Introduction

Two separate issues regarding the relationship between administrative law and labour law have arisen in South African law in recent years. The first is whether the Promotion of Administrative Justice Act 3 of 2000 (PAJA) applies to employment decisions in the arena of public sector or government employment, and the second is whether decisions of the Commission for Conciliation, Mediation and Arbitration (CCMA), established in terms of the Labour Relations Act 66 of 1995 (LRA), are reviewable by the courts on the basis only of the grounds of review set out in the LRA, or if these decisions amount to administrative action and are reviewable on the more extensive grounds of review set out in PAJA. The contrasting responses of the high courts, Labour Court, Labour Appeal Court (LAC) and the Supreme Court of Appeal (SCA) to these issues were considered in a PAJA Newsletter Special Issue published alongside the 8th Edition of the PAJA Newsletter. Since the publication of the Special Issue, the Constitutional Court has considered both of the issues. This special section of the 9th Edition of the PAJA Newsletter considers the views of the Constitutional Court in regard to each of these issues.

1 Public sector employment decisions as administrative action for the purposes of PAJA - Chirwa v Transnet Ltd and others [2007] JOL 21166 (CC)

The Constitutional Court addressed each of these issues in Chirwa v Transnet Ltd and others [2007] JOL 21166 (CC). The matter involved the dismissal of Ms Chirwa from the employ of Transnet Ltd. She complained against her dismissal first in terms of the LRA, and aired her grievance in conciliation proceedings before the CCMA. Following the failure of the CCMA to resolve the issue, instead of proceedings to arbitration before the CCMA and ultimately to the Labour Court in terms of the LRA, Ms Chirwa approached the High Court seeking administrative review of Transnet's decision to dismiss her. The essence of her complaint was that one Mr Smith acted both as complainant against her work performance as well as adjudicator of her disciplinary hearing, and that this infringed administrative justice rights to procedural fairness. The crisp questions raised by this approach were whether the High Court had jurisdiction to hear Ms Chirwa's complaint, and whether Transnet's decision constituted administrative action within the ambit of PAJA. Three judgments were written in the SCA decision. All three judgments held that the High Court had jurisdiction to hear the matter. Mthiyane JA (Jafta JA concurring) concluded that the decision did not amount to the exercise of a public power and did not therefore satisfy the requirements of the definition of administrative action; Conradie JA found that the decision did amount to administrative action but held that labour law applied to the dispute and left no room for the principles of administrative law; and Cameron JA (Mpati DP concurring) found that the decision amounted to administrative action and should be reviewed as such. In the

There are three base on which courts have decided the issue of whether PAJA applies to public sector employment decisions. The first is the view that employment decisions are a purely private affair, which entail no element of public power. The second, related consideration, is that a public sector employment decision is not the exercise of a public power if the source of the power is contractual rather than statutory. These two considerations go directly to the definition of administrative action as it is laid out in PAJA. The third basis of decision has considered whether administrative law should apply to public sector employment decisions in light of the fact that the field is already covered by the LRA and the body of labour law.
Constitutional Court, three judgments were again written: judgments by Skweyiya J and Ngcobo J together constitute the majority (both judgments were concurred in by the same majority of judges), and a minority dissent written by Langa CJ concurred in by Mokgoro J and O'Regan J.

(a) Skweyiya J's judgment

Skweyiya J's judgment turned on jurisdictional considerations. It was argued on behalf of Ms Chirwa that the High Court was the appropriate forum to hear the matter since, in terms of section 157(2) of the LRA, the High Courts have 'concurrent jurisdiction' with the Labour Courts 'in respect of any alleged or threatened violation of any fundamental right' entrenched in the Bill of Rights. Section 157(1) of the LRA, on the other hand, confers exclusive jurisdiction on the Labour Courts in respect of all matters 'that are to be determined by the Labour Court' in terms of the LRA or any other legislation. Skweyiya J considered Ms Chirwa's claim in light of this framework. Important to his reasoning was the characterisation of Ms Chirwa's challenge to her dismissal as a failure to comply with procedures set out in the LRA:

"Ms Chirwa's complaint is that Mr Smith "failed to comply with the mandatory provisions of items 8 and 9 of Schedule 8 to the LRA." Schedule 8 contains the Code that sets out guidelines that must be taken into account by "[a]ny person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure" [section 188(2) of the LRA]." (para 61)

Skweyiya J then pointed out that unfair dismissals and unfair labour practices are dealt with by the provisions of the LRA, that section 188 provides that a dismissal is unfair unless the employer can demonstrate that the dismissal was procedurally fair and supported by fair reasons, and that item 9 of Schedule 8 to the LRA sets out the guidelines for dismissal on cases of poor work performance (para 62). Skweyiya J therefore concluded:

"This is a dispute envisaged by section 191 of the LRA, which provides a procedure for its resolution: including conciliation, arbitration and review by the Labour Court. The dispute concerning dismissal for poor work performance, which is covered by the LRA and for which specific dispute resolution procedures have been created, is therefore a matter that must, under the LRA, be determined exclusively by the Labour Court. Accordingly, it is my finding that the High Court had no concurrent jurisdiction with the Labour Court to decide this matter." (para 63)

Skweyiya J dismissed the appeal on the basis of jurisdiction alone. On the administrative law question raised by the matter, he aligned himself with both Conradie JA in the SCA (para 44) and Ngcobo J's judgment (para 73). He followed the line that the decision of Administrator, Transvaal, and Others v Zenzile and Others 1991 (1) SA 21 (A), the case on which Cameron JA relied in the SCA in holding that the dismissal was the exercise of a public power and amounted to administrative action, had been decided in a statutory context in which public sector employees enjoyed no labour rights, and that, since the LRA had extended labour rights to public sector employees, the principles of administrative law no longer applied (paras 38-42).

Both Langa CJ and Ngcobo J found that the matter could not be disposed of purely on the basis of jurisdiction. Langa CJ began by pointing out two flaws in Skweyiya J's approach. The first was that Skweyiya J's conclusion in regard to jurisdiction rested on a flawed assessment of the case as pleaded by Ms Chirwa:

"According to Skweyiya J, "Ms Chirwa's complaint is that Mr Smith 'failed to comply with the mandatory provisions of items 8 and 9 of Schedule 8 to the LRA.'" I take a different view of the applicant's claim. While the quoted sentence does indeed appear in the applicant's submissions, it forms only a small part of her argument. The bulk of her submissions were devoted to arguments based squarely on PAJA. Firstly, she contends that her dismissal is administrative action as understood by PAJA. In addition, her substantive complaints were that the alleged administrative action contravened: (a) section 3(2)(b) of PAJA for failing to provide adequate notice; (b) section 6(2)(a)(iii) of PAJA because the administrator was biased; and (c) section 3(3)(a) of PAJA because she was prevented from obtaining assistance or representation. The reference to items 8 and 9 is used solely to bolster a further argument that her dismissal also violated sections 6(2)(b) and 6(2)(f)(i) of PAJA. These sections provide for the review of actions that are not permitted by the empowering provision or contravene another law.

While that argument alone might have been construed as a disguised reliance on the LRA, in the broader context of her argument, I do not believe that is a fair or correct characterisation. It should be added that it was not a characterisation urged upon us by the applicant's counsel in argument;
nor one adopted in any of the three judgments in the Supreme Court of Appeal, nor in the High Court judgments. In my view, it is incorrect.

Most of my disagreement with the judgment of Skweyiya J flows from this mischaracterisation. It seems clear to me that, evaluated as a whole, the applicant’s complaint is that her dismissal should be evaluated in terms of PAJA, not the LRA. Whatever we think of the wisdom of her election to avoid the specialised provisions of the LRA, we must evaluate the claim as it was presented to us.’ (paras 157-59, footnotes omitted)

The second flaw Langa CJ pointed out was a logical one. Ms Chirwa’s claim was that Transnet’s action in dismissing her amounted to administrative action, and could be reviewed as such. The jurisdiction of the High Court, Langa CJ pointed out, could not depend on the correctness of this claim:

‘The determination of whether the dismissal does constitute administrative action is part of the merits of the claim, not a jurisdictional requirement. The finding, however, rests on the case as pleaded by Ms Chirwa. She formulated her case on the basis of PAJA, and a court must assess its jurisdiction in the light of the pleadings. To hold otherwise would mean that the correctness of an assertion determines jurisdiction, a proposition that this Court has rejected [in Fraser v ABSA Bank Ltd (National Director of Public Prosecutions as Amicus Curiae) 2007 (3) SA 484 (CC)]. It would also have the absurd practical result that whether or not the High Court has jurisdiction will depend on the answer to a question that the Court could only consider if it had that jurisdiction in the first place. Such a result is obviously untenable.’ (para 169, footnotes omitted)

Although Ngcobo J agreed with Skweyiya J’s conclusions in regard to jurisdiction (para 125), and is to that extent subject to the same criticism made of Skweyiya J by Langa CJ, Ngcobo J did address the administrative law question, and differed in his conclusions to those reached by Langa CJ. Consideration of both of these judgments follows.

(b) Ngcobo J’s judgment
Ngcobo J began by noting that what has divided the approach of the courts on the issue of whether public sector employment decisions attract principles of administrative law is “disagreement over whether the decision of a public entity to dismiss an employee should be characterised as the exercise of a public power” (para 129). After reviewing the views and reasoning of the courts below, Ngcobo J took account of Langa CJ’s view that the power exercised by Transnet in this matter was not public since it was sourced in contract (para 137). Ngcobo J differed from this opinion:

‘Neither the Supreme Court of Appeal nor the High Court considered the proper cause of action. They approached the matter on the footing that there was an overlap in the grounds of review under the common law, ECA and PAJA. It is apparent that the decision of this Court in Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others [2004 (4) SA 490 (CC)] was not drawn to the attention of the courts below. By the time the matter reached this Court, however, the applicant had made up its mind; it relied on PAJA, in particular, on subsections 6(2)(b), 6(2)(e)(iii) and 6(2)(i). It is necessary to address this issue and put in context the provisions of section 36 of ECA which make provision for a person aggrieved by a decision made under ECA to approach a high court for review.

However, Ngcobo J proceeded to argue that Transnet’s decision, although correctly characterised as the exercise of a public power, could not properly be called an administrative action since the source of the power was contractual:

‘The subject matter of the power involved here is the termination of a contract of employment for poor work performance. The source of the power is the employment contract between the applicant and Transnet. The nature of the power involved here is therefore contractual. The fact that Transnet is a creature of statute does not detract from the fact that in terminating the applicant’s contract of employment, it was exercising its contractual power. It does not involve the implementation of legislation which constitutes administrative action. The conduct of Transnet in terminating the employment contract does not, in my view, constitute administration. It is more concerned with labour and employment relations. The mere fact that Transnet is an organ of State which exercises public power does not transform its conduct in terminating the applicant’s employment contract into administrative action. Section 33 is not concerned with every act of administration performed by an organ of state. It follows therefore that the conduct of Transnet did not constitute administrative action under section 33.’ (para 142)
did not constitute administrative action precisely because it was made in terms of the contract of employment. In any case, Ngcobo J goes on to give another reason for holding that Transnet’s decision did not constitute administrative action. This reason is consistent with the approach adopted in the SCA by Conradie JA:

‘[T]he line of cases which hold the power to dismiss amounts to administrative action rely on Zenzile. This case and its progeny must be understood in the light of our history. Historically, recourse was had to administrative law in order to protect employees who did not enjoy the protection that private sector employees enjoyed. Since the advent of the new constitutional order, all that has changed. Section 23 of the Constitution guarantees to every employee, including public sector employees, the right to fair labour practices. The LRA, the Employment Equity Act [55 of] 1998, and the Basic Conditions of Employment Act [75 of] 1997, have codified labour and employment rights. The purpose of the LRA and the Basic Conditions of Employment Act is to give effect to and regulate the fundamental right to fair labour practices conferred by section 23 of the Constitution. Both the LRA and the Basic Conditions of Employment Act, were enacted to give effect to section 23, now govern the public sector employees, except those who are specifically excluded from its provisions. Labour and employment rights such as the right to a fair hearing, substantive fairness and remedies for non-compliance are now codified in the LRA. It is no longer necessary therefore to treat public sector employees differently and subject them to the protection of administrative law.

In my judgement labour and employment relations are dealt with comprehensively in section 23 of the Constitution. Section 33 of the Constitution does not deal with labour and employment relations. There is no longer a distinction between private and public sector employees under our Constitution. The starting point under our Constitution is that all workers should be treated equally and any deviation from this principle should be justified. There is no reason in principle why public sector employees who fall within the ambit of the LRA should be treated differently from private sector employees and be given more rights than private sector employees. Therefore, I am unable to agree with the view that a public sector employee, who challenges the manner in which a disciplinary hearing that resulted in his or her dismissal, has two causes of action, one flowing from the LRA and another flowing from the Constitution and PAJA.’ (para 148-49)

Ngcobo J concluded that Transnet’s decision to dismiss Ms Chirwa did not constitute administrative action as contemplated by section 33 of the Constitution, and there was accordingly no need to consider separately the application of PAJA (para 150).

(c) Langa CJ’s judgment

In addressing the approach to jurisdiction taken by Skweyiya J, Langa CJ relied on what he described as an important principle:

‘Both PAJA and the LRA protect important constitutional rights and we should not presume that one should be protected before another or presume to determine that the “essence” of a claim engages one right more than another. A litigant is entitled to the full protection of both rights, even when they seem to cover the same ground. I agree with Cameron JA that, while it may be possible for the legislature to prefer one right over another, it must do so much more explicitly than it has in the LRA and PAJA... The implication is that there is no constitutional reason to prefer adjudication of a claim that may simultaneously constitute both a dismissal and administrative action, under the LRA rather than under PAJA. I should add that the legislature could resolve any potential problems of duplication by conferring sole jurisdiction to deal with any disputes concerning administrative action under PAJA arising out of employment upon the Labour Court. So far the legislature has not chosen this route.’ (para 175)

In taking this view, Langa CJ rejects the view that the principles of administrative law can be ousted, where they would otherwise apply, simply by the application of labour law principles. The issue before the court - ‘whether the dismissal of Ms Chirwa by Transnet constituted administrative action within the meaning of section 33 of the Constitution and PAJA’ (para 179) - could not be answered simply by asserting that the matter would be more suitably resolved through the application of labour law.

Against this background, Langa CJ went on to consider whether Transnet’s decision met the definitional requirements of administrative action set out in section 1 of PAJA. He held that because the decision had been taken entirely in terms of the contract of employment, where no legislative provision in any legislation provided for the appointment and dismissal of persons in the position of Ms Chirwa, the decision had not been taken ‘in terms of legislation' (paras 182-84). This was sufficient on its own to justify a conclusion that Transnet’s decision did not amount to administrative action (para 185). Langa CJ nevertheless went on to consider whether the power could be considered ‘public’. He relied on Cape Metropolitan Council v Metro Inspection Services (Western
Cape) CC and Others 2001 (3) SA 1013 (SCA) for the proposition that a public entity does not exercise public power when it gains no additional advantage from its public position (para 187). The power Transnet has over its employees, he said, 'flows merely from its position as an employer and would be identical if it had been a private company' (para 187). A second factor Langa CJ considered was whether the exercise of the power had any significant impact on the public. The fact that it did not, in his view, suggested that the power exercised should not be characterised as public.

(d) Conclusion
Langa CJ took the view in this matter that the determination of whether an employment decision by a public sector employee amounts to an administrative action depends on the facts. He found in this case that Transnet's decision did not constitute an administrative action, but noted that his reasoning 'does not entail that dismissals of public employees will never constitute "administrative action" under PAJA.' (para 194) In this important regard he differed from Skweyiya J and Ngcobo J, whose conclusions do entail that public sector employment decisions will never constitute administrative action. Skweyiya J and Ngcobo J constituted the majority in this case. Therefore, the principle to emerge from the Constitutional Court in this regard is that public sector employment decisions will be governed exclusively by labour law and the LRA and will never amount to administrative action within the meaning of section 33 of the Constitution or PAJA.

2 The application of PAJA to decisions of the CCMA - Sidumo and Another v Rustenburg Platinum Mines and Others [2007] JOL 20811 (CC)

(a) Background to the problem
The Commission for Conciliation, Mediation and Arbitration (CCMA) was created in terms of the LRA in 1995. It is an organ of state charged with assisting in the resolution of labour disputes. It must attempt to resolve any dispute referred to it by any party by conciliation. Where conciliation fails, and the parties request the CCMA to do so, it is empowered to make arbitration awards that are binding on the parties (see section 115 of the LRA). There is no appeal against a decision of the CCMA in terms of the LRA to the Labour Court nor indeed any other court, but the Labour Court is empowered by section 145 of the LRA to scrutinise the decisions of the CCMA. The relevant parts of section 145 provide:

'(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award-
(a) within six weeks of the date that the award was served on the applicant...

(2) A defect referred to in section
(1), means-
(a) that the commissioner-

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
(iii) exceeded the commissioner's powers; or

(b) that an award had been improperly obtained.'

Section 158(1)(g) of the LRA provides room for the Labour Court to review the conduct of the CCMA on broader grounds. It provides that the Labour Court may:

'subject to section 145, review the performance or purported performance of any function provided for in this Act on any grounds that are permissible in law'.

The relationship between sections 145 and 158(1)(g) raises questions about the proper scope and extent of review of CCMA decisions. The core question has been whether the Labour Court, when reviewing decisions of the CCMA, may have regard to the grounds of review set out by administrative law in addition to the grounds of review set out in section 145.

(b) Views of the courts
The Labour Appeal Court (LAC) first turned to this question in Carephone (Pty) Ltd v Marcus NO and Others 1999 (3) SA 304 (LAC). Deciding the issue before PAJA had been enacted, and therefore in terms of item 23(2)(b) of Schedule 6 to the Constitution, the LAC held that the administrative justice provisions of the Constitution suffused the LRA and extended the scope of review allowed by section 145 of the LRA. The LAC said in that case:

'The peg on which the extended scope of review has been hung is the constitutional provision that
administrative action must be justifiable in relation to the reasons given for it (s 33 and item 23(2)(b) of Schedule 6 to the Constitution). This provision introduces a requirement of rationality in the merit or outcome of the administrative decision. This goes beyond mere procedural impropriety as a ground for review, or irrationality only as evidence of procedural impropriety.’ (para 31)

Once PAJA had been enacted, the question of whether the scope of review of CCMA decisions extended to administrative law grounds would come to rest on whether PAJA applied to CCMA decisions - or more specifically, whether CCMA decisions amounted to ‘administrative action’ as defined in section 1 of PAJA. The question of PAJA’s applicability was squarely raised before the LAC in Shoprite Checkers (Pty) Ltd v Ramdaw NO and Others 2001 (4) SA 1038 (LAC). The LAC found it unnecessary to decide the issue, though, finding that the CCMA's decision could be evaluated against the rationality standard set by Carephone (para 33). The court did however accept ‘the possibility that PAJA may well be applicable to arbitration awards issued by the CCMA’ (para 33).

In Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration 2007 (1) SA 576 (SCA) the SCA was asked to decide was whether standards of administrative review as set out in section 6(2) of PAJA can be relied on in reviewing decisions of the CCMA. The Carephone test, as it stands the high-water mark of administrative review of CCMA decisions, investigates only whether there is a rational connection between the material and facts before the commissioner and the substance of his decision. Section 6(2)(f)(ii) of PAJA sets out similar grounds of review:

'(2) A court or tribunal has the power to judicially review an administrative action if-
(f) the action itself-
(ii) is not rationally connected to-
(aa) the purpose for which it was taken;
(bb) the purpose of the empowering provision;
(cc) the information before the administrator;
(dd) the reasons given for it by the administrator’.

Section 6(2) of PAJA lists a wealth of other bases on which administrative decisions can be reviewed. Rationality is merely one of the grounds of review available in terms of PAJA. Importantly, section 6(2)(h) of PAJA allows review of an administrative decision on the basis of its unreasonableness. The application of PAJA to CCMA decisions would greatly expand the extent of review contemplated by section 145 of the LRA.

Cameron JA, writing for the Court in Rustenburg Platinum, was in no doubt that a commissioner's decision in the CCMA amounts to administrative action as defined in PAJA (para 24). The question was thus not whether CCMA decisions fit the definitional requirements of PAJA, but whether the application of PAJA is precluded by the application of the LRA to labour disputes. Cameron JA held that it was not. Part of his reasoning in this regard was that PAJA enjoys primacy over the LRA since PAJA is constitutionally mandated by section 33(3) of the Constitution (para 24). Another part of his reasoning was that Carephone formulated the rationality test on the basis of the rights to administrative justice conferred by the interim Constitution, and that it would be untenable for the level and extent of protection to be reduced by the 1996 Constitution (para 26). Applying the review test as set out in section 6(2)(f)(ii) of PAJA, the SCA held that the commissioner's decision could not be rationally justified and had to be set aside.

The employee, Mr Sidumo, was aggrieved by this decision and sought the consideration of the Constitutional Court. The matter was argued before the Court in May 2007 and decided in October 2007. The decision is available as Sidumo and Another v Rustenburg Platinum Mines and Others [2007] JOL 20811 (CC). Four judgments were filed in the Constitutional Court's decision. While Sidumo's appeal was upheld and the SCA judgment overturned, there was an important difference in the reasoning of the judges. The court, composed of a quorum of ten judges, unanimously held that decisions of the CCMA do not constitute administrative action within the meaning of section 1 of PAJA. The Court was split, however, on the question of whether review in terms of section 145 of the LRA was infused with the standards of administrative justice set by section 33 of the Constitution. In a judgment concurred in by Moseneke DCJ, Madala J, O'Regan J and Van der Westhuizen J, Navsa AJ held that CCMA decisions are administrative actions but that PAJA does not apply. He
went on to hold that section 145 of the LRA must be interpreted consistently with the Constitution, and must be read to ensure that administrative action by the CCMA is lawful, reasonable and procedurally fair as required by section 33 of the Constitution. O'Regan J wrote a separate judgment emphasising slightly different reasons for the same conclusion. Ngcobo J, in a judgment concurred in by Mokgoro J, Nkabinde J and Swewyiya J, concurred in the order made by Navsa AJ but disagreed with the conclusion that section 33 was apposite to the review of CCMA decisions. Sachs J concurred in both Navsa AJ’s judgment and Ngcobo J’s judgment, giving his reasons in a separate judgment.

The multiple judgments do not offer a clear resolution of the underlying legal problem. Five judges hold that PAJA does not apply to CCMA decisions but that section 33 of the Constitution does. Four judges hold that although neither section 33 nor PAJA are implicated by CCMA decisions, those decisions can nevertheless be reviewed against some standard of reasonableness. The determination of a majority, and thus of a precedent, is however complicated by Sachs J’s floating allegiance. The judgments are analysed in detail below in an attempt to determine if there is any agreement on legal principle that can offer a clear and unambiguous precedent.

(c) Navsa AJ’s judgment

In considering whether PAJA or the LRA governed the CCMA’s functions, Navsa AJ began by considering whether the decisions of the CCMA are ‘administrative actions’. He began by referring to a statement of the Constitutional Court in President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC) (SARFU) directing courts to look to the nature of the function performed in determining whether it is administrative or not:

‘In s 33 the adjective “administrative” not “executive” is used to qualify “action”. This suggests that the test for determining whether conduct constitutes “administrative action” is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not.’ (para 141, quoted at para 81)

Navsa AJ went on to note that although the CCMA exercise powers and performs functions that are similar to those of a court or judicial tribunal, there are significant differences (paras 82-85). The judge referred to academic opinion in support of his view that the CCMA’s functions should be seen as differentiated from those of the courts. He quoted Brassey:

‘Unlike the Labour Court, it enjoys none of the status of a court of law and so has no judicial authority within the contemplation of the Constitution. It is an administrative tribunal in the same way as the industrial court was and, being an organ of state under s 239 of the Constitution, is directly bound by the Bill of Rights. It is also subject to the basic values and principles governing public administration.’ (Brassey Employment and Labour Law: Commentary on the Labour Relations Act (2006) at A7-1 - A7-2, quoted at para 86)

And he quoted Currie and De Waal:

‘The CCMA is not a branch of the judiciary and does not exercise judicial power. Rather, the exercise of the compulsory arbitration power is an exercise of public power of an administrative (“governmental”) nature. The arbitration power is designed to fulfil the primary goal of the Act which is to promote labour peace by the effective settlement of disputes. It does so with an element of compulsion, corresponding to the traditional government/governed relationship.’ (Currie and De Waal Bill of Rights Handbook 5 ed (2005) at 651, quoted at para 87)

Navsa AJ noted that in the language of pre-constitutional administrative law the functions of the CCMA would have been called ‘quasi-judicial’ administrative functions, and would thus have been subject to the principles of administrative justice of the day. He concluded that in the language of the current administrative law regime, ‘a commissioner conducting a CCMA arbitration is performing an administrative function.’ (para 88)

Navsa AJ then made an important argumentative step and said that while section 33(1) of the Constitution requires administrative action to be lawful, reasonable and procedurally fair, and section 33(3) required national legislation to give effect to this right, ‘[n]othing in section 33 of the Constitution precludes specialised legislative regulation of administrative action such as section 145 of the LRA alongside general legislation such as PAJA. (paras 89 and 91) Section 145 of the LRA amounts to national legislation for the purpose of section 33(3) of
the Constitution in respect of 'administrative action' within the specialised field of labour law (para 89). Even though the definition of ‘administrative action’ in PAJA is ‘extensive’ and was intended to ‘cover the field’ (para 90, referring to Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae) 2006 (2) SA 311 (CC) at para 95), there is nothing to suggest that there are 'administrative actions' that fall outside the scope of PAJA. Navsa AJ referred to O'Regan J's judgment in Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC) at para 25, where she intimated that there are 'causes of action for judicial review of administrative action that do not fall within the scope of PAJA' (quoted at para 92). Navsa AJ concluded that while PAJA is a codification of the common-law grounds of review, it is not to be regarded as the exclusive basis of legislative review. In this sense, section 145 of the LRA provides a legislative basis for the review of administrative actions that do not fall within the ambit of PAJA.

Navsa AJ then gave several reasons that CCMA decisions do not fall within the ambit of PAJA, despite the fact that they amount to administrative actions (from paras 94-103). These reasons included the fact that PAJA and the LRA lay out different procedures on review, including different time-periods within which review proceedings must be instituted; the fact that if section 6 of PAJA were to apply to the review of decisions of the CCMA the exclusive jurisdiction of the Labour Court in this regard would be negated, since the High Court would have concurrent jurisdiction in this field; the fact that the LRA and PAJA set out significantly different remedies; and the fact that section 210 of the LRA explicitly provides that in cases of legislative conflict with other laws, the provisions of the LRA will prevail.

Section 33 of the Constitution requires administrative action to be lawful, reasonable and procedurally fair. Having found that CCMA decisions are administrative action for the purposes of section 33 of the Constitution but are not subject to control by PAJA, Navsa AJ concluded that CCMA decisions must nevertheless be lawful, reasonable and procedurally fair. As national legislation giving effect to the right to lawful, reasonable and procedurally fair administrative action, section 145 of the LRA had to be read to ensure that administrative action by the CCMA is lawful, reasonable and procedurally fair (para 105). The grounds of review of CCMA decisions set out in section 145 of the LRA must therefore be read to include review on the basis of reasonableness. 'To summarise', Navsa AJ said,

‘Carephone held that section 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that section 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in Bato Star: Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.' (para 110)

On the facts, Navsa AJ held that the decision reached by the CCMA commissioner in this case was one that a reasonable decision-maker could have made, and the decision should not have been set aside by the SCA (para 119).

Ngcobo J disagreed with Navsa AJ's conclusion because he took a different approach to the issues. This difference is dealt with below. Before investigating Ngcobo J's approach it is necessary to identify two concerns that flow from the terms of Navsa AJ's judgment. The first has to do with bypassing the provisions of PAJA. The Constitutional Court has said on a number of occasions that where national legislation gives effect to constitutional rights, a person must assert constitutional rights though reliance on the provisions of the legislation. A litigant cannot seek to circumvent the requirements set out by legislation by relying directly on the constitutional provision (see for example South African National Defence Union v Minister of Defence and Others 2007 (8) BCLR 863 (CC) at para 51, New Clicks at paras 96 and 436). It might appear that Navsa AJ's approach disregards this principle by allowing a litigant seeking review of a CCMA arbitration decision to rely on section 33 without relying on PAJA - but of course where a litigant does so he or she must nevertheless rely on section 145 of the LRA. Direct reliance on section 33 of the Constitution is not countenanced by Navsa
AJ's approach since section 145 of the LRA is determined to be, alongside PAJA, national legislation that gives effect to the right to lawful, reasonable and procedurally fair administrative action.

The second concern is less easily disposed of. In New Clicks Chaskalson CJ suggested that if the definition of 'administrative action' in PAJA excluded from its ambit a decision that fell within the purview of 'administrative action' for purposes of section 33(1) and (2) of the Constitution, then PAJA's definition of 'administrative action' would have been unconstitutional (New Clicks, paras 119-126). This suggests that the definition of 'administrative action' in PAJA is co-extensive with the definition of 'administrative action' in section 33 of the Constitution. Navsa AJ's decision contemplates a category of administrative actions within labour law that fall outside PAJA's definition of 'administrative action'. It is not clear how this view is to be reconciled with Chaskalson CJ's statement in New Clicks.

(d) Ngcobo J's judgment
Ngcobo J did not agree with Navsa AJ's conclusion that the conduct of CCMA arbitration proceedings constitutes administrative action within the meaning of section 33 of the Constitution (para 163). Ngcobo J's reason for this finding was primarily that the arbitration proceedings of the CCMA are judicial rather than administrative in nature. He set out his starting point, and the approach he adopted to resolving the question, thus:

'CCMA commissioners arbitrate over those disputes which, under the LRA, require arbitration. The CCMA is an entity created by the LRA and designed to fulfil the objectives of the LRA. It performs a public function by, among other things, providing an infrastructure for resolving labour disputes. It is therefore an organ of state within the meaning of section 239(b)(ii) of the Constitution which exercises public power in terms of the LRA. There can be no question therefore that when CCMA commissioners conduct arbitration proceedings, they perform a public function which is to resolve labour disputes. They therefore exercise public power under the auspices of the CCMA. COSATU and the employer therefore correctly accepted that the conduct of an arbitration by a CCMA commissioner is an exercise of public power. But does the conduct of an arbitration constitute administrative action? This question must be answered in the light of the test for administrative action.' (paras 200-201, footnotes omitted)

Referring to the same paragraph in the SARFU judgment that Navsa AJ referred to, Ngcobo J pointed out that in determining whether an action is an administrative action what matters is not the functionary, or the person exercising the function, but the nature of the function the public official performs (para 203). Disagreeing with both NAVsa AJ and the academic opinions he referred to, Ngcobo J described proceedings before the CCMA as 'in the nature of litigation' (para 207). He stated:

'CCMA arbitrations bear all the hallmarks of a judicial function in that there is a lis between the employer and a worker in which a tribunal is called upon to apply a recognised body of rules in a manner consistent with fairness and impartiality. The adjudication deals primarily with rights of workers and employers. CCMA commissioners are clothed with virtually all the powers that presiding officers in a court of law have, including the power to make findings of contempt of the commission. The sole task of a commissioner in an arbitration hearing is to find facts and then apply the provisions of the LRA. In my view the process of factual and legal evaluation involved in deciding whether the dismissal was for a fair reason and to issue an award is clearly judicial in nature.' (para 208, footnotes omitted)

Ngcobo J sought support for this conclusion on the fact that the functions that are performed by CCMA commissioners may be performed by the Labour Court (para 217). To characterise a function as 'administrative' when it is performed by the CCMA and 'judicial' when it is performed by the Labour Court, Ngcobo J said, is to draw a distinction based on the identity of the functionary - a distinction the possibility of which the Constitutional Court ruled out in SARFU. Ngcobo J went further, to point out that while the CCMA may perform administrative functions on occasion, it is important to 'draw a line between its administrative functions on the one hand and the adjudicative functions performed by the commissioners on the other hand' (para 238). Where CCMA commissioners sit as 'independent and impartial tribunals as contemplated by section 34' of the Constitution, section 33 of the Constitution has no application:

'The CCMA is an independent and impartial tribunal contemplated in section 34 of the Constitution. It resolves disputes concerning unfair dismissal which are disputes capable of being decided by the application of the LRA. Although
Ngcobo J therefore concluded that it is inappropriate to import the requirements of administrative justice - lawfulness, reasonableness and procedural fairness - into review proceedings in terms of section 145 of the LRA. Rather, review of CCMA decisions in terms of section 145 of the LRA should be confined to the grounds of review laid out in section 145(2)(a)(i), (ii) and (iii). These paragraphs allow review where a commissioner has committed misconduct in relation to his duties as an arbitrator, has committed a gross irregularity in the arbitration proceedings, or has exceeded the powers of the commissioner. Ngcobo J then considered the meaning of these grounds of review. Although it was alleged in this case that the commissioner’s decision fell foul of all three of these grounds of review (para 256), Ngcobo J took the view that only the meaning and scope of gross irregularity and acting in excess of powers conferred needed to be considered (para 257).

Ngcobo J's approach to the meaning of 'gross irregularity' (paras 258-28) does not focus on interpreting the term itself. Rather, Ngcobo J imports an understanding of fairness into the term. He begins by noting that the functions of CCMA commissioners in arbitration proceedings amount to the exercise of public power, and are 'therefore subject to the constitutional constraints applicable to the exercise of public power.' (para 260) One of these constraints, as Ngcobo J points out earlier, is the rules of law (para 232). A complaint based on a 'gross irregularity' must, however, go to the method or conduct of the proceedings, and not the result of the proceedings (para 265). Nevertheless, there is an aspect of engagement with the reasoning of the commissioner:

'Determining whether the commissioner has committed a gross irregularity will inevitably require the reviewing court to examine the reasons given for the award. In doing so the reviewing court must be mindful of the fact that it is examining the reasons not to determine whether the conclusion reached by the commissioner is correct but whether the commissioner has committed a gross irregularity in the conduct of the proceedings.' (para 265)

A fair hearing, Ngcobo J goes on, lies at the heart of the rule of law. Further, CCMA arbitrations are required to be 'fair public hearings' since they are independent and impartial tribunals for the purposes of section 34 of the Constitution (para 266). Ngcobo J concluded that where a CCMA commissioner fails to have regard to material facts, or 'fails to apply his or her mind to a matter which is material to the determination of the fairness of the sanction', it cannot be said that the requirement of fairness has been met. Such a failure

'prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings as contemplated in section 145(2)(a)(ii) of the LRA.' (para 268, footnotes omitted)

In regard to review on the basis that a commissioner has exceeded his or her powers, Ngcobo J adopted something akin to the 'symptomatic unreasonableness' test familiar to common-law review. He held that the legislature could not have intended to confer on CCMA commissioners the power to make arbitration awards that are 'manifestly unfair.' Where they do so, he reasoned, they must have exceeded their powers:

'As public officials who exercise public powers, commissioners may only make those awards which are consistent with their obligations under the LRA and the Constitution. Where a commissioner renders an award that is inconsistent with his or her powers conferred on a commissioner by the LRA, in my view, the commissioner exceeds his or her powers and the award falls to be reviewed and set aside under section 145(2)(a)(iii) of the LRA. Given the constitutional right to fair labour practices, the provisions of section 188 read with items 1, 2 and 7 of the Code, an award which is manifestly unfair to either the employer or employee can hardly be said to be consistent with the powers conferred upon a commissioner to
make an award that is fair. In effect, if a commis-
sioner fails to determine the dispute fairly, he or
she is in breach of the statute that is the source of
his or her power to conduct the arbitration and is
also in breach of the doctrine of legality, which is a
constitutional constraint upon the exercise of his
or her powers. This conduct on the part of the
commissioner is ultra vires, that is, beyond powers
conferred on the commissioners as contemplated
in section 145(2)(a)(iii)." (para 276)

Although Ngcobo J finds that CCMA decisions
are not administrative action for the purpose of
section 33 of the Constitution, and that the
requirements of administrative justice should
not be applied in the review of CCMA arbitra-
tion decisions, he nevertheless imports ele-
ments of fairness and reasonableness into
section 145 review of CCMA decisions. Given
the similarity of the standards against which
Ngcobo J and Navsa AJ ultimately assessed
the commissioner's decision in this case, it is
unsurprising that Ngcobo J concurred in the
order made by Navsa AJ.

(e) O'Regan J's judgment
O'Regan J concurred in Navsa AJ's conclu-
sion, but her judgment emphasised a different
justification for that conclusion. Her judgment
was in large a response to that of Ngcobo J,
and turned on a criticism of two distinctions that
Ngcobo J sought to make in his judgment.

The first of these distinctions was between the
ambit of application of section 33 and section
34 of the Constitution. In O'Regan J's view, one
of the reasons that Ngcobo J concluded the
adjudicative functions of the CCMA do not con-
stitute administrative action is that as inde-
pendent and impartial tribunals they are more
properly governed by section 34 of the
Constitution:

'O'Regan J took the view that whether a deci-
sion of the CCMA was administrative action or
not had to be decided by engaging with the
nature of the decision itself, and could not be
determined simply by asserting that because
the adjudicative functions of administrative tri-
unals are governed by section 34 of the
Constitution they are not governed by section
33(para 135).

The second distinction on which Ngcobo J
relied lies between adjudicative acts and
administrative acts. In emphasising that it is the
nature of the function that is important to deter-
mining the applicability of principles of adminis-
trative justice rather than the identity of the
functionary, Ngcobo J ignored, in O'Regan J's
view, the substantive nature of CCMA deci-
sions. His approach, she reasoned, was redo-
lent of the classificatory approach to adminis-
trative law according to which the principles of
administrative justice where held to govern
only those acts that could be classified as
'purely administrative' or 'quasi-judicial':

'In our pre-constitutional order, the classification of
functions in administrative law proved to be an
unsatisfactory basis for determining the scope of
judicial review and it was finally and firmly rejected
by the courts. I am concerned that if we under-
stand section 33 and section 34 to be mutually
exclusive constitutional provisions, we may end up
with a formalist jurisprudence based on a distinc-
tion between "administrative" in section 33 and
"judicial" or "adjudicative" decisions by tribunals
governed only by section 34 which is at odds with
the substantive vision of our Constitution.' (para
135, footnotes omitted)

O'Regan J preferred a view that was 'based
on a substantive understanding of section
33', and agreed with Navsa AJ that deci-
sions of the CCMA are to be understood as
administrative actions within the meaning
of section 33.

(f) Sachs J's judgment
Sachs J concurred in both Navsa AJ's judg-
ment and Ngcobo J's judgment, despite the
fact that the judgments disagreed with each
other (para 146). On a close reading, though,
Sachs J does not give any support to Navsa
AJ's conclusion that decisions of the CCMA
amount to administrative action for purposes of
section 33 of the Constitution. Rather he finds,
as Ngcobo J does, that review of CCMA deci-
sions in terms of section 145 of the LRA must
extend further than the very narrow grounds of
review set out in section 145(2)(a) to include values of reasonableness and fairness. Sachs J summed up his position as a synthesis of the underlying premises of the other two judgments:

‘[i]n an open and democratic society based on human dignity, equality and freedom, it would be inappropriate to restrict review of the commissioner’s decision to the very narrow grounds of procedural misconduct that a first reading of section 145(2) would suggest; at the same time, the labour-law setting, requiring a speedy resolution of the dispute with the outcome basically limited to dismissal or re-instatement, makes it inappropriate to apply the full PAJA-type administrative review on substantive as well as procedural grounds; and to the extent that the right to just administrative action is involved, the values of fair dealing that underlie section 33 of the Constitution must be respected. I accept that inasmuch as the right to a fair labour practice is at the centre of the analysis, the outcome of the arbitration process must not fall outside the bounds of reason; to accept it doing so would hardly represent a fair outcome. Finally, acknowledging the adjudicatory element that implicates the right to a fair hearing under section 34, I would hold that a fair hearing demands that at the very least there be some reasonably sustainable fit between the evidence and the outcome.’ (para 158, footnotes omitted)

The form of reasoning Sachs J adopts in coming to the conclusion that values of reasonableness and fairness should inform review in terms of section 145 is similar to that of Ngcobo J. Sachs J does not conclude, as Navsa AJ and O’Regan J do, that CCMA decisions should be reviewed against the standards of lawfulness, reasonableness and procedural fairness because they constitute administrative action. He concludes that CCMA decisions should be reviewed against the values of reasonableness and fairness because that is what ‘an open and democratic society demands.’ (para 158) Sachs J gives no consideration to the question of whether CCMA arbitration award amount to administrative action as contemplated by section 33 of the Constitution, and as a result, Sachs J cannot be said to have concurred in Navsa AJ’s finding in this regard.

(g) Conclusion
While the judgments in this matter are plentiful and diverse, and the Constitutional Court’s decision is by no means unanimous in its reasoning or indeed its conclusions, there is one principle that emerges clearly from the Constitutional Court’s decision. This is that the narrow grounds for the review of CCMA arbitration decisions set out in section 145(2)(a) of the LRA must be supplemented by considerations of fairness and reasonableness. In this regard, the Constitutional Court has trod a middle ground between the earlier decisions of the Labour Appeal Court in Carephone and the Supreme Court of Appeal in Rustenburg Platinum. The Carephone decision held that section 145 of the LRA is suffused by principles of administrative justice and allows review of CCMA decisions on grounds of reasonableness. The SCA held in the judgment on appeal in this matter that CCMA decisions constitute administrative action in terms of PAJA, and that review in terms of section 145 must consequently proceed on the basis of all the grounds of review set out in section 6(2) of PAJA. The principle that emerges from the Constitutional Court is that review of CCMA decisions in terms of section 145 is not limited to the narrow grounds listed in section 145(2)(a) of the LRA, but includes review on the basis of fairness and reasonableness. Although Navsa AJ and Ngcobo J reached this conclusion following different routes of reasoning, there can be no doubt that this is the binding principle to emerge from the Constitutional Court.

The Constitutional Court did not resolve the issue of whether CCMA decisions constitute administrative action in terms of section 33 of the Constitution, however. Five judges held that it does, four judges held that it does not, while the tenth judge seems to have agreed with the latter four - although this agreement is equivocal. While nothing turned on this disagreement in the present case, the importance of deciding whether CCMA decisions are administrative action or not lies in the standard of review that will be applied. Section 33 requires administrative action to be lawful, reasonable and procedural fair. There is a great deal of jurisprudence regarding these requirements and their application as standards of review. Ngcobo J’s approach, in avoiding section 33’s standards of review, sets up the requirements that each party must have his or her case ‘fully and fairly determined’ and that results must not be ‘manifestly unfair’ (paras 268 and 276). It is, however, far from clear what considerations must or can be taken into account in applying these novel standards. The clearer and jurisprudentially established standards of review set by section 33 will prove
more amenable to application than the standards of review Ngcobo J favours. Indeed, it may well be that the considerations that underlie the application of section 33’s standards of review inform Ngcobo J’s approach anyway. In this sense, it is perhaps of little consequence that the Constitutional Court has not firmly decided whether CCMA arbitration awards amount to administrative action or not.

PROMOTION OF ADMINISTRATIVE JUSTICE ACT 3 OF 2000 (PAJA)

Section 1 - Administrative action defined

It is by now well-established in our law that state tender processes by which government departments and organs of state tender for goods and services from the public are administrative actions as contemplated in section 33 of the Constitution and defined in section 1 of PAJA. Section 217(1) of the Constitution requires that:

“When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must so do in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.”

Section 217(2) provides that subsection (1) does not prevent organs of state from pursuing procurement policies which aim to advance people or categories of people disadvantaged by previous unfair discrimination, and subsection (3) requires national legislation to prescribe a framework within which policies referred to in subsection (2) are to be carried out. The Preferential Procurement Policy Framework Act 5 of 2000 (the PPPF Act) is this legislation.

The Supreme Court of Appeal (SCA) held in Umfolozi Transport (Edms) Bpk v Minister van Vervoer [1997] 2 All SA 548 (SCA) that the award of a state tender amounts to an administrative action (552j-553a), while in Transnet Ltd v Goodman Brothers (Pty) Ltd 2001 (1) SA 853 (SCA) the SCA held that calling for an adjudicating tenders also amounts to administrative action (para 7). In Olitzki Property Holdings v State Tender Board 2001 (3) SA 1247 (SCA) the SCA held that administrative justice rights are applicable to a tender process and tender processes must comply with the requirements of administrative justice. There are numerous High Court decisions that follow this line, many of which are reported in earlier editions of this Newsletter (see for example Darson Construction (Pty) Ltd v City of Cape Town and another [2007] 1 All SA 393 (C) reported in the 8th Edition, MEC for Roads, Eastern Cape, and Another v Intertrade Two (Pty) Ltd 2006 (5) SA 1 (SCA) reported in the 7th Edition, Chairperson: Standing Tender Committee and others v JFE Sapela Electronