subordinate position. Whether the coercion is economic or financial is really irrelevant.

If the source of the power where to be considered in every case where State power is involved, it would not necessarily put naught to the State's freedom to contract as such. However, it will put responsibility on the State actor to contract responsibly as he or she will not get away with unfair terms to the contract. This will offer better protection to the party contracting with the state, as they are usually in a subordinate position with the State or its organ. Further, this will afford better protection to an individual affected by public power as per the objectives of the Administrative Law and the Constitution, i.e. Article 18 referred to above. In looking at Article 18 of the Namibian Constitution, the Article does not exclude the exercise of public bodies in a contractual relationship. Article 18 should be applicable to public bodies or authority in exercising their public power. In that when a public body is exercising its power, it must apply common law principles as well as constitutional principles.

**4.2 Criticism leveled against the purely contractual approach, i.e. the approach taken by the Supreme Court in WARD II.**

[59] WARD II Ibid, p 16.
[60] Ibid.

In the majority judgment of *Mustapha*, the court read the relationship as contractual which Hoexter observed that this seemed artificial.[61] She stated that in real life a successful applicant of this kind does not dream that the Minister has 'offered' the permit on certain conditions which he, the applicant has 'accepted', therefore creating a contract.[62] Hoexter stated that there is nothing genuinely consensual about this process; an applicant for a permit is not in a position to negotiate terms.[63] This is the position that was taken by judge Muller in the WARD I case, when he stated that the terms of the agreement were all dictated by the Ministry of Finance, therefore in the true sense of the word the two parties were not really on equal footing, especially in terms of their bargaining power. However, in WARD II, even though the judges acknowledged that there was some form of coercion; to them the coercion was mainly economical, therefore insignificant. At this juncture a question can be posed, could an economical coercion not be regarded as coercion for that purpose only? One would say no, as any form of coercion puts the coerced party in a vulnerable position, therefore susceptible to abuse by the party dictating all or the important terms of the contract. Therefore, an inference made by Hoxter with regard to the *Mustapha* case, in that an offer on a take it or leave it basis cannot be regarded as genuinely consensual has application.

Hugh Collins in the case of *Carlill v Carbolic Smoke Ball,*[64] stated that it suits the state to be seen to be enforcing (and therefore respecting) the voluntary choices (and therefore the liberty) of its citizens.[65] Seen in this way, a contract is a device for legitimizing state power. The court in *Mustapha* moves from 'essentially contractual character' of the permit, to the proposition that the

[61] Hoexter, C. 2004 . "Contracts in Administrative Law: Life after formalism?". *South African Law Journal,* 121: 585, p 601, ibid.
[62] Ibid.
[63] Ibid.
[64] *[1893] 1 QB 256 (CA)*.
[65] Hoexter, C. 2004 . "Contracts in Administrative Law: Life after formalism?". *South African Law Journal,* 121: 585, ibid.

applicant's liability to be given notice derives 'not from some statutory provision forced upon him, but from his voluntary consent'.

Hoexter further states that the contractual label, once affixed to the problem, guarantees the court the presence of all the classical features of a contract.[66] 'We have said that this is a contract, so it must have been entered into voluntarily'.[67] This is evident in the WARD II case, where a lower court found elements of governmental action but the Supreme Court found that it was a purely commercial act, therefore a pure contract with the classical features of a contract present.

The purely contractual approach is said to have been used to defeat claims to procedural fairness.[68] One of the best-known examples of this is *Sibanyoni v University of Fort Hare*[69] where Pickard ACJ famously remarked that the rules of natural justice 'have no application in a matter of contract'.[70] This was the same reasoning that was advocated by the Supreme Court judges in the WARD II case. Upon the unilateral cancellation of an agreement between the Ministry and Ward due to alleged fraud without affording Ward the opportunity to be heard; the Minister justified this action by citing a contractual relationship. The Supreme Court judges endorsed this reasoning, which has an inference that procedural fairness is irrelevant in an administrative agreement. The reasoning in *Sibanyoni* proved persistent in spite of some sharp criticism from academics and disapproval from the courts.[71]

Another short coming of the purely contractual approach is that, one would ask why if statute permits a contract to be entered into; why does the same statute not govern the rest of the contractual relationship, including the

[66] Ibid.
[67] Ibid.
[68] Ibid.
[69] *1985 (1) SA 19 (Ck).*
[70] Hoexter, C. 2004 . "Contracts in Administrative Law: Life after formalism?". *South African Law Journal,* 121: 585, p 603, ibid.
[71] Ibid.

cancellation of the contract?[72] In the WARD II case the judges contended that the source of power acted upon by a functionary can almost always be traced back to some statutory enactment which, practically, and if applied indiscriminately, will mean that every decision or act by a functionary could be classified as administrative action. If this was to be construed to be correct, the burden on the state would be tremendous and affect the State's freedom to enter into contracts like any private individual! In an attempt to justify their decision, the court stated that it is because the cancellation did not take place in terms of legislation or on statutory grounds, but on common-law grounds which were fraud amounting to material breach.[73] This approach is criticized by Hoxter as highly formalistic, and rightly so. The court in *Cape Metropolitan* actually admits that if the council had purported to cancel the contract in terms of legislation, and more particularly in terms of regulation 22(1) of the Financial Regulations for Regional Services Councils of 1991, it would have constituted administrative action. Regulation 22(1) allowed the council to cancel a contract where it 'is satisfied' of any of the several types of contractual misbehavior, including fraud. Therefore, the case would have been decided differently if the council had explicitly made reference to regulation 22(1) when cancelling the contract. This proposition is heavily criticized on the ground that public bodies can escape the rules of administrative law as long as they purport to cancel the contracts on common-law as opposed to statutory grounds. Evidently this position is not satisfactory as a basis of a just law, nor is it as a tool to protect vulnerable parties in administrative agreement relationships.

In the *WARD II* case, the judges stated that the source of the power by the Ministry of Finance to terminate the contract was the contract itself, and not the legislation. This proposition is not acceptable. The existence of the relationship which was the provision of service under PSEMAS, was provided

[72] Hoexter, C. 2004 . "Contracts in Administrative Law: Life after formalism?". *South African Law Journal,* 121: 585, p 611, ibid.
[73] The same argument was quoted and used in the WARD II case, p 20.

for by a statute (i.e. the Public Service Act of 1995)[74]. The proposition that the whole relationship should be governed by public law as the existence of the relationship is governed or regulated by an Act is preferable. Instead of some parts of the relationship being governed by Private law and other parts by Public law, as is the position currently in Namibia in the law laid down by WARD II.

Furthermore, the classical model of contract envisages consensus on the basis of theoretical arm's length negotiations in trade and industry between parties of roughly equal standing.[75] In the South African context as well as Namibia, this model of contract has become generic in the sense that it is applied indiscriminately, outside of its theoretical context and irrespective of the prevalent disparities in resources.[76] This was illustrated by the outcome of the judgment in WARD II where the court did not take into consideration the economic benefit which Ward stood to gain or lose. Although it acknowledged the coercive nature of the relationship between WARD and the Ministry of Finance, the court did not take this into consideration in its decision. While our law of contract has acknowledged that consensus alone is not always a sufficient basis for insisting on the sacredness of contracts. There are still cases which yield outcomes that are not complementary with constitutional standard of fairness, equality and human dignity, despite the presence of what may be called 'legitimate' consensus.[77] The role of consensus together with the associated weight of the principle of sanctity of contract must be re-evaluated in light of constitutional considerations of fairness, equality and human dignity.

[74] (Act 13 of 1995).
[75] Hoexter, C. 2004 . "Contracts in Administrative Law: Life after formalism?". *South African Law Journal,* 121: 585, p 883, ibid.
[76] Ibid.
[77] Ibid.

Furthermore, the interpretation of the concept of consensus as expressed in the crystallized rules of contract law is very limiting.[78] Even though the law of contract seeks to ensure the legitimacy of consensus between the parties by means of strictly defined doctrines of mistake and improperly obtained consensus, the emphasis on adherence to clearly established rules of contract law means not only the possibility that the particular circumstances of a case will not be taken into account, but also that over time the law becomes insensitive to the context in which it operates. The result of this is that there is a real likelihood that consensus may be present in form but not in substance. In this manner, a rigid application of long-standing legal rules however 'necessary and acceptable' they may have been at their inception, may expose contract law to a real danger of stagnation.[79] In contemporary contract law, this demonstrates itself in the general insensitivity of a contract to the constitutional, social and economic context in which it operates.[80]

In the WARD II case, looking at the facts, consensus can be considered to have been present in form but not in substance. There was a contract in place, in which the Minister purported to have made an offer as an equal party, to WARD, which WARD accepted. However, on closer inspection it is evident that there was indeed an economic coercion. The terms of the contract were offered to WARD on a take it or leave it basis. The economic benefit of the agreement was tremendous to WARD; if WARD tried to negotiate the terms of the agreement in his favour, the Minister could have simply contracted another doctor who was willing to accept the Minister's terms. In the WARD I case, the court observed that it is clear that Ward did not formulate the terms of the agreement. It is possible that the Ministry would have formulated terms that where favourable to itself. It is also possible that the Ministry in contracting doctors would use standard or set terms for all contracts, that it would not

[78] Hoexter, C. 2004 . "Contracts in Administrative Law: Life after formalism?". *South African Law Journal,* 121: 585, p 884, ibid.
[79] Ibid.
[80] Ibid.

adopt terms to suit each doctor's needs. The Supreme Court did not take the realities of the situation into consideration in making its decision. Instead, it focused on the rigid rules and applied such to the facts, even though the end result was not constitutionally sound.

The concept of equality of contracting parties is a sham because in the current Namibian situation, consensus is rarely the end-product of negotiations between parties of more or less equal standing as postulated by classical liberal theory.[81] Prospective contracting parties as stated above often face a harsh choice between agreeing to contractual terms as presented and not contracting at all. Terms are therefore generally imposed upon certain parties rather than negotiated. This is contrary to the perception in the WARD II decision that the party was contracting on an equal basis, and that the basis of the contractual relationship was consensus. This is most often the direct result of an inequality of bargaining power between the parties and the absence of any real freedom of choice or negotiation when contracting.[82] The reality of unequal bargaining power undermines the very notion of freedom, along with the substance of consensus underlying *pacta servanda.*[83]

The fundamental foundation of the law of contract is the freedom of parties to contract, however if the very foundation of the law of contract is undermined by unequal bargaining power then one should not rely on contract principles but probably on other principles i.e. administrative law principles. The situation of unequal bargaining power can easily lead to economic coercion or undue influence, and the current rules of contract law are not sufficiently comprehensive to deal with such deficiencies in consensus.[84] Economic necessity more often than not compels a party to contract, and that means that

[81] D Bhana, M Pieterse. 2005. "Towards a reconciliation of contract law and constitutional values: Brisley and Afrox revisited*". The South African Law Journal*, 122:p 844.
[82] Ibid.
[83] Ibid.
[84]Hoexter, C. 2004 . "Contracts in Administrative Law: Life after formalism?". *South African Law Journal,* 121: 585, p 885, ibid.

there is in reality no freedom of contract.[85] The principle of sanctity of contract is discordant with a material inequality of bargaining power; it is inclined to facilitate an abuse of power by the stronger party against the more vulnerable party; and in this way it endorses social inequality.[86] In other jurisdictions like the United Kingdom courts have acknowledged that sometimes there can be unequal bargaining power. A critical analysis of freedom of contact led to the suggestion that contracts should be treated differently where there is an inequality of bargaining power.[87] This suggestion has received formal recognition in the United States of America, in the form of statutes.[88] It also received favourable notice in English judgments though there is no clear ratio yet.[89]

The problem of formalism was addressed by Hoexter[90] who stated that 'formalism is a term that has acquired various meanings when used in relation to law. However, in her article she describes a judicial tendency to attach undue importance to the pigeonholing of a legal problem and to its superficial or outward characteristics; and a concomitant judicial tendency to rely on technicality rather than subjective principle or policy, and on conceptualism instead of common sense'.[91] She further states that in cases displaying formalistic reasoning the merits often seem strangely divorced from the outcome of the case, so that it is 'difficult and perhaps embarrassing to explain the case to a layperson'.[92] There is often a reliance on what one might call code, a legalistic shorthand that lawyers may understand, however dimly, but

[85] Ibid.
[85] Furmston, M.P. (1996) *Cheshire, Fifoot & Furmston's Law of Contract.* 13th ed. Butterworths: London, p 20.
[86] Uniform Commercial Code, s 2-302; Leff 115 U Pennsylvania L Rev 485; White and Summers Uniform Commercial Code ch 4 quoted in Furmston, M.P. (1996) *Cheshire, Fifoot & Furmston's Law of Contract.* 13th ed. Butterworths: London, p 20.
[87] Furmston, M.P. (1996) *Cheshire, Fifoot & Furmston's Law of Contract.* 13th ed. Butterworths: London, p 21.
[88] C Hoexter. 2004 . "Contracts in Administrative Law: Life after formalism?". *South African Law Journal,* 121: 585, p 597, ibid.
[89] Ibid.
[90] Ibid.
[91] Ibid.
[92] A Cocrell. 1996. "*Rainbow jurisprudence". South African Journal for Human Rights* 12:587.

that others will find impenetrable and altogether mystifying.[93] Alfred Cockrell[94] observed that there is a tendency to avoid substantive reasons in the form of 'moral, economic, political, institutional or other social considerations' and instead to put up a screen of formal reasons.[95] This approach is evidenced by the outcome of WARD II, where the reasons given by the judges are incompatible with the merits of the case. The judges did not consider moral as well as legal implications in coming to their decision. They did not acknowledge that the unilateral termination of the agreement was unfair, even if it was provided for by the agreement. They did not take into consideration that the terms of the agreement must be constitutional and fair, and that the law of contract is bound by the Constitution.

**4.3 Why advocate for the public law approach**

In *Logbro Properties CC v Bedderson NO & Others*[96], Cameron JA resisted the purely contractual approach, stating that the province would have to act lawfully, procedurally and fairly in exercising its contractual rights.[97] Some of its contractual rights, such as the entitlement to give no reasons, would give way to its public duties under the Constitution and other legislation. In this case Cameron JA rejected the province's reliance on *Cape Metropolitan,* stating that the case was no authority for the proposition that a public authority could exercise its contractual rights without having regard to public duties of fairness. Rather it established that the public authority's power to cancel a contract did not amount to an exercise of public power where the 'contract was concluded on equal terms with a major commercial undertaking, without any element of superiority or authority deriving from its public position'.[98]

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[95] Ibid.
[96] *(372/2010) [2002] ZASCA.*
[97] C Hoexter. 2004 . "Contracts in Administrative Law: Life after formalism?". *South African Law Journal,* 121: 585, p 599, ibid.
[98] Ibid.

However, the public authority was undoubtedly acting from a position of superiority by virtue of its being a public authority.

The constitution answers the question that has puzzled the courts for a long time. As Cameron JA indicated, the principle of administrative justice *frames the contractual relationship.*[99] Therefore, there is no escaping certain 'public duties', and, in particular the duties to act lawfully, reasonably and fairly. Article 18 of the Namibian constitution, gives everyone, including parties to a contract, a right to administrative justice.

The public law approach to contractual relationships where there is a public body involved is advocated as this approach entrench constitutional requirements. It is fitting to incorporate constitutional principles in the law of contract as the Constitution is the Supreme law of the land to which all laws must be tested. The Supreme Court of Namibia, in the WARD II case failed to recognize this and could be said to have been unwilling to recognize that contract law, just like all other branches of the law have to re-establish its legitimacy in a constitutional dispensation founded on the values of dignity, equality and freedom.[100]

Even today the public-law approach is preferable to the purely contractual approach, because it avoids the highly artificial division between the contracts entered into by administrators and the statutory powers that enable them to do so.[101] The answer seems obvious once Cameron JA answered it, that this correct understanding of the place of the Constitution in the order of things has not necessarily been obvious to all courts, not even since *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Public of South Africa,*[102] where the Constitutional Court made it plain that all laws, including

[99] C Hoexter. 2004 . "Contracts in Administrative Law: Life after formalism?". *South African Law Journal,* 121: 585, p 614, ibid.
[100] D Bhana, M Pieterse. 2005. "Towards a reconciliation of contract law and constitutional values: Brisley and Afrox revisited." *The South African Law Journal*, 122: 865.
[101] Ibid.
[102] *2000 (2) SA 674 (CC)*.

common law, derives its force from the supreme Constitution and is subject to constitutional control.[103]

### 4.4 Formalistic reasoning in the public law approach

Hoexter, stated that the public-law approach can seem like such an attractive alternative to the purely contractual approach that it may be difficulty for some readers to see any flaw in it.[104] However, this approach is not free from flaws. Elite scholars like Hoxter, advocate for the public law approach because this approach avoids the highly artificial divide between contracts entered into by administrators and the statutory powers that enable them to do so.[105] This approach is said not to be ideal as it also encourages formalism because it allows the court to reason by rote, and to rely on purely technical features. The courts apart from relying on substantive reasons why it is desirable to hear the respondents: the disciplinary nature of the dismissal and the catastrophic effects of being retrenched, this in *Administrator, Transvaal v Zenzile*[106] *and Administrator, Natal v Sibiya*[107] respectively. The *Mustapha* minority judgment, the Cape *Metropolitan Council v Minister of Provincial Affairs and Constitutional Development and Another* [108] judgment and even the WARD I case, tend to rely heavily on the invocation of a single formal characteristic, the statutory source of the power to contract (and to terminate the contract). According to Hoexter, this factor is perfectly meaningless as a distinguishing feature in itself because it is present in *every* case involving a public body.[109] This difficulty was also acknowledged in WARD II, when the judges stated that in a case involving a public body the source of power is almost always traced back to a statute. If

[103] D Bhana, M Pieterse, "Towards a reconciliation of contract law and constitutional values: Brisley and Afrox revisited" ibid.
[104] C Hoexter. 2004 . "Contracts in Administrative Law: Life after formalism?". *South African Law Journal,* 121: 585, p 614, p 608, ibid.
[105] Ibid.
[106] 1991 (1) SA 21 (A).
[107] 1992 (4) SA 532 (A)
[108] *(CCT34/99) [1999] ZACC 12; 2000(1) SA 727.*
[109] C Hoexter. 2004 . "Contracts in Administrative Law: Life after formalism?". *South African Law Journal,* 121: 585, p 614, p 608, ibid.

this was to be a determining factor then every relationship where there is a public body will always be an administrative relationship. The judges in this case were uncomfortable with this rote reasoning. In *Ramburan v Minister of Housing (House of Delegates)*[110] , in spite of a monopoly of relevant considerations pointing towards the need for hearing, the emphasis was made from the fact that the Board's decisions were taken during the course of 'implementing a government policy' something that can be said about almost every decision of public body.

The answer, as Hoexter purports, lies in the public law approach incorporating constitutional principles to contractual relationships where a state is a party.[111] Therefore the essential question that must be asked in these cases is *what does administrative justice demand here?* Evidently our courts have been asking the wrong questions, which entail the source of the agreement or the functions of an organ.

**4.5 Conclusion**

The purely contractual approach has many flaws as indicated above, and leads to formalistic reasoning. This approach was followed in the WARD II case. As illustrated the court acknowledged the relationship of inequality as required by administrative law; however it trivialized such a relationship. The reasons given for such trivialization were inadequate. Ward stood to benefit financially from the agreement, and somehow the element of coercion did not apply to commercial settings. This reasoning led to the lax application of legal principles, giving an impression that the principles of legality might be subordinated to the parties' freedom to contract; such freedom did not exist in the present case in any case. Furthermore, the court took to the narrow interpretation of the Constitution which is irregular. There is a vast

[110] *1993 (1) SA 405 (T).*
[111] Ibid, p 614.

jurisprudence which suggests otherwise, i.e. that provisions of the Constitution should be interpreted broadly and purposively. In Namibia, extra caution should be taken in applying present legal rules as well as restricting individual rights, especially where state power is involved; so as to avoid entrenching unfair past laws. The court ignored all these considerations. It seemed as though the court needed to come to a certain pre-determined conclusion, and all other considerations were irrelevant, but the end result.

The public law approach is the preferred approach, although depending on what the court is focusing on i.e. the source of the contracting party's power, i.e. statute, this can also lead to formalistic reasoning. Hoexter, advocates for the public law approach, although courts should have regard to constitutional principles when making their decision. This is the approach that WARD I took. In this case the Court acknowledged the presence of the contract. However, the contract was to be subordinated to constitutional principles of fairness. The Court acknowledged that the presence of a contract did not negate the state's or the state department's public duties, thus it applied the principles of legality with the needed vigour. The court rightly acknowledged the superiority of the Minister compared to Ward, and rightly applied the principles of common law which govern administrative decisions. The court further applied Article 18 to the facts, and rightly so, as Ward in terms of the constitution is guaranteed fundamental rights and freedoms in terms of Chapter 3 of the Namibian Constitution. This approach was to guarantee Ward the right to be heard, and present evidence in his favour. The right to be heard is a common law right but it is also entrenched in terms of Chapter 3 (Namibian Constitution), i.e. article 12, 'the right to fair trial.' Therefore, the right to be heard is a very important right in our law, and the court acknowledged this. This was a fair, justifiable and legally sound decision. Furthermore, the WARD I decision was in conformity with attitudes in other jurisdictions which, analogous to Namibia have a Constitution with a bill of rights. However, they have moved away from the purely contractual approach because of its lack of evolution and relevance.

WARD II decision could be considered a set back from the progressive reasoning in WARD I.

## Chapter 5

### 5.1 Conclusion and recommendations

Common law contracts differ from administrative agreements, therefore they should not be dealt by the courts like they are similar. In reading the guidelines set by the courts in determining whether administrative agreements should be decided under public law of contract or administrative law; one would say one cannot easily conclude on what the law is. The current position is that administrative agreements should be decided under private law if there is an element of coercion, but if there is no coercion, such contract should be dealt with under private law, the authority for this being WARD II. However, in the presence of WARD II as authority, the courts still have discretion to decide otherwise. What is challenging is determining the presence of coercion as was illustrated by the two WARD cases, where the courts came to two polarized decisions. Clearly there is a need to settle this debate in the form of a law, as well as to create certainty in the law as to the resolution of disagreements relating to administrative agreements.

The question that needs to be answered is whether there is a need for law reform. One would answer in the affirmative as there must be a law in place which will deal with administrative agreements in a manner which recognizes the public body involved, and not as if the two parties are on an equal footing. Even in a private contract relationship where there is no organ of the state, the term equality in such a contractual relationship is sometimes a misnomer as indicated, as even private parties could sometimes not be contracting on an equal basis. This is due to the bargaining power which one party may possess as discussed and thus may set all the terms of a contract. Therefore, to claim equality in administrative agreements is whimsical. What is the position in other jurisdictions?

### 5.4 Administrative law in neigbouring countries

#### 5.4.1 South Africa

The primary source of administrative law in South Africa is section 33 of the South African constitution[112], the Promotion of Administrative Justice Act of 2000[113] (hereinafter PAJA), and the promotion of Access to Information Act of 2000[114] (hereinafter PAIA). However, Burns[115] cautions that the PAJA does not constitute a source of administrative power, but regulates or governs the action of the administration to ensure good administrative practice by laying down the minimum procedural requirements related to just decision making. The bill of rights is also of great importance as it lists a number of fundamental rights which must be respected and protected by the state.

Hoxter,[116] contends that the importance of PAIA cannot be overstated. This Act is based on the Constitutional right of access to information, and the Constitutional right to access courts (section 34) and just administrative action as stated above (in section 33), these promote and protect the fundamental rights of the individual and contributes greatly to the achievement of the democratic goals of administrative accountability, responsiveness and openness, i.e. good administration.

However, PAJA is the pioneer of administrative law in South Africa. This is because it gives a definition of what an administrative action is. The confusion experienced by our courts today, is mainly because there is no definition in our law as to what constitutes an administrative action. Further compared to

[112] Act 108 of 1996.
[113] Act 3 of 2000.
[114] Act 2 of 2000.
[115] Burns, Y., Beukes, M. (2006) *Administrative Law under the 1996 Constitution*. P 74. (ibid).
[116] Ibid, p 77.

Article 18 of the Namibian constitution which deals with administrative justice, section 33 of the South African Constitution is very extensive.

Section 33 of the South African Constitution of 1996 deals with just administrative action;

**33. Just administrative action**

1. Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

2. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

3. National legislation must be enacted to give effect to these rights, and must

a. provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

b. impose a duty on the state to give effect to the rights in subsection (1) and (2);

c. promote an efficient administration.[117]

The Namibia equivalent, Article 18 of the Constitution states that Administrative bodies and administrative official shall act fairly and reasonably and comply with the requirements imposed upon them 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.

Evidently, our Administrative justice provision in the Constitution, is not as detailed and as advanced as that of South Africa. Further, our Constitution relies heavily on common law, which as illustrated above does not develop as fast as our administrative law needs require.

[117] The South African Constitution and PAJA obtained from **http://www.acts.co.za/**, accessed on 16 November 2010.

Section 1 of PAJA defines administrative action as any decision taken, or any failure to take a decision, by;

a) an organ of state when,
i) exercising a power in terms of the Constitution or a provincial constitution; or
ii) exercising a public power in performing a public function in terms of any legislation; or
b) a natural or juristic person, other than an organ or state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, however, this does not include;

aa) the executive powers or functions of the National Executive, including the powers or functions referred to in PAJA and the Constitution.

bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in PAJA and the Constitution;

cc) the executive powers or functions of a municipal council;

dd) the legislative powers or functions of Parliament, a provincial legislature or a municipal council

ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special investigating Units and Special Tribunals Act, 1996 (Act 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;

ff) a decision to institute or continue a prosecution;

gg) a decision relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person, by the Judicial Service Commission in terms of any law;

hh) any decision taken, or failure to take a decision, in terms of a provision of the Promotion of Access to Information Act, 2000; or

ii) any decision taken, or failure to take a decision, in terms of section 4(1) PAJA;

The Act further defines "empowering provision" as a *law*, a *rule of common law*, *customary law*, or *an agreement, instrument or other document in terms of which an administrative action was purportedly taken*;[118]

### 5.4.2 Zimbabwe

In Zimbabwe the source of Administrative law is the Administrative Justice Act Chapter 10:28.[119] Section 2 of this Act deals with the interpretation and application of the Act. Subsection 1 has relevance and it reads;

**Administrative action** means any action taken or decision made by an administrative authority, and the words "act", "acting" and "actions" shall be construed and applied accordingly; whereas

**Administrative authority** means any person who is;

(a) an officer, employee, member, committee, council, or board of the State or a local authority or parastatal; or
(b) a committee or board appointed by or in terms of any enactment; or
(c) a Minister or Deputy Minister of the State; or

[118] Emphasis added.
[119] Obtained from **http:///www.cfuzim.org/index.php?option=com content&view=article&id=95:admins….,** accessed on 16 November 2010.

(d) any other person or body authorized by any enactment to exercise or perform any administrative power or duty;

and who has the lawful authority to carry out the administrative action concerned.

**Empowering provision** is defined as a written law or rule of common law, or any *agreement* or other document in terms of which *any administrative action is taken.*[120]

### 5.5 Is there a need for law reform?

Hoexter, states that the purely contractual approach was a blessed relief in the pre-democratic era.[121] In the pre-democratic era liberal lawyers automatically welcomed any weapon that allowed for an increased application of administrative-law principles.[122] The pre-democratic era is over, thus purely contractual approach should not be applicable in a democratic setting. Hoexter goes on and states that;[123]

> Things are different now, and I hope it is uncontroversial that public lawyers can no longer proceed on the simple assumption that the more judicial intervention there is, the better things will be.

The purely contractual approach served its purpose during the colonial era. It was used as a shield to protect individuals during colonialism, because there was no Constitution which could protect people, or on which discriminatory laws could be measured against and be declared unconstitutional. Namibia inherited these laws from South Africa when it was under the South African rule. South Africa does not apply these laws anymore because they are contrary to democracy, and further because they do not serve the purpose for which they were applied in the first place. The reasons why the purely contractual approach was applied was to extent the

[120] Emphasis added.
[121] Ibid, p 608.
[122] Ibid.
[123] Ibid.

courts involvement in people's lives in order to protect them from government power as well the regime of legislative sovereignty. This is the reasoning by Hoexter, although it cannot be substantiated by decisions taken during the Apartheid dispensation. The decisions taken seem to have offered less protection for individuals as illustrated in Chapter 2 of this dissertation. As shown above, in a democratic setting the contractual approach does not serve this purpose. Instead this approach seems to cement institutionalized legalistic patter as indicated above.

In Namibia new substantive aspirations are explicitly documented in the Constitution and its Bill of Rights. However, 'we seem slow to appreciate the implications of these for our style or adjudication'.[124] In his article on the link between constitutional transformation and judicial reasoning, Karl Klere puts this very well;[125]

> The constitution invites a new imagination and self-reflection about legal methods, analysis and reasoning consistent with its transformative goals. By implication, new conception of judicial role and responsibility are contemplated. Judicial mindset and methodology are part of the law, and therefore they must be examined and revised so as to promote equality, a culture of democracy and transparent governance… the drafter cannot have intended dramatically to alter substantive constitutional foundations and assumptions, yet to have left these new rights and duties to be interpreted through the lens of classical legalist methods.

The constitutional aspiration towards a culture of justification, compellingly described by Etienne Mureinik,[126] means little or nothing if we remain content with a style of adjudication in which judges are expected to distract their audience with legalistic patter instead of relying explicitly on the reasons that really move them. The values of accountability, transparency upheld in our

[124] C Hoexter. 2004 . "Contracts in Administrative Law: Life after formalism?". *South African Law Journal,* 121: 585. She did not refer to Namibia, but South Africa. However, Namibia and South Africa have similar legal history and are both governed by the concept of Constitutional Sovereignty. Thus, this reasoning is relevant to Namibia.
[125] K Klare. 1994. *"*Legal Culture and transformative Constitutionalism*". South African Journal for Human Rights,* 14:146.
[126] E Mureinik. 1994. "A bridge to where? Introducing the Interim Bill of Rights*". South African Journal for Human Rights,* 10:31.

Constitution, and promised by the right to administrative law, that remains content with a mechanistic and technical style of classification and reasoning.[127] To the extent that formalism is a kind of juridical minimalism, one should also mention the danger of what Christopher Roederer calls 'judicial insulation',[128] conceiving of judges as a separate community of 'insiders' with its own special rules for reasoning, isolated from the 'outsiders'-that is, the rest of us.

With the advent of Constitutionalism, judges should bear in mind when adjudicating that they are guided by the Constitution. The purely contractual approach dissociates judges from the people, because the language used by them is distinct, highly technical and removed from the reality at hand. The purely contractual approach further provides limiting options to the aggrieved party whereas the public law approach provides a lot of options and is highly flexible as indicated above. The public law approach which uses constitutional principles is in line with the concept of state accountability and constitutionalism, as it looks to the constitution for guidance. The principles of legality are well utilised under the public law approach, as opposed to the purely contractual approach which enforces unfair actions from one of the contracting party or parties as long as there is consensus as well as equality of parties to contract.

Evidently, there is a need for law reform, in enforcing administrative contractual relationships. Reform can be in the form of an Act, a good example will be an Act the equivalent of the South African PAJA or the Zimbabwean Administrative Justice Act. These Acts, especially PAJA and The Administrative Justice Act define empowering provisions to include an agreement in terms of which any administrative actions are taken. An Act can set principles as well as definitions of administrative actions which can guide

[127] Ibid.

[128] C Roederer. 1999. "Judicious engagement: Theory, attitude and Community*". South African Journal on Human Rights, 15:486.*

judges in their decisions making. An Act will also guide and sensitize judges when presiding over administrative law cases. Furthermore, as illustrated above, our Constitution does not cover administrative justice extensively by indicating what exactly constitutes administrative justice. Courts usually use common law principles as well as case law to come up with an answer. An Act of Parliament where administrative justice is extensively covered and clear definitions are given will offer better protection in administrative law relationships including administrative agreements. It is evident that administrative law in Namibia is under developed, as we struggle with issues that are already settled in other jurisdictions. Administrative law here is also somewhat a neglected area, therefore any law which will help in its development should be welcomed. An effort should be exerted in coming up with legislation to better regulate administrative law relationships.

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## 5.2 Statutes

### 5.2.1 Namibian statutes

Namibian Constitution (Act 1 1990)

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Access to Information Act of 2000 (Act 2 of 2000)

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### 5.4 Websites

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