AJA Newsletter

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FOREWORD by Cecille van Riet

This is the fourth edition of the *AJA Newsletter,* the purpose of which is to keep judicial officers and administrative decision makers up to date with developments in the law relating to administrative justice. On behalf of all who benefit from the publication, I thank GTZ for their continued support of this programme.

The completion of a manual on the judicial review of administrative decisions, a joint project of GTZ and Justice College, awaits the approval by Parliament of rules of procedure for such reviews made by the Rules Board for the Courts of Law. Once these rules have been approved, the manual will be published and further training of judicial officers will take place. The jurisdiction conferred on Magistrates' Courts by the Promotion of Administrative Justice Act 3 of 2000 will take effect only when the rules become operative.

In the meantime, reported judgments of the superior courts continue to develop the law to make the constitutional guarantee of administrative justice a reality.

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This edition of the newsletter reflects cases reported between October 2004 and May 2005

German Technical Cooperation

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CASE LAW

THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT (AJA)

New Clicks South Africa (Pty) Ltd v Msimang NO and Another; Pharmaceutical Society of South Africa and Six Others v Minister of Health and Another was discussed in the August-September 2004 edition of this newsletter. The case is now reported as 2005 (3) SA 231 (C); [2005] 1 All SA 196 (C). The matter was heard on appeal in the SCA. That judgment is reported as ***Pharmaceutical Society of South Africa and others v Minister of Health and another; New Clicks South Africa (Pty) Ltd v Tshabalala Msimang NO and another*** **[2005] 1 All SA 326 (SCA)**. The Constitutional Court heard the Minister's appeal against the SCA judgment on 15 March this year. The SCA judgment will not be discussed in this newsletter because the Constitutional Court has reserved judgment on the matter. The Constitutional Court's decision, apart from being dispositive of the dispute and resolutive of the issues, will carry greater precedential weight than the SCA judgment. The case will be discussed in a future edition of the newsletter, after the Constitutional Court has delivered its judgment.

Section 1 of the AJA – Administrative action defined

Nel and Another NNO v The Master (ABSA Bank Ltd and Others intervening) **2005 (1) South Africa 276 (SCA)** (see discussion below under "Section 6") concerned the discretion given by the Companies Act 61 of 1973 to the Master of the High Court to determine "reasonable remuneration" to be paid to the liquidator upon the winding-up of a company. A determination was sought as to the ambit of the courts' powers to review such a determination in terms of the Insolvency Act 24 of 1936.

Although the appellants made no reference to the AJA in their founding papers, the Master, in responding to the appellants argued that it was incumbent on them to base their review application on the AJA. The Court agreed, and said that "[t]he Master's ruling in this case would certainly seem to fall within the ambit of the definition of 'administrative action' in s 1 (a)(i) of

the AJA" (at para 28). The Court quoted that section of the AJA, which defines as administrative action

> "any decision taken, or any failure to take a decision by–
> (a) an organ of State when–
> (i) exercising a power in terms of the Constitution or a provincial constitution".

Although the Court held that the Master's decision may have qualified as administrative action, it held that since the appellants had failed to make out a case under the AJA anyway (see the discussion under "Section 6" below), it was not necessary to say anything further with regard to section 1 of the AJA. The Court did note, however, the AJA's intention to exclude certain decisions for the ambit of the AJA (at para 29):

> "There is, however, another view, namely that there is a very real possibility that some actions by administrative officials may fall outside the ambit of 'administrative action' in s 1(i) and hence *not* be governed by the AJA."

***Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 25(c)** (see discussions below under "Section 3", "Section 33 of the Constitution" and "Rule of law") concerned the constitutional validity of certain sections of Pound Ordinance 32 of 1947 (KZN). The sections authorise landowners to decide whether livestock has trespassed on their land, seize, destroy or sell the livestock without a court order.

The court held that the decisions the Ordinance authorises landowners to make constitute administrative action in terms of section 1(b) of the AJA (at 31H-I). In coming to this conclusion the court had regard to the following dictum in *President of the RSA and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) (1999 (10) BCLR 1059) at para 141:

> "[T]he test for determining whether conduct constitutes 'administrative action' is not the question of 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....The focus of the enquiry as to whether the 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."

The court relied only on this abstract account of "administrative action" and did not expressly consider the terms of section 1 of AJA in reaching the conclusion that decisions taken in terms of the Ordinance constitute administrative action under the AJA.

In ***Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and Another*** **2005 (3) SA 156 (C)** (see discussions below under "Section 3", "Section 4", "Section 6", "Section 7", "Section 8", and "Section 33 of the Constitution") the second respondent, a decision in favour of which was the subject of a review application by the applicant, argued that the decision in question did not constitute administrative action as defined by section 1 of the AJA, because it had no "direct external legal effect". The court did not address this argument, though, since the second respondent abandoned the point. In the court's view, the submission was in any case without merit (at para 21).

In ***Reed and others v Master of the High Court of SA and others*** **[2005] 2 All SA 429 (E)** (see discussion under "Section 7") the court was called upon to review a decision made by the first respondent regarding the administration of estates. The court chose not to engage with the definition of administrative action in the AJA, holding that the first respondent's decision was reviewable in terms of section 1 of the Constitution in any case. It said at para 17:

> "I shall assume, without deciding, that the decision under challenge is administrative action as defined in section 1 of the PAJA. Whether it is or not is largely academic because it is reviewable, either in terms of section 1(c) of the Constitution (supplemented if need be by the common law) or in terms of section 6(2) of the PAJA, essentially on the same grounds."

Section 3 – Procedural fairness in administrative action affecting individuals

In ***Zondi v MEC for Traditional and Local Government Affairs and Others*** **2005 (3) SA 25 (c)**(see discussion above in "Section 1" and below under "Section 1 of the Constitution" and "Section

33 of the Constitution") the court, having decided that decisions taken under Pound Ordinance 32 of 1947 (KZN) constituted administrative action for purposes of section 1 of the AJA, investigated whether those decisions amounted to administrative action requiring fair procedures under section 3 of the AJA (at 32B). In terms of section 3, administrative action must be procedurally fair when it materially and adversely affects a person's rights or legitimate expectations. The court held that the power given to landowners to decide if another person's livestock had trespassed on his or her land, and to impound, destroy or sell the livestock, infringed the constitutional rights to access to courts. Section 34 of the Constitution provides that

> "everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court, or, where appropriate, another independent and impartial tribunal or forum."

The court went on to note that the powers given to landowners by the ordinance precluded the settlement of disputes through the courts. Decisions taken in terms of the ordinance therefore affected a constitutional right materially and adversely (at 32I-J):

> "The landowner acts as judge and prosecutor or lawyer or party or witness. It follows that s 16(1) of the ordinance is inconsistent with s 33 of the Constitution read with s 3(1) and (2) of PAJA and inconsistent with s 34 of the Constitution."

When administrative action that adversely affects rights is taken, the court said that section 3(2) of the AJA requires that the following, among others, be given (at 32D-E)–

(i) adequate notice of the nature and purpose of the proposed administrative action;

(ii) a reasonable opportunity to make representations;

(iii) clear statement of the administrative action;

(iv) adequate notice of the right to request reasons for the action in terms of section 5 of the AJA.

The court held that since the ordinance neither requires nor makes provision for any of these procedures, it failed to meet the standards of procedural fairness contained in section 3 of the

AJA (at 33G-H). It was for this reason inconsistent with section 33 of the Constitution read with section 3(1) and (2) of the AJA.

***Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and Another* 2005 (3) SA 156 (C)** (see discussions under "Section 1" above and under "Section 4", "Section 6", "Section 7", "Section 8" and "Section 33 of the Constitution" below) concerned the procedures for the preparation, submission and consideration of environmental impact reports for purposes of applications to the Director-General to carry on activities which "may have a substantial detrimental effect on the environment" (section 22 of the Environmental Conservation Act 73 of 1989). The relevant portions of the regulations promulgated in terms of the Act require, first, that an applicant appoint an independent consultant to comply with the regulations on his or her behalf; and second, that all interested parties be given an opportunity to participate in the procedures contemplated by the regulations.

The second respondent, Eskom, successfully applied to the Director-General in terms of this scheme for the authorisation to construct and operate a pebble-bed modular reactor. The applicant's primary complaint was that although it was afforded an opportunity to participate in the early stages of the procedures, it was not included in the final stages. In particular, the applicant complained that it was not given an opportunity to comment on the final environmental impact report. The court began its consideration of the review application with the point that

> "the administrative action in question affects the rights not only of individual persons but of the public in general. It follows, therefore, that such administrative action should comply with both ss 3 and 4 of PAJA unless, of course, either of the exceptions in terms of ss 3(5) or 4(4) is found to apply." (at para 48)

The parties to the dispute agreed that as part of the right to procedural fairness, the applicant was entitled to a fair hearing before a decision was made by the Director-General. It was further common cause that the right to a fair hearing did not extend to an oral hearing, and that a "'reasonable opportunity to make (written) representations', as contemplated by s 3(2)(b)(ii) of PAJA, sufficed." (at para 49)

The applicant's complaint that it had been denied a fair hearing was based on three legs: first, the applicant did not have access to crucial information required to enable it to make full and proper representations; second, the applicant was not afforded an opportunity to respond to the final environmental impact report attendant upon Eskom's application; third, the applicant was confined to making submissions to Eskom's consultants, rather than Eskom itself. The court addressed each of these legs.

i) Access to material information.
The court held that "[f]airness ordinarily requires that an interested party be given access to all material and information in order to make meaningful representations." (at para 52) The court posted the caveat, though, that this rule should not be allowed to "over-judicialise" the administrative process:

> "'The right to know is not to be equated to the right to be given "chapter and verse".' What is required in order to give effect to the right to a fair hearing is that the interested party must be placed in a position to present and controvert evidence in a meaningful way. In order to do so, the aggrieved party should know the 'gist' or substance of the case it has to meet." (at para 53, quotation from *Nisec (Pty) Ltd v Western Cape Provincial Tender Board and Others* 1998 (3) SA 228 (C) at 235B)

These remarks were ultimately relevant to the applicant's second leg of complaint.

ii) Submissions on the final report.
In deciding that the Director-General's decision to exclude procedures for commenting on the final report was unfair, the court said the following (at para 60):

> "The regulations provide for full public participation in 'all relevant procedures contemplated in these regulations'. The respondents seek to limit such participation to the 'investigation phase' of the process....After submission of the EIR [environmental impact report], however, the 'adjudicative phase' of the process commences, involving the DG's consideration and evaluation, not only of the EIR, but also – more broadly – of all other facts and circumstances that may be relevant to his decision. There is nothing in the Act...or the regulations that expressly excludes public participation or application of the *audi* rule during this 'second stage' of the process. In line with settled authority, therefore, it follows that procedural fairness demands application

> of the *audi* rule also at this stage." (citations omitted)

The court further concluded that since the final EIR placed substantial new facts before the Director-General, fairness requires that an interested party be afforded an opportunity to comment on the new material before the decision is taken. The court quoted the then Appellate Division in this regard (at para 62):

> "Were *new facts* to be placed before the 'administrator' which could be prejudicial to an appellant, it would be only fair that the latter be given an opportunity to counter them if he were able to do so, more particularly were the matter one in which the extant rights of an appellant could be detrimentally affected." (*Huisman v Minister of Local Government, Housing and Works (House of Assembly) and Another* 1996 (1) SA 836 (A) at 845F-G)

Given that the interim EIR was, on the facts, substantially overtaken by the final EIR, the court held that the applicant was entitled, as part of its right to procedural fairness, to a reasonable opportunity to make representations to the Director-General on the new points raised by the final EIR (at para 62). Section 3(4)(b)(ii) of the AJA was thus not complied with.

iii) Representations to the decision-maker.

The applicant argued that procedural fairness and the right to a fair hearing demands a reasonable opportunity to address the decision-maker him- or herself. That did not happen in this case.

> "In support of this argument the applicant submitted that the very purpose of the *audi* rule is to give an interested party an opportunity to influence the way in which the decision-maker – in this case the DG – exercises his discretionary power. To deny interested parties an opportunity of making representations to him and to confine them instead to representations made to someone else did not serve the purpose of the *audi* rule at all and was particularly invidious in the circumstances of the present case. This is so because, although Eskom's consultants were notionally 'independent', in the sense that they were not institutionally part of Eskom, they were employed by Eskom to act as its agents and the purpose of their engagement was to obtain the authorisation Eskom sought....It meant that the only 'hearing' afforded to the applicant was an opportunity to make submissions to 'the other side', as it was put." (at para 72).

Minister of Environmental Affairs and Tourism and another v Scenematic Fourteen (Pty) Ltd **[2005] 2 All SA 239 (SCA)** (see discussion under "Section 6") was an appeal against a decision taken in terms of regulations promulgated under the Marine Living Resources Act 18 of 1998. The decision of the court a quo was discussed in the April-July edition of this newsletter. The decision to be taken involved the allocation of fishing rights. The court considered the applicant's complaint that the administrator neglected to fully apprise the applicant of the procedure for making allocations before it applied for such an allocation (at para 18).

> "It was argued that the failure on the part of the DDG properly to advise the applicants rendered the allocation process procedurally unfair. Section 3(2)(a) of PAJA expressly provides that what is procedurally fair depends on the circumstances of each case."

After assessing the circumstances of this case, the court held that the decision-maker was not required by section 3(2) of the AJA to explain exactly how the applications would be processed. (at para 18)

Section 4 – Procedural fairness in administrative action affecting the public

In ***Earthlife Africa (Cape Town v Director-General: Department of Environmental Affairs and Tourism and Another*** **2005 (3) SA 156 (C)** (see discussions under "Section 1" above and under "Section 3", "Section 6", "Section 7", "Section 8" and "Section 33 of the Constitution" below) the court noted in obiter that the action taken by the respondent, although it was challenged under section 3 of the AJA, also constituted administrative action affecting the public. It therefore had to comply with the fairness provisions of section 4 as well (at para 48).

Section 6 – Grounds of review

In ***Nel and Another NNO v The Master (ABSA Bank and Others Intervening)*** **2005 (1) SA 276 (SCA)** (see discussion under "Section 1" above), the appellants articulated only one specific ground of review in their papers. They argued that the Master had

> "erred in fixing the liquidators' remuneration based on an assumption of the time spent by the liquidators in the administration of the estate and that [the Master] should have had regard to the tariff when fixing the liquidators' remuneration." (at para 26)

The Master, in answer, argued that it was incumbent on the appellants to rely on the AJA (see discussion above), and that the only basis in the AJA on which his decision could be reviewed was section 6(2)(h), which allows review if the exercise of administrative power is "so unreasonable that no reasonable person could have so exercised the power or performed the function". The Court identified, however, with reference to the court a quo, three other grounds of review on which the appellants' case could have been based (at para 27). These were the "catch-all category" of section 6(2)(i), which allows for review of action which is "otherwise unlawful". The second was the basis that the Master had erred in making a time-related assessment of "reasonable remuneration". The court held that this could have amounted to a ground of review under section 6(2)(d), in that the Master was "materially influenced by an error of law". Third, in considering the time factor, the Master took "irrelevant considerations into account" (section 6(2)(e)).

