CASE LAW
THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT (PAJA)

Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others CCT 59/04 (as yet unreported), 30 September 2005 (CC)

Introduction

This case involves regulations made by the Minister of Health on the recommendation of the medicines pricing committee in terms of the Medicines and Related Substances Act 101 of 1965 (as amended) (the Medicines Act). The regulations purported to regulate the price at which medicines moved along the distribution chain from manufacturers or importers of medicines to consumers. The ultimate aim of the regulations was to make medicines more affordable to the public.[1] The regulations were challenged in the Cape High Court in two separate applications, by New Clicks and a number of pharmaceutical retailers represented by the Pharmaceutical Society of South Africa (the Pharmacies). The cases were consolidated and heard together.[2] The majority of the High Court upheld the regulations and dismissed the application, while the minority agreed with the Pharmacies.[3] The Pharmacies then appealed to the Supreme Court of Appeal (SCA). The SCA overturned the judgment of the majority in the High Court, holding the regulations in their entirety to be unconstitutional and invalid. The court accordingly set the regulations aside.[4]

The Minister of Health and the Chairperson of the pricing committee applied for leave to appeal to the Constitutional Court. The application was argued before the Court on 15 and 16 March 2005, and judgment was delivered on 30 September 2005. Judgments on the issues in the case were prepared by five of the eleven judges, while three judges wrote short judgments indicating their views on the main judgments. A separate judgment summarising the findings and giving the order was prepared by the Court. Four of the five main judgments expressed views on the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Five of the judges hold that PAJA is applicable to the dispute (Langa DCJ, O'Regan J and Van der Westhuizen J concurring in the judgments of Chaskalson CJ and Ngcobo J), five hold that the question of its applicability need not be answered (Madala J, Mokgoro J, Skweyiya J and Yacoob J concurring in the judgment of Moseneke J), while one judge holds that it is applicable only to certain of the issues raised by the dispute (Sachs J).

Views of the courts below

Both the High Court and the SCA saw the making of recommendations by the pricing committee and the passing of regulations by the Minister to be separate processes, to be evaluated separately against the principles of administrative justice. The majority in the High Court held that neither the recommendations nor the regulations themselves fell within the definition of 'administrative action' in PAJA.[5] The minority disagreed, holding that PAJA applied to both processes.[6] The minority added though, that the applicability of PAJA made no difference, and agreed with the majority that the processes were reviewable under the common law and sections 1 and 33 of the Constitution.[7]

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[1] *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* CCT 59/04 (as yet unreported), 30 September 2005 (*'New Clicks CC'*), at para 1.

[2] *New Clicks South Africa (Pty) Ltd v Tshabalala-Msimang and Another NNO; Pharmaceutical Society of South Africa and Others v Minister of Health and Another* 2005 (2) SA 530 (C) ('New Clicks CPD').

[3] Discussed in the March-September 2004 edition of the PAJA Newsletter.

[4] *Pharmaceutical Society of South Africa v Tshabalala-Msimang and Another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health and Another* 2005 (3) SA 238 (SCA); 2005 (6) BCLR 576 (SCA) (*'New Clicks SCA'*).

[5] *New Clicks CPD* (per Yekiso J), at paras 34-43, 48-49.

[6] *New Clicks CPD* (per Traverso DJP), at paras 32-39.

[7] Id, at paras 52-58. See the majority judgment (per Yekiso J) at paras 44-45, 50, 69.

The SCA declined to answer the question whether PAJA applied to either the making of recommendations or to the regulations themselves. The court agreed with the minority's view that it made no difference whether PAJA applied or not, and decided the case on the broader constitutional principle of legality.[8]

The judgment of the Constitutional Court

The judgment of the Court lists the principal issues and the conclusions reached by the Court. The list includes a summary of the conclusions relating to the applicability of PAJA:

> '*Does the Promotion of Administrative Justice Act, 3 of 2000 (PAJA) apply to the recommendations of the Pricing Committee and the subsequent making of regulations by the Minister?* Five members of the Court hold that PAJA is applicable. One member of the Court holds that PAJA is applicable to the fixing of the dispensing fee only; and five other members of the Court hold that it is not necessary to decide whether PAJA is applicable, since on the assumption in favour of the Pharmacies that it is, they find the procedure followed to have been fair.'[9] (footnotes omitted)

It is to be seen immediately that there is a slight majority insofar as PAJA's applicability to the question of the dispensing fee. More than this, there is little that emerges immediately from the judgment. The various judgments of the members of the Court must be examined before the precedential impact of the judgment is revealed.

There are two levels at which PAJA is engaged with in the judgments. The first involves the general question of whether the applicability of PAJA is an issue that needs to be determined at all in this case. If it must be decided at the first level that PAJA applies or that it doesn't, the second level then confronts the more specific question of whether PAJA applies to regulations.

Can PAJA be avoided?

Chaskalson CJ's judgment

The first point of difference to be noted between Chaskalson CJ's view and that of the courts below relates to the process authorised by the Medicines Act. Chaskalson CJ holds that the process contemplated by the Medicines Act is a single process, albeit with two distinct stages.[10] The two stages together amount to a joint decision of the Minister and the pricing committee, and it is this joint decision that is the action to be reviewed:

> 'In the circumstances of the present case, to view the two stages of the process as unrelated, separate and independent decisions, each on its own having to be subject to PAJA, would be to put form above substance.'[11]

> 'The Pricing Committee's work on the regulations was continuing and ongoing until the Minister agreed. In substance the decision to make the regulations was, and had to be, a joint decision of the Minister and the Pricing Committee.'[12]

Chaskalson CJ centres the investigation of the first-level question around an examination of the relationship between PAJA and the Constitution. Section 33(3) of the Constitution, he notes, required national legislation to be enacted to give effect to the rights enumerated in section 33. PAJA was the legislation passed to comply with this requirement, and it addresses the four substantive rights listed in section 33: rights to lawful reasonable and procedurally fair administrative action, and the right to reasons for administrative action.[13] With reference to *Bato Star*,[14] Chaskalson CJ says that PAJA was required by the Constitution to cover the field of administrative justice, and purports to do so.[15] The conclusion to be drawn, therefore, is that

> '[a] litigant cannot avoid the provisions of PAJA by going behind it, and seeking to rely on section 33(1) of the Constitution or the common law. That would defeat the purpose of the Constitution in requiring the rights contained in section 33 to be given effect by means of national legislation.'

Chaskalson CJ holds, therefore, that it is necessary to decide if the regulation-making process amounted to administrative action

[8] *New Clicks SCA*, at para 94.
[9] *New Clicks CC*, at para 13(4).
[10] Id, at paras 136-142.
[11] Id, at para 137.
[12] Id, at para 141.
[13] Id, at para 143.
[14] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC), at para 25.
[15] *New Clicks CC*, at para 95.

within the meaning of PAJA. Following the decision in *Bato Star*,[16] if PAJA is applicable, then the case must be decided with reference to its provisions.

Ngcobo J's judgment

The conclusions reached by Ngcobo J square with Chaskalson CJ's. His reasoning follows much the same lines, focussing on the relationship between section 33 and PAJA. In addition, though, he refers to the principle of our law that the practical exercise of administrative justice is grounded in the Constitution. To allow litigants to rely alternately on the Constitution and legislation enacted to give effect to rights in the Constitution would result in the development of two streams of law. This would be inconsistent with the views of this court that there are not two systems of administrative law, one under PAJA and one under the Constitution and the common law, 'but only one system of law grounded in the Constitution.'[17]

In reaching this conclusion Ngcobo J relies on the dicta of several judgments. In *NAPTOSA and Others v Minister of Education, Western Cape, and Others*[18] the Cape High Court considered whether a party could seek relief directly under section 23(1) of the Constitution without relying on the Labour Relations Act 66 of 1995 (LRA). One of the primary objects of the LRA is to give effect to and regulate the fundamental labour rights conferred by the Constitution.[19] The court held that a litigant cannot go beyond the provisions of the LRA except by arguing that the provisions of the LRA are themselves inconsistent with the Constitution. It would be 'singularly inappropriate', the court went on, if labour law jurisprudence were to develop on one hand in respect of section 23, and on the other hand in respect of the LRA.[20] In *Ingledew* the Constitutional Court referred to *NAPTOSA*, but went only as far as to say that it is doubtful that a party will be able to rely directly on the Constitution where there is a statutory provision dealing with a matter.[21]

Ngcobo J concludes that reliance on section 33(1) of the Constitution and the common law, where PAJA – enacted to give effect to section 33 – is applicable, is inappropriate.[22] The conclusion is inescapable that where constitutional rights to administrative justice are sought to be enforced before a court, the court must determine if PAJA is applicable or not. This is the 'threshold question that must be decided'.[23]

Sachs J's judgment

Although Sachs J's view is that the judicial control of subordinate legislation should generally be based on the constitutional principle of legality, he nevertheless confronts the question of whether PAJA should be applied. Sachs J agrees explicitly with the conclusion of Chaskalson CJ and Ngcobo J that if PAJA is applicable, 'there is no scope for bypassing it.'[24] Sachs J's argument is that review of subordinate legislation according to the principle of legality fits into the constitutional scheme regulating public power, and 'corresponds more directly with the reality of the national polity.'[25] The 'shoe' of section 33 and PAJA is too tight to provide an adequate and appropriate means for the constitutional control of legislation.

Although Sachs J takes a different view to Chaskalson CJ and Ngcobo J on the actual application of PAJA to the facts of the case – the second level question – he does agree with

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[16] Above n 14, at para 26.

[17] *Bato Star*, above n 14 at para 22, cited by Ngcobo J at para 436. See also *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 paras 33-45.

[18] 2001 (2) SA 112 (C).

[19] Section 1 of the LRA reads :

> 'The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are –
>
> (a) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution'.

The rights contained in section 27 of the interim Constitution now appear in section 23 of the final Constitution. The preamble to PAJA indicates a similar object:

> 'To give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action as contemplated in section 33 of the Constitution'

[20] *NAPTOSA*, above n 18 at 123B-I, cited by Ngcobo J at para 434.

[21] *Ingledew v Financial Services Board: In re Financial Services Board v Van der Merwe and Another* 2003 (4) SA 584 (CC); 2003 (8) BCLR 825 (CC) at para 24, cited by Ngcobo J at para 435.

[22] *New Clicks CC*, at para 436.

[23] Id, at para 421.

[24] *New Clicks CC*, at para 586.

[25] Id, at para 585.

them on the first level question. Altogether then, six members of the Court – a majority –reach two important conclusions at the first level. The first is that where relief is sought in terms of section 33 of the Constitution, the party seeking such relief must look for it in the terms of PAJA. It is only where an allegation is made that PAJA is inconsistent with the terms of section 33 that reliance could be placed directly on section 33. The second conclusion flows from this. It must be decided in every case where relief is sought under constitutional rights to administrative justice, whether PAJA is applicable or not. Because PAJA and section 33 together represent the entirety of rights to administrative justice (no rights were conferred by section 33 until PAJA had been enacted), no rights in terms of section 33 can be accessed in the absence of reliance on, or without reference to PAJA.

