AJA Newsletter

Issue 1 October 2003

Contents

FOREWORD by Cecille van Riet

I believe Magistrates will join me in thanking GTZ for the excellent work they have done in assisting us in curriculum development and education programmes on the "Administrative Act / AJA". In addition a conference was hosted of which the papers will soon be published and a benchbook written by Iain Curie and Jonathan Klaaren saw the light. I especially want Claudia Lange (GTZ) and Thinus Rudolph and Jakkie Wessels (Justice College) for their endeavours in this regard.

The publication of the "AJA Newsletter" demonstrates an ongoing commitment to keeping magistrates abreast of developments in the field of Administrative Justice and the Promotion of Access to Information real and accessible for South African citizens.

We wish them well.

Cecille van Riet

This edition of the newsletter reflects cases reported between January and August 2003

CASE LAW

THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT 3 OF 2000 (AJA)

SECTION 1 OF THE AJA – DEFINITION OF ADMINISTRATIVE ACTION

In ***Gamevest (Pty) Ltd v Regional Land Claims Commissioner, Northern Province and Mpumalanga & others*** 2003 (1) SA 373 (SCA) the appellant challenged a decision of the Regional Land Claims Commissioner to accept the claim of the fifth respondent for certain land in terms of the Restitution of Land Rights Act 22 of 1994 (see para 17). The steps to be followed, in terms of s11 of that Act, are:

a) the applicant lodges the claim
b) once accepted, notice is given in the *Government Gazette* of this fact
c) the Commissioner investigates the matter and
d) the matter is referred to the Land Claims Court (in terms of s 14)

German Technical Cooperation

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In reaching its decision the court could not refer to the AJA because its main provisions came into force on 30 November 2000 and the application was launched on 3 August 2000 (para 10). The Supreme Court of Appeal, therefore, had to rely on the common law. It said the following (para 12):

> 'What is an *administrative act* for the purpose of justiciability? There is no neat, ready-made definition in our case law, but in *Hira and Another v Booysen and Another* 1992 (4) SA 69 (A) Corbett CJ at 93 A-B required, for common-law review, the non – performance or wrong performance of a statutory duty or power ; where the duty / power is essentially a decision–making one and the person or body concerned has taken a decision, a review is available.'

Olivier JA said the following about the first stage of the application process (para 7):

> 'At the [first stage of the process, the duties of the Commissioner or its representatives are . . . formal in nature. . . It is clear that . . . the Commissioner or its representatives does not take any administrative decision, nor does it perform any administrative action which may prejudicially affect any right of the present landowner . . . It has no discretion to refuse receipt of a claim at this stage; hence it takes no administrative decision in receiving the claim.'

On the facts, the alleged decision was merely an opinion expressed by a representative of the Commissioner at the first stage of the process and was thus not an administrative decision that could be set aside (para 20).

In ***Despatch High School v Head, Department of Education Eastern Cape & others*** 2003 (1) SA 246 (Ck) the applicant challenged the decision of the first respondent to institute a disciplinary hearing in terms of s 18 of the Employment of Educators Act 76 of 1998 against its principal since it alleged that the first respondent should have instituted proceedings under s 17, which deals with 'serious misconduct'. The principal had been convicted of the theft of a cell-phone belonging to the applicant (para 8).

The respondent referred to s 1(b)(ff) of the AJA, which excludes from its ambit 'a decision to institute or continue a prosecution' and, while admitting that a disciplinary hearing is not the same as a prosecution, argued that the principles are comparable
(para 16). The applicant argued that s 1(b) of the AJA defines administrative action as including the decision of a natural or juristic person 'exercising a public power or performing a public function in terms of an empowering provision' and that the decision of the first respondent was therefore reviewable.

The court rejected the respondent's argument and in doing so quoted from *President of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC), para 141, in para 19 of its judgment, as follows:

> 'What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. . . The focus of the enquiry as to whether conduct is "administrative action" is not on the arm of the government to which the relevant action belongs, but on the nature of the power he or she is exercising.'

The court also distinguished between the aims of a prosecution and a disciplinary enquiry in rejecting the respondent's submission that the principle was comparable to that enunciated in s 1(b)ff of the AJA (para 18).

In ***Logbro Properties CC v Bedderson NO & others*** 2003 (2) SA 460 (SCA) the KwaZulu-Natal provincial government had awarded a tender to someone other than the appellant. The appellant had successfully appealed this decision and the Natal Provincial Division had ordered the tenders to be reconsidered (para 2). Instead of awarding the tender the province decided to accept new tenders. The appellant had unsuccessfully challenged this decision in the Natal Provincial Division and appealed to the Supreme Court of Appeal.

The Supreme Court of Appeal confirmed that a tendering process constitutes administrative action (para 5)**:**

> 'The starting point must be that the tender process constituted "administrative action" under the Constitution. . . I say "must be" since in the light of several decisions of this Court applying the Constitution's administrative justice provisions to governmental tender processes the statement seems obvious. Yet counsel for the province asserted the contrary. (Footnotes omitted.)'

Included in the decisions that the court referred to were *Umfolozi Transport (Edms) Bpk v Minister van Vervoer* [1997] 2 All SA 548 (SCA) at 552—3 and *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA) at 870.

The province had attempted to rely on *Cape Metropolitan Council v Metro Inspection Services (Western Cape)* CC 2001 (3) SA 1013 (SCA) for the proposition 'that the tender conditions the province stipulated gave it a contractual right to withdraw the property from tender . . . which could be exercised "without having to pass the scrutiny of lawful administrative action"' (ibid). Cameron JA pointed out that in *Cape Metropolitan* the court was careful to distinguish the tender cases and 'did not purport to provide a general answer to the question whether a public authority in exercising powers derived from a contract is in all circumstances subject to a public duty to act fairly. That question was left open. Instead, the Court's judgment makes it plain that the answer depends on all the circumstances' (para 9).

The province also relied on *Mustapha v Receiver of Revenue, Lichtenburg* 1958 (3) SA 343 (A). In that case the Minister had cancelled a permit allowing the occupation of land and the Appellate Division, with Schreiner JA dissenting, held 'that, since the permit was embodied in a contract, the termination constituted the exercise of an absolute and unqualified contractual power' (para 12). 'The total fissure the majority attempted to effect between the statutory source of the contract and the powers the contract conferred' led the Supreme Court of Appeal finally to overrule *Mustapha* and accept Schreiner JA's dissent as correct (para 13). The court did not refer to the AJA because the cause of action arose in 1997.

In ***Pretoria Portland Cement Co Ltd & another v Competition Commission & others*** 2003 (2) SA 381 (T) the Competition Commission had successfully applied for a search warrant of the applicants' premises, in terms of the Competition Act 89 of 1998. The aggrieved applicants, instead of resorting to various other methods to have the warrant set aside (see 383C—F), attempted to have the decision to grant the warrant reviewed.

In holding that the decisions of judges are not reviewable as administrative action, Roux J said the following (at 383G—H):

> 'In times when Judges are publicly abused by ill-informed, strident and vulgar critics, no new avenues of attack should be tolerated. If a judicial decision is reviewable a Judge will no longer rely on his judgment but will have to file affidavits and possibly be mulcted in costs. Such a future must be avoided if a proper interpretation of legislation permits.'

The court held further (at 384A—B):

> 'I do not accept that a Judge considering whether or not to make any order acts in an administrative capacity. One brings a judicial mind to bear on any matter and either grants or refuses relief. The administrative act follows on that decision in that the Registar issues an order reflecting the Judge's decision.'

The court did not refer to the AJA because the case was decided before it was promulgated. The action would, however, presumably be excluded by s 1(ee) of the AJA.

It should be noted that this matter came before the Supreme Court of Appeal, reported in 2003 (2) SA 385. Schutz JA said the following (paras 35—36):

> 'Review is not directed at correcting a decision on the merits. It is aimed at the maintenance of legality . . . And throughout it has been the High Court, and only the High Court, acting through its Judges, that has enjoyed the general, inherent jurisdiction to entertain reviews. It is not itself the subject of review . . . There are other means, quite sufficient means, to which I shall come, by

> which the judgment of a Judge may be corrected.
>
> The primary means of correction of judicial errors is appeal to a higher Court, which is appropriate where a Judge has reached a final decision. But if an *ex parte* order has been granted, that may be corrected by another single Judge through the ordinary processes of the Court.'

The court was prepared to assume, to the advantage of the applicants, that the action was administrative in nature (para 39), but the appeal was still dismissed on other grounds. Of interest is the following remark (para 42):

> 'What I have said about non-reviewability of a Judge does not, of course, apply to a magistrate. A magistrate is subject to review, so that the particular problem that has to be addressed in this case does not arise in the case of a magistrate.'

In ***Nontenja v Director of Prosecutions, Umtata & another*** [2003] JOL 10614 (Tk) Jafta AJP relied on the remarks of Schutz JA to find the following (para 6):

> 'The aforesaid *dictum* by the learned Judge of Appeal makes it quite clear that a review procedure is not competent if one seeks to correct a decision of a judge. Schutz JA overruled various decisions of the High Courts which stated that a judge's decision could be reviewed. The learned Judge held the view that a judge's decision was not reviewable irrespective of whether it is administrative or judicial in nature. Such a decision can only be corrected on appeal or at a rehearing depending on whether it was final or provisional.'

The court also emphasized that the decision to grant or refuse bail is not an administrative act (para 10).

In ***Jayiya v MEC for Welfare, Eastern Cape Provincial Government & another*** [2003] 2 All SA 223 (SCA) the appellant had applied for a disability grant in terms of the Social Assistance Act 59 of 1992. After waiting 19 months to be paid, the appellant approached the court for an order compelling payment. The Eastern Cape Provincial Division had ordered the second respondent, the Permanent Secretary for Welfare in the Eastern Cape, to make the payment. The appellant had cited the second respondent because (para 4)

> 'Presumably it was thought that the decision-maker had to be brought before the court. The Promotion of Administrative Justice Act 3 of 2000 in s 1 makes it clear that the Welfare Department is, for the purpose of the Act, an "administrator", that is to say, an organ of State taking administrative action. "Administrative action" in terms of s 1 of the Act means
>
> "any decision taken, or any failure to take a decision by -
>
> (a) an organ of state when -
> (i) …
> (ii) exercising a public power or performing a public function in terms of any legislation".'

However, the court held (para 5):

> 'A litigant brings a national or provincial department before court by citing the political head of the department in a representative capacity. In the case of a department of the national government, this would be the responsible minister. In the case of a provincial department it is the responsible member of the executive council. That is what s 2 of the State Liability Act 20 of 1957 provides. The first respondent should have been the only one.'

The applicants in ***Richie & another v Government of the Northern Cape Province & others*** [2003] 2 All SA 573 (NC) challenged the decision of the Director-General of the Northern Cape to allocate state funds to be used by the third to ninth respondents in their defamation suit against the applicants. The case turned on many issues but of relevance is the court's rejection of the applicants' argument that the decision of the Director-General was reviewable in terms of administrative law.

The court quoted from Y Burns *Administrative Law Under the 1996 Constitution* (1998) 115—6 as follows (para 20):

'Wiechers says:
"The state administration serves an impersonal, general interest. The civil courts serve the same general interest in their own individual way. It is the duty of the courts to correct the state administration in its domestic management if the latter is no longer serving the general interest. This is not to suggest that the courts should dictate to the administration what is the best way to manage its own affairs, for this would mean that the courts lay down policy and no court may do this. However, the courts must ensure that the general interest is served in the way that is prescribed by administrative law."

Internal acts which do not affect or threaten individual rights and freedoms fall outside the court's power of judicial review.'