These comments must be seen to have been made in obiter, though, as the case was not pleaded on the basis of AJA. The Court disposed of the matter without relying on AJA.

Section 6(2)(a)(i)-(ii) – administrator not authorised to act by empowering legislation

In ***Minister of Environmental Affairs and Tourism and another v Scenematic Fourteen (Pty) Ltd*** **[2005] 2 All SA 239 (SCA)** (see discussion under "Section 3") it was argued that the functionary authorised by the empowering legislation had unlawfully delegated his power to take administrative action to an advisory committee. The court said (at para 20):

> "A functionary in whom a discretionary power is vested must himself exercise that power in the absence of the right to delegate. In

Hofmeyr v Minister of Justice 1992 (3) SA 108 (C) at 117F-G King J formulated the rule thus:

> 'It is well established that a discretionary power vested in one official must be exercised by that official (or his lawful delegate) and that, although where appropriate he may consult others and obtain their advice, he must exercise his own discretion and not abdicate it in favour of someone else; he must not, in the words of Baxter Administrative Law (at 443), "pass the buck" or act under the dictation of another and, if he does, the decision which flows therefrom is unlawful and a nullity.'

As to the reliance on the advice of another, the functionary would at the least have to be aware of the grounds on which that advice was given. (See *Vries v Du Plessis NO* 1967 (4) SA 469 SWA) 481F-G.) But it does not follow that a functionary such as the DDG in the present case would have to read every word of every application and may not rely on the assistance of others. Indeed, given the circumstances, Parliament could hardly have intended otherwise. What the functionary may not do, of course, is adopt the role of a rubber stamp and so rely on the advice of others that it cannot be said that it was he who exercised the power. If in making a decision he were simply to rely on the advice of another without knowing the grounds on which that advice was given the decision would clearly not be his. But, by the same token, merely because he was not acquainted with every fact on which the advice was based would not mean that he would have failed properly to exercise his discretion. This would be particularly so if that advice was merely one of the factors on which he relied to arrive at his ultimate decision. As Baxter Administrative Law at 436 says: 'Where the delegation is very limited and the delegator retains full control over the final decision the delegation is likely to be intra vires'. Whether therefore there has been an abdication of the discretionary power vested in the functionary is ultimately a question that must be decided on the facts of each case. The same must apply to the enquiry whether there was a delegation within the meaning of s 79(2) of the Act and s 6(2)(a)(ii) of PAJA."

In this regard see also the comments in ***Kimberley Girls' High School v Head of Department of***

Education, Northern Cape Province and others **[2005] 1 ALL SA 360 (NC).** At issue was a two-stage decision-making process by which school governing bodies recommend appointments to be made to the Department of Education, in terms of the Employment of Educators Act 76 of 1998. The Department is only entitled to decline to accept the recommendations in limited circumstances (section 6(3)(b)(i)-(v)). One of these circumstances is where the governing body has not paid due regard to the need to achieve "equality, equity and the other democratic values and principles which are contemplated in section 195 (1) of the Constitution" (section 7(1) of the Employment of Educators Act). The court noted that the Head of Department, even within these limited circumstances, should not confine itself to a rubber-stamping function. The court expressly disagreed with the judgment in *High School Carnavorn v MEC for Education, Training, Arts and Culture of the Northern Cape Provincial government and another* [1999] All SA 590 (NC). The latter case said (at 600j-601a):

> "In my view, the discretion conferred upon the Head of Department under section 6(3)(b) does not extend to the power to sit in judgment on the recommendation of the governing body. He is not concerned with the merit of the recommendation; he is only concerned with whether or not it meets with the requirements of section 6(3)(b). The question is not whether the recommendation accords with those values and principles, but simply whether or not the recommendation had regard thereto."

The court in the ***Kimberley Girls' High*** case held that the above approach "completely negates the positive obligations imposed upon a head of department in terms of section 7(1)." (at para 16). Further, this approach

> "reduces the role of a head of department in making the appointment of an educator into a rubber stamping exercise. No enquiry as to whether a governing body has paid mere lip service to the democratic values and principles referred to in section 7(1) is permitted on the part of the head of department on this approach." (at para 16)

Section 6(2)(c) – procedurally fair administrative action

In ***Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and Another*** **2005 (3) SA 156 (C)** (see discussions under "Section 1" above and under "Section 3", "Section 4", "Section 7", "Section 8" and "Section 33 of the Constitution" below the applicant brought an application for review of a decision of the first respondent on the basis that its right to procedurally fair administrative action had been infringed, contrary to section 33 of the Constitution, read with section 6(2)(c) of the AJA. A full discussion of the unfairness of the procedures followed by the Director-General appears under "Section 3".

Section 6(2)(d) – errors of law

In ***Liberty Life Association of Africa Ltd v Kachelhoffer NO and Others*** **2005 (3) SA 69 (C)** (see discussion under "Item 23 of Schedule 6 to the Constitution") the applicant complained that administrative action taken against it was unlawful as a result of an error of law committed by the administrator. The court considered academic opinion on the matter before indicating its view:

> "[47] Under the common law errors of law were reviewable only if they prevented an administrative tribunal from appreciating his/her powers or had the effect of precluding the exercise of such a tribunal's discretion….Current views on the effect of the constitutionalisation of administrative justice has had (sic) on that approach is not uniform. Cora Hoexter *The New Constitutional and Administrative Law* vol 2 'administrative Law' at 152-3 is of the view that every error of law is reviewable; Iain Currie and Jonathan Klaaren *The AJA Benchbook* at 163 para 6.15; Yvonne Burns *Administrative Law under the Constitution* 2nd ed (1996) at 175; Margaret Beukes 'Review as a Tool for the Development of a Culture of Accountability in the Public Administration" 2002 *SAPL* 244 at 256-7; and J R De Ville *Judicial Review of Administrative Action in South Africa* at 152 are of the view that only material errors of law are reviewable. Johan De Waal *et al The Bill of Rights Handbook* at 516 express the view that the common law approach to the reviewability of errors of law can no longer be maintained under the right to lawful administrative action.

> [48] In terms of s 6(2)(d) of the PAJA administrative action may be reviewed if it '…was materially influenced by an error of law'. An error of law is not material or relevant if the decision is justifiable on the facts despite such an error….As the purpose of the PAJA is to give content and meaning to the constitutional right to just administrative action, I favour the view that only material errors of law, ie errors that materially influence the outcome of administrative action, should be reviewable."

Section 6(2)(e)(vi) – administrative action taken arbitrarily or capriciously

Thatcher v Minister of Justice and Constitutional Development and others **[2005] 1 All SA 373 (C)** (see discussion under "Section 1 of the Constitution") concerned a request by the government of Equatorial Guinea to the South African government to allow it to question the applicant regarding an alleged *coup* plot. The first and second respondents acceded to these requests, and the applicant argued that the decisions to do so ignored his constitutional rights, and therefore fell foul of section 6(2)(e)(vi) of the AJA in that they were arbitrary or capricious.

Turning its attention to these claims in respect of the second respondent, the court held:

> "[59] The second respondent had a very simple function to execute in the present matter. He was required merely to satisfy himself that proceedings had been instituted in a court exercising jurisdiction in Equatorial Guinea. Since this has, at all relevant times, been common cause, he did not have to consider the alternative, namely whether there were reasonable grounds for believing that an offence has been committed. It was likewise not necessary for him to determine whether an offence has been so committed and that an investigation was being conducted in that country. It is, in any event, not in dispute that there was, and still is, an ongoing investigation in Equatorial Guinea directed at establishing whether more persons than the fourteen accused currently on trial there had been involved.
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> . . . .
>
> [63] It is clear from these considerations that no basis exists to review or set aside the

> decision made by the second respondent. It cannot be said that, in carrying out his statutory functions in terms of the Co-operation Act, he acted irrationally, unreasonably, arbitrarily, capriciously, unlawfully or unconstitutionally in any respect."