Moseneke J's judgment

Moseneke J disagrees with the view summarised so far that it is necessary to decide whether PAJA applies or not. He holds that it is unnecessary to decide 'whether the tenets of administrative justice under the Constitution and PAJA apply to ministerial regulation-making.'[26] In giving reasons for this position, Moseneke J distinguishes this case from *Bato Star*. In that case, he says, the Court applied PAJA because it was common cause that the decision under review amounted to administrative action. The scope of the definition of administrative action was therefore not an issue in that case. In this case, however, the parties take issue over whether ministerial regulation-making and the recommendations of the pricing committee are properly governed by PAJA or not. In the face of this dispute, Moseneke J finds it 'neither prudent nor necessary' to decide the complex and contested issues of the appropriate level of review of ministerial rule-making.[27] Moseneke J goes on:

> 'I am well aware that there may be compelling reasons for holding ministerial regulation-making reviewable under PAJA. The difficulty is that there are at the very least equally persuasive considerations that ministerial legislation is not administrative action and does not fall within PAJA but is controlled and limited by the Constitution and legislation that confers the power to the minister concerned.'[28]

And concluding his views on PAJA:

> 'Given the conclusion I have arrived at on the facts I need not decide the issue. I shall, however, assume without deciding that the administrative justice standard of lawfulness, reasonableness and procedural fairness espoused by the Constitution is given legislative effect in PAJA and that it applies to the recommendation of the Pricing Committee and to ministerial regulation-making.'[29]

Conclusions on whether PAJA's applicability must be settled in every case

By a slim majority of six to five, the Court holds that PAJA must be applied in every case where it is applicable. It is therefore an unavoidable threshold question whether PAJA or not applies to the facts of a specific case.

Does PAJA apply to ministerial regulation-making?

Chaskalson CJ's judgment

Section 1 of PAJA establishes a definitional door through which every exercise of public power must pass before it can be reviewed. PAJA requires that 'administrative action' must be procedurally fair (section 3), reasons must be provided for 'administrative action' (section 5), and a person may institute review of 'administrative action' on a number of grounds (section 6).[30] The relevant parts of the definition in section 1 indicate that 'administrative action' means a decision, taken either by an organ of state or a person or body performing a public function, which 'adversely affects the rights of any person and which has a direct, external legal effect'. The definition does, however, exclude from its reach a number of actions including those related to the powers of the national, provincial and municipal executive. Chaskalson CJ's approach to the definitional requirements set by PAJA separates them into four parts.

[26] Id, at para 671.
[27] Id, at para 722.
[28] Id, at para 723.
[29] Id, at para 724.
[30] Sections 3 and 5 require further factors, relating to the effect of administrative action, to be present before PAJA applies. These are not relevant for present purposes.

i) Organs of state
Section 1 of PAJA assigns to 'organ of state' the meaning it is given in section 239 of the Constitution. That definition includes not only 'any department of state or administration in the national…sphere of government', but also 'any other functionary or institution exercising a public power or performing a public function in terms of any legislation'. Chaskalson CJ has no difficulty in concluding that both the Minister and the pricing committee are organs of state.[31]

ii) Action adversely affecting rights, with a direct external legal effect.
Chaskalson CJ similarly has no hesitation in concluding that the regulation of prices will adversely affect the rights of pharmacists and other persons involved in the pharmaceutical industry.[32] Although Chaskalson CJ does not go into any detail in considering the requirement of a 'direct, external legal effect', he does state that the regulations did have such an effect.[33] The judgment seems to suggest that a direct, external legal effect can be inferred from the fact that rights were adversely affected. It is not clear what the phrase means, exactly,[34] but it seems to flow from the judgment that, at least where rights are adversely affected, the requirement will have been met.

This part of Chaskalson CJ's judgment is concurred in explicitly by Langa DCJ[35] and O'Regan J.[36] In deciding that PAJA applies only to the narrow question raised in this case, Ngcobo J aligns himself with the reasons given by Chaskalson CJ for deciding that ministerial regulation-making generally is subject to PAJA.[37] Ngcobo J must be seen, therefore, to concur in this part of Chaskalson CJ's judgment as well. Van der Westhuizen J concurs in Ngcobo J's judgment.[38] Sachs J does not agree with the approach of Chaskalson CJ and Ngcobo J, except to a limited extent, and does not say anything about the 'direct, external legal effect' requirement; while the remaining five of the judges do not engage the definitional questions raised by PAJA at all. To the extent that this part of Chaskalson CJ's judgment is not controverted by other judgments, it must be seen as an authoritative statement on the issue.

iii) A decision
Having decided that the above requirements were met, Chaskalson CJ states that the regulations will be 'administrative action' for the purposes of PAJA if making regulations constitutes a 'decision' that is not excluded by subparagraphs (aa)-(ii) of the definition.[39] In deciding that a 'decision' was made by the Minister and the pricing committee, Chaskalson CJ reviews the majority's reasoning in the High Court.

That ministerial regulation-making is not explicitly referred to in PAJA's definition of 'decision' was important to the majority's conclusion that it does not constitute administrative action.[40] Chaskalson CJ

[31] *New Clicks CC* at para 121.
[32] Id.
[33] Id, at para 135.
[34] It has been pointed out that the phrase was imported into PAJA from German law at the eleventh hour of its drafting, and is not clearly defined in South African law. See Hoexter, *The New Administrative Law*, p 107; Pfaff and Schneider 'The Promotion of Administrative Justice Act from a German Perspective' (2001) *SAJHR* 59.
[35] *New Clicks CC* at para 843.
[36] Id at para 846.
[37] Id at para 422.
[38] Id at para 851.
[39] *New Clicks CC* at para 121.
[40] *New Clicks CPD* at para 48. A 'decision' is defined as 'any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to-
(a) making, suspending, revoking or refusing to make an order, award or determination;
(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
(c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
(d) imposing a condition or restriction;
(e) making a declaration, demand or requirement;
(f) retaining, or refusing to deliver up, an article; or
(g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly'.

does not agree with this view. On the plain meaning of the definition he concludes it is wide enough to cover the making of regulations. The definition refers to '*any* decision of an administrative nature' and to 'doing or refusing to do *any* other act or thing of an administrative nature'.[41] Another reason advanced by the majority in the High Court for its view was the exclusion of 'any decision taken, or failure to take a decision, in terms of section 4(1)' from the definition of administrative action. The majority held that the regulations affected the public and thus constituted a decision in terms of section 4(1) of PAJA. Chaskalson CJ points out two reasons that this view is wrong. First, section 4 only comes into play once the action at issue falls into the definition of administrative action to begin with.

> 'The fact that the choice of a particular procedure to be followed in terms of section 4(1) is not itself subject to review, does not provide any help in deciding what is or is not "administrative action".'[42]

Second, the majority was wrong as far as the content of the exclusion. It is not all administrative action affecting the public that is excluded from the definition of administrative action. Section 4(1) requires administrators taking action affecting the public to comply with the requirements of procedural fairness, but authorises them to decide how those requirements will be met. It is only this latter decision that is excluded from the definition of administrative action.[43]

iv) The exclusions

Subparagraph (aa) of the definition of administrative action excludes from that definition

> 'the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79 (1) and (4), 84 (2) (a), (b), (c), (d), (f), (g), (h), (i) and (k), 85 (2) (b), (c), (d) and (e), 91 (2), (3), (4) and (5), 92 (3), 93, 97, 98, 99 and 100 of the Constitution'.

Of the sections of the Constitution listed in the subparagraph, only section 85, dealing with the powers of the President and Cabinet is relevant. It is further relevant that only sections 85(2)(b)-(e) are listed in the exclusion. Section 85(2)(a) states that the President and Cabinet exercise executive authority by 'implementing national legislation except where the Constitution or an Act of Parliament provides otherwise'. In considering all of this, Chaskalson CJ quotes this passage from *President of the Republic of South Africa and Others v South African Rugby Football Union and Others:*

> '[O]ne of the constitutional responsibilities of the President and Cabinet Members in the national sphere (and premiers and members of executive councils in the provincial sphere) is to ensure the implementation of legislation. This responsibility is an administrative one, which is justiciable, and will ordinarily constitute "administrative action" within the meaning of s 33.'[44]

PAJA has to be construed consistently with section 33. If certain conduct is administrative action for the purposes of section 33, then it must be the case that it is administrative action for the purposes of PAJA. To the extent that PAJA is not capable of being read in such a way that it includes such conduct within its ambit, it is inconsistent with section 33 and unconstitutional. Chaskalson CJ makes this clear:

> 'If section 85(2)(a)…had not been omitted from the list of exclusions, the core of administrative action would have been excluded from PAJA, and the Act mandated by the Constitution to give effect to sections 33(1) and (2) would not have served its intended purpose. The omission of section 85(2)(a)…from the list of exclusions was clearly deliberate. To have excluded the implementation of legislation from PAJA would have been inconsistent with the Constitution. The implementation of legislation, which includes the making of regulations in terms of an empowering provision, is therefore not excluded from the definition of administrative action.'

Chaskalson CJ therefore holds that the making of regulations constitutes administrative action within the meaning of PAJA.

[41] *New Clicks CC* at para 128.
[42] Id at para 132.
[43] Id at para 131-132.
[44] 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 142.

Ngcobo J's judgment

While acknowledging that the question of PAJA's applicability has to be answered in this case, Ngcobo J prefers to turn his mind only to the question of the applicability of PAJA to the facts presented by the case. He does not decide, therefore, that PAJA applies to all instances of ministerial regulation-making, but only that it applies to the specific power to make regulations conferred by section 22G(2) of the Medicines Act.[45]

Ngcobo J starts with a description of the process required by section 22G(2). The process, he says, is unique:

> 'It is unique in the sense that it requires the Minister to make regulations "on the recommendation of the Pricing Committee." The recommendation of the Pricing Committee is therefore a jurisdictional fact for the exercise by the Minister of her power to make regulations. Section 22G(2) contemplates that the Minister will only make regulations if the Pricing Committee recommends them. Neither the Minister nor the Pricing Committee can act alone. They must act together.'[46]

Ngcobo J confines himself to considering the unique process of section 22G(2).His starting point is the construction given to 'administrative action' in section 33 of the Constitution. Where the Constitutional Court has given a construction to a concept used in the Constitution, and Parliament has enacted subsequent legislation giving effect to that concept, 'it is safe to assume that the legislature when using the concept in question intended it to be given the meaning which has been given to it' by the Constitutional Court.[47] Ngcobo J relies on a number of cases that construe the implementation of legislation as administrative action for the purposes of section 33.[48] The Medicines Act, he continues, requires the Minister and the pricing committee to act together in *implementing* the provisions of section 22G(2); and it is this specific requirement which is determinative in Ngcobo J's judgment:

> 'Viewed in isolation regulation-making authority may be said to be a legislative act. However, as pointed out previously, it is incorrect to view individually the component parts of what is essentially a single process. The regulation-making is as much part of the entire process as the recommendation of the Pricing Committee itself. One cannot excise this step from the rest of the process for the purposes of the operation of PAJA. The making of the recommendation by the Pricing Committee and the making of the regulations by the Minister are part of a process which, when viewed in its entirety, is, in my view, administrative.'[49]

Ngcobo J therefore leaves open the question whether ministerial regulation-making generally will amount to administrative action within the meaning of section 33 and PAJA. The specific and unique process contemplated in this case, though, means that the regulations made by the Minister on the recommendation of the pricing committee are reviewable under PAJA as 'administrative action'.

Sachs J's judgment

The essence of Sachs J's judgment is that PAJA is not generally applicable to subordinate legislation and that legislation of this sort should be controlled by the constitutionally embedded principle of legality. He does decide, however, that the fixing of the dispensing fee by the regulations in this case is an act of sufficient specifity to warrant review under PAJA. There are two levels on which Sachs J advances his argument. The first is the broad principle of legality; and the second is the specific application of PAJA to the fixing of the dispensing fee.

Sachs J advances three propositions in support of his position that subordinate legislation does not amount to 'administrative action' for constitutional purposes. The first is that section 33 has to be seen in the context of an expansive constitutional framework setting the standards of governmental action. '[S]ection 33

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[45] *New Clicks CC* at para 422.
[46] Id at para 441.
[47] Id at para 465.
[48] *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 27; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 142; *Permanent Secretary, Department of Education and Welfare, Eastern Cape, and Another v Ed-U-College (PE)* (Section 21) Inc 2001 (2) SA 1 (CC); 2001 (2) BCLR 118 (CC) at para 18; *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 45.
[49] *New Clicks CC* at para 471.

does not stand as a solitary bulwark against arbitrary or unfair exercises of public power.'[50] Governmental action, Sachs J suggests, is to be controlled not solely or even primarily by section 33, but by the principles and values that underlie this expansive framework. While it is certainly true that accountability and respect for fundamental rights are values inherent in the Constitution, as Sachs J notes,[51] this is not on its own sufficient reason to remove the control of public power from the scope of the right designed to ensure governmental compliance with these principles, and base such control directly on those values and principles. Given that there is a right in the Bill of Rights guaranteeing administrative justice, it is that right that should be applied wherever it is applicable. This part of Sachs J's argument leaves it open whether that right is actually capable of controlling the public power in question.

The second leg of the argument is that section 33 confers a right to administrative justice on individuals rather than the public at large. Further, the specific rights conferred, such as procedural fairness and the right to written reasons fit the notion of adjudicative justice for individuals.[52] Only subordinate legislation that adversely affects the rights of the public, Sachs J says, will be reviewable under PAJA. The only reason Sachs J does not subject the bulk of the regulations to scrutiny under PAJA is his view that they do not adversely affect rights.

The third argument that Sachs J advances rests on an interpretation of the text of PAJA itself. Examining several sections of PAJA, Sachs J concludes that there is no direct reference in PAJA to subordinate legislation.[53] The determinative question, though, 'is whether the absence of express reference in PAJA to subordinate legislation contradicts the required reach of the principles of section 33, or accurately reflects their limits.'[54] Sachs J notes that there are three routes to filling this lacuna in PAJA:

> 'The first would be to give section 33 the more expansive meaning attributed to it by Chaskalson CJ, and then stretch the language in PAJA to include subordinate legislation. The second would be to treat PAJA as unconstitutional to the extent that, without apparent justification, it excludes review of subordinate legislation. The third is to see no incongruency at all between section 33 and PAJA, but rather to view them both as being directed towards the well-focused objective of protecting the rights of individuals or relatively discrete groups in their dealings with the public authorities….I believe that the third approach is the one most consistent with the structure and values of the Constitution.'[55]

Conclusions on the application of PAJA

Langa DCJ and O'Regan J agree explicitly with Chaskalson CJ's judgment, while Van der Westhuizen J indicates his concurrence lies with Ngcobo J's judgment. Moseneke J's judgment, concurred in by four judges, does not decide whether PAJA applies to regulation-making or not, but assumes for the purposes of the judgment that it does. Sachs J decides that only the making of regulations relating to the dispensing fee falls within the purview of PAJA. Three judges therefore hold that PAJA applies generally to regulation-making, two hold that it applies only to the regulation-making process in this case, one holds it applies to a limited degree and five do not decide the issue.

Section 1 – Administrative action defined

The question of whether the definition of "administrative action" in section 1 of PAJA applies was avoided in the case of ***MEC: Department of Finance, Economic Affairs & Tourism, Northern Province v Mahumani*** **[2005] All SA 479 (SCA)** (see comments below under headings "Section 3 – Procedural fairness in administrative action affecting the public" and "Common-law review – Procedural fairness"). The case concerned the disciplinary hearing of an employee of the appellant. Resolution 2 of 1999 of the Public Service Bargaining Council contained the Disciplinary Code and Procedures for the Public Service. In terms of this Code neither employees nor the employer are to be legally represented at disciplinary hearings. The court said with reference to *Hamata and another v Chairperson,*

[50] Id at para 587.
[51] Id at para 588.
[52] Id at paras 596-597.
[53] Id at paras 599-607.
[54] Id at para 607.
[55] Id at para 608.

Peninsula Technikon Internal Disciplinary Committee and others 2002 (5) SA 449 (SCA), that it was unnecessary to decide if the conduct complained against constituted "administrative action" as it would make no difference to the outcome (at para 11).

***Greys Marine Hout Bay (Pty) Ltd and others v Minister of Public Works and others* [2005] All SA 33 (SCA)** (see below under heading "Section 3 – procedural Fairness in administrative action affecting the public", and "Section 6 – grounds of review") was an appeal against a High Court decision. The High Court case in this matter was discussed in the August/September 2004 edition of this newsletter. It is reported as ***Greys Marine Hout Bay (Pty) Ltd & others v Minister of Public Works & others* [2004] 3 All SA 446 (C).** In this case, although the court posted its criticisms of the definition of administrative action in PAJA, the definition was confronted head on. The court noted that the "question at the outset is whether the Minister's decision constitutes administrative action falling within the terms of PAJA." (at para 19) The court said:

> "What constitutes administrative action – the exercise of the administrative powers of the State – has always eluded complete definition. The cumbersome definition of that term in PAJA serves not so much to attribute meaning to the terms as to limit its meaning by surrounding it within a palisade of qualifications." (at para 21, footnotes omitted)

After considering the definition in section 1, the court went on to hold that guidance as to the scope and extent of the definition can be taken from section 33 of the Constitution:

> "At the core of the definition of 'administrative action' is the idea of action (a decision) 'of an administrative nature' taken by a public body or functionary. Some pointers as to what that encompasses are to be had from the various qualifications that surround the definition but it also falls to be construed consistently, wherever possible, with the meaning that has been attributed to administrative action as the terms is used in section 33 of the Constitution (from which PAJA originates) so as to avoid constitutional invalidity." (at para 22)

Against this background, the court went on to make the following comments about the definition:

> "While PAJA's definition purports to restrict administrative action to decisions that, as a fact, 'adversely affect the rights of any person', I do not think that literal meaning could have been intended. For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from the construction that has until now been placed on section 33 of the Constitution. Moreover, that literal construction would be inconsistent with section 3(1) [of PAJA], which envisages that administrative action might or might not affect rights adversely. The qualification, particularly when seen in conjunction with the requirement that it must have a 'direct and external legal effect', was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals." (at para 23, footnotes omitted)

The court indicated that it did not think there are grounds for distinguishing administrative action in terms of section 1of PAJA from administrative action in terms of section 33 of the Constitution. It held that even if the qualifications of section 1 do exclude from its ambit some acts that would qualify as administrative action under section 33, such acts were not in issue before the court (at para 28). Ultimately the appellate court agreed with the High Court that none of the appellants had shown that any of their rights had been compromised by unlawful administrative action (at para 30).

In ***Gold Fields Ltd v Connellan NO and others* [2005] 3 All SA 142 (W)** (see below under headings "Section 6 – grounds of review" and "Section 7(2) – Exhaustion of internal remedies") the parties were agreed that PAJA applied. The definition of administrative action was not in issue, and the court did not go into a discussion of the definition.

***Nala Local Municipality and Another v Lejweleputswa District Municipality and Others* [2005] 3 All SA 571 (O)** (see discussion below under heading "Section 1of the Constitution – The doctrine of legality") concerned an application to review the decision of the first respondent to appoint a commission of inquiry into alleged improprieties of the applicants. In terms of the Local Government: Municipal Systems Act, 32 of 2000, the second respondent has the power to investigate breaches of the Code of Good Conduct for Councillors. The applicants contended that the

meeting at which the first respondent (of which the second respondent is the Speaker) resolved to appoint such a commission was irregularly convened and that as a result, the second respondent acted unilaterally and unlawfully.

After concluding that the meeting of the first respondent was indeed unlawful (at para 10: see discussion below), Musi J, with whom Lombard J concurred, considered the question whether the conduct of the second respondent amounted to administrative action. The judge noted that the second respondent, as a natural person, fitted into part (b) of the definition, as action taken by a natural person "when exercising a public power or performing a public function in terms of an empowering provision" (at para 16). Counsel for the respondents submitted, first, that the second respondent was not exercising a public power or performing a public function, and secondly, that the action taken by the second respondent did not affect adversely the rights of any parties concerned, and could not be said to have a "direct, external legal effect" (at para 17). As to the first of these, the judge disagreed with counsel's submissions. In particular, the judge distinguished the case from *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC); 1999 (10) BCLR 1959 (CC). In that case, the judge said:

> "It was found that the function was part of the President's public policy responsibilities and not administrative. It surely cannot be argued that the speaker of a municipality can have any such policy functions. There was no suggestion moreover in this case that the second respondent's functions were anything other than administrative." (at para 18).

The judge then went on to consider the question of prejudice, a question which the considered in relation to whether the action complained of had a "direct, external legal effect". He concluded:

> "In my view, in the instant case, the applicants have shown that the decision in question was prejudicial not only for them but for the communities served by the two municipalities as well. In the first place, the remuneration of the committee members would have to be paid by the first respondent and no one else. The investigation being unauthorised, the resultant expenditure would be unauthorised expenditure. Secondly, the expenditure would unjustifiably diminish the coffers of the first respondent and indirectly that of the first applicant which is a contributor to the first respondent's budget. Thirdly, the whole exercise was unnecessary being a duplication of the work of the Provincial Auditor general. The funds to be expended could fruitfully have been used for service delivery to the communities involved. Lastly, there cannot be any doubt that the decision has a direct, external legal effect." (at para 20)

Section 3 – Procedural fairness in administrative action affecting the public

The case of ***Commissioner, South African Revenue Service v Hawker Aviation Services Partnership and Others* 2005 (5) SA 283 (T)** concerned a challenge to certain sections of the Value Added Tax Act, 89 of 1991, and a "judgment" taken administratively by the filing by the Commissioner with the clerk of a court a certificate of tax payable. The respondents argued that the procedures established by the Act are unconstitutional. In this case, income tax assessments had been raised against the respondents. The applicant gave to the respondent an undertaking that a revised assessment would be issued. No such assessment was issued, however, before judgment was taken. Patel J held that the undertaking had created a legitimate expectation on the part of the respondents that a revised assessment would be issued before a certificate of tax payable was filed with the clerk of the court. The failure to do so in this case amounted to a breach of a legitimate expectation (at para 57). The judge did not refer to PAJA directly at this stage, but it is worth pointing out that section 3(1) of PAJA states that administrative action that materially and adversely affects rights or legitimate expectations must be procedurally fair.

In interpreting section 40(2) of the VAT Act, the judge said that it is capable of two interpretations. The interpretation that preserved the right to procedural fairness must be preferred, the judge said.

> "Since s 40(2) is silent on the procedure to be followed, it lends itself to at least two possible constructions. It may be construed as permitting an ex parte application to the Registrar containing a mere statement that the amount of tax specified is due and payable, or that the application for the judgment must be preceded by reasonable notice

> to the taxpayer and that the statement must be one which is supported by an assessment upon which it is based. The former construction would make grave inroads into the taxpayers' fundamental rights to administrative justice, access to court and to property, (namely ss 33(1), 34 and 25(1) of the Constitution). If it is reasonably possible to do so, then the latter construction is the one to be preferred. Given the legislative silence on the issue, such a construction is manifestly possible. In any event, procedural fairness is a requirement of the Promotion of Administrative Justice Act." (at para 58)

The judge concluded that "[f]airness certainly requires notice of intended action and an opportunity to be heard".