The cause of action arose in 1999 and the court did not, therefore, consider the AJA.

In ***Nephawe v Premier of Limpopo Province & another*** [2003] JOL 10972 (T) the Premier had appointed a Commission to enquire about the rights of certain parties, including the applicant, to be considered traditional leaders. The Premier had passed the report onto the Minister for Local and Provincial Government in order to assist in the formulation of national policy regarding traditional rule. The applicant sought review of the decision to pass on the report before it was tabled in the provincial legislature.

In concluding that the action of the Premier was not administrative action the court quoted from *President of the RSA v SA Rugby Football Union* 2000 (1) SA 1 (CC), paras 140—147 as follows (para 88):

'In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others,* this Court held that "administrative action" as contemplated in section 33 does not include within its ambit, legislative decisions taken by a deliberative and elected legislative body established by the Constitution. Such action, we held, was not action of the public administration, but action of a constitutionally empowered legislature . . .

In section 33 the adjective "administrative" not "executive" is used to qualify "action". This suggests that the test for determining whether conduct constitutes "administrative action" is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in *Fedsure*, that some acts of a legislature may constitute "administrative action". Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is "administrative action" is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.

. . . It follows that some acts of members of the executive, in both the national and provincial spheres of government will constitute "administrative action" as contemplated by section 33, but not all acts by such members will do so.

Determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will, as we have said above, depend primarily upon the nature of the power. A series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. So too is the nature of the power, its subject matter, whether it involves the exercise of a public duty, and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. While the subject matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of section 33. Difficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of section 33. These will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration.

> This can best be done on a case by case basis.
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> The remaining section 84(2) powers are discretionary powers conferred upon the President which are not constrained in any express manner by the provisions of the Constitution. Their scope is narrow: . . . [eg] . . . the appointment of commissions of inquiry . . . *They are closely related to policy; none of them is concerned with the implementation of legislation . . . In the case of the appointment of commissions of inquiry, it is well-established that the functions of a commission of inquiry are to determine facts and to advise the President through the making of recommendations. The President is bound neither to accept the commission's factual findings nor is he or she bound to follow its recommendations*
>
> *A commission of inquiry is an adjunct to the policy formation responsibility of the President. It is a mechanism whereby he or she can obtain information and advice*. When the President appointed the commission of inquiry into rugby he was not implementing legislation; he was exercising an original constitutional power vested in him alone. *Neither the subject matter, nor the exercise of that power was administrative in character . . .*' (emphasis supplied and non-applicable portions omitted by the judge).

Visser AJ continued (para 89): '[f]rom the above quotation it may be accepted that the actions taken by cabinet members in carrying out their constitutional responsibility to develop policy and to initiate legislation cannot be construed as being administrative action for the purposes of section 33.'

In ***Minister of Home Affairs v Eisenberg & Associates in re: Eisenberg & Associates v Minister of Home Affairs & others*** 2000 (8) BCLR 838 (CC)(see the discussion under 'Section 4' below) the respondent challenged regulations made by the Minister in terms of the Immigration Act 13 of 2002, which it claimed he had promulgated without the necessary consultation. The court said the following regarding regulations promulgated in terms of an Act (para 52):

> 'The definition of "decision" does not refer to the making of regulations and it is not clear whether this constitutes administrative action for the purposes of PAJA. Moreover, the definition of "administrative action" specifically excludes "any decision taken, or a failure to take a decision, in terms of section 4(1)". It may be open to doubt, therefore, whether reliance could be placed on PAJA in the circumstances of this case.'

This was an obiter dictum (see para 53).

In ***Awumey & another v Fort Cox Agricultural College & others*** 2003 (8) BCLR 861 (Ck); [2003] JOL 11162 the applicant (the second applicant withdrew) had been suspended and then fired by the Interim Board of the first respondent. The applicant alleged that this was, amongst other things, a violation of his right to administrative justice and was an unfair labour practice (at 864G—H). The respondents argued that the court had no jurisdiction to hear the matter as questions of unfair labour practices are to be determined by the Labour Court in terms of the Labour Relations Act 66 of 1995 (at 865A—B).

Section 157(2) of the Labour Relations Act reads as follows:

> 'The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996 and arising from –
> (a) . . .
>
> (b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer'.

In dismissing the argument of the respondents, the court said (at 865G—H):

> 'That section provides that challenges based on constitutional rights arising from the State's conduct in its capacity as employer is a matter that may be determined by the Labour Court concurrently with the High Court. Section 157(2) cannot be interpreted as ousting the jurisdiction of the High Court since it expressly provides for concurrent jurisdiction.'

The court concluded that since the applicant was basing his action on a violation of s 33 of the Constitution, the matter was clearly constitutional and fell under s 157(2) (at 386C—D).

The court was also satisfied that the applicant was entitled to use the right to administrative justice as the basis for his action since 'the proposition that the functioning of educational institutions created by statute such as Universities, Technikons and Schools are governed by administrative law principles appears to be well supported by authority' (at 868B—C).

The applicants in ***Hayes & another v Minister of Finance & Development Planning, Western Cape & others*** 2003 (4) SA 598 (C) lived in Stellenbosch in a suburb subject to building restrictions. The third and fourth respondents applied to the second respondent to have certain of the restrictions relaxed so that they could build a block of flats. Many of the residents in the area objected and the second respondent refused the application. The third and fourth respondents appealed successfully to the first respondent. In *Hayes & another v Minister of Housing, Planning and Administration, Western Cape & others* 1999 (4) SA 1229 (C) the court set aside the decision of the first respondent because the determination was made without sufficient notice given to the interested parties (see 1249E—F and 1249I—J of the 1999 decision).

Following the decision of the court in 1999, the third respondent appealed again, and in November 1999 the first respondent again allowed the restrictions to be relaxed (at 608G of the decision reported in 2003, but delivered in 2001). The applicants then appealed that decision in the present case.
In concluding that the decision to uphold the appeal was administrative action the court said the following (at 610H—611C):

> 'In determining whether or not conduct constitutes administrative action as contemplated by s 33 of the Constitution, the focus on the enquiry is on the nature of the power being exercised (*President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) in para [141] at 67B—C (1999 (10) BCLR 1059)). If the exercise of the power involves the implementation of legislation, it would be administrative action within the meaning of s 33. . . What has to be taken into consideration is, inter alia, the source of the power, the nature of the power, its subject-matter, whether it involves the exercise of a public duty and
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> "how closely it is related on the one hand to policy matters which are not administrative, and on the other hand to the implementation of legislation, which is'.
>
> ([*Sarfu*] (supra in para [143] at 67G); *Transnet Ltd v Goodman Brothers* (Pty) Ltd 2001 (1) SA 853 (SCA) at 865F—H).'

This conclusion might be different if decided under the AJA, in the light of s 1(bb).

Unsurprisingly, the court concluded that the decision to remove the restrictive conditions was also an administrative act (at 612B—D):

> 'The source of the power is the Act: the decision of the first respondent is taken within the framework of the Act and it is implementation of the provisions of the Act. Here too, the fact that the decision implementing the legislation may contain overtones of policy, does not deprive it of its administrative nature (see *Permanent Secretary, Department of Education and Welfare, Eastern Cape, and Another v Ed-U-College (PE) (Section 21) Inc* [2001 (2) SA 1 (CC), para 18].'

SECTION 3 – PROCEDURAL FAIRNESS

The applicants in ***Mafongosi & others v United Democratic Movement & others*** [2003] 1 All SA 441 (Tk); [2003] JOL 10607 had been dismissed as councilors for the United Democratic Movement and challenged their dismissal. The applicants arrived at the disciplinary hearing without a lawyer and the presiding officer would only postpone the hearing for a week, which, according to them, rendered the proceedings procedurally unfair. The subsequent decision to dismiss them, based on the finding of the hearing, was thus invalid, according to their argument (para 4).

The short postponement had a serious affect on the applicants' ability to be represented. This was because they lacked the funds to secure a lawyer and needed more time to raise them (paras 14—15). The conclusion of Jafta AJP that the hearing was procedurally unfair is evident from the following (para 16):

> 'It is . . . axiomatic that the presiding officer was bound to adopt and follow a procedure that complied with constitutional standards of administrative justice based on the well-known common-law principles. Although the common law does not confer a right to legal representation upon those affected by an administrative decision, where such right has been given common sense dictates that the beneficiary of such right would be entitled to its full enjoyment without hindrance from the decision-maker who should afford the affected party the opportunity to exercise the right. The right to legal representation is extremely important in any proceedings and therefore the decision maker is bound not to pay lip-service thereto.'

The court found that the applicants had also been treated unfairly in their appeal of the decision, within the Movement, and it was thus set aside (para 27). The court did not refer to the AJA.

In ***Smith v Minister of Environmental Affairs & Tourism, RSA & another*** [2003] 1 All SA 628 (C) a Government Notice issued in terms of the Marine Living Resources Act 18 of 1998 provided for applications for fishing rights. In terms of the notice, applications had to be received by 12h00 on 13 September 2001 (at 631b—c). The applicant's forms were late because they had arrived with only the originals instead of the two additional copies that were required. The question before the court was whether the provision of the notice setting the cut-off time was peremptory or directory and, thus, whether the respondent could condone the late application. The rationale for the decision of Davis J, that the respondents should consider the application, is captured in the following (at 638i—j):

> 'Given the importance of procedural fairness as a constitutional value, a decision which refused to consider an application where the only defect was the omission of copies of the application form, cannot be justified as complying with a constitutionally mandated standard of fairness. In all the circumstances of this particular case, an inflexible policy offends the principle of procedural fairness.'

Although no reference was made to the AJA, the court based its decision on review owing to procedural unfairness. Of relevance, therefore, as well as s 3(1), is s 6(2)(c).

In ***Minister of Safety & Security v Mashego & others*** [2003] 6 BLLR 578 (LC) the court cited with approval (at 585A), the following extract from L Baxter *Administrative Law* (1984) 540, which is a quote from *General Medical Council v Spackman* [1943] AC 627 at 644—5:

> 'If the principles of natural justice are violated in respect of any decision, it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision.'

The court continued as follows (at 585B—E):

> 'In *Yates v University of Bophuthatswana* 1994 (3) SA 815 (B), the court, in respectful agreement with the learned author's citation . . . stated that it was imperative to draw a distinction between the merits of a decision and the process of reaching it. Even if the merits are unassailable, the court held, they could not justify an infraction of the rules of procedure in which the principles of natural justice have been ignored or subverted. The merits and the procedure must not be blurred (at 836A—B). . .
>
> Further, Baxter (*supra*) supports the idea that the affected party must be afforded the opportunity to present evidence supporting his contentions, and to contradict and challenge evidence which is against him (at 553). The learned author further states that while cross-examination, for fear that hearings might be over judicialised, has

> been held by South African courts not to necessarily [sic] entail a right to cross-examination, it may be a requirement for a fair hearing where it is necessary to serve the purposes of natural justice – especially that of promoting accuracy (at 554—555).

Although the court did not refer to the AJA, which might have been owing to the shoddy heads of argument presented by both sides (see para 11), the considerations mentioned seem to mirror those mentioned in s 3 of the AJA.

In ***Magingxa v National Commissioner, SA Police Service & others*** 2003 (4) SA 101 (Tk) the applicant contested the decision of the first respondent to revoke his license to deal in arms and ammunition, in terms of s 19(7) of the Arms and Ammunition Act 75 of 1969.

The court, referring to s 3(5) of the AJA, said that the first question is 'whether the procedure set out in s 19(7)(b) of the Arms and Ammunitions Act is fair' (at 110E). This is because s 3(5) says the following:

> 'Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure.'