With respect to the complaints against the first respondent's decision, the applicant argued that the first respondent had failed to take into account, properly or at all, the applicant's right to silence and other constitutional rights. The applicant argued that since this decision was of an administrative rather than an executive nature, it fell within the provisions of the AJA. Accordingly, it was reviewable on the grounds that it was taken arbitrarily and capriciously (at para 83). The court concluded (at para 94):

> "It would appear that, despite [counsel for the applicant]'s arguments to the contrary, the weight of authority is against permitting the applicant to exercise his right to silence and right against self-incrimination at this stage of the proceedings. There is hence no merit in the contention that the first respondent acted arbitrarily, capriciously, irrationally, unlawfully or unconstitutionally by not considering the applicant's constitutional rights in her decision to approve the request of Equatorial Guinea. She was not required to do so since it was clear that he would not be deprived of those rights, which he could raise at any time during the hearing before the fourth respondent. At no stage have such rights been violated or even threatened."

Section 6(2)(f)(i) – action not authorised by empowering legislation

In ***Minister of Environmental Affairs and Tourism and another v Scenematic Fourteen (Pty) Ltd*** **[2005] 2 All SA 239 (SCA)** (see discussions under "Section 3") the court considered the link between section 6(2)(a)(i) and (ii) of the AJA and section 6(2)(f)(i). It noted that the applicant's complaint against the administrator's decision was based on both paragraphs of the subsection. The court considered only whether the administrator had unlawfully delegated the power to an administrator not authorised by the empowering legislation to wield it. It did not go on to consider whether the decision taken was itself *ultra vires* the Act.

Section 6(2)(f)(ii) – rationality review

In ***Liberty Life Association of Africa Ltd v Kachelhoffer NO and Others*** **2005 (3) SA 69 (C)** (see discussion under "Item 23 of Schedule 6 to the Constitution") the court said the following about the legislative scheme set up by the Constitution (at para 45):

> "It is generally accepted that s 24 of the interim Constitution and subsequently item 23(2)(b) introduced a rationality threshold for the judicial review of administrative action by having provided for administrative action that is justifiable in relation to the reasons given for it where a person's rights are affected or threatened. Whether that threshold has been met is determined with reference to whether there is a rational objective basis on which, on the basis of the evidence properly before him or her, the conclusion eventually arrived at by an administrative decision-maker could be justified….Section 6(2)(f) of the PAJA recognises an absence of rationality as one of a number of bases upon which administrative action may be assailed by means of judicial review."

The court went on to approve of the approach taken by academics and earlier judgments:

> "The view expressed by Iain Currie and Jonathan Klaaren [in the *AJA Benchbook* at para 6.23] in relation to s 6(2)(f)(ii) of the PAJA, namely that in applying the rational connection test the reasons provided should be considered cumulatively rather than discretely, finds support in the judgment of Mlambo J in *Ellerine Holdings Ltd v CCMA and Others* [1999] 7 BLLR 676 (LC) at 681F-682A. And as was pointed out by MacRobert AJ in *Gray Security Services (Western Cape) (Pty) Ltd v Cloete NO and Another* (2000) 21 *ILJ* (LC) [discussed in the edition of this newsletter covering March-September 2004] the odd misconceived finding of fact or occasional error of law does not necessarily render a decision unjustifiable."

The court concluded that, when considering errors of law and fact (see discussion under "Section 6(2)(d)" above) "what has to be determined is the impact of the errors of law and fact attributed to the [administrator]on the rationality of the decision arrived at by him and not whether they are right or wrong." (at para 46)

In ***Foodcorp (Pty) Ltd v Deputy Director General: Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management and others*** **[2005] 1 All SA 531 (SCA)** the court considered the effect that "fettering" has on the validity of a discretionary administrative decision. Where a general guideline to the exercise of a discretion is followed as a hard and fast rule, the court held, the decision-maker cannot be said to have properly considered the matter before him or her. Such a decision will want for rationality (at para 10). The court went on to quote from *Computer Investors Group Inc v Minister of Finance* 1979 (1) SA 879 (T) at 898C-E:

> "Where a discretion has been conferred upon a public body by a statutory provision, such a body may lay down a general principle for its general guidance, but it may not treat this principle as a hard and fast rule to be applied invariably in every case. At most it can be only a guiding principle, in no way decisive. Every case that is presented to the public body for its decision must be considered on its merits. In considering the matter the public body may have regard to a general principle, but only as a guide, not as a decisive factor. If the principle is regarded as a decisive factor, then the public body will not have considered the matter, but will have prejudged the case, without having regard to its merits. The public body will not have applied the provisions of the statutory enactment."

The court in ***Foodcorp*** concluded that the situation "is no different under PAJA, especially section 692)(f)(ii)(aa)."

Section 6(2)(h) – Reasonableness review

Foodcorp (Pty) Ltd v Deputy Director General: Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management and others **[2005] 1 All SA 531 (SCA)** was an appeal against the decision of the Cape High Court refusing to review a decision of the Deputy Director General of the Department of Environmental Affairs and Tourism refusing to allocate the appellant any portion of the total allowable fishing quota in terms of the Marine Living Resources Act 18 of 1998. The SCA upheld the appeal, set aside the order of the High Court, and set aside the first and second respondents' allocation of fishing quotas for the 2005 season. The High Court decision was

discussed in the August-September 2004 edition of this newsletter. It is reported as *Foodcorp (Pty) Ltd v Deputy Director General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management and Others* 2004 (5) BCLR 487 (C).

Review for reasonableness often raises questions of the extent to which a court of review is entitled to engage in the merits of the administrative decision. Courts must be careful not collapse the procedural nature of review proceedings into the substantive content of appeals. The court said, in upholding the appeal, that while the appellant's case in the court below had relied on a number of provisions of the AJA, it focussed its reliance before the SCA on section 6(2)(h) of the AJA. The court said of review for reasonableness (at para 12):

> "The right to just administrative action is derived from the Constitution and the different review grounds have been codified in PAJA, much of which is derived from the common law. Pre-constitutional case law must now be read in the light of the Constitution and PAJA. The distinction between appeals and reviews must be maintained since in a review the court is not entitled to reconsider the matter and impose its view on the administrative functionary. In exercising its review jurisdiction a court must treat administrative decisions with 'deference' by taking into account and respecting the division of powers inherent in the Constitution. This does not 'imply judicial timidity or an unreadiness to perform the judicial function'. The quoted provision, section 6(2)(h) of PAJA, requires a simple test namely whether the decision was one that a reasonable decision-maker could not have reached or, put slightly differently, a decision-maker could not reasonably have reached."

The court referred to the authority of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 (4) SA 490 (CC); ***Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA)** (discussed below under "Common law review – ultra vires"); and *Zondi v MEC for Traditional and Local Government Affairs* 2005 (4) BCLR 347 (CC). On the basis that there were several anomalies in the respondents' decisions, and that they could not proffer any explanation (at para 18), the court concluded that a reasonable decision-maker could not have arrived at the same decision (at para 19):

> "A reasonable decision-maker would, in my judgment, have used a formula to make a provisional allocation but would have considered the output as a result of the application of the formula and then have considered whether the output gives reasonably justifiable results bearing in mid the facts. That the results were distorted would have been patent to anyone applying his or her mind to them. Some participants were inexplicably and unreasonably favoured; at least the appellant was prejudiced, but not only the appellant. A reconsideration of the formula or of the input fed into it would have been called for. If the problem had not been solved thereby, the results would have been adjusted to make some sense."