In ***MEC: Department of Finance, Economic Affairs & Tourism, Northern Province v Mahumani* [2005] All SA 479 (SCA)** (see above under heading "Section1 – Administrative action defined", and below under "Common-law review – Procedural fairness), PAJA was not applied. The court nevertheless noted that the provisions of PAJA relating to procedural fairness in general correspond to the common law rules relating to disciplinary proceedings (at para 11). The case concerned whether it was fair or unfair to refuse an employee legal representation at disciplinary proceedings. The common law, the court held, did not confer an absolute right to be legally represented before such tribunals. But such proceedings must nevertheless be fair. Quoting from *Hamata and another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and others* 2002 (5) SA 449 (SCA), the court said (at para 11):

> "If, in order to achieve such fairness in a particular case legal representation may be necessary, a disciplinary body must be taken to have been intended to have the power to allow it in the exercise of its discretion unless, of course, it has plainly and unambiguously been deprived of any such discretion." (at para 23)

In ***Greys Marine Hout Bay (Pty) Ltd and others v Minister of Public Works and others* [2005] All SA 33 (SCA)** (see above under heading "Section 1 – Administrative action defined" and below under heading "Section 6 – grounds of review), the Supreme Court of Appeal (SCA) had cause to consider the wording of section 3(1) of PAJA. The case involved a decision by the first respondent to let out an undeveloped section of the quayside in Hout bay, owned by the state, to a small commercial fishing concern. The court remarked that section 3(1) confers a right of procedural fairness only in case of administrative action that materially and adversely affects rights or legitimate expectations (at para 30). The court considered whether the appellants had suffered an injury to either rights or legitimate expectations. As regards the former, the court said:

> "While 'rights' may have a wider connotation in this context, and may include prospective rights that have yet to accrue, it is difficult to see how the term could encompass interests that fall short of that. It has not been shown that any rights – or even prospective rights – of any of the appellants (or any other person) have been adversely affected by the Minister's decision. None of the appellants have any right to use the property that has been let, or to restrict its use by others, nor has any case been made out that their rights of occupation of their own premises have been unlawfully compromised." (at para 30, footnotes omitted)

The court noted that to the extent that other cases had recognised an interest falling short even of a prospective right (the court referred to *Bullock NO and others v Provincial Government, North West Province and another* 2004 (5) SA 262 (SCA)), what the courts had had in mind was a legitimate expectation. In this case, the court considered whether reliance could be placed on "a legitimate expectation, grounded in past practice, that the affected property would continue to be available for the use of the aggrieved party." The court held, however, that the appellants had not shown a "peculiar interest transcending those enjoyed by the public at large." (at para 31) The court continued:

> "Nor has it been shown that any of the appellants (or any other person) has a legitimate expectation that the property would be left vacant, or even that they would be consulted, or their comments invited, before it was let." (at para 32)

Section 6 – Grounds of review

In ***Greys Marine Hout Bay (Pty) Ltd and others v Minister of Public Works and others* [2005] All SA 33 (SCA),** the facts of which appear above under heading "Section 3 – Procedural fairness in administrative action affecting the public" (see also under heading "Section 1 – Administrative action defined"), the appellants submitted that the Minister's

actions had been arbitrary and irrational and fell to be set aside under section 6 of PAJA. The appellants' argument was that the Department of Public Works had "aligned itself" to a policy to leave certain property vacant. The Minister's decision to let that property, they argued, purported to vary that policy. The appellants argued the decision was therefore arbitrary and irrational. Further, they submitted that the decision failed to take into account the traffic congestion and inconvenience the occupation of the plot would cause (at para 34). The court held that the appellants had failed to establish proper grounds for impugning the decision:

> "I do not think the evidence established the existence of a policy on the part of Environmental Affairs – it showed no more than that Environmental Affairs held views from time to time as to the best use of the property – nor that Public Works aligned itself with any policy and even less that it adopted the views of Environmental Affairs as its own. Nor does the evidence establish that the Minister failed to take account of the consequences of the property being developed by [the third respondent]. If the appellants were entitled to seek to review the Minister's decision on the grounds set out in terms of section 6 of PAJA – a matter on which I express no opinion – there are no proper grounds for finding that the Minister's decision was arbitrary or irrational and there is no merit in those submissions." (at para 35)

Note: The court did not refer to any specific provisions in section 6. Had it done so, the provision dealing with arbitrary administrative action is **section 6(2)(e)(iv)**, while the provisions dealing with irrationality are in **section 6(2)(f)(ii)(aa)-(dd)**.

In ***Profmed Medical Scheme v Madumise NO and Another*** **[2005] 3 All SA 484 (T)** the question at issue was whether the first respondent, the chairperson of the Appeal Board of the Council for Medical Schemes, established in terms of the Medical Schemes Act, 131 of 1998, has the power in terms of the Act to call witnesses when deciding appeals to it. The applicant's Disputes Committee had taken a decision against one Govender, who then appealed to the second respondent. The applicant sought the review and setting aside of the Appeal Board's decision to call one Naidoo to give evidence before it, arguing that the second respondent has no such power in terms of the governing legislation. The applicant based this submission on an interpretation of section 50(9) of the Medical Schemes Act. In the alternative, the applicant argued that if the Appeal Board does have such a power, it is to be exercised sparingly.

The court did not agree. Patel J held that the correct construction of the legislation allowed the Appeal Board to call for evidence, and that the Board had done so in terms of the legislation, on the facts of this case (at para 26).

Note: The judge did not refer to any of the sections of PAJA in his decision. It is not clear if the case was pleaded in terms of PAJA by the applicant. However, the case could have been pleaded on the basis of **section 6(2)(a)(i)** of PAJA, which provides for the review of administrative action if the administrator who took the action "was not authorised to do so by the empowering provision".

In ***Gold Fields Ltd v Connellan NO and others*** **[2005] 3 All SA 142 (W)** (see under heading "Section 1 – Administrative action defined" and below under "Section 7(2) – Exhaustion of internal remedies"), the court quoted a passage from the Constitutional Court judgment in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 (4) SA 490 (CC) to the effect that section 6 of PAJA has cemented the interrelationship between PAJA, the common law and the Constitution:

> "The provisions of s 6 divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past. And the authority of PAJA to ground such causes of action rests squarely on the Constitution." (at para 25)

Section 6(2)(a)(iii) – Bias

Section 6(2)(a)(iii) allows review of administrative action if the administrator who took it was "biased or reasonably suspected of bias).

In ***Gold Fields Ltd v Connellan NO and others*** **[2005] 3 All SA 142 (W)** (see under heading "Section 1 – Administrative action defined" and below under "Section 7(2) – Exhaustion of internal remedies") the court had occasion to consider an allegation of bias on the part of an

administrator. The applicant was a company conducting gold mining operations in a number of countries. The third respondent, Harmony, made an offer to acquire the entire issued share capital of the applicant. The acquisition fell to be regulated by the Securities Regulation Panel (the SRP), the fourth respondent to the application. The first respondent was the Executive Director of the SRP at the time. In terms of the offer document drawn up by Harmony and approved by the SRP, the offer had to be made by Harmony within certain time periods. Harmony, however, appealed successfully to the SRP on a number of occasions for extensions of time. The applicant sought to have the decisions of the SRP and its Executive Director reviewed in this respect.

The court began its consideration of bias as a ground of review in PAJA with a review of case law. With reference to *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A), the court held that the "declared objectivity, honest diligence and integrity of the Executive Director is relevant to this consideration [of bias], but not decisive." (at 165c-d) The inquiry, the court went on, is wider than this. In the context of recusal applications, the court noted, the terms "apprehension of bias" and "suspicion of bias" have been used interchangeably. (at 165e) In determining whether an official is "reasonably suspected of bias", the court held that it is appropriate to consult authorities on recusal applications. (at 165f) The court then went on quote passages from *President of the RSA v SARFU* 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC) (at paras 37 and 48) and *South African Commercial Catering and Allied Workers Union and others v Irvin and Johnson (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC); 2000 (8) BCLR 886 (CC) (at paras 14-17). The court's conclusion was the following:

> "The wording used in section 6(2)(a)(iii) of PAJA is 'reasonably suspected of bias', a phrase similar to that used in the case[s] quoted in relation to recusal applications. The test stated in the present context is that the onus is on Gold Fields to show that, on the facts a reasonable person in the position of Gold Fields would reasonably apprehend or suspect that the Executive Director is biased against it." (at 167b-c)

Considering the facts of the case, the court concluded that the incidences raised by Gold Fields did satisfy the test for bias in section 6(2)(a)(iii) of PAJA. The court's summary of the facts and conclusions is as follows:

> "[I]n a scenario of ferocious opposition between the offeror and offeree, Gold Fields were denied, on a number of occasions, the opportunity to make submissions on a ruling that affected the very essence of the disputes between the parties; Gold Fields were not informed of the rulings sought and rulings made; the Executive Director was defensive of the rights of Harmony and was reluctant to exercise his powers in terms of section 440D of the Companies Act; Gold Fields were afforded an inordinately short period of time within which to make submissions; Gold Fields were left under a misapprehension of the SRP version of the alleged implied consent, and the Executive Director closed his mind to the issue around the meaning of rule 28.6.
>
> In a scenario where objectivity and independence is required of a Regulator, as is the case here, incidents like these should not arise. Because they did, the question inevitably arises why they happened. Is it required that one speculates about the reason they happened – due to pressure, bias, ignorance, etc? No. If a reasonable person in the position of Gold Fields reasonably comes to the conclusion that it happened due to bias, the test has been satisfied. All of the incidents mentioned favoured Harmony and prejudiced Gold Fields. No incident of the same nature has been pointed out which prejudiced Harmony and favoured Gold Fields. Consequently the conclusion of a reasonable suspicion of bias is an inevitable one." (at 167d-g)

The court also considered the argument from the respondents that, even if the Executive Director was biased, the Executive Committee of the SRP could not be found to be similarly biased. The court disagreed, holding that on the facts, the Executive Committee had aligned itself with the Executive Director, and could be said to "institutionally biased". (at 168c-169h)

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

In ***Gold Fields Ltd v Connellan NO and others* [2005] 3 All SA 142 (W)** (the facts appear above under the heading "Section 6(2)(a)(iii) – Bias". See also headings "Section 1 – Administrative action defined" and "Section 7(2) – Exhaustion of internal remedies") the applicant complained that the decision of the

first respondent was vitiated due to procedural irregularity. The court pointed to three incidences of irregularity that led to a finding of procedural unfairness. First, the alleged implied consent of the SRP to Harmony's application for an extension of time was not communicated to the applicant for some time; second, the applicant was asked to make submissions regarding a ruling by the SRP within a few hours; and third, the SRP was reluctant to exercise its powers in terms of section 440D of the Companies Act in the interest of resolving the dispute.