Section 19(7)(b) of the Arms and Ammunitions Act sets out the procedure to be followed in the case of a decision to revoke a license.

The court then pointed to the second question. 'If [the procedure is] not [fair], it would have to be decided whether it is reasonable and justifiable in the circumstances for the first respondent to depart from the requirements of s 2 of the Promotion of Administrative Justice Act.' What the court seems to have meant is that if the procedure in the Arms and Ammunition Act is not fair, it might be possible to condone this in terms of s 3(4)(a) and of the AJA, which reads '[i]f it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).'

Section 3(4)(b) provides the factors to be considered when determining if it is reasonable and justifiable to depart from the procedure of subsec (2). That the court intended this meaning is borne out by its reference to s 3(4) at 112B and 112F.

The court concluded that the procedure in s 19(7)(b) is unfair (at 111G). In concluding that s 3(4)(b) of the AJA could not save the procedure, the court said the following (at 112F—I):

> 'With regard to the provisions of s 3(4)(b) of Act 3 of 2000, I cannot see how it can be said that the objects of s 19(7) of Act 75 of 1969 or the nature, purpose and need to take administrative action or the need to promote an efficient administration can, on any basis, in this matter, justify a departure from the requirements stipulated in s 3(2) [of the AJA]. The giving of reasonable notice of the proposed administrative Act and allowing the license-holder to make representation will not undermine any of these factors, nor will it be against the public interest or safety because it concerns the trading of firearms. That this is so is evidenced by the provisions of s 42(3) of the Firearms Control Act 60 of 2000, which provide that a license-holder be given 30 days' notice in writing to submit written representations as to why the license should not be cancelled . . . It . . . provides an indication that none of the aforementioned factors set out in s 3(4)(b) of Act 3 of 2000, either singularly or cumulatively, provide sufficient justification, in the eyes of the Legislature, to dispense with the requirements set out in s 3(2) of Act 3 of 2000.'

See ***Logbro Properties CC v Bedderson NO & others*** 2003 (2) SA 460 (SCA) (for the facts see the discussion above under 'Section 1') for a decision of the Supreme Court of Appeal that held that a failure to provide an opportunity to make representations violated the audi alteram partem rule (para 25).

In ***Radio Pretoria v Chairman of ICASA & another*** [2003] JOL 10732 (T) (for the facts see the discussion under 'Section 6(2)(d)') the court approved of and applied the following dictum of Zulman JA in *Chairman, Board on Tariffs and*

Trade v Brenco Inc 2001 (4) SA 511 (SCA), para 14 (see para 24.6 of the judgment):

> 'There is no single set of principles for giving effect to the rules of natural justice which will apply to all investigations, enquiries and exercises of power, regardless of their nature. On the contrary, courts have recognized and restated the need for flexibility in the application of the principles of fairness in a range of different context. As SACH, LJ pointed out in *Re Pergamon Press*:
>
> "In the application of the concept of fair play, there must be real flexibility, so that very different situations may be met without producing procedures unsuitable to the object in hand . . .
>
> It is only too easy to frame a precise set of rules which may appear impeccable on paper and which may yet unduly hamper, lengthen and indeed, perhaps even frustrate . . . the activities of those engaged in investigating or otherwise dealing with matters that fall within their proper sphere. In each case careful regard must be had to the scope of the proceeding, the source of its jurisdiction (statutory in the present case), the way in which it normally falls to be conducted and its objective."'

In ***Ndindwa v Mnquma Local Municipality*** [2003] JOL 11026 (Tk) the appellant sought the review of the decision of the respondent to dismiss her as Executive Mayor. The court summed up the issues thus (at 5 of 11026): '[t]he issue to be determined is whether the appellant had a fair hearing. This entails that she should have received notice of the hearing; a) timeously; and b) disclosing the allegations against her.'

The court pointed out that in terms of s 3(2)(b)(i) of the AJA 'it is compulsory to give a person adequate notice of the nature and purpose of the proposed action' (at 6).

The appellant had been given 3 days to prepare for the meeting. In finding that this was insufficient, the court said (at 7):

> 'I am of the opinion that the complexity of the issues and the particularity of the charges also have an effect on the time needed to prepare. It might be that it is possible to prepare at short notice, if the charge relates to a single incident on a particular day. In this instance it is clear that the allegations against the appellant relate to alleged transgressions committed during an undisclosed timeframe and without a particular date that the appellant is alleged to have transgressed or for which she is supposed to be held accountable. I am of the opinion that under the circumstances, the notice given was too short to prepare properly.'

On the question of the disclosure of the charges the court referred to *Minister of the Interior v Bechler & others*; *Beier v Minister of the Interior & others* 1948 (3) SA 409 (A) at 451—2; *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) at 652 for authority that the substance of the allegations against a party must be disclosed so that the party can controvert them. The court found that the allegations against the appellant constituted a statement of the duties of the mayor without explaining how she had failed to perform them and an allegation against another party. Neither were adequate (at 9).

SA National Defence Union & another v Minister of Defence & others: In re SA National Defence Union v Minister of Defence & others [2003] JOL 11263 (T) concerned various regulations made in terms of the Defence Act 44 of 1957 by the Minister of Defence. In *South African National Defence Union v Minister of Defence & another* 1999 (4) SA 469 (CC) the Constitutional Court declared invalid s 126B(1) of the Act because it prohibited members of the SANDF from forming trade unions. Following this, in August 1999, the Minister made various regulations to govern the creation of trade unions and the applicants challenged the constitutionality of some of them.

The court characterized the first challenge of relevance to administrative law, as follows (at 41 of 11263): '[t]he effect of regulations 25 and 27 is to deny officials, office bearers and representatives of military trade unions the right to represent members in grievance proceedings, disciplinary proceedings and military court proceedings.'

In declaring these regulations invalid, the court said (at 41—2):

> 'Regulation 25(b) envisages that conduct on the part of the Minister or the department that impacts on a member will in certain circumstances constitute "administrative action". In such circumstances the member has a right to "procedurally fair" administrative action in terms of section 33 of the Constitution. Procedural fairness requires in appropriate cases that a member must have the opportunity to be represented by a military union (see section 3(3)(a) of the Promotion of Administrative Justice Act 3 of 2000 and *Hamata and another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and others* 2002 (5) SA 449 (SCA) at paragraph 12.'

It seems as if the court was not applying the AJA directly, but rather using it as guidance on the question of constitutionality. Since the court was engaging in constitutional analysis, it moved on to the question of justification and concluded that because the Minister had offered none, the regulations were invalid (at 43).
Regulation 53 allowed the Registrar of the Military Arbitration Board to withdraw the registration of military trade unions. The applicants argued that this could be done without a hearing being conduct. The court said the following (at 58):

> 'The Promotion of Administrative Justice Act 3 of 2000 is the legislation envisaged in section 33(3) of the Constitution. Section 3(2) of the Act provides that, in order to give effect to the right to procedurally fair administrative action, an administrator must generally afford a hearing to the affected person. Section 3(5) provides that an administrator may act in accordance with a procedure that deviates from s 3(2) as long as the relevant empowering provision "is fair".

The court did not expressly consider whether it would be fair to depart from the requirement of a hearing but rather concluded that it was not 'persuaded that it was the clear intention of the legislature to oust the principles of the *audi* rule in regulation 53' (at 59). It was, of course, the Minister and not the legislature, who was responsible for regulation 53.

SECTION 4 – ADMINISTRATIVE ACTION AFFECTING THE PUBLIC

Minister of Home Affairs v Eisenberg & Associates in re: Eisenberg & Associates v Minister of Home Affairs & others *2000 (8) BCLR 838 (CC)*, unreported) (see the discussion under 'Section 1' above) concerned a challenge by the respondent to regulations made by the Minister in terms of the Immigration Act 13 of 2002 (the Cape High Court had declared the regulations invalid). The respondent argued thatthe Minister had failed to comply with the consultation process set out in s 7 of the Act when making the regulations,

The respondent attempted to argue that the Immigration Act must be read together with the AJA and that, furthermore, the Minister was obliged to follow the procedure of s 4(1) of the AJA in making the regulation. As the court put it, 'the respondent did not rely directly on PAJA in its founding affidavit, it sought to do so indirectly, by using the provisions of PAJA to support its construction of the Act' (para 50). The court expressed doubt as to the correctness of using the AJA to interpret other legislation: (ibid):

> 'It is not at all clear that using PAJA as an interpretive tool to assist in interpreting other legislation, as the respondent contends, is appropriate. PAJA regulates the manner in which certain powers are to be exercised. If the power under question is one within the scope of PAJA it must be exercised consistently with PAJA. If it is not such a power, PAJA has no application. Questions may arise as to whether legislation may by necessary implication oust the requirements of PAJA, but they do not arise here. Be that as it may, I shall nevertheless consider whether section 4 of PAJA can assist the respondent.'

Using s 4(4), the court pointed out that the provisions of s 4(1) may be bypassed, if reasonable and justifiable in the circumstances. If the Minister had been obliged to conduct (time consuming) consultations, the regulations would not have been ready at the time when

the Immigration Act came into force. Without the regulations, however, the Act could not have worked properly. In addition the respondent had not challenged the proclamation that brought the Act into force. Chaskalson CJ said the following (para 58):

> 'Counsel for the respondent correctly accepted that the Act would be unworkable without its own regulations and that the old regulations could not fill that void. They also accepted that the section 7 process is a time consuming process which could not possibly have been complied with prior to 12 March when the operative provisions of the Act came into force. The validity of the Proclamation was not challenged. Thus, even if section 4(1) of PAJA is applicable to the making of regulations and it is open to the respondent to challenge the Minister's failure to comply with its provisions, it would in the light of these facts have been reasonable and justifiable for the Minister to depart from the notice and comment provisions when he made the regulations.'

SECTION 5 – REASONS FOR ADMINISTRATIVE ACTION

Minister of Environmental Affairs and Tourism & others v Phambili Fisheries & another [2003] 2 All SA 616 (SCA) (see the discussion under 'Section 6(2)(b)' for the facts) dealt with adequate reasons in terms of s 5(3) of the AJA. The court quoted, with approval, Cora Hoexter *The New Constitutional & Administrative Law II* (2002) 244 as follows (para 40):

> '[I]t is apparent that reasons are not really reasons unless they are properly informative. They must explain *why* action was taken or not taken; otherwise they are better described as findings or other information.'

The Supreme Court of Appeal added that the reasons to be given are the reasons for the decision, which in this case concerned the total tonnage, allocated to each fishing concern, and concluded that on the facts adequate reasons had been given for the decision (para 44). The court also quoted with approval (para 40) the following dictum of Woodward J in *Ansett Transport Industries (Operations) Pty Ltd v Wraith* (1983) 48 ALR 500 at 507 that in order to provide adequate reasons it is necessary for the

> 'decision-maker to explain his decision in a way which will enable a person aggrieved to say, in effect: "Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging."
>
> This requires that the decision-maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute), and the reasoning processes which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation. The appropriate length of the statement covering such matters will depend upon considerations such as the nature and importance of the decision, its complexity and the time available to formulate the statement. Often those factors may suggest a brief statement of one or two pages only.'

Lategan & others v Lategan NO & others [2003] 3 All SA 204 (D) concerned an enquiry in terms of s 417 of the Companies Act 61 of 1973. The first and second applicants were to testify and the first respondent had ordered the enquiry. Of interest to s 5 of the AJA is that the applicants requested that the enquiry be held in public and were successful in this attempt. The applicants now requested reasons for this decision.

In dismissing this part of the applicants' claim, Magid J said the following (at 217a—c):

> 'I was very surprised to be told that the legislature had provided that one could demand reasons for an administrative decision which, as in this case, was decided in one's favour . . . I was relieved to ascertain that the legislature had not done anything as absurd as was suggested by [the applicants' counsel] for, as was pointed out by [counsel for the respondent], section 33(2) of the Constitution gives a constitutional right to written reasons to persons whose rights have been adversely

affected by administrative action. . . Plainly one's rights cannot be said to have been so affected if one obtains what one has asked for.'

Commissioner for the SAPS v Maimela & another [2003] 3 All SA 298 (T) concerned the application of the respondents for firearm licences in terms of s 3(1) of the Arms and Ammunition Act 75 of 1969. The first respondent was refused his because his 'premises/residence does not comply to required standar(d)' (at 300f). The second respondent was refused his because of 'lack of motivation/not convinced of need' (at 301a).

The parties had appealed to the Appeal Board, which had refused their appeal without giving reasons (see 300f and 301b). Thereafter, the first respondent applied to court to force the Commissioner to give better reasons than he had originally provided and for the Appeal Board to give full reasons for its decision. The court a quo granted this relief (at 300d).

In their replying affidavits, the appellants gave much more detailed reasons than they originally had but the respondent argued that these did not constitute reasons to which the appellants would be bound if their decision was reviewed (301f). Therefore, according to the respondents, the court a quo was correct in granting the order (ibid).

In dismissing this argument, the court said the following (at 301f—g):

> 'I know of no principle of law whereby the two appellants are not bound by the reasons given in the answering affidavits. Moreover, the appellants state explicitly in a duplicating affidavit that what has been said in the answering affidavits constitutes their reasons and that the only remaining issue is one of costs. . . in my view the court *a quo* should not have given any order other than an order for costs.'

On the matter of costs, the court pointed out that, since the cause of action arose before 30 November 2000, item 23(2)(b) of Schedule 6 of the Constitution of the Republic of South Africa Act, 108 of 1996 applied (at 302b). In terms of that item, the respondents were entitled to 'be furnished with reasons in writing for administrative action which affects any of their rights or interests'. The court, therefore, turned to the question of adequate reasons and said the following (at 303b—c):

> 'The adequacy of reasons will depend on a variety of factors such as the factual context of the administrative action, the nature and complexity of the action, the nature of the proceedings leading up to the action and the nature of the functionary taking the action. Depending on the circumstances, the reasons need not always be "full written reasons", the briefest pro forma reasons may suffice. (See [C] Hoexter [with R Lyster *The New Constitutional and Administrative Law* II *Administrative Law* (2002)] 246; *Rèan International Supply Company (Pty) Ltd and other v Mpumalanga Gambling Board* 1999 (8) BCLR 918 (T) at 927A—B.) Whether brief or lengthy, reasons must, if they are read in their factual context, be intelligible and informative. They must be informative in the sense that they convey why the decision-maker thinks (or collectively think) that the administrative action is justified.'

In concluding that the reasons given by the Commissioner were not adequate, the court said that '[i]f reasons refer to an extraneous source, the extraneous source must be identified to the reasonable reader' (at 303g). While cautioning that it was not its place to be prescriptive, the court offered the following example of a possibly adequate reason: 'applicant's dwelling [is] structurally unsuitable to affix a safe in accordance with regulation 28(3)(a)' (at 303h).

However, the court found that the first respondent was not entitled to the relief in the manner in which he sought it (at 304a—c):

> 'To the extent that the wording of the prayer conveys that the court can direct an administrative decision-maker who has furnished reasons, to give further or better reasons, an order could not have been made in those terms. A court can make an order for reasons to be furnished only if it concludes that the decision-maker *did not give reasons at all* or that what are purported to be "reasons" do not in law constitute reasons. *A court cannot prescribe to an administrative decision-maker what his/her/its reason should be*. Should the

> person whose rights or interests are affected by an administrative decision contend that the reasons do not justify the action, the appropriate remedy is to have the decision reviewed.' (My emphasis.)

In ***MEC, Public Works, Roads and Transport, Free State & another v Morning Star Minibus Hiring Services (Pty) Ltd & others*** 2003 (4) SA 429 (O) (see the discussion under 'Section 6(2)(h)' for the facts) the respondents argued that the MEC was bound to give reasons for a particular regulation that he issued. In rejecting this argument, the court said the following (para 13):

> '[Appellants'] counsel submitted that the Court *a quo's* conclusions in this regard are based on a failure to distinguish between legislative action and administrative action. They also submitted that the same applies to the requirement of the trial Judge that the first respondent was apparently nevertheless obliged to state the purpose of reg 52. These submissions . . . must be accepted.'

SECTION 6 – GROUNDS OF REVIEW

SECTION 6(2)(A)(III) – DECISION MADE WITH BIAS OR A REASONABLE SUSPICION THEREOF

In ***Ruyobeza & another v Minister of Home Affairs & others*** [2003] All SA 696 (C) the issue before the court was the following: in terms of the Refugees Act 130 of 1998, a person granted refugee status is entitled to apply for an immigration permit, which will be granted upon the recommendation of the Standing Committee (s 27). The first applicant argued that, since at least some of the members of the committee were employed by the department of Home Affairs, there was departmental bias that prevented the committee from reaching an impartial decision (at 700i). Thring J referred to obiter remarks of Erasmus J in *Watchenuka v Minister of Home Affairs* 2003 (1) SA 619 (C) at 626F—627G and gave examples of the dependence of certain members in the Standing Committee upon the Department of Home Affairs concluding (at 702g—i):

> 'More examples of their dependence could be given, but it is not necessary to labour the point: by its very nature, the relationship of servant to master has inherent in it subservience, in matters of work to be done, of the servant to the wishes and directions of the master. Moreover, as Baxter, *Administrative Law* says in the passage quoted by Erasmus J in the *Watchenuka* case (*supra*) there will almost always be –
>
> "[C]onsiderations of policy which departmental officials and ministers are (rightly) interested in propagating but which engender so-called 'departmental bias'." Section 9(2) of the Refugees Act requires that the committee "must function without any bias and must be independent". Obviously it cannot comply with this requirement if it manifests, in its workings or its decisions, a "departmental bias" of the kind referred to by Baxter.'

Watchenuka had involved a challenge to regulations promulgated by the Minister of Home Affairs, which prohibited asylum seekers from working or studying in South Africa during their stay. In terms of ss 22(1) and 11(h) of the Refugees Act, the Standing Committee) has the power to determine the conditions of the sojourn of refugees and also the conditions of work and study. Since the Minister made the regulations before the Standing Committee had made its decision on these matters, the regulations were ultra vires the Act (at 625G). The court in *Ruyobeza,* and in *Watchenuka***,** did not refer to the AJA.

In ***Clan Court CC v Gauteng Provincial Liquor Board & others*** [2003] JOL 11223 (T) the applicant sought the review and setting aside of the refusal of the first respondent of its application for a liquor licence. The application was opposed by various parties including a church and a school. The former objected owing to the high crime rate in the area and the presence of social evils. The latter objected because it was an all-girl school and it feared that the patrons of the liquor store would harass the children on their way to and from school.

The reason that the first respondent gave for refusing the licence was 'over-saturation'. Counsel conceded that there was no evidence

to reach such a conclusion and the court turned to other possible reasons for the refusal. The court said the following (at 5 of 11223):

> 'The 1st respondent and the members of his Board appear to have adopted, as policy, not to grant licences in respect of premises situate [sic] within a radius of 500 metres from similar licensed premises, 450 metres from schools, and 400 metres from a church. . . In so doing the Board is no longer in a position to exercise an independent and unfettered discretion. The Board is charged with considering applications and to grant or refuse same with reference to the parameters laid down and referred to in the Act, not with reference to an artificially contrived "policy" which is not referred to in the Act.'

The court pointed out that the liquor store would be closed on Sundays and would not, therefore, interfere with church attendance. The store would be closed in the mornings and would not cause trouble for the girls on their way to school. The court held, further, that there was no evidence that off-consumption stores posed the treat to the girls that the second respondent alleged (at 6). The court concluded that it was 'constrained to find that the respondent Board failed to exercise an independent and unbiased discretion, but rigidly applied a policy without properly considering the merits of the application' (at 7). The judgment gives no indication of when the cause of action arose and it is not clear why the court did not refer to the AJA.

One of the challenged regulations in ***SA National Defence Union & another v Minister of Defence & others: In re SA National Defence Union v Minister of Defence & others*** [2003] JOL 11263 (T) (see 'Section 3' for the facts) allowed the Minister to appoint 'independent' persons to the Military Arbitration Board. One of the duties of the board was to mediate on conditions of employment, which the Minister conceded would 'almost always involve the employer in his representative capacity' (at 47 of 11263).

In declaring this provision unconstitutional, the court quoted (at 48) the following extract from *R v Valente* (1985) 24 DLR (4th) 161 (SCC), which was approved of in *De Lange v Smuts* NO 1998 (3) SA 785 (CC), para 71:

> 'Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties to the particular case. The word "impartial" . . . connotes absence of bias, actual or perceived. The word "independent" . . . reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly the Executive branch of government, that rests on objective conditions or guarantees.'

The court also approved (at 50) of the following remarks of the European Court of Human Rights in the case of *Campbell and Fell v United Kingdom* (28 June 1984, Series A No 80, para 78):

> 'In determining whether a body can be considered to be independent – notably of the executive and the parties in the case – the court has regard to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.'

Relying on *Van Rooyen v S (General Council of the Bar intervening)* 2002 (5) SA 246 (CC), paras 19—30, the court held that the test of independence is objective and continued (at 53):

> 'for the following reasons . . . the Military Arbitration Board would not be perceived to be independent and impartial:
> Disputes before the Board will always – at best for the Minister almost always – involve the employer in his representative capacity;
> The members of the Board are appointed by the Minister and the members may be chosen on the basis of their political, social or economic views;
> Members of the board have no security of tenure and may be removed by the Minister if he dislikes an award given by that member;

> Those who appear before the Board will find it impossible to forget that its incumbents are beholden to the Minister if he dislikes an award given by that member'.

The court found that this violation of s 33 of the Constitution could not be justified (at 55).

In terms of another of the challenged regulations, 'the Registrar of the Military Trade Unions has the power to register military trade unions, to consider the returns and reports of military trade unions, to withdraw the registration of a military trade union and to perform a host of ancillary functions' (at 56). These provisions gave the Registrar an open-ended discretion when performing his functions. The court said the following (at 57):

> 'Section 33 of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. That means that there must be no reasonable perception of bias. Presently, in my view, there is a reasonable perception that the Registrar might be perceived to be biased by virtue of the fact that he owes his appointment to the Minister.'

SECTION 6(2)(B) – A MANDATORY AND MATERIAL PROCEDURE OR CONDITION PRESCRIBED BY AN EMPOWERING PROVISION WAS NOT COMPLIED WITH

In ***Despatch High School v Head, Department of Education Eastern Cape & others*** 2003 (1) SA 246 (CkH) (see the discussion of the facts under 'Section 1' above) the court found that the administrator had relied on the correct provision of the empowering legislation in reaching its decision. The court said the following (para 32):

> 'The promulgation of the Administrative Justice Act has resulted in the grounds upon which administrative action may be reviewed being defined statutorily. Both [counsel] have referred to various provisions of the Administrative Justice Act. They have, in support of their respective arguments, accepted the relevance of the said Act in determining the issues raised by this application in regard to the grounds upon which the decision of the first respondent may be reviewed an set aside. I am mindful of the fact that the applicant's cause of action arose prior to the promulgation of the . . . Act. Nevertheless, it is clear, as stated in *Pharmaceutical Manufacturers* [*Association of SA: In re Ex parte President of the Republic of South Africa* 2002 (2) SA 674 (CC), para 33] that it is incorrect to draw a distinction between the common-law principles of review and review under the Constitution.'

The case of ***Minister of Environmental Affairs and Tourism & others v Phambili Fisheries & another*** [2003] 2 All SA 616 (SCA) (see the discussion under 'Section 5' above) involved the allocation of fishing quotas in terms of the Marine Living Resources Act 19 of 1998 ('the MLRA'). Of relevance to this case was 'the need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry' (s 2(j) of the MLRA).

Schutz JA (Howie P, Mthiyane, Conradie JJA and Jones AJA concurring) pointed out that the grounds of review upon which the respondents relied 'range[d] around most of the review grounds to be found in the books, and more' (para 13) but it seems that their contention can be narrowed down to this: the Chief Director failed to take into consideration the imperative of transformation, as he was required to do.

Referring to the Act, and after a comprehensive review of the sections dealing with the relevant factors to be considered by the Chief Director, Schutz JA concluded that the factors to be considered under s 2(j) were not meant to fetter the discretion of the Chief Director (para 30). Furthermore, although the Chief Director would have failed in his duty if he did not consider transformation at all in deciding what quotas to allocate, this consideration did not trump the other matters falling under s 2 of the MLRA *(para 28).*

In ***Awumey & another v Fort Cox Agricultural College & others*** 2003 (8) BCLR 861 (Ck) (see the discussion under 'Section 1' for more details of the facts) the applicant had been dismissed by a board whose composition he challenged. The applicant alleged that the board consisted of members who did not fall

within the description in the empowering legislation the Fort Cox College Decree No 5 of 1991 (Ck).

The court set out the whole of s 6 of the AJA and then said the following (at 869B—D):

> 'It is quite clear from the language employed in section 33 of the Constitution that it provides for three distinct and separate rights relating to the nature of administrative action. It must be lawful, reasonable and procedurally fair. The requirement that administrative action should be lawful, as given effect to in section 6 of the Promotion of Administrative Justice Act, encompasses the common-law requirement that an administrative organ or official who is to exercise an administrative power must not act *ultra vires* in the sense *that the composition of the administrative body or the qualifications of the official who is to carry out the administrative duty, must be competent to exercise that authority*.' (Emphasis added.)

On the facts, one of the members of the board was not entitled to be appointed to it and therefore all decisions taken by it were invalid (at 870F).

As a defence, the respondents argued that the applicant had been invalidly appointed by the original board with whom he had contracted (at 872G). The court referred to authorities that suggest that an administrative act remains valid until a court declares it invalid (at 875C—F). This is because of the presumption of validity reflected in the maxim omnia praesumuntur rite esse acta (at 875E). This led the court to say the following (at 875I—876C):

> 'What the respondents are asking us to do in the present matter is to hold that the Board of the College performed an invalid act in appointing the applicant. This can on the aforementioned authorities not be done without a substantive application, the purpose of which is to establish the invalidity of the Board's action. . . The remedy of review or the granting of a declaratory order is discretionary. This discretion is a judicial one which must be exercised by weighing all the surrounding circumstances. In exercising its discretion the court will be called upon to consider issues such as undue delay in instituting proceedings . . . the likely effect it may have on innocent third parties or a possible waiver of the right to object. . .
>
> The respondents chose to simply [sic] raise the issue of an *ultra vires* act as a defence and not to challenge it by way of direct action, which in the present proceedings would have been by way of counter-application. Their failure to do so . . . made it impossible for this court to judicially [sic] exercise its discretion.'

The court in ***Hayes & another v Minister of Finance & Development Planning, Western Cape & others*** 2003 (4) SA 598 (C) (see the discussion under 'Section 1' above for the facts) held that, in terms of the ordinance dealing with building restrictions, a decision to depart from them had to be based solely on desirability (at 624I—J). The court held that the reasons given by the first respondent suggested that he did not take his decision on the basis of what was desirable for the area (at 629B).

The headnote succinctly describes the reasons for the decision of the court and it is convenient to quote from it (at 602E—F):

> 'The test for desirability was whether a positive advantage would be served by the granting of the application. In his evaluation of the desirability of the proposed development, the first respondent should have taken into consideration the circumstances, first, that the second respondent had refused to grant the application and had conveyed its opposition, in the strongest terms, to the upholding of the appeal, in several submissions; and, secondly, that there was very strong public opposition to the development from a large number of residents in the area concerned. The lack of desirability of the development in its proposed form and locality had been manifest.'

SECTION 6(2)(D) – ACTIONS MATERIALLY INFLUENCED BY A MISTAKE OF LAW

In ***Laerskool Middelburg en 'n ander v Departementshoof, Mpumalanga Department van Onderwys, en andere*** 2003 (4) SA 160 (T) the first applicant was the only public school in the area that taught in Afrikaans exclusively. In terms of s 6(1) of the

South African Schools Act 84 of 1996 the Minister of Education had published certain regulations governing admission and language policy. The respondents read these regulations as allowing them to compel the first applicant to admit learners to be taught in English, even before other schools in the area that taught English were full. Therefore, acting in terms of the regulations, the first respondent compelled the first applicant to admit certain learners and to teach them in English. The applicants believed that they could only be compelled to admit and teach learners in English if all the other public schools in the area were full.

The court agreed with the applicant and although not referring to the AJA or explicitly to a mistake of law, it held that the respondents had misinterpreted the regulations (at 171A—B):

> 'Die respondente betoog dat die korrekte uitleg van die hierbovermelde regulasies daarop neerkom dat dit die eerste respondent vrystaan om van 'n Afrikaansmedium skool te verwag om 'n Englese baan te open selfs voordat die getalleverhouding van 40 tot een in ander skole wat Engels as voertaal gebruik, bereik is; en selfs al is daar minder as 40 leerders vir die voorgestelde nuwe graad in die nuwe baan by die applikant.
>
> Hierdie uitleg strook hoegenaamd nie met die uitdruklike bewoording van diè regulasie nie.

However, the applicants had waited some time to challenge the respondents and in the meantime the children had become settled in the school. The court balanced the right to fair administrative action with the best interests of the children (see s 28(2) of the Constitution) and held that the children should remain at the school and be taught in English, notwithstanding the violation of the applicants' rights under administrative law. As the court put it (at 178H): 'Hoe onbevredigend die resultaat dus ook uit die oogpunt van die applikante, die administratiefreg en enkelmedium skole in die algemeen mag wees, moet die aansoek van die hand gewys word.'

In ***South African Veterinary Council & another v Veterinary Defence Association*** [2003] 2 All SA 156 (SCA) the appellants challenged the decision of the court a quo to overturn the finding of a disciplinary hearing that they conducted. The hearing had concluded that a particular vet was guilty of unprofessional, improper or disgraceful conduct.

In dismissing the appeal Farlam JA said the following (para 35):

> 'It is clear from the authorities that if a disciplinary tribunal has applied the wrong criterion in making a finding of guilt the application of such criterion constitutes a reviewable irregularity, which can only be ignored if it is clear that if the correct criterion had been applied the finding would have been the same: see, eg, *Hira and Another v Booysen and Another* 1992(4) SA 69(A) at 95 C-F.'

The vet had been found guilty on the basis of his failure to testify at the hearing. Referring to the decision of the court a quo, the court said the following (para 25):

> 'Roux J held that there was no evidence to support the conviction and that the finding of the tribunal had accordingly to be set aside: reference was made in this regard to *Mpemvu and Others v Nqasala* (1909) 26 SC 531, *SA Medical and Dental Council v McLoughlin* 1948 (2) SA 355 (A) at 393 and *SA Medical and Dental Council v Lipron* 1949 (3) SA 277 (A) at 283. He proceeded to distinguish the *dictum* in *Prokureursorde van Transvaal v Kleynhans* [1995 (1) SA 839 (T) at 853 G-H] upon which the second appellant had relied, holding that it was not authority for the proposition that where there are no facts proven to support a finding of guilt "silence fills the gaps".'

The dictum that the second appellant had relied on, is as follows (reproduced in para 17 of the judgment):

> 'Uit die aard van die dissiplinêre verrigtinge vloei voort dat van 'n respondent verwag word om mee te werk en die nodige toeligting te verskaf waar nodig ten einde die volle feite voor die Hof te plaas sodat 'n korrekte en regverdige beoordeling van die

> geval kan plaasvind. Blote breë ontkennings, ontwykings en obstruktionisme hoort nie tuis by dissiplinêre verrigtinge nie.'

The appellants argued that once a prima facie case had been made against the respondent his silence made the case against him conclusive (para 30). This was particularly so, they argued, in cases such as the present where the information that would be part of the testimony was in the sole knowledge of the person who fails to testify (paras 30—31). Importantly, the respondents 'did not contend that if there had been no *prima facie* case against [the vet] the tribunal would have been entitled to regard his silence as filling the gap notwithstanding that the facts may have lain peculiarly within his knowledge' (para 32).

The court held that the tribunal had indeed applied the wrong criterion (para 37):

> 'I say this because in my view the tribunal did not consider whether there was a *prima facie* case (which became conclusive when it was not answered). It is plain both from the tribunal's reliance on the second appellant's interpretation of the decision in *Prokureursorde van Transvaal v Kleynhans, supra,* and its statement that [the vet's] failure to co-operate and assist left it with no option but to find him guilty, together with the statement in the supplementary reasons that it was not correct to speak of a *prima facie* case not having been established against [the vet], that it approached the matter on a totally erroneous basis and, as Roux J correctly found, that it found [the vet] guilty simply because he failed to testify, without considering whether a *prima facie* case had been made out.'

Furthermore, it was impossible to determine whether the result would be the same had the tribunal applied the correct one (para 41).

In ***Radio Pretoria v Chairman of ICASA & another*** [2003] JOL 10732 (T) (see the discussion under s 3 above) the applicant was denied a license to broadcast as a community radio station. One of the reasons that the license was refused was that s 32 of the Broadcasting Act 3 of 1999 requires the board of a community station to be democratically elected. According to the respondents, the applicant's board was not. The applicant argued that the respondents had misconstrued the section and had interpreted the term 'democracy' too narrowly. The court disagreed (para 24):

> '[w]ith respect I agree with the second respondent that this is nothing else but a blatant and indefensible self-perpetuating oligarchy which is incompatible with the purport and spirit of the Act, namely to ensure and promote wider community involvement and participation in the affairs of a community broadcaster.'

In ***Pepcor Retirement Fund & another v The Financial Services Board & another*** [2003] 3 All SA 21 (SCA) it was held that the Registrar of Pension Funds has locus standi to apply for the review of his own decision to grant certificates in terms of s 14(1) of the Pension Funds Act 24 of 1956 (para 15). Relying on *Transair (Pty) Ltd v National Transport Commission* 1977 (3) SA 784 (A) at 792H—793G the court held that, depending on the legislation involved, a public body that made an error in performing an administrative act might not only be entitled to raise the error in a court of law, but be bound to do so (para 10). The court rejected the argument that because the legislation did not specifically empower the Registrar to have his decision reviewed, he did not have such a right. The Act mandated several prerequisites for the Registrar to issue the certificates and it would be unthinkable to deny the Registrar locus standi to correct errors, which he discovered later, relating to those requirements, (para 13). The court also rejected the contention that the Registrar had not been prejudiced by his erroneous decision and that the parties truly prejudiced should have brought the matter to court. The Registrar performs a function for the general public and his prejudice suffered was the fact that his ability properly to function had been compromised (para 14).

SECTION 6(2)(E)(I) – ACTION TAKEN FOR A REASON NOT AUTHORIZED BY THE EMPOWERING LEGISLATION

See ***Kimberley Girls' High School & another v Head, Department of Education, Northern***

Cape Province & others [2003] JOL 11106 (NC) for a case that upheld the decision of the Head of Department of Education to refuse to appoint certain candidates as teachers at the first applicant on the basis that the governing body of the school failed to consider its duties to promote affirmative action in its hiring process. The applicant school had advertised a position as a senior English teacher and had called for applications. The school short-listed three candidates, none of whom were from previously disadvantaged backgrounds. Three candidates who were from such backgrounds and, in addition, who had excellent academic qualifications, were not short-listed.

Although the court did not consider the AJA, the applicants' argument was that the Head of Department was not entitled to take such a decision in terms of the relevant legislation (see paras 11—12).

See ***RHI Joint Venture v Minister of Roads and Public Works & others*** 2003 (5) BCLR 544 (Ck) (which is discussed in greater detail under 'Section 8' below) where the decision to award a tender to the third respondent instead of the applicant was set aside because it did not comply with s 2 of the Preferential Procurement Policy Framework Act 5 of 2000.

Section 2 provides different criteria that are to be considered when an organ of state contracts for services. Points are to be attached to each criterion and the bidder with the highest points is to be given the contract. Section 2(1)(f) creates an exception because the contract need not be given to the bidder with the highest points if 'objective criteria in addition to those contemplated . . . justify the award to another tenderer'. The court set aside the decision because the tender board had taken one of the criteria mentioned in the Act and had treated it as an additional criterion.

> 'The objective criteria referred to [in s 2(1)(f)] must be additional criteria, in other words these must be criteria over and above those which have already received consideration as specific goals' (para 32).

The court did not refer to the AJA, in this part of its judgment, and this case could presumably also fall under s 6(2)(b) because the tender board did not comply with the procedure as set down in the empowering provision in that it failed to award the tender to the bidder with the highest points in the absence of additional counter-veiling criteria. This decision could also fall under s 6(2)(d), because it was caused by an erroneous interpretation of the section.

SECTION 6(2)(E)(II) AND (VI) – DECISIONS MADE WITH ULTERIOR PURPOSE OR MOTIVE/ARBITRARY AND CAPRICIOUS DECISIONS

In ***Basson v Provincial Commissioner (Eastern Cape), Department of Correctional Services*** [2003] 4 BLLR 341 (LC); [2003] JOL 10780 Ndlovu AJ said the following about judicial review (at 355I—356B):

> 'The courts are, generally, wary and reluctant to interfere with the executive or other administrative decisions taken by executive organs of government or other public functionaries, who are statutorily vested with executive or administrative power to make such decisions, for the smooth and efficient running of their administrations or otherwise in the public interest. Indeed, the courts should not be perceived as having assumed the role of a higher executive or administrative authority, to which all duly authorised executive or administrative decisions must always be referred for ratification prior to their implementation. Otherwise, the authority of the executive or other public functionaries, conferred on it by law and/or the Constitution, would virtually become meaningless and irrelevant, and be undermined in the public eye. This would also cause undue disruptions in the State's administrative machinery.
>
> These administrative decisions should only fall within the purview of judicial review and be set aside, where they are found to be patently arbitrary or capricious, objectively irrational, or actuated by bias or malice, or by other ulterior or improper motive.'

Although the court did not refer to the AJA, the considerations that it mentioned would fall under s 6(2)(ii) and (vi) of the Act.

SECTION 6(2)(E)(III) – IRRELEVANT CONSIDERATIONS TAKEN INTO ACCOUNT/ RELEVANT CONSIDERATIONS NOT CONSIDERED

See ***Phillips Medical Customer Support (Pty) Ltd v Eastern Cape Provincial Tender Board & others*** [2003] JOL 11118 (E) where the court found that the first respondent failed to apply its mind to a tender process in that it excluded the tender of the applicant on the basis that it failed to comply with requirements that the successful bidder also did not comply with (see para 14).

In ***Pepcor Retirement Fund & another v The Financial Services Board & another*** (SCA 30 May 2003 (case 198/2002), unreported) (see the discussion under 'Section 6(2)(d)') the court had to consider whether a decision made by an administrator could be reviewed where it was based on a material error of fact that was not induced by a party that could have benefited from the erroneous decision and might have been caused by the administrator's own negligence.

Referring to *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) SA 132 (A) at 152C—D and *Hira v Booysen* 1992 (4) SA 69 (A) at 93B—C the court pointed out that previously the Appellate Division had not allowed a mistake of fact to be a ground of review and (para 32)

> '[j]udicial intervention ha[d] been limited to cases where the decision was arrived at arbitrarily, capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter'.

However, referring to decisions of the Constitutional Court (see *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC); *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) and *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC)) the Supreme Court of Appeal found that although the existing common-law principles of administrative action had not become redundant since the coming into force of the Constitution of the Republic of South Africa, Act 108 of 1996, these principles had to be read in the light of it (paras 41—44). Refusing to review a decision based on a material error of fact would render the administrative action non-compliant with s 33 of the Constitution, which requires administrative action to be 'lawful, reasonable and procedurally fair' (para 45). Furthermore, although the AJA had not yet come into force when the present litigation had been undertaken, the court pointed out that 's 6(2)(e)(iii) [of that Act] provides that a court has the power to review an administrative action *inter alia* if "relevant considerations were not considered" (para 46). While this section could be interpreted as merely restating the common law, the court pointed out that it could easily be interpreted to include a mistake of fact as a ground for review (ibid).

In ***Hayes & another v Minister of Finance & Development Planning, Western Cape & others*** 2003 (4) SA 598 (C) (see the discussion under 'Section 1' above for the facts) the court in the 1999 decision had held that the first respondent was not entitled simply to rely on a summary of objections when reaching his decision (*Hayes & another v Minister of Housing, Planning and Administration, Western Cape & others* 1999 (4) SA 1229 (C) at 1248E—F). In the current case the first respondent did exactly the same thing. Furthermore, the summary was inadequate and misleading (at 618B—C and see the discussion from 618C—621F, which highlights various problems with the summary).

The first respondent argued that he hears so many appeals that he needs to rely on his staff to assist him and 'to verify the correctness of allegations made in letters of objection and not to include false information in the relevant reports that serve before me' (at 623G).

The court said the following (at 623H—I):

> 'The first respondent was obviously entitled to rely upon the expertise and the advice of the officials in his department, provided that the final decision was his (*President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (supra in paras [40] and [43] at 29A and 30A)). In coming to his final decision, he must himself exercise the discretion which s 44(2) of the ordinance gives him. He may not abdicate it in favour of someone else; he may not in the words of Baxter *Administrative Law* at 442, 'pass the buck'. If he does, the decision which flows therefrom is unlawful and a nullity (see *Hofmeyr v Minister of Justice and Another* 1992 (3) SA 108 (C) at 117F—H and the authorities cited there).

The court found that because the summary was flawed, it caused the first respondent to fail 'to apply his mind to the issues raised' (at 624A).

SECTION 6(2)(F)(II) – RATIONAL DECISIONS

In ***PSA of SA obo Coetzee v MEC for Education, North West Province & others*** [2003] 6 BLLR 588 (LC) an employee had been injured in a car accident, while on duty. He resumed work but could not work a full day and after a year his employer insisted that he undergo a medical assessment. The assessment concluded that he could indeed work a full day and the employer invited him to submit reasons why his salary should not be reduced in proportion to the hours that he could not work (para 4). This was because the employee still claimed that he could not work a full day, a conclusion supported by various doctors.

The employer decided to reduce the employee's salary and he decided to pursue the option of a medical discharge on pension (para 9). The employer said that if he was to take this option, his pension would be reduced on the basis of his reduced salary (para 10).

The court concluded that the employer had acted rationally and fairly (paras 20—23). The justification for this conclusion appears from the fact that 'apropos the reduction of his status . . . applicant himself requested his discharge on medical grounds, a request he never retracted even when he became aware of the consequences of that discharge (para 22).'

SECTION 6(2)(H) – UNREASONABLE ACTIONS

In ***MEC, Public Works, Roads and Transport, Free State & another v Morning Star Minibus Hiring Services (Pty) Ltd & others*** 2003 (4) SA 429 (O) (see the discussions under 'Section 5' and Section 6(2)(i)') the second respondent operated a taxi-rank at which other of the respondents parked their taxis, made use of the petrol facilities and collected passengers (para 6). In the area was a public taxi rank, which none of the respondents used. Because the taxi rank was doing very well, many rival taxi groupings believed the second respondent to have an unfair advantage, which caused violence in the area (ibid). As a result, the MEC for Transport issued regulations in terms of the Free State Act 16 of 1998, which had the effect of closing the second respondent's taxi rank for 3 months, forcing other of the respondents to use the public rank. The aim of the MEC was to curtail the violence and calm the area.

The main argument of the respondents was that the regulation was unreasonable because it interfered with their property and discriminatory because it treated taxi operators differently (para 15).

The court pointed out that before the Constitution the test for interfering with discretion was quite narrow (para 18.1) and then continued (para 18.2):

> '[T]he Constitution has had a huge impact on administrative law. This led to a more unified approach formulated as follows in the case of *Carephone (Pty) Ltd) v Marcus NO and Others* 1999 (3) SA 304 (LAC):
> "In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve a consideration of the "merits" of the matter

> in some way or another. As long as the Judge determining the issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order.'"

The court continued to approve (ibid) of the following remarks of Davis J in *Niewoudt v Chairman, Amnesty Subcommittee, Truth and Reconciliation Commission* 2002 (2) SA 143 (C) at 155F—G:

> 'The essence of the test to be employed in reviewing the substance of a decision of a body such as the committee concerns an inquiry as to the presence of a rational connection between the decision taken, the facts on which such decision is based and the reasoning provided for the decision. Viewed within this context, this form of rationality test is appropriate to a review which deals with the substance of a decision. It reconciles the seemingly competing principles of the autonomy of the specialised body created by the Legislature for a particular purpose . . . and the principle of the rule of law in which accountability for a rational decision-making is mandated.'

One of the arguments of the respondents was that the regulations would have a severe affect on their financial situation. On this the court said that 'this would often be the effect of a municipal by-law or other administrative act. If the [appellants'] regulation is rationally justifiable and therefore *intra vires*, this cannot affect the validity of the regulation' (para 24).

On the facts of the case as a whole, the court concluded that the decision of the MEC was reasonable. The MEC concluded that the best way to solve the problem was to arrange that all long-distance taxi operators use the same rank. 'Although the Court's views may differ from that of the first [appellant] with regard to his conclusion, it is clear that he did not act arbitrarily or *mala fide*, and that it also cannot be held that the promulgation or legislation was unreasonable' (para 25).

SECTION 6(2)(I) – ACTIONS THAT ARE OTHERWISE UNCONSTITUTIONAL OR UNLAWFUL

In ***MEC, Public Works, Roads and Transport, Free State & another v Morning Star Minibus Hiring Services (Pty) Ltd & others*** 2003 (4) SA 429 (O) (see the discussion under 'Section 5' and Section 6(2)(h)' above) one of the grounds upon which the respondents based their attack of the regulations was that they were vague. The court accepted as correct the following principles (para 12.2):

> '[12.2.1] the Court will ascertain the meaning of the regulation with reference to the normal rules of interpretation;
>
> [12.2.2] the Court will then establish whether the act or omission which is required or forbidden can be ascertained with a reasonable measure of certainty;
>
> [12.2.3] the law requires reasonable and not perfect, clarity; and
>
> [12.2.4] the regulation must be understandable to the reasonable man and not to the fool.'

The court continued (para 12.3):

> 'Further considerations are the mischief which the regulation endeavours to curtail, and the importance of the regulation, and the fact that it can be applied with reasonable certainty in many cases. In *Smith NO and Lardner-Burke NO v Wonesayi* 1972 (3) SA 289 (RA) at 296A it was held:
> "As I see it, if the legislation can be applied with reasonable certainty in the vast majority of cases, that is enough, and the fact that in borderline cases it may be extremely difficult to apply, is not a ground for holding the legislation to be void for vagueness" . . .
>
> The mere fact that a particular word, phrase or sentence is vague does not necessarily lead to the whole regulation being declared void. The Court should, as far as possible, attempt to uphold the general tenure of the regulation, and to separate the good from the bad.'

The court concluded that on the facts none of the regulations were vague in the light of the principles mentioned above (para 12.15). The court did not refer to the AJA and since the cause of action arose in 2001, there is no clear reason for this.

SECTION 8 – REMEDIES IN PROCEEDINGS FOR JUDICIAL REVIEW

In ***Jayiya v MEC for Welfare, Eastern Cape Provincial Government*** [2003] 2 All SA 223 (SCA) it was held that in matters of judicial review it is inappropriate for an applicant to ask for 'constitutional damages' in cases where a loss has been suffered as a result of administrative conduct. Section 8(1)(c)(ii)(bb) of the AJA provides for the payment of compensation by administrators in exceptional circumstances and should be used instead.

Conradie JA said the following (para 9):

> 'As appears from its preamble the Promotion of Administrative Justice Act was passed by Parliament to give effect to the constitutional guarantee of just administrative action. The appellant should accordingly have sought her remedy in this Act. 'Constitutional damages' in the sense discussed in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at 826 para [69] might be awarded as appropriate relief where no statutory remedies have been given or no adequate common law remedies exist. Where the lawgiver has legislated statutory mechanisms for securing constitutional rights, and provided, of course, that they are constitutionally unobjectionable, they must be used. The Promotion of Administrative Justice Act does not provide for the kind of relief afforded to the appellant in paragraphs 2(c) and 3 of the order. Instead, it provides in sec 8(1)(c)(ii)(bb) that a court may in proceedings for judicial review, exceptionally, direct an administrator to pay compensation.'

In ***RHI Joint Venture v Minister of Roads and Public Works & others*** 2003 (5) BCLR 544 (Ck) (see the discussion under 'Section 6(2)(e)(i) above) the applicant asked for the decision to award a tender to the third respondent to be set aside and replaced with a finding that the applicant should receive the tender. Having set aside the decision (see paras 41—42), the court applied s 8(1)(c)(ii) of the AJA and, while acknowledging the reluctance of courts to replace decisions of administrators with decisions of their own (see para 43), said the following (para 49):

> 'In my view, on the information that was before it, and had the Tender Board applied the provisions of the [Preferential Procurement Policy Framework Act] in a proper manner, it was obliged to award the tender to the applicant. I can see no purpose, therefore, in referring the matter back to the Tender Board for reconsideration.'

In ***Clan Court CC v Gauteng Provincial Liquor Board & others*** [2003] JOL 11223 (T) the court set aside a decision of the respondent to refuse the applicant a liquor licence (see the discussion under 'Section 6(2)(a)(iii) above for a more detailed discussion of the facts). The applicant, in addition to its request for review and setting aside, asked the court to grant the liquor licence. In agreeing to do so, the court said the following (at 8 of 11223):

> 'The authorities appear to suggest that this Court can, in exceptional circumstances, grant the licence. All the relevant facts have been placed before the court. The SAPS have no objection, and in fact support the application. It is this Court's finding that the first respondent and his Board were biased and acted arbitrarily. There is no indication that it will act differently if this matter is to be referred back. Having regard to the facts of the case I am satisfied that such circumstances as are required do exist.'

The court in ***SA National Defence Union & another v Minister of Defence & others: In re SA National Defence Union v Minister of Defence & others*** [2003] JOL 11263 (T) (see 'Section 3' for a fuller discussion of the facts) declared invalid regulations that prohibited members of the SANDF from being represented by officials at disciplinary and grievance hearings as well as at military court. The regulations allowed only for assistance, which, on the evidence of the Minister, excluded representation. The court gave the following remedy (at 44 of 11263):

'it seems to me the words "but not to representation" in section 25(a) are to be severed from the Regulations, section 25(a) of the Regulations is to be read as though the following words appear therein after the word "assist": "and represent", the proviso to section 27 is to be severed from the Regulations, section 27(a) and (b) of the Regulations are to be read as though the following words appear therein after the word "assist": "and represent".'

MISCELLANEOUS

FUNCTUS OFFICIO

In ***Nkosi v Khanyile NO & another*** 2003 (2) SA 63 (N) the respondent, a magistrate empowered to supervise the administration of the estates of black persons in terms of the Black Administration Act 38 of 1927, made certain determinations in respect of the estate of a husband and wife, who had died in 1989 and 1991 respectively. These were: a) that the applicant was the heir to the estate of the wife b) that the wife was heir to the estate of the husband and c) that, in fact, the second respondent was the true heir of the husband's estate and that the wife was not. The applicant wanted the third decision set aside on the basis, among other things, that the magistrate was functus officio when he made it and it was thus invalid.

In upholding the argument of the applicant, Magid J said the following (at 70A—F):

'The law is clear that the exercise of a discretion by an official (whether it is a quais-judicial or administrative discretion) which confers benefits cannot be set aside by the official. . . There can be no doubt that the decision to appoint [the wife] as heiress in the estate conferred a benefit. As [the wife] was already dead at the time the second decision to this effect was made, it enured to the benefit of her heirs.

It matters not that the first respondent believed that the second decision was wrong or even that he feels that he was induced to make a wrong decision by the applicant's attorney's incorrect statement that the deceased and the widow had been married in community of property . . . All that matters is that he conferred a benefit which he had authority to confer. The correctness or otherwise of the decision does not affect the question of his power to revoke the benefit.'

LEGITIMATE EXPECTATIONS

SA Veterinary Council & another v Szymanski 2003 (4) BCLR 378 (SCA); 2003 (4) SA 42 concerned whether the respondent had a legitimate expectation that the required passing mark for the registration exam of the Veterinary Council was 40 per cent and was thus entitled to have the council's decision to deny him membership, on the basis that he achieved less than 50 per cent on his exam, set aside.

The court made the following finding on the requirements for the legal recognition of a legitimate expectation (para 21):

'It is worth emphasising that the reasonableness of the expectation operates as a pre-condition to its legitimacy. The first question is factual – whether in all the circumstances the expectation sought to be relied on is reasonable. That entails applying an objective test to the circumstances from which the applicant claims the expectation arose. Only if that test is fulfilled does the further question – whether in public law the expectation is legitimate – arise.' (Footnotes omitted.)

On the facts, the respondent's expectation was not reasonable.

In ***Radio Pretoria v Chairman of ICASA & another*** [2003] JOL 10732 (T) (for the facts see the discussion under 'Section 6(2)(d)') the court applied the following dictum of Hlophe J, as he then was, in *University of the Western Cape & others v Member of the Executive Committee for Health and Social Services & others* 1998 (3) SA 124 (C) at 134D–F (see para 24.7 of the judgment): 'Without dwelling much on the doctrine of legitimate expectation, it should be pointed out that no one can have a legitimate expectation of doing something contrary to the law, or of preventing a functionary from discharging his statutory duty'. This led the court to conclude that the applicant could not have a legitimate expectation to be allowed to

continue to evade the provisions of the Broadcasting Act 4 of 1999.

In ***Meyer v Iscor Pension Fund*** [2003] 5 BLLR 439 (SCA); 2003 (2) SA 715 the court held, albeit obiter, that there is no basis to conclude that the doctrine of legitimate expectations has developed to provide substantive relief in South African law (paras 26—27). The court declined the invitation of the appellant to follow the lead of English law in which certain cases may be cited as 'authority for the proposition that . . . the doctrine of legitimate expectation has now developed into a comprehensive code that embraces a spectrum of administrative relief ranging from a claim for procedural fairness to a claim for substantive relief' (para 27).

PEREMPTORY AND DIRECTORY PROVISIONS

In ***Waymark & others v Meeg Bank Ltd*** [2003] 1 All SA 518 (Tk); 2003 (4) SA 114 the court said the following on the approach to determine whether a provision is peremptory or directory (para 13):

> 'The question whether a statutory requirement is peremptory or directory has been the subject of numerous decisions. The basic test is whether the legislature expressly or impliedly visits non-compliance with nullity. In each case one must look to the subject matter, consider the importance of the provision that has been omitted and the relation of that provision to the general object and purpose intended to be achieved by the legislation, and with that framework, decide whether the provision is imperative or directory.'

The case could not be heard under the AJA as the cause of action arose in 1997.

PROMOTION OF ACCESS TO INFORMATION ACT 2 of 2000 (AIA)

SECTION 1 – DEFINITION OF A 'RECORD'

In ***CCII Systems (Pty) Ltd v Fakie & others NNO*** 2003 (2) SA 325 (T) (see the discussion under 'Section 44' for the facts) Hartzenberg J, having quoted the definition of 'records' in s 1 of the AIA, said the following (para 14):

> 'If I understand the section correctly it relates to information in written and printed form, video recordings and photographs, tape recordings, computer data or possible other forms of recordings, yet to be invented. It stands to reason that a single page can constitute a "record". If there is one page about one subject in the possession of the public body it is a "record".

SECTION 7 – ACT NOT APPLYING TO RECORDS REQUIRED FOR LEGAL PROCEEDINGS AFTER COMMENCEMENT OF PROCEEDINGS

In **CCII Systems (Pty) Ltd v Fakie & others NNO** 2003 (2) SA 325 (T) (see the discussion under 'Section 1', 'Section 44', for the facts, 'Section 45(b)' and 'Section 81(3)') the applicant had instituted an action against the fourth respondent and it was argued that it was therefore precluded by s 7 from obtaining the information that it sought.
In dismissing this argument, Hartzenberg J said the following (para 21):

> 'Section 7 provides that the Act does not apply to a record requested after commencement of criminal or civil proceedings. In this matter the request was long before institution of the action. The prohibition against access after commencement of proceedings was obviously included in the Act to see to it that litigants make use of their remedies as to discovery in terms of the Rules of the relevant court and to avoid the possibility that one litigant gets an unfair advantage over his adversary. Before a litigant has instituted proceedings and even if he wants to institute proceedings he is, in my view, not prohibited from invoking the provisions of the Act to get access. One of the objects of the Act must be that citizens can get information regarding wrongs perpetuated against them to enable them to hold the wrongdoers accountable in a court of law. See s 9(c), and especially s 9(e). To interpret the Act that everybody who

contemplates legal action is prohibited from requesting access will be to render the Act nugatory for the very purpose for which it was promulgated.'

SECTION 36(1) – MANDATORY PROTECTION OF COMMERCIAL INFORMATION OF A THIRD PARTY

In **SA Metal & Machinery v Transnet** [2003] 1 All SA 335 (W) the applicant had tendered to supply Spoornet, a business unit of the respondent, with scrap metal. The applicant was unsuccessful and attempted to use the AIA to gain access to various information (para 3). The respondent refused whereupon the applicant instituted proceedings. The information that the applicant requested was certain pages of the tender documents and the name of the successful tender showing the accepted price (ibid).