Section 7(1) – Institution of review proceedings

AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another **2004(6) SA 557 (T)** (see discussion under "Section 1 of the Constitution") concerned the adoption by the first respondent of a set of rules governing when money lenders seek to be exempted from the provisions of the Usury Act 73 of 1968. The first respondent had been approved as a regulatory institution by the Minister of Trade and Industry (the second respondent). The first respondent adopted a revised set of rules in 2002. Since the first respondent was a private institution, the applicant argued that the rules constituted an unlawful and unconstitutional assumption of legislative power. The applicant sought an order to this effect.

The Court granted the application, and declared the revised rules invalid, unlawful and unconstitutional (at 568B and 569I). The Court then turned its attention to the initial rules (at 568G), which the applicant challenged on the same basis as the revised rules (at 562A-B). Counsel for the respondent submitted that since the initial rules were brought into effect in 1999, the applicant should have challenged them then. The Court said the following (at 568G-I):

> "Review proceedings must be instituted within a reasonable time. In terms of s 7(1) of the [AJA] review proceedings must be instituted within 180 days. The present application must in my view succeed on the attack based on the absence of legality of the rules. I am not sure that such an attack must also be made with in a reasonable time, but I assume that it must. I am satisfied that the attack on the initial rules was precipitated by the 'enactment' of the revised rules. That explains why the application to set

> aside the initial rules was not brought earlier...I am not disposed to refuse the application [impugning the initial rules] purely on the basis that it was brought a long time after the rules came into force."

Note that this dictum was made in obiter. Section 7 of the AJA is not directly implicated in this statement, since the attack on the rules was not made in terms of the AJA.

***Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302** (see discussion below under "Common law review – ultra vires") concerned an administrative decision made before the AJA or the final Constitution had come into force. The application for review in this case was made some four years after the impugned decision had been taken. The 180 day limitation imposed by the AJA in section 7(1) therefore did not apply to the case. The court relied on common law rules in assessing the effect of the applicants' delay (at para 46):

> "It is a longstanding rule that courts have the power, as part of their inherent jurisdiction to regulate their own proceedings, to refuse a review application if the aggrieved party had been guilty of unreasonable delay in initiating the proceedings. The effect is that, in a sense, delay would 'validate' the invalid administrative action (see *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) ([2004] 3 All SA 1) [noted in the April-July 2004 edition of this newsletter] at para [27])."

The court concluded that the reasonableness or unreasonableness of delay, in this common law sense, is dependent in each case on the facts.

Section 7(2) – Exhaustion of internal remedies

The court in ***Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and Another* 2005 (3) SA 156 (C)** (see discussions under "Section 1" above and under "Section 3", "Section 4", "Section 6", "Section 8" and "Section 33 of the Constitution" below) was called upon to determine, firstly, whether the applicant had exhausted all its internal remedies as required by section 7(2)(a) and (b), and secondly, whether the exceptions to this rule in section 7(2)(c) operated.

The legislation relevant to this case (the Environmental Conservation Act 73 of 1989 – ECA) establishes a process by which an appeal against the decision of the Director-General can be made to the Minister. It was common cause between the parties that this procedure amounted to an "internal remedy" within the meaning of section 7(2)(a). Further, the applicant had lodged an appeal in terms of the provision, but had proceeded with the review application before that appeal process was complete. It is important to note that the relevant legislation also contains a provision for review in the High Court notwithstanding the provision of an internal remedy. Section 7(2)(c) gives the courts a discretion to exempt applicants from the requirement of exhausting internal remedies in "exceptional circumstances" and where it is in the "interests of justice". The court held (at para 32):

> "[T]he same statutory enactment that provides for the internal remedy (s 35(3) of ECA) also provides for the possibility of simultaneous judicial review (s 36 of ECA). To that extent, the present applicant can distinguished its case from the type of case for which only an appeal is statutorily provided: ordinarily there will be an intention by the Legislature, either express or implied, that the internal remedy is first to be exhausted. Such intention is absent in ECA."

The court listed several other factors which, in conjunction with the above point, tended cumulatively to constitute exceptional circumstances (at para 33).

In rounding off its discussion of section 7(2)(c), the court noted that the interests of justice will not be served in allowing a review application before internal remedies have been exhausted where the possibility of duplicate or contradictory relief exists. (at para 39, with reference to *Bato Star Fishing v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC)) In this case, the appeal in terms of the ECA and review in terms of the AJA are distinct and dissimilar remedies, and the interests of justice allowed hearing the review application.

In ***Reed and others v Master of the High Court of SA and others*** **[2005] 2 All SA 429 (E)** (see discussion above under "Section 1") the court considered the appropriate interpretation of the section 7(2) requirement that internal remedies be exhausted before judicial review proceedings can

be instituted. The court held that, since the subsection limits a constitutional right, it must be interpreted as narrowly as the legislation allows (at para 19):

> "Section 7(2) of the PAJA, assuming as I must for present purposes that it is constitutional, limits the fundamental right of access to court by barring resort to judicial review until internal remedies provided by any law have been exhausted (or until the time period for utilising the internal remedy has elapsed). By deferring resort to judicial review in this way, section 7(2) restricts the jurisdiction of a court to determine an otherwise justiciable issue before it. because it interferes with fundamental rights, it must be interpreted restrictively."

The court then went on to consider what constitutes an internal remedy for purposes of the subsection. It held that the term is usually used to connote an administrative *appeal on the merits* rather than review procedures (at para 25). The court also noted that internal remedies are distinctively extra-curial in nature (at para 26). However, the court noted in passing that complaints to Parliament or to Chapter 9 institutions like the Public Protector do not qualify as "remedies" within the meaning of the section. Further, such complaints cannot be characterised as "internal" in any way.

Section 8 – Remedies

In ***Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and Another*** **2005 (3) SA 156 (C)** (see discussions under "Section 1" above and under "Section 3", "Section 4", "Section 6", "Section 7" and "Section 33 of the Constitution" below) the court had regard to the provisions of section 8(1)(c)(i) of the AJA in granting its order. The section authorises the court to "grant any order that is just and equitable". The court said that, in light of the procedural unfairness that had plagued the first respondent's initial decision, a just and equitable order would be one setting aside the initial decision, and directing the Director-General to reconsider the matter after the applicant and all other interested parties have been given an opportunity to address the Director-General on any relevant considerations that may affect his decision. (at para 80)

MISCELLANEOUS

Section 33 of the Constitution

In ***Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and Another*** **2005 (3) SA 156 (C)** the applicant brought an application for review of a decision of the first respondent on the basis that its right to procedurally fair administrative action had been infringed, contrary to section 33 of the Constitution, read with section 6(2)(c) of the AJA. A full discussion of the unfairness of the procedures followed by the Director-General appears under "Section 3".

In ***Radio Pretoria v Chairman, Independent Communications Authority of South Africa, and Another*** **2005 (1) SA 47 (SCA),** the appellant had applied to the Independent Communications Authority of South Africa (ICASA), the second respondent, for a radio broadcasting license. Radio Pretoria attended a hearing towards the end of 2000 where it made oral and written submissions in support of its application. Subsequent to the hearing ICASA invited the appellant to make written submissions addressing certain of its business practices. The appellant did so, after which ICASA refused a broadcasting license.

Radio Pretoria applied to the Pretoria High Court to have the decision reviewed and set aside. It contended that, in requiring it to make written submissions and refusing the opportunity to make further oral representations, ICASA unlawfully negated the principles of audi alterem partem. This, it argued before the court a quo, infringed its constitutional rights to lawful administrative action. The court a quo dismissed the application with costs. (This decision is reported as *Radio Pretoria v Chairman, Independent Communications Authority of South Africa, and Another* 2003 (5) SA 451 (T)). (Radio Pretoria applied to the Constitutional Court for leave to appeal late last year. In a judgment delivered on 8 December under case number CCT 38/04 the Court refused leave to appeal.)

In ***Zondi v MEC for Traditional and Local Government Affairs and Others*** **2005 (3) SA 25 (C)** (see discussions above under "Section 1", "Section 3" and below under "Section 1 of the Constitution"), the court held that a provincial

ordinance that failed to meet the standards of procedural fairness of section 3 of the AJA was therefore inconsistent with section 33 of the Constitution, and had to be declared unconstitutional to that extent. The court's declaration of invalidity was referred to the Constitutional Court for confirmation in terms of section 172(2)(a) of the Constitution. In a judgment delivered in October last year, reported as 2005 (4) BCLR 347 (CC), the Constitutional Court confirmed in part the declaration of invalidity. The parts of the High Court order that it did not confirm are of no relevance to this discussion.

Item 23 of Schedule 6 to the Constitution

***Liberty Life Association of Africa Ltd v Kachelhoffer NO and Others* 2005 (3) SA 69 (C)** (see discussion under "Section 6") involved a determination made by the first respondent, an additional member of the industrial court, regarding the retrenchment by the applicant of the second to 24th respondents. The applicant challenged this determination on grounds of procedural fairness, but since the determinations at issue was made in May and September 1999 – before the AJA and section 33 of the final Constitution became operative – the source of the court's review powers was item 23(2)(b) of Schedule 6 to the Constitution. Item 23(2)(b) essentially re-enacted section 24 of the interim Constitution, and provided that everyone has the right to administrative action that is, among others, lawful and procedurally fair. The applicant argued that the determination in question was procedurally unfair because the decision-maker was biased, and that it was unlawful because he was influenced by material errors of fact and law. A full discussion of the complaint of bias appears below (see discussion under "Common law review – bias").

Section 1 of the Constitution – Rule of Law

In ***AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2004(6) SA 557 (T)** (see discussion above under "Section 7"), the first respondent (the MFRC) had been approved as a regulatory body by the Minister of Trade and Industry in terms of the relevant legislation. The MFRC, a private association incorporated in terms of section 21 of the Companies Act 61 of 1973, applied rules it had enacted in terms of its memorandum in the course of its regulatory functions.

The question the Court applied itself to was the following (at 562G-563B):

> "[W]as the first respondent exercising a public power to legislate or was it making its own domestic rules to which lenders bind themselves by contract? If the first respondent was exercising a public power to legislate, the fact that its memorandum empowers it to make rules is of no consequence. A private entity cannot empower itself to exercise public power to legislate. That is so because the rule of law is a founding principle of the Constitution...(see s 1(c) of the Constitution; *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 at paras [19] and [20]).
>
> . . . .
>
> While this constitutional power to legislate may be, and often is, delegated by the respective legislative bodies, no power to legislate can be exercised lawfully unless it can be traced back to the Constitution".

The Court stated that if the MFRC's actions in making the rules constituted the exercise of public power, they had to conform to the rule of law; but if the MFRC's actions amounted to the exercise of private power they would not be subject to review (at 563E). The Court went on (at 564D):

"In the context of rule making, an important consideration is whether the rules purport to be of general application or whether they bind only those who voluntarily subjected themselves thereto. If the rules purport to be of general application, biding the general public, making them will probably constitute the exercise or the attempted exercise of public power."

Zondi v MEC for Traditional and Local Government Affairs and Others **2005 (3) SA 25 (C)** see discussions above) held that where legislation or delegated legislation empowers a person to take administrative action, and no clear guidelines or rules are set up as to how this power should be exercised, the rule of law will be offended. Such power negates rights to administrative justice, since persons

> "affected by the exercise of the unfettered discretionary powers do not know what circumstances they are entitled to seek relief from an adverse decision. This is contrary to the rule of law principle in s 1(c) of the

Constitution. See *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs and Others; Thomas v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) (2000 (8) BCLR 837) at para [47].

Section 1 of the Constitution – The doctrine of legality

The Constitutional Court case of ***Affordable Medicines Trust and Others v Minister of Health and Others*** (CCT 27/04, 11 March 2005, unreported) concerned a challenge to the validity of a licensing scheme introduced by government. The applicants sought an order declaring invalid certain sections of the Medicines and Related Substances Act 101 of 1965 and regulations made in terms thereof. The scheme authorised the Director-General of Health (the second respondent) to issue licenses to dispense medicines to health practitioners such as dentists and doctors. The scheme conferred a wide discretion on the Director-General in this regard. Section 22C(1)(a) makes provision for the Director-General to issue such licences "on the prescribed conditions", while Regulation 18 of the Regulations made in terms of the Medicines Act and published in Government Gazette 24727 under Government Notice R510 of 10 April 2003.

The applicants argued that the phrase "on the prescribed conditions" gave to the Director-General "wide, unlimited and un-circumscribed arbitrary legislative powers. They submitted that this is in breach of the principle of legality." (at para 24) Essentially, then, the scheme left it to the Minister or the Director-general as the Minister's delegee, to determine what the 'prescribed conditions" for issuing a license would be. The challenge raised the question of whether it is permissible "for Parliament to leave it to the Director-General to prescribe the conditions upon which a licence may be issued." (at para 31). The Court held (at paras 32-4):

> "[32] The 'prescribed conditions' referred to in sub-section 22C(1)(a) are not set out in the Medicines Act. What the section in effect does is to leave it to the Director-General to determine what those prescribed conditions shall be. There is nothing in the Constitution which prevents Parliament from delegating subordinate regulatory authority to other bodies. In *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* (1995 (4)

SA 877 (CC); 1995 (10) BCLR 1289 (CC)), Chaskalson P said:

> 'The legislative authority vested in Parliament under s 37 of the Constitution is expressed in wide terms – 'to make laws for the Republic in accordance with this Constitution'. In a modern State detailed provisions are often required for the purpose of implementing and regulating laws and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution Parliament can pass legislation delegating such legislative functions to other bodies. There is, however, a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body, including, as s 16A does, the power to amend the Act under which the assignment is made.' (at para 51, footnote omitted)

[33] Nor is there anything that prevents Parliament from conferring upon the Director-General the discretion to determine those conditions. Discretion has an important role to play in decision making. And its scope may vary. In *Dawood* (*Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC)), this Court held:

'Discretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner. The scope of discretionary powers may vary. At times they will be broad, particularly where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the Legislature to identify them in advance. Discretionary powers may also be broadly formulated where the factors relevant to the exercise of the discretionary power are indisputably clear. A further situation may arise where the decision-maker is possessed of expertise relevant to the decisions to be made.' (at para 53, footnote omitted)

[34] However, the delegation must not be so broad or vague that the authority to whom the power is delegated is unable to determine the nature and the scope of the powers conferred. For this may well lead to the arbitrary exercise

of the delegated power. Where broad discretionary powers are conferred, there must be some constraints on the exercise of such power so that those who are affected by the exercise of the broad discretionary powers will know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision. (at para 47) These constraints will generally appear from the provisions of the empowering statute as well as the policies and objectives of the empowering statute."

The applicants also argued that the regulations were not contemplated by the Act. Because the regulations were not consistent with the overall scheme of the Act, they were ultra vires and in breach of the principle of legality. The Court said of the principle of legality (at paras 48-50):

> "[48] Our constitutional democracy is founded on, among other values, the '[s]upremacy of the constitution and the rule of law.' (Section 1(c) of the Constitution) The very next provision of the Constitution declares that the 'Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid'.(Section 2 of the Constitution) And to give effect to the supremacy of the Constitution, courts 'must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency'. (Section 172(1)(a) of the Constitution) This commitment to the supremacy of the Constitution and the rule of law means that the exercise of all public power is now subject to constitutional control.
>
> [49] The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. (*Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 20) The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. (*Pharmaceutical Manufacturers* at para 17*; Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at para 58) It entails that both the legislature and the executive 'are constrained by the principle that they may exercise no power and perform no

function beyond that conferred upon them by law.' (*Fedsure* at para 58) In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power. (*Pharmaceutical Manufacturers* at para 19)

[50] In exercising the power to make regulations, the Minister had to comply with the Constitution, which is the supreme law, and the empowering provisions of the Medicines Act. If, in making regulations the Minister exceeds the powers conferred by the empowering provisions of the Medicines Act, the Minister acts ultra vires (beyond the powers) and in breach of the doctrine of legality. The finding that the Minister acted ultra vires is in effect a finding that the Minister acted in a manner that is inconsistent with the Constitution and his or her conduct is invalid. (*Pharmaceutical Manufacturers* at para 20) What would have been ultra vires under common law by reason of a functionary exceeding his or her powers, is now invalid under the Constitution as an infringement of the principle of legality. (*Pharmaceutical Manufacturers* at para 50)"

In ***Reed and others v Master of the High Court of SA and others*** **[2005] 2 All SA 429 (E)** (see discussion above under "Section 1") the court relied on the dicta of Chaskalson P in *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte President of the Republic of South Africa and others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at paras 83-86, where it was held that every exercise of public power must be objectively rational (at paras 45-46).

In ***Thatcher v Minister of Justice and Constitutional Development and others*** **[2005] 1 All SA 373 (C)** (see discussion above under "Section 6") the court relied on *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 for the proposition that all executive action must be rational (at para 84). The court found on the facts of the case that the decisions sought to be reviewed by the applicant had not been irrational (see discussion above under "Section 6(2)(e)(vi)).

Common law review – Audi alterem partem

***Taylor v Kurtstag NO and Others* 2005 (1) SA 362 (W)** involved the excommunication from the Jewish faith of a Jewish man. The Jewish Ecclesiastical Court (Beth Din) issued the *cherem* excommunicating him because he had failed to comply with earlier maintenance awards made by the Beth Din against him.

The applicant argued that in exercising its power, the Beth Din was subject to the principles of natural justice. He contended that the Beth Din had not observed the principle of audi alterem partem, and that its decision fell to be reviewed by the court for this reason.

With reference to *Long v Bishop of Cape Town* (1863) 4 Searle 162 and *Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere* 1976 (2) SA 1 (A), the Court held that "the decisions of religious tribunals are...subject to the same common law review jurisdiction as those of other voluntary organisations" (at para 42). The Court was however careful to maintain the distinction between appeal and review, and confined itself to assessing the fairness of the procedures followed by the Beth Din. The Court did not wish to "entangle" itself in the merits of the Beth Din's decision (at para 61):

> "Although the decisions of the Beth Din are subject to judicial scrutiny, just as those of any other faith are, the values embodied in the doctrines of entanglement and the reluctance to interfere in matters of faith, whether it be procedural or otherwise, cannot be discarded (cf *Ryland v Edros* 1997 (2) SA 690 (C) and *Mankatshu v Old Apostolic Church of Africa and Others* 1994 (2) SA 458 (TkA))...It is not always possible to distinguish between the merits and the procedure and thus to ascertain the thin line between the State and religion".

The Court went on to hold that the audi alterem partem rule "generally requires that the person concerned be afforded an opportunity to address the tribunal before any decision is made". The Court went on to hold as part of its ratio decidendi that the determination of whether a fair hearing as taken place, and whether the principle of audi alterem partem has been observed, is a factual matter to be determined on the basis of each set of facts.

> "To define the operation of this flexible rule is neither possible nor desirable (cf *Visagie v State President and Others* 1989 (3) SA 859 (A) at 865; *Doody v Secretary of Sate for the Home Department and Other Appeals* [1993] All ER 92 (HL) at 106e-h). Clearly, when deciding the fairness of the process, its nature must be taken into account. A religious tribunal is subject to the discipline of the Constitution, but its being a religious body giving effect to the associational rights of its members, must be accounted for."

In this case, the Beth Din had issued a first *cherem*, but then withdrawn it because the Beth Din had been advise that there might have been merit in the applicant's compliant that he had not been afforded any hearing. The Beth Din subsequently issued a second *cherem* following a hearing. The Court found on the facts that the procedures adopted by the Beth Din had been fair (at para 63).

Note: Although this case was decided without reference to the AJA, violations of the principles of audi alterem partem are accommodated by the AJA under section 3.

In ***Imbali 13 and 15 Taxi Association and others v Kwa-Zulu Natal provincial Taxi Registrar and others*** **[2005] 2 All SA 268 (N)** it was held that the common law principles of natural justice do not require in every case that an opportunity to make oral representations be afforded to those affected by administrative action or proposed administrative action. (at 276-7)

Note: This case could also have been decided under section 3 of the AJA, but since the parties did not plead the matter in terms of the AJA, it was decided without reference to it.

Common law review – Bias

In ***Taylor v Kurtstag NO and Others*** **2005 (1) SA 362 (W)** (see discussion above under "Common law review – audi alterem partem"), the Court referred with approval of a dictum in the Canadian case *Lakeside Colony of Hutterian Brethren v Hofer* [1992] 3 SCR 165 to the effect that "an unbiased tribunal is one of the central requirements of natural justice." (at para 43) The Court noted that the circumstances and facts of each case must be examined where bias is complained of. The applicant complained of a "reasonable apprehension of bias, in the sense that the outcome of the hearing had a predetermined

outcome." (at para 60) The Court held, however, that it will not always be possible or advisable–

> "to infer bias where the members of the tribunal have had prior contact with the member to be disciplined...It cannot reasonably be said that, because the members of the Beth Din persisted in pursuing the matter in the performance of their duty under Jewish law, the outcome was a 'forgone conclusion'".

Note: The AJA accommodates bias as a ground of review under section 6(2)(a)(iii). The case was neither pleaded nor decided on the basis of the AJA, though.

In ***Liberty Life Association of Africa Ltd v Kachelhoffer NO and Others*** **2005 (3) SA 69** (see discussion above under "Section 6" and "Item 23 of Schedule 6 to the Constitution") the court held that "[p]roof of actual or perceived bias on the part of the first respondent would clearly offend against the applicant's right to procedurally fair administrative action as entrenched in item 23(2)(b)." (at para 27) More specifically, the court said (at para 30):

> "A party invoking perceived bias is required to show that a reasonable person in his/her/its position would have held an apprehension of bias and that such apprehension was reasonable in the circumstances….Cameron AJ in the *South African Commercial Catering and Allied Workers' Union* case [2000 (2) SA 705 (CC)] observed (at para [15]) that the double aspects of reasonableness in the test is possible of being compacted inasmuch as a reasonable person should not be supposed to entertain an unreasonable or ill-informed apprehension, but serves to underscore the weight of the burden resting on a person invoking actual or perceived bias."

In light of this heavy burden, the court found that, on the case before it, the applicant had not discharged this burden.

Common law review – ultra vires

Associated Institutions Pension Fund and Others v Van Zyl and Others *2005 (2) SA 302 (SCA)* (see discussion above under "Section 7"), involved a decision taken in terms of regulations governing the transfer of members from one pension fund to another. The decision in question was made in August 1995, before either the final

Constitution and the AJA had been enacted. The principles of administrative justice governing the review were thus to be found in the common law and the interim Constitution.

Regulations promulgated in terms of the Associated Institutions Pension Fund Act 41 of 1963 provide that when members are transferred from the Associated Institutions Pension Fund (AIPF) created in terms of that Act, a determination of the transfer value of each member's assets as at the transfer date is to be made. It is the actuary of the AIPF who is to make this determination. The court held since the determination had been made in 1995, the "legal substructure" for the case had to be found in section 24(d) of the interim Constitution (at para 36):

> "This subsection – which was re-enacted as a transitional measure pending the promulgation of PAJA in tem 23(2)(b) of Schedule 6 to the final Constitution – vested in every person the right to administrative action 'which is justifiable in relation to the reasons given for it'. Although the subsection expanded the ambit of judicial review, it did not abolish the well-established distinction between review and appeal (se eg *Carephone (Pty) Ltd v Marcus NO and Others* 1999 (3) SA 304 (LAC) at 315C). Nor did it introduce substantive fairness as a criterion for judging the validity of administrative action. That much is clear from the explanation of the analogous provisions of item 23(b) of Schedule 6 in the majority judgment by Chaskalson CJ in *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* 2002 (3) SA 265 (CC) at 291F-292G. These provisions, the Chief Justice said, encapsulate and extend the common-law grounds of judicial review – legality, procedural fairness and rationality – as they have been developed ver the years in England and South Africa. For good reasons, he said, judicial review of administrative action has always distinguished between procedural fairness and substantive fairness. The substantive unfairness of a decision in itself, has never been a ground for review.

It was on the basis of this administrative legal system, operative at the time the determination of members' transfer value was made, that that determination had to be assessed. The argument made by the respondents before the SCA (applicants in the court a quo) and accepted by the court a quo, was that, on a reading of the regulations, the actuary had acted *ultra vires* the powers conferred on him by the regulations. The court held, though, that what the regulations set up

was a methodology of reaching a determination. On the facts, the method employed by the actuary was consistent with the regulations, and the resulting determination therefore could not be faulted. The court said (at para 32):

> "On a proper construction the transfer regulations, in my view, enjoined the actuary to act, throughout the entire process...in accordance with actuarial practice. On this basis it was accepted in the *Unisa* case [*Associated Institutions Pension Fund and Another v Le Roux and Others* 2001 (4) SA 262 (SCA)] (in para 16), with reference to the determination of actuarial liabilities that this necessarily entailed the application of professional actuarial methodology. By the same token the regulations, in my view, prescribed the selfsame actuarial methodology, involving assumptions and predictions to allow for contingencies and imponderables when it came to the determination of assets. It follows that [the actuary's] methodology was not *ultra vires* the regulations."

The court went on to emphasise the distinction between appeal and review, and the need for courts to be alive to the fact that certain administrative decisions are informed by skills, training, knowledge and expertise that the court does not necessarily have. The court said the following (at para 39):

> "Particularly in the light of the training, skills, experience an intricacies involved in the application of actuarial science, I believe that this is a matter where judicial deference is appropriate. Of course, I do not mean judicial timidity, but judicial deference as explained in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*...[reported in the August-September version of this newsletter]. In these circumstances it is almost self-evident that the respondents have failed to make out a case that [the actuary's] methodology was not one which an actuary could reasonably have adopted, ie that [the actuary] had failed to act rationally in the execution of his brief."

The actuary's determination, as the result of a methodology within the scope of the regulations, was therefore not *ultra vires*.

Note: The AJA captures common-law ultra vires review in section 6(2)(f). The decision at issue in the case occurred before the AJA was in force, which is why the case was decided without reference to this provision.

PROMOTION OF ACCESS TO INFORMATION ACT (AIA)

Makasi v MEC for Education, Province of Eastern Cape **[2004] 4 All SA 452 (Ck)** concerned interdict proceedings. The applicant had not been paid an amount of money, calculated as compensation for leave not taken, upon retirement from employment with the respondent. The respondent argued that adequate alternative relief was available to the applicant in the form of an action for damages, and that the mandatory order should accordingly not be granted. The respondent argued that the applicant could have utilised the machinery provided by the AIA to access information held by the respondent, in order to calculate the quantum of damages prayed for in an application for relief of this kind. The court rejected this argument, saying, firstly, that at the time the leave entitlement should have been paid, the AIA was not yet in force. Secondly, the court held that reliance on the AIA would have further delayed already overdue payments (at para 20).

Section 44(1) – Refusal of request for access

In ***Minister for Provincial and Local Government v Unrecognised Traditional Leaders, Limpopo Province (Sekhukhuneland)*** **2005 (2) SA 110 (SCA),** the respondent (applicant before the court a quo) had sought access to the report of a commission of inquiry known as the Ralushai Commission. The report was held by the Department of Provincial and Local Government, and was not made public.

Section 44(1)(a) and (b) of the AIA entitle the information officer of a public body to refuse a request in terms of section 18 of the AIA. The department refuse the respondent's request in terms of this section. The respondent was successful in an application to the Pretoria High Court for an order declaring that it had a right of access to the report (that decision s reported as *Unrecognised Traditional leaders of the Limpopo Province (Sekhukhuneland) v Minister for Local and Provincial Government of the RSA* 2003 (5)

BCLR 563 (T)). Section 44(1)(a) allows the refusal of a request for access to a record of a public body

> "(a) if the record contains–
>
> (i) an opinion, advice, report or recommendation obtained or prepared; or
>
> (ii) an account of consultation, discussion or deliberation that has occurred...
>
> for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law; or

Note that section 44(1)(b) also contains circumstances under which a public body may refuse access. This paragraph was not relevant to the case. The following dictum from the court a quo's judgment was central to its granting the application (quoted at para 10):

> The subsection merely requires that an advice, report or recommendation has been *obtained* or *prepared* for the purpose of assisting to formulate a policy or take a decision in the exercise or performance of a duty conferred or imposed by law. It does not require that the public body concerned must have commissioned the advice, report or recommendation. It is sufficient if it has *obtained* the advice, report or recommendation for the stated purpose.

The SCA noted that the critical question on appeal was whether the court a quo's interpretation and application of the of the subsection had been correct (at para 12). In analysing this interpretation, and in interpreting the AIA, the court said that the legislative history of the AIA was important (at paras 16-17):

> "[T]he genesis of the legislation was the Constitution and the Act must be interpreted with due regard to its terms and spirit. The right of access to information held by the state is couched therein in wide terms. Subsection 44(1)(a) must be construed in the context of s 32(1)(a), read with ss 36 and 39(2) of the Constitution (cf *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) South Africa 490 (CC) (2004 (7) BCLR 687) para [72]).It is clear that s 44(1)(a) limits the right of access to information and s 36 of the Constitution requires that the scope of such a provision be restricted only to an extent which is reasonable and justifiable.

Section 39(2) obliges every court to promote ‘the spirit, purport and objects of the Bill of Rights’ when interpreting any legislation. It must also be borne in mind that the Act was enacted in order to give effect to access to information and promote the values of openness, transparency and accountability which are foundational to the Constitution.

In the light of what is set out in the preceding paragraph it is clear that the restrictive meaning of ‘obtain’ is to be preferred. In the context under discussion it must mean procuring information for any of the purposes referred to in the subsection.”

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