It was argued on behalf of the respondents that the Code and Rules of the SRP allow the executive Director of the SRP to make rulings after consulting only the party applying for the ruling. The court held that this approach is in general correct; but that in the circumstances of the case, involving an extremely hostile takeover bid,

> "it is hardly appropriate to argue that in the current scenario decisions could be taken and rulings made without allowing Gold Fields to make any submissions and vice versa, particularly so in respect of the highly contentious issues between the parties." (at 168b-c)

The highly publicised case of ***Governing Body, Mikro Primary School, and Another v Minister of Education, Western Cape, and Others*** **2005 (3) SA 504 (C)** (See below under headings "Section 7 – Procedure for review" and "Common-law review – Ultra vires") concerned 41 school children who had been turned away from the school over which the first applicant was the governing body. The school was an Afrikaans-medium school. After the refusal to admit the pupils, the second respondent, the Head of Education of the Western Cape Administration, issued a directive requiring the school to admit the pupils and offer instruction in English. An appeal against the directive was made to the first respondent, who dismissed it. The applicants sought an order from the court that the second respondent's directive was unlawful and fell to be reviewed and set aside. The applicants challenged the first respondent's decision to dismiss the appeal on two grounds listed in PAJA. One of these was that the action in dismissing the appeal was procedurally unfair.

The point of contention was that the first respondent had refused or failed to allow the applicants' attorneys to place before him further matter which would probably have been relevant to his decision. Despite requests to this end, without further notice to the applicants or their attorneys, and without affording the applicants the opportunity to amplify their appeal, the first respondent dismissed the appeal. The respondents' argument was that the urgency of the situation – schools were set to resume – did not allow for the expansion of the appeal. The court, however, indicated that especially where urgency is of the administrator's own making, urgency cannot be allowed to obstruct procedural fairness:

> "Had [the relevant information] been allowed to be placed before the first respondent before he had decided against the appeal, he might have decided it differently. He says, and it was argued, that he could not wait for this material because the schools were due to open on 19 January 2005, and finality was urgently required. The answer to this contention is that the urgency was of the Education Department's own making….Had the directive been issued at an earlier stage, the appeal against it could have been disposed of less summarily and with less haste. I find that the first respondent's action in dismissing the appeal as he did was procedurally unfair (s 6(2)(c) of the Promotion of Administrative Justice Act)." (at 522E-H)

This decision was confirmed on appeal in ***Western Cape Minister of Education and others v Governing Body of Mikro primary School*** **[2005] 3 All SA436 (SCA).**

Section 6(2)(d) – Material error of law

In ***Governing Body, Mikro Primary School, and Another v Minister of Education, Western Cape, and Others*** **2005 (3) SA 504 (C)** (see discussions above and below under headings "Section 7 – Procedure for review" and "Common-law review – Ultra vires") it was contended that the first respondent's decision in dismissing an appeal against action taken by the second respondent fell foul of section 6(2)(d) of PAJA because it was "materially influenced by an error of law". The court found in its judgment that the second respondent had acted unlawfully in its actions, and that the first respondent, in believing that the second respondent had not acted unlawfully, based his own decision on an erroneous view: "The error

of law was that the first respondent thought that the second respondent was entitled to issue the directive" that it did. (at 521E-F) This decision was confirmed on appeal in ***Western Cape Minister of Education and others v Governing Body of Mikro primary School*** **[2005] 3 All SA436 (SCA).**

Section 7 – Procedure for judicial review

Section 7(1) – Delay

In ***Ntame v MEC, Dept of Social Development, Eastern Cape; Mnyaka v MEC, Dept of Social Development, Eastern Cape; Mnyaka v MEC, Dept of Social Development, Eastern Cape*** **[2005] 2 All SA 535 (SE)** (See discussions under headings "Section 9 – Variation of time", "Item 23 of Schedule 6 to the Constitution", Common-law review – Delay", and "Common-law review – Exhaustion of internal remedies"), the applicants in all three cases sought to have the decisions of the respondent to all three applications, MEC for Social Development for the Eastern Cape, reviewed. In the first application the decision at issue was a decision by the respondent to suspend payment of a disability grant, and in the other two applications the administrative action complained against was the failure of the respondent to consider applications for payment of child support grants.

In all three cases the applicants applied for condonation in the form of an order directing that the 180-day period referred to in section 7(1) of PAJA be extended in terms of the provisions of section 9(1) of PAJA. Plasket J held, however, that since the cause of action in all three cases arose before PAJA came into force on 30 November 2000, PAJA did not apply. The common-law delay rule, rather than section 7(1) and section 9 of PAJA was held to govern the proceedings. (at para 14) (See the discussion below under the heading "Common-law review – Delay".)

Section 7(2) – Exhaustion of internal remedies

In ***Gold Fields Ltd v Connellan NO and Others*** **[2005] 3 All SA 142 (W)** (see comments above under headings "Section 1 – Administrative action defined" and "Section 6 – Grounds of review"), the court referred to the limitations section 7(2)(a) of PAJA imposes. The section provides:

> "Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted."

The court noted, in considering the impact of the section, that the applicant had not at any stage appealed against the decision of the first respondent in terms of the Code and Rules of the SRP. "The internal remedies provided for…have thus not been exhausted by Gold Fields." (at 155b)

Section 7(2)(c) of PAJA provides that applicants may be exempted from the obligation imposed by paragraph (a) to exhaust internal remedies where exceptional circumstances exist. The applicant argued that a reasonable perception of bias on the part of the first respondent and procedural unfairness create the exceptional circumstances that would justify exemption in terms of section 7(2)(c).

The court ultimately concluded that the applicant had succeeded in showing a reasonable apprehension of bias (at 167g) (see above under heading Section 6(2)(a)(iii)). In light of this finding, the court held that

> "Gold Fields has shown exceptional circumstances within the requirements of PAJA. The exceptional circumstances…are such that it is in the interests of justice that this court decides the issues placed before it." (at 170b)

Plasket J held in ***Ntame v MEC, Dept of Social Development, Eastern Cape; Mnyaka v MEC, Dept of Social Development, Eastern Cape; Mnyaka v MEC, Dept of Social Development, Eastern Cape*** **[2005] 2 All SA 535 (SE)** that PAJA did not apply since the causes of action had arisen prior to the coming into force of PAJA (see discussion above under headings "Section 7(1) – Delay" and "Common-law review – Delay"). Nevertheless, the judge considered the meaning of section 7(2) since the applicants in all three cases prayed for an order exempting them from the obligation created by the section to exhaust internal remedies before approaching a court for relief. The judge said, albeit in

obiter, that such an order would not have been necessary:

> "Even if the PAJA had applied, such an order would not have been necessary because section 7(2) merely defers the right of access until any internal remedy provided by any law has been exhausted, or the time period for utilising that internal remedy has expired. Section 7(2) certainly does not oust the jurisdiction of the courts when an applicant has chosen not to utilise an internal remedy or, for some other reason, has not done so. Such an interpretation of the section would most probably render it unconstitutional." (at para 30)

The judge then went to apply the common-law rule on the exhaustion of internal remedies (see discussion below under heading "Common-law review – exhaustion of internal remedies").

In ***Governing Body, Mikro Primary School, and Another v Minister of Education, Western Cape, and Others*** **2005 (3) SA 504 (C)** (see discussion above under headings "Section 6(2)(c) – Procedurally fair administrative action", "Section 6(2)(d) – Material error of law" and "Common-law review – Ultra vires"), it was argued by the respondents that the applicants had not exhausted internal remedies and were therefore precluded from seeking judicial review of the respondents' actions (at 515B-C). Thring J referred to paragraph (c) of section 7(2), noting that the obligation to exhaust internal remedies can be relaxed in "exceptional circumstances". The judge held:

> "That this question should be resolved with as little delay as possible is self-evident. Unfortunately, and due to nobody's fault, almost a month has already elapsed since these proceedings were launched. A fresh reference of this dispute to a body such as the Pan South African Language Board, or to arbitration, would inevitably result in further delay, and would undoubtedly exacerbate the problem, especially as the board referred to lacks the power to make decisions which are bonding on the parties who appear before it.…Such delay can be avoided if the matter is finalised here and now, after having been fully ventilated in this Court, as it has been. Moreover, this case has generated considerable public interest. It can safely be assumed, I think, that there are many people to whom the principal issues raised in this matter, and especially the central questions of language policy in public schools and the rights and powers of governing bodies, are of great moment. It would be regrettable if issues of such magnitude and importance were to be decided behind closed doors by a statutory board or by an arbitrator….To my mind, the cumulative effect of these factors constitutes 'exceptional circumstances' for the purposes of s 7 (2)(c) of the [PAJA], justifying the exemption of the applicants from any obligation which they might otherwise have been under to exhaust their internal remedies, and I deem such exemption, which s sought by the applicants, to be in the interests of justice."

On appeal at the SCA (***Western Cape Minister of Education and others v Governing Body of Mikro primary School*** **[2005] 3 All SA436 (SCA))**, the court agreed with this view. It said that in terms of section 7(2)(c), courts have a discretion whether to grant an exemption to the requirements of section 7(2)(a). A court of appeal is only entitled to interfere in the exercise of a discretion if the court a quo has exercised its discretion capriciously or upon a wrong principle of law, or has not brought an unbiased mind to bear on the matter (at para 25). In this case, no such circumstances justified the interference in the court a quo's decision.

The SCA did point to a further factor that justified the granting of the section 7(2)(c) exemption:

> "The second appellant, acting on an instruction by the first appellant, nevertheless implemented the decision without affording the respondents any opportunity to challenge the validity of the dismissal of its appeal to the first appellant. The first and second appellants thereby forced the respondents to launch the urgent application to the court a quo. This fact in itself constituted exceptional circumstances justifying the exemption of the first and second respondents as aforesaid." (at para 26)

Section 8 – Remedies

Gauteng Gambling Board v Silverstar Development Ltd and Others **2005 (4) SA 67 (SCA)** was an appeal against a decision in review proceedings before of the High Court. The respondent applied to the court a quo for review of a decision by the appellant refusing the former a license to operate gambling facilities in a casino in Gauteng. The court a quo did indeed find that the decision fell to be set aside; but instead of remitting the matter to the appellant for reconsideration, the court directed the appellant to grant a gaming license to the respondent (at para 1). The question on appeal before the SCA was whether the court

a quo was correct in assuming the decision-making functions of the appellant.

The court, per Heher JA, noted that the usual course for a court on review, if a decision falls to be set aside, is to remit the matter to the appropriate functionary. Occasionally, though, courts are justified in following a different course:

> "The power of a court on review to substitute or vary administrative action or correct a defect arising from such action depends upon a determination that a case is 'exceptional': s 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act 3 of 2000. Since the normal rule of common law is that an administrative organ on which a power is conferred is the appropriate entity to exercise that power, a case is exceptional when, upon a proper consideration of all the relevant facts, a court is persuaded that a decision to exercise a power should not be left to the designated functionary. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair." (at para 28)

Section 8(1)(c)(ii)(aa) of PAJA reads:

"The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders setting aside the administrative action and substituting or varying the administrative action or correcting a defect resulting from the administrative action".

Although courts have this power, Heher JA cautioned that situations where its use is appropriate are rare:

> "An administrative functionary that is vested by statute with the power to consider and approve or reject an application is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The court typically has none of these advantages and is required to recognise its own limitations. See *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) at paras [47] - [50], and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) (2004 (7) BCLR 687) at paras [46] - [49]. That is why remittal is almost always the prudent and proper course." (at para 29)

Taking into account all the facts of the matter, and considerations of fairness and reasonableness, the court reasoned that the court a quo was justified in the course it followed. The outcome that the court a quo's decision effected was inevitable. All the parties had an interest in matter's finality, and no purpose would be served by remitting it to the appellant:

> "Taking all the matters which I have referred to in the preceding paragraph into account no objection of substance enunciated in the 1998 memorandum remains unanswered. No countervailing or additional objections have been raised by the Board. The result is that the Court a quo was not merely in as good a position as the Board to reach a decision but was faced with the inevitability of a particular outcome if the Board were once again to be called upon fairly to decide the matter." (at para 39)

Section 9 – Variation of time

Section 9 of PAJA allows a court or the parties concerned to vary the time limits imposed by sections 5 and 7. The section arose briefly for consideration in ***Ntame v MEC, Dept of Social Development, Eastern Cape; Mnyaka v MEC, Dept of Social Development, Eastern Cape; Mnyaka v MEC, Dept of Social Development, Eastern Cape*** **[2005] 2 All SA 535 (SE)** (see comments above under "Section 7 – Procedure for judicial review" and below under "Item 23 of Schedule 6 to the Constitution"; "Common-law review – Delay" and "Common-law review – Exhaustion of internal remedies"). The applicants in the case applied for a variation of the time limits stipulated by section 7(1) in terms of section 9. Plasket J held, though, that since PAJA did not apply in the case, the issue of delay had to be resolved under the terms of the common law rather than section 9 of PAJA.

MISCELLANEOUS

Section 33 of the Constitution – the right to administrative justice

***Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC)** involved the confirmation of an order of invalidity made by the Pietermaritzburg High Court. That decision is reported as ***Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 25 (N)** and was discussed in the October 2004 – May 2005 edition of this newsletter. The constitutional validity of certain sections of Pound Ordinance 32 of 1947 (KZN) was considered by the Court. The sections authorise landowners to decide whether livestock has trespassed on their land, seize, destroy or sell the livestock without a court order. The High Court, in assessing these constitutional challenges, concluded 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 Constitutional Court held, though, that

> "PAJA cannot be used to evaluate a constitutional challenge. A constitutional challenge must be evaluated under s 33 of the Constitution. Generally, PAJA only comes into the picture when it is sought to review administrative action. Ordinarily anyone who wishes to review any administrative action must now base the cause of action on PAJA. This is so because '(t)he cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past'." (at para 99. The quote is taken from *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 at para 25)

In the same case, Ngcobo J considered whether the impugned provisions of the Ordinance amounted to administrative action as contemplated in section 33 of the Constitution. With reference to the judgment of *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC); 19999 (10) BCLR 1059 (CC), Ngcobo J held, for the Court, that the impugned provisions involve the exercise of a public power. "It follows therefore", the Court held, "that the exercise of the powers conferred by the impugned provisions constitutes administrative action." (at para 105)

The plaintiff in ***Dendy v University of the Witwatersrand and others* [2005] All SA 490 (W)** brought five claims, identified in the particulars of claim as claims A, B, C. D and E. Claims A and B were claims for damages in delict based on alleged violations of constitutional rights. Among the rights he claimed were violated by the defendants was the right to administrative justice in terms of section 33 of the Constitution. The defendants excepted to claims, arguing that no cause of action exits in the South African law of delict for violations of rights in the Bill of Rights.

The plaintiff applied to be appointed as one of the Chairs of Law in the School of Law at the first respondent. The Selection Committee for Chairs of Law did not appoint him. The plaintiff set out in Claim A a number of ways in which this failure allegedly amounted to a breach of the right to just administrative action in terms of section 33 or the common law (at para 8). These include an alleged failure to take relevant considerations into account and taking irrelevant considerations into account, and bias. The plaintiff argues in Claim B that the failure of the defendants to furnish him with reasons amounted to a breach of the right to just administrative action in terms of section 33(2) of the Constitution or alternatively the common law (at para 51). Claims C, D and E are not relevant to the discussion at hand.

Boruchowitz J ultimately upheld the exceptions in respect of Claims A and B. The judge therefore did not consider the argument that constitutional or common-law rights to administrative justice had been breached. The judge held that Claims A and B disclosed no cause of action because a clear distinction is drawn in our law between delictual and constitutional wrongs. The plaintiff's argument, essentially for the creation of a constitutional delict, could not be upheld (at para 23).

The judge did say in obiter in respect of Claim B that, although the claim disclosed no cause of action, the plaintiff could have applied for reasons for the refusal to appoint him to the Chair of Law under the constitutional right to be

furnished with reasons for administrative action. (at para 56)

Section 1 of the Constitution – the doctrine of legality

In ***Nala Local Municipality and Another v Lejweleputswa District Municipality and Others*** **[2005] 3 All SA 571 (O)** (see above under heading "Section1 – administrative action defined") the legality of a meeting at which a decision to investigate alleged irregularities of the applicants was taken by the first respondent was called into question. As a starting point, Musi J said the following:

> "In line with the principle of legality embodied in the Constitution and built into the Promotion of Administrative Justice Act 3 of 2000 (PAJA), administrative action not authorised by an empowering provision is unlawful and invalid and a person prejudiced by it may have it reviewed and set aside." (at para 9)

The structures, powers and functions of municipalities and their functionaries are set out in the Constitution in chapter 7, as well as in the Local Government: Municipal Structures Act, 117 of 1998 and the Local Government: Municipal Systems Act, 32 of 2000. in addition, the MEC for local government in the province promulgated by proclamation "standard rules and orders" regulating the procedures in the conduct of affairs of local government. The Judge considered the legality of the meeting in question against this statutory background:

> "the applicants contend that the notice calling the meeting did not comply with the requirements of clause 10(1) of the standard rules and orders. The clause stipulates that at least 48 hours notice must be given to each and every councillor. Particulars of the notice must be published in a newspaper and a copy placed on the municipal notice board. Most importantly, the duty to issue such notices vests in the municipal manager. In *casu*, it is the speaker [the second respondent] who issued the notices and he does not, in his answering affidavit, say whether he has complied with the above requirements. All that he says is that he has often issued similar notices in the past and does not see anything wrong with that. In other words, it does not bother him whether he complies with the standard rules and orders or not. He vaguely claims that these rules and orders were superseded by those contained in the Schedules to the Systems Act "to some extent", without elaborating.
>
> I have no hesitation in concluding that the meeting was irregularly convened and was therefore invalid." (at para 10)

Item 23 of Schedule 6 to the Constitution

Schedule 6 to the Constitution provides for a number of transitional arrangements. One of these had to do with administrative justice. Section 33 of the Constitution contains the right to administrative justice; but it also requires that national legislation give effect to that right. Until such time as that legislation was enacted, the operation of section 33 of the Constitution was suspended, and the provisions of item 23(2)(b) of Schedule 6 applied.

In ***Ntame v MEC, Dept of Social Development, Eastern Cape; Mnyaka v MEC, Dept of Social Development, Eastern Cape; Mnyaka v MEC, Dept of Social Development, Eastern Cape*** **[2005] 2 All SA 535 (SE)** (see above under headings "Section 7 – procedure for review" and "Section 9 – Variation of time" and below at "Common-law review – Delay" and "Common-law review – Exhaustion of internal remedies"), the cause of action arose prior to the coming into force of PAJA. The constitutional right to administrative action was thus to be found in item 23(2)(b) of Schedule 6, rather than section 33. The item provided that every person has the right to "procedurally fair administrative action where any of their rights or legitimate expectations are affected or threatened". The judge held in the light of item 23(2)(b) that the decision to suspend the payment of the disability grant in respect of the first application (the facts are set out above under the heading "Section 7(1) – Delay"), in circumstances where the applicant had not been afforded a hearing prior to the stopping of payment, was procedurally unfair and a nullity. (at para 34-35) Similarly, in respect of the second and third applications, the judge held that a failure to take a decision where a duty is cast on an administrative decision-maker to do so "constitutes a violation of the fundamental right to lawful administrative action." (at para 36)

Common-law review – Procedural fairness

The facts of ***MEC: Department of Finance, Economic Affairs & Tourism, Northern Province v Mahumani*** **[2005] All SA 479 (SCA)** appear above under the heading "Section 1 – Administrative action defined" (see also "Section 3 – Procedural Fairness in administrative action affecting public"). At issue was a decision by the officer presiding at a disciplinary hearing not to allow the respondent legal representation at that hearing. Although the Disciplinary Code and Procedures for the Public Service (the Code) states that neither the Department of Finance, Economic Affairs and tourism nor its employees shall be legally represented at disciplinary hearings, a provision in the Code allows departure from the Code in "appropriate circumstances". The presiding officer was of the view that no discretion was reposed in him to grant legal representation.

The court, per Patel AJA, disagreed. Its view of the matter was that there is "no justification for interpreting 'appropriate circumstances' in clause 2.8 [of the Code] so as not to include circumstances, which would render it unfair not to allow legal representation at a disciplinary enquiry" (at para 12). The court went on to conclude:

> "It follows that, if, on a conspectus of al the circumstances it would be unfair not to allow legal representation the provisions of clause 7.3(e) may in terms of clause 2.8 be departed from. The presiding officer erred in holding that he had no discretion to allow such a departure. The court *a quo*, therefore, correctly reviewed his decision and se it aside." (at para 13)

The court held finally that the matter had to be remitted to the decision-maker for reconsideration. The court emphasised that it is not for the court to take decisions on the part of the administrator entrusted with that decision:

> "In the face of the failure by the presiding officer to exercise the discretion which he had, this matter has to be referred back to him for consideration. It is not for this court to exercise the discretion which is reposited in the presiding officer unless there are good reasons for doing so."
>
> . . . .
>
> "It will be for the presiding officer to apply his mind to the need for legal representation after considering the circumstances of the case. The matter therefore will of necessity have to be referred to the presiding officer for him to exercise his discretion." (at paras 14 and 15)

Common-law review – Audi alteram partem

Buffalo City Municipality v Gauss and Another **2005 (4) SA 498 (SCA)** concerned expropriation in terms of the Expropriation Act, 63 of 1975, and Municipal Ordinance 20 of 1974 (Cape). The appellant in this case was a local authority, the powers of which to expropriate property are located in the Ordinance. In terms of the Ordinance, a local authority may expropriate only according to an established procedure. First, the authority must resolve by special resolution to expropriate the property; then a "preliminary notice" must be served on the owner of the land to be expropriated, informing him that any objections must be lodged within a set time period. After this process has been exhausted, and having communicated any objections to the Premier of the province, the authority must seek the approval of the Premier.

The respondent argued that this process is unlawful because he was not given prior notice of the appellant's intention to expropriate his property, and was thus not given an opportunity to make representations to the appellant before it took the decision to expropriate (at para 6). This argument was successful before the Eastern Cape division of the High Court. The court in this case, per Nugent JA, stated the common-law rule in this respect, relying on *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A), at 10G-I (footnotes omitted):

> "[W]hen a statute empowers a public official or body to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the latter has a right to be heard before the decision is taken…unless the statute expressly or by implication indicates the contrary".

The ordinance provides that once the preliminary notice is given, the owner of the property is restricted from alienating, disposing of or letting the land, or impairing its value in any way. The respondent submitted that the restrictions themselves prejudicially affect his rights, whether or not he was planning to alienate, dis-

pose of or deal with the property in any similar manner (at para 11). The court assumed in favour of the respondent that the restrictions did indeed affect his rights, and went on to determine if procedural fairness demanded that he be given a hearing before the decision was taken. The crux of the court's argument was that no unfairness arises from the absence of an opportunity to be heard by the municipality before it decided to expropriate the property, when the entire effect of the taking of the decision is to preserve the status quo:

> "Even when pressed to do so, the respondent's counsel could not tell us in what manner the temporary preservation of the status quo without a prior hearing operated unfairly upon the owner of property that was marked for expropriation. Nor can I see how it might operate unfairly. (I have already drawn attention to the fact that it had no adverse effect in the present case.) Its effect will be felt only by an owner who would otherwise have acted to alter the status quo; yet it is in precisely such a case that the ordinance and the public interest requires that he be prevented from doing so. It is not the preservation of the status quo itself that prejudices the owner but rather the fact that he might be dispossessed of his property, but he has a full opportunity to be heard before that occurs." (at para 14)

Bearing in mind that the principle of audi alteram partem must now be seen in the context of the Constitution (particularly section 33 and item 23(2)(b) of Schedule 6 to the Constitution which, the court pointed out, operated at all times material to this case), the court concluded that the respondent was not entitled to a hearing before the decision was taken, and that this situation was not unfair or unconstitutional:

> "Clearly the ordinance does not envisage a hearing before the local authority's decision is taken - that the owner is invited to object only after the decision is made necessarily means that no objection before then is contemplated - and this construction is not in conflict with the Constitution." (at para 15)

Common-law review – Ultra vires

In ***Governing Body, Mikro Primary School, and Another v Minister of Education, Western Cape, and Others*** **2005 (3) SA 504 (C)** (the facts appear above under heading "Section 6(2)(c) – Procedurally fair administrative action"; see also "Section 7 – procedure for review"), it was argued that the directive issued by the second respondent was unlawful in that the South African Schools Act, 84 of 1996, did not authorise to make an order of the nature he did. In considering the relevant legislation, Thring J held:

> "[E]ven using the machinery of s 22 of the Schools Act, it is not open to a provincial education department to override the properly established language policy of a single-medium public school by proclaiming it a parallel-medium school unless it has first been established that all the other public schools in the school district concerned, in which tuition is given in the other language, are full: see *Laerskool Middelburg en 'n Ander v Departementshoof, Mpumalanga Departement van Onderwys en Andere* 2003 (4) SA 160 (T) at 170I-171A, 171G and 173G." (at 520G-I)

The judge concluded that

> "the second respondent's directive of 2 December 2004 was unlawful. It follows that both his decision to issue the directive and his subsequent decision to put it into operation when the school opened on 19 January 2005 were likewise unlawful." (at 521D)

Important to the judge's reasoning was the fact that the legislation provided the respondents with remedies to achieve the outcome they sought. In this light, the route they chose to pursue the desired outcome, not authorised by the Act, could only be construed as unlawful.

Note: Although the judge did not refer to PAJA in deciding the unlawfulness point, PAJA makes provision for reviewing administrative actions if the administrator who took the action was "not authorised to do so by the empowering provision" (**section 6(2)(a)(i)**). This point could have been decided with reference to this provision of PAJA.

On appeal, in ***Western Cape Minister of Education and others v Governing Body of Mikro primary School*** **[2005] 3 All SA436 (SCA),** the court, per Streicher JA, agreed (at para 43).

Common-law review – Delay

In ***Ntame v MEC, Dept of Social Development, Eastern Cape; Mnyaka v MEC, Dept of Social Development, Eastern Cape; Mnyaka v MEC, Dept of Social***

Development, Eastern Cape **[2005] 2 All SA 535 (SE)** (see discussions under headings "Section 7 – procedure for review", "Section 9 – Variation of time", "Item 23 of Schedule 6 to the Constitution", "Common-law review – Exhaustion of internal remedies"), the court found that PAJA did not apply. It therefore considered whether the applicants' delay in launching proceedings was fatal to their application for review. All three applicants gave explanations for the delay in their founding papers. Plasket J held that while this is not usually necessary, in cases where the delay is "manifestly inordinate" it is incumbent on the applicant to explain the delay rather than wait for the respondent or the court to raise the issue of delay. (at para 18) The positions of the applicants and the explanations given by them for the delay are similar. They argue that they are uneducated people with little formal education, and only became aware of their rights when they approached an NGO, the Centre for Human Rights, Community Advice and Development. The causes of action in the cases arose in 1999 and 1997. The Notices of Motion in all the cases, however, were only issued on 8 November 2004. Plasket J's response to the delay was the following:

> The conclusion is inescapable, in my view, that the delays from the time of the causes of action arising to the launching of all three of these applications, when viewed objectively, are unreasonably long, even though, once the applicants were placed in contact with attorneys who could advise them and represent them, the steps that followed were taken with reasonable haste." (at para 24)

The judge nevertheless condoned the applicants' delay. Two things were persuasive in reaching this conclusion. The first was that section 34 of the Constitution enshrines a right to access to courts, and that, given the embedding of the doctrine of legality in our legal order by section 1(c) of the Constitution, courts should allow as few invalid exercises of public power to "slip through the net" as possible. (at para 25) Second, the judge bore in mind the fact that the applicants were seeking to protect the right to social assistance, through the right to administrative action. It was important in this respect that the applicants were drawn from the "very poorest within our society" and "have the least chance of vindicating their rights through the legal process". (at para 25)

Common-law review – Exhaustion of internal remedies

After deciding that PAJA did not apply in ***Ntame v MEC, Dept of Social Development, Eastern Cape; Mnyaka v MEC, Dept of Social Development, Eastern Cape; Mnyaka v MEC, Dept of Social Development, Eastern Cape*** **[2005] 2 All SA 535 (SE)** (see discussions under headings "Section 7 – procedure for review", "Section 9 – Variation of time", "Item 23 of Schedule 6 to the Constitution", "Common-law review – Delay"), Plasket J considered the obligation to exhaust internal remedies from the perspective of the common law. He stated the rule thus:

> "[The] rule is to the effect that the jurisdiction of the courts to review administrative action is only deferred if and to the extent that statute creates, either expressly or impliedly, an obligation to first exhaust internal remedies. The rule is applied sparingly because 'generally an aggrieved person…should have unrestricted access to the court to seek redress'. There certainly is no general rule that a 'person who considers that he has suffered a wrong is precluded from having recourse to a court of law while there is hope of extra-judicial redress' and the 'mere fact that the Legislature has provided an extra-judicial right of review or appeal is not sufficient to imply a intention that recourse to a court of law should be barred until the aggrieved person has exhausted his statutory remedies'." (at para 31, footnotes omitted)

The judge concluded that the failure of the applicants to exhaust internal remedies was not fatal to the application. Although section 10 of the Social Assistance Act, 59 of 1992 creates a right of internal appeal, there is no provision in the Act that places an obligation on an aggrieved person to exhaust this remedy. In any event, the period of 90 days prescribed in the Act for launching such an appeal was long past. (at para 32)

THE PROMOTION OF ACCESS TO INFORMATION ACT (PAIA)

In ***Trustees, Biowatch Trust v Registrar: Genetic Resources, and Others*** **2005 (4) SA 111 (T),** the applicants had made a number of requests for access to information held by the respondents. The second and third respondents were the Council established in terms of the Genetically Modified Organisms Act, 15 of 1997 and the Minister of Agriculture, while the

fourth to sixth respondents were companies involved in the research and development, production, and sale of genetically modified food items. The respondents objected to the requests from the applicants on the basis that they had neither exhausted internal appeal procedures before approaching the courts as required by PAIA, nor complied with the procedures stipulated in PAIA (at para 12).

The first question considered by the court, however, was whether PAIA applied at all at the times the requests were made by the applicants. All four of the requests made by the applicants were made between 17 July 2000 and 26 February 2001. PAIA was assented to by the President on 2 February 2000, but came into operation, upon proclamation to that effect in the *Government Gazette* only on 9 March 2001. The requests were thus made during what Dunn AJ called the "hiatus period" (at para 19). The "cardinal question", the judge said,

> "therefore had to be whether PAIA applies to the requests for information that Biowatch had made prior to PAIA's provisions coming into effect. Quite obviously, if PAIA did apply retrospectively to requests that had already been made by Biowatch, it would have been obliged to follow the procedures set out therein." (at para 27)

The judge went on to list five reasons why PAIA could not be read as having retroactive effect. First, there is a common-law presumption against the retroactive application of laws. As counsel for the amicus curiae pointed out, there was no clear legislative intent in PAIA that would support the reversal of this presumption (at para 28(a)). Second, if PAIA was applied retrospectively, requests for access to information that had been validly and properly in terms of the legislation operative prior to the coming into operation of PAIA, would be rendered invalid despite their validity at the time they were made (at para 27(b)). Thirdly, and similarly, if a request made prior to the coming into effect of PAIA was refused, the requester would be entitled to institute proceedings in terms of PAIA before it came into effect:

> "If the state of *litis contestatio* were to be reached after PAIA comes into effect, the requester could still be divested of his or her rights if they failed to follow the procedure set out in PAIA in the event of its being applied retrospectively". (at para 27(c))

Fourth, section 32 of the Constitution is intended to increase access to information. If it were to be applied retroactively in a way that frustrates that intention, it would be at odds with the Constitution (at para 27(d)). Fifth, section 2(1) and (2) of the National Environmental Management Act, 107 of 1998, enjoins the courts to interpret legislation relating to environmental matters in such a way that the spirit, purport, objects and principles of the Act are given effect to. To interpret PAIA in the manner contended for by the respondents would run contrary to the spirit and objects of the National Environmental Management Act.

The judge then pointed out that, although Currie and Klaaren, the authors of the *Promotion of Access to information Act Commentary* are of the view that the transitional arrangements set out in item 23(2)(a) of Schedule 6 to the Constitution remained in force during the hiatus period, the judge held, with reference to the SCA decision in Investigating Director of the Investigating Directorate: Serious Economic Offences and Another v Gutman NO 2002 (4) SA 230 (SCA), that section 32 of the Constitution operated in its unqualified form during this period (at para 29). In the result, Dunn AJ held:

> "Consequently, if one were to apply PAIA's provisions retrospectively in the manner contended for by the respondents those provisions would certainly interfere with Biowatch's then existing rights, because it would have the effect of rendering its requests for information invalid simply on the grounds that they were not made in terms of, and did not comply with, PAIA, which was not, in any event, in force at the time such requests were made. In turn, it would have the further effect of denying Biowatch the very right it was seeking to exercise under s 32 of the Constitution." (at para 29)

The judge held that PAIA did not have retroactive application, and that its provisions could not be applied retroactively to frustrate the applicants' requests for access to information.

Section 32 of the Constitution and PAIA

The applicants in ***Institute for Democracy in SA and Others v African National Congress and others*** **[2005] 3 All SA 45 (C)** aimed to

> "establish the principle that political parties, or at least those who hold seats in the national, provincial and local government legislatures, are obliged in terms of section 32(1) of the Constitution and section 11 or section 50 of the [PAIA] to disclose particulars of all the substantial donations they receive, on due and proper request for those particulars made by any adult South African citizen." (at para 1)

To this end, the applicants sought access to the donations records of respondents, the four largest political parties in the national legislature. The applicants argued that it was open to them to rest their cause of action either on the provisions of section 32 of the Constitution or of PAIA itself (at para 14). The respondents argued, however, that PAIA now provides the exclusive statutory regime governing access to information. They essentially argued that a party is not entitled to rely directly on the provisions of section 32. Griesel J referred to the opinion of Currie and Klaaren in the *Promotion of Access to Information Commentary* (2002) at pp 25-26. The judge said:

> "It appears, therefore, that the learned authors envisage a twofold role for section 32: the one to 'inform' the interpretation of PAIA; the other is to serve as a basis for a possible challenge to the constitutionality of PAIA for being either under-inclusive or over-restrictive.
>
> . . . .
>
> In these circumstances, it is clear to my mind that section 32 of the Constitution provides the underlying basis for and informs the rights contained in PAIA, but that the section itself is subsumed by PAIA, which now regulates the right of access to information." (at para 17)

Relying on Hoexter, *The New Constitutional and Administrative Law vol 2 – Administrative Law* (2002), who argues that parties must assert the right via PAIA (see p 57), the judge concluded:

> "In my view, therefore, section 32 is not capable of serving as an independent legal basis or cause of action for enforcement of rights to access to information in circumstances such as the present where no challenge is directed at the validity or constitutionality of any of the provisions of PAIA." (at para 17)

Section 32(1)(b) of the Constitution states that everyone has the right to access information held by another person if that information is necessary for the exercise or protection of any rights. This requirement is repeated in section 50(1)(a) of PAIA. ***Clutchco Pty (Ltd) v Davis 2005 (3) SA 486 (SCA)*** (see discussions below) concerned a request from the respondent for access to the appellant company's books of first accounting entry. The respondent held 30% of the share capital of the appellant, although he had been removed as a director of the company. He argued that the information was necessary for the exercise or protection of his right to know the actual financial position of the appellant company, as it would allow him to ascertain the true value of his shares (at para 4). The question arose as the scope of the words "any rights" in section 32(1)(b) of the Constitution and section 50(1)(a) of PAIA. The court, per Comrie AJA, however, chose not to decide this question:

> "We listened to argument about the meaning of the words 'any rights' in s 32(1)(b) of the Constitution and in s 50(1)(a), read with s 9 (objects) of the statute, and on whether the underlying right asserted by the respondent fell within the ambit of that phrase. In the view I take of the matter, however, it is unnecessary to express any views on those questions, and it would be wiser not to do so without the benefit of opposing argument." (at para 10)

Section 1 – Definitions

Depending on whether a body is a public body or a private body, different sections of PAIA apply in respect of attempts to access information held by such bodies. Both "public body" and "private body" are defined in section 1.

In ***Institute for Democracy in SA and Others v African National Congress and others*** **[2005] 3 All SA 45 (C)** (the facts appear above under the heading "Section 32 of the Constitution and PAIA") the applicants argued that political parties are institutionalised within the legal system, and play the constitutive role in the democratic process, the legislature and consequently the executive (at para 24). They are thus public bodies within the meaning of section 1 of PAIA, so the argument went. The respondents on the other hand emphasised the voluntary nature of political parties, and pointed to the fact that they are created and regulated by their own constitutions and not by legislation in arguing that they fall within the definition of private bodies for the purposes of section 1 of PAIA.

Griesel J adverted to the use of the word "when" in section 1 and the provisions of section 8 of PAIA in concluding that

> "the definition of 'public body' is a fluid one and that the division between the categories of public and private is by no means impermeable. The act recognises the principle that entities may perform both private and public functions at various times and that they may hold records relating to both aspects of their existence. The records being sought can thus relate to a power exercised or a function performed as a public body, in which even Part 2 of PAIA is applicable, or they can relate to a power exercised or a function performed as a private body, in which event Part 3 of PAIA is applicable. The language of section 8(1) makes it clear that, in respect of any particular record, a body must be either a 'public body' or a 'private body'; it cannot be both. Whether it is one or the other thus depends on whether the record 'relates to' the exercise of a power or performance of a function by that body 'as a public body' or 'as a private body'." (at para 29, footnotes omitted)

The judge concluded that since the records sought relate to the private fundraising activities of the various political parties, the matter had to be approached on the basis that, for purposes of their donation records, the respondents are "private bodies" and not "public bodies" (at paras 30-32).

Section 50 - Right of access to records of private bodies

PAIA requires in section 50(1)(a) that a person requesting information from a private body must show that the information is necessary for the exercise or protection of any rights. In ***Institute for Democracy in SA and Others v African National Congress and others*** **[2005] 3 All SA 45 (C)** Griesel J said that the right to access information held by private bodies is not a right that exists in the abstract. Rather, the inquiry is a factual one, and the person seeking the information must make out a case for it on the papers:

> "As was said in the *Cape Metropolitan Council case [Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and others* 2001 (3) SA 1013 (SCA); 2001 (10) BCLR 1026 (SCA)] the applicants must not only show what the rights for which they contend are that and what the information is, but they must also demonstrate how the information will assist them in exercising or protecting those rights." (at para 46)

The judge eventually concluded that on the evidence presented to him by the applicants, it was not possible to find that the documentation requested was required for the exercise or protection of their rights.

In ***Clutchco (Pty) Ltd v Davis*** **2005 (3) SA 486 (SCA)** (see comments above under heading "Section 32 of the Constitution and PAIA) the question arose whether the right asserted by the respondent, the protection or exercise of which the information requested was allegedly necessary for, fell with the ambit of section 50(1)(a). The court disposed of the matter on other grounds, and did not decide the question.

> The underlying right which the respondent asserts is his right as a shareholder to value his shareholding in order to fix an appropriate selling price. I shall assume, without deciding, that the right is a right within the compass of Part 3 of the statute." (at para 11)

In deciding the matter, Comrie AJA said for the court that the respondent had failed to establish that the information requested was necessary for the exercise or protection of his rights:

> "In enacting PAIA, Parliament could not have intended that the books of a company, great or small, should be thrown open to members on a whiff on impropriety or on the ground that relatively minor errors or irregularities could have occurred. A far more substantial would be required." (at para 17)

Section 78 – Exhaustion of internal remedies

It was held in ***Trustees, Biowatch Trust v Registrar: Genetic Resources, and Others*** **2005 (4) SA 111 (T)** (see discussion above and below under heading "Chapter 4 Part 2 – refusal of access to information") that PAIA did not operate retroactively. The judge nevertheless considered the argument of counsel for the fourth respondent that rights of access to information accrued during the hiatus period and that the coming into effect of PAIA did not affect this right. No unfairness could be found, counsel for the fourth respondent submitted, "in applying PAIA to all applications for access to information initiated after its commencement" (at para 31). If PAIA was applicable, then, the applicant had failed to exhaust internal remedies as required by section 78, and

the application was premature. Dunn AJ's response was the following:

> "My earlier finding to the effect that the provisions of PAIA cannot - indeed should not - be applied retrospectively so as to render any of Biowatch's requests for information invalid solely because they did not comply with PAIA, does not entirely dispose of Mr Wilson's latter, not entirely unattractive, argument. After all, Biowatch's fourth request was only made on 26 February 2001, ie some eleven days prior to PAIA coming into operation. Since internal appeals have to be lodged within 60 days, it would have been possible for Biowatch, if it was indeed obliged to follow the internal appeal route, to have done so. The complete answer to this argument on behalf of the first to third respondents and Monsanto is this: s 78 of PAIA only requires a requester or third party to exhaust 'the internal appeal procedure against a decision of the information officer of a public body provided for in s 74'. (My emphasis.) Section 74(1) of PAIA in turn only makes provision for an internal appeal against a 'public body' as contemplated in para (a) of the definition of that expression in s 1 of PAIA. The Registrar and the Council are clearly not public bodies of the kind contemplated in para (a) of that definition." (at para 32, footnotes omitted)

The judge concluded that the section did not constitute an obstacle to the relief claimed by the applicants.

Section 82 – Relief

Section 82 of PAIA authorises a court to grant any order that is just and equitable in the circumstances. In ***Institute for Democracy in SA and Others v African National Congress and others*** **[2005] 3 All SA 45 (C)** (see discussions above in this section), Griesel J held that in light of the evidence presented by the respondents, the question of whether funding of political parties should be made public is a complex policy issue best left to the legislature (at para 54). It would not therefore have been just and equitable to grant the relief claimed by the applicants.

Chapter 4 Part 2 – Refusal of access to information

In ***Trustees, Biowatch Trust v Registrar: Genetic Resources, and Others*** **2005 (4) SA 111 (T)** (see above under headings "Promotion of Access to Information Act (PAIA)" and "Section 78 – Exhaustion of internal remedies"), the fourth to sixth respondents relied on the regime provided in chapter 4 part 2 of PAIA to justify refusal of access to the information requested by the applicants. In this regard the judge pointed out that

> "The right of access to information is not an absolute right and it has to be balanced with justifiable governmental and private concerns for maintaining confidentiality of certain information." (at para 39)

Dunn AJ went on to consider the retrospectivity of this part of PAIA:

> "I stated earlier that the provisions of PAIA cannot be applied retrospectively to nullify the validity of Biowatch's requests for information. But I am not convinced that it cannot be applied retrospectively to the degree that the Registrar would be entitled to rely on the provisions of ch 4 of Part 2 thereof as grounds for refusal of access to the records sought." (at para 40)

The judge concluded that since the applicant never had an absolute right of access to information under section 32(1)(a) of the Constitution, it would be unfair if the respondents were precluded from justifiably refusing access to the information sought. Since PAIA was enacted to give effect to the rights in section 32, he judge held that

> "it would not be unfair to Biowatch, or for that matter any of the other parties involved in this application, if the grounds for refusal of access to records contemplated in ch 4 of Part 2 of PAIA were to find application. I say that it will not be unfair to Biowatch, because it never had any absolute right of access to information. At best its right for access to information was subject to the general limitation clause in s 36 of the Constitution. Obviously the onus of justifying such a limitation would be on the party who seeks to limit the right. The same applies to PAIA, because the burden of establishing that the refusal of a request for access is justified rests on the party claiming the refusal. The retrospective application of PAIA to the degree indicated also promotes even-handedness in the operation of the law and avoids the difficulty of undertaking the balancing exercise crafted in the provisions of ch 4 of Part 2 of PAIA.
>
> In view of these considerations, I am of the view that the Registrar would be entitled to rely on the provisions of ch 4 of Part 2 of PAIA to refuse access to any record - if he were honestly and bona fide of the opinion that such a refusal is justified - on the grounds contemplated in ch 4 of Part 2 of PAIA: Provided, of course, that he would not

be entitled to do so merely because Biowatch's requests for information were not made in the form or in the manner prescribed in PAIA." (at paras 40-41, footnotes omitted)

The judge made an order consonant with the views expressed in para 41 of the judgment.

ARTICLES AND REVIEWS

E Bray: "Legal perspectives on global environmental governance: South Africa's Partnership role" (2005) vol 68 n 2 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 210 (part 1) and (2005) vol 68 no 3 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 357 (part 2). The article investigates how the law provides a framework for the goals of environmental governance: sustainable development, intra- and intergenerational equity, alleviation of poverty and improvements in quality of life. The article examines how the law can regulate the relationship between human beings and their environment. The "environment" in this sense embraces both the natural environment (renewable and non-renewable resources) and the human environment (human-made and socio-cultural environment).

A Pillay: "Reviewing reasonableness: an appropriate standard for evaluating state action and inaction" (2005) vol 122 no 2 *South African Law Journal* 419. One of the most important issues facing administrative law, the article points out, is the role of the courts in constitutional democracy. The present constitutional climate requires courts to develop a theory of deference that introduces some level of variability into the way in which state action is scrutinised by the courts. The article explores this theme in respect of the doctrine of legality under the Constitution, reasonableness, socio-economic rights, and delictual claims for unreasonable state omissions.