The respondent attempted to rely on ss 33(1)(a) and (b), 36(1), 47 and 48 of the AIA but the court found that the only potentially applicable provisions were those of s 36(1) (para 10).

The court began by pointing to the purpose of the AIA (para 7):

> 'The purpose of the Act is to give effect to the constitutional right of access to information in section 32(1) of the Constitution (section 9 of the Act). It makes the constitutional right "more effective" or "elaborate" upon it [sic] and should therefore, as section 2(1) of the Act itself provides, be interpreted purposively (Currie & Klaaren paragraphs 2.1, 2.3). . .
>
> The Act does away with the "secretive and irresponsible culture in public and private bodies" that often existed before 27 April 1994 and often led to an abuse of power and human rights violations and to give effect to the right to access information as a constitutional right having horizontal application'.

The court declined to give a meaning to s 36(1)(a), which refers to trade secrets of a third party, since the respondent did not rely on it but, relying on Currie & Klaaren, suggested that the concept might be given a narrow meaning so as to distinguish s 36(1)(a) from (b) and (c) (para 10).

Turning to s 36(1)(b), the court said the following (para 12):

> 'Section 36(1)(b) entitles and enjoins the respondent to refuse disclosure of "financial, commercial, scientific information, other than trade secrets, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party".
>
> The word "likely" denotes probability, opposed to a mere possibility or remote contingency (compare S v ffrench-Beytagh 1972 (3) SA 430 (A) at 458A and S v Ncokazi 1980 (3) SA 789 (Tk) at 798B—C; S v Hull 1963 (3) SA 647 (A) at 654H—655B). The harm to be caused to the third party's interests must therefore be, not merely possible, but probable. To cause harm to the commercial and financial interests of the third party by disclosure of the information, the information must obviously have an objective or market value. This will be the case where the information is "important or essential to the profitability, viability or competitiveness of a commercial operation" (Currie & Klaaren paragraph 8.36).'

In finding for the applicants the court made various points. The first was that one of the respondents' reasons for refusal suggested potential prejudice to itself. The court pointed out that s 36(1)(b) 'is concerned not with the interests of the public body but with those of the third parties involved' (para 13).

The court continued (ibid):

> 'Secondly, a distinction must be made to disclosure [sic] of tender price before and subsequent to the closing date. Clearly, secrecy before the closing date lies at the heart of most tender procedures since their purpose is to elicit the best prices. Disclosure of tender prices before the closing date would quite obviously affect the commercial and financial interests of the tenderer and "likely to cause harm" to them. . . [A]fter closure of the tender or the award matters are different and there can be no possibility of any tenderer suffering loss in the tender process itself by a subsequent disclosure. Moreover, the respondent has

> not shown that harm would follow the subsequent disclosure of the tender prices. . . The prices tendered if disclosed would now be of historical interest only.'

The court also found that s 36(1)(c) could not assist the respondent. The court was prepared to assume that each bid was given to Transnet in confidence but continued (para 14):

> 'Confidentiality per se does not excuse disclosure of the information. Disclosure must also be such that it could reasonably be expected that the third party would be at a disadvantage in contractual or other negotiations (subparagraph (i)) or prejudice him in commercial competition (subparagraph (ii)).'

Having found s 36(1) to be of no assistance to the respondent, the court concluded by saying that '[d]isclosure of the tendered prices and the price tendered by the successful tenderer is, to my mind, essential to ensure not only that the tender process is transparent but also that the award was made responsibly' (ibid).

SECTION 44 – CIRCUMSTANCES WHERE INFORMATION OFFICER OF A PUBLIC BODY MAY REFUSE A REQUEST FOR ACCESS TO A REPORT

Unrecognised Traditional Leaders, Limpopo Province v Minister for Local and Provincial Government of RSA 2003 (5) BCLR 563 (T); [2003] JOL 10793 concerned the request of the applicant for access to the report of a certain Commission. The report contained a recommendation relating to the succession to the Sekhkukhuneland chieftainship. The information officer attempted to refuse the request 'because it contained an opinion, advice, a report or recommendation obtained for the purpose of assisting the department to formulate policy on the issue of disputes relating to traditional leadership' (at 566B). The respondent argued that the applicants did not require the report for the protection of a right and that their request was therefore invalid (at 566A), whereas the applicant argued that in the light of s 32 of the Constitution and s 9(1)(a) of the AIA, it is not necessary for an applicant that seeks access to information 'to show that he needs the information for the exercise or protection of any right' (at 567B).

The court held as follows (at 569D):

> 'I do not agree with the submission that an applicant who seeks information in the possession of the State has to prove that he requires the information for the exercise or protection of the right. That requirement was contained in section 23 of the interim Constitution and it was retained in item 23(2)(a) of Schedule 6 of the Constitution pending the enactment of national legislation dealing with the access to information. Such national legislation has been enacted in the form of the Act and the requirement of a need was signally left out in the case of information in the possession of the State.
>
> The omission is in conformity with section 32(1) of the Constitution, which has now taken effect. Section 9(a)(i) of the Act, in contradistinction to section 9(a)(ii) which deals with information held by persons other than the State, does not contain the requirement that the information sought should be required for the exercise or protection of a right.'

The above notwithstanding, the respondent was held, on the facts, to be entitled to invoke s 44(1)(a) in order to refuse the application (at 571E).

In ***CCII Systems (Pty) Ltd v Fakie & others NNO*** 2003 (2) SA 325 (T) (see the discussions under 'Section 1' and 'Section 81(3)') the applicants were excluded from supplying certain technology as part of the Strategic Defence Package that parliament procured. Owing to the controversy at the time, parliament established a joint commission to investigate the defence package. The applicants requested certain records relating to the work of the joint commission in terms of s 18 of the AIA.

One of the arguments of the respondents was that they were entitled to withhold the information in terms of s 44. The court held the following (para 18):

> '[The respondents' argument] raises the question what the object of s 44 is. It was submitted that it is not to hamper a public body in its administration and formulation of

policy and to guard against the supply of confidential information prematurely. Senior and junior officials must be able to talk freely about development of policy matters and their interaction at a stage before finalisation should not at that stage be accessible. Opportunistic entrepreneurs should not be allowed to obtain information along this route which gives them an unfair advantage over their rivals. In my view, it does not deal with historical situations. . . At this stage the draft reports are of historical importance and cannot obstruct the joint commission in it work. In my view, they are no longer protected by the provisions of s 44.'

SECTION 45(B) – DOCUMENTS WITHHELD BECAUSE WORK INVOLVED IN PROCESSING REQUEST WOULD SUBSTANTIALLY AND UNREASONABLY DIVERT THE RESOURCES OF THE PUBLIC BODY

In ***CCII Systems (Pty) Ltd v Fakie & others*** *NNO* 2003 (2) SA 325 (T) (see the discussions under 'Section 1', 'Section 44' and 'Section 81(3)') the respondents attempted to withhold the information requested (see 'Section 44 above) on the basis that the number of documents was too great and that it would take too much work to provide them (para 4). The court said the following: 'The first respondent also does not deal, otherwise than in general terms, with the resources available and what the inroad on its ordinary activities will be if the request is to be considered in terms of the Act' (para 7), which led it to conclude that (para 17)

'[i]f regard is had to the media coverage which this matter enjoyed and the prominence of the members of the joint commission, this is certainly a case where maximum access is necessary to dispel any suspicion of a cover-up. It is not good enough to hide behind generalities. If it means that the first respondent has to employ extra staff, it must be done.'

SECTION 81(3) – ONUS

In ***Unrecognised Traditional Leaders, Limpopo Province v Minister for Local and Provincial Government of RSA*** 2003 (5) BCLR 563 (T); [2003] JOL 10793 (see the discussion under 'Section 44' above) it was confirmed that where an information officer seeks to use s 44 to deny access to requested information, the onus is on her to show that such refusal complies with the Act (at 568C).

See ***CCII Systems (Pty) Ltd v Fakie & others NNO*** 2003 (2) SA 325 (T) (see the discussions under 'Section 44' and 'Section 1' above), paras 12 and 16 for an example of failure to discharge the onus imposed by s 81(3) of the AIA.

SECTION 82 – DECISIONS ON APPLICATION

The court in ***Unrecognised Traditional Leaders, Limpopo Province v Minister for Local and Provincial Government of RSA*** 2003 (5) BCLR 563 (T); [2003] JOL 10793 (see the discussions under 'Section 44' and 81(3) above) gave the following interpretation of s 82 of the AIA (at 571E—F):

'I cannot agree with the submission that the court is in terms of section 82 entitled to grant access if it is just and equitable even if the public body concerned was justified in terms of section 44(1) to refuse access to a record. Otherwise it would make nonsense of the elaborate structure of circumstances justifying a refusal of access set up in Chapter 4 of Part 2 of the Act. . . There can be little room for an overriding power to make an order based on justice and equity where elaborate grounds for mandatory refusal and a discretionary refusal have been set out.'

CASES BEFORE THE ACT CAME INTO OPERATION

In ***Ingledew v Financial Services Board*** 2003 (8) 858 (CC) Ncgobo J dismissed an application for appeal from the High Court saying the following (para 36):

> 'The constitutional issues that are raised in this application arose during what was referred to in argument as "the hiatus period", that is, the period between the passing of the PAI Act on 2 February 2000 and its coming into operation on 9 March 2001. Our ruling on the issues raised in this application will therefore affect those applications for discovery made during the hiatus period and would in all likelihood have been disposed of by now. The latter group will be governed by the PAI Act while, in the other group, the issue will not arise. The resolution of the constitutional issues raised in this application will not therefore be likely to have implications beyond the immediate needs of the applicant, who, as I have already found, will suffer no prejudice if the application is refused.'

NOTES AND ARTICLES

In John Campbell 'Legitimate expectations: The potential and limits of substantive protection in South Africa' 120 (2003) *SALJ* 292 the author traces the development of the doctrine of legitimate expectations in the United Kingdom; the author suggests that the AJA be interpreted to include legitimate expectations to avoid unconstitutionality (at 316—7); the articles appears to have been written before the decision of *Meyer v Iscor Pension Fund* [2003] 5 BLLR 439 (SCA); 2003 (2) SA 715, which was noted in the last newsletter.

In John M Evans 'Deference with a difference: Of rights, regulation and its judicial role in the administrative state' 120 (2003) *SALJ* 322 the author discusses the Canadian approach to deference to administrators and argues for a pragmatic or functional approach to judicial review.

The author of Wium de Villiers 'An appraisal of the right to access of information held by police or state officials for purposes of a bail application under Canadian and South African law (2)' 61 (2003) *THRHR* 349 suggests that more emphasis should be placed on s 32 of the Constitution when considering access to information held by the police. Normally, in the past, the focus has been on s 53 of the Constitution.

The case of ***Meyer v Iscor Pension Fund*** 2003 (2) SA 715 (SCA) is discussed by Johan Esterhuizen in May 2003 *De Rebus* at 48. The note is essentially a summary of the decision.

The same case is discussed in 'Plucky Pensioner: Meyer v Iscor Pension Fund' in April 2003 Vol 19 Part 2 of *Employment Law*. Although the focus of this journal is not administrative law, there is a discussion in this note on the doctrine of legitimate expectations.

In addition, see W De Villiers 'An appraisal of the right to access to information held by police or State officials for purposes of a bail application under Canadian and South African law' 66 (2003) *THRHR* (part 2) for a discussion of ss 11(1)(b), 33(1) and 39(1)(a) of the AIA read with s 60(14) of the Criminal Procedure Act 51 of 1977.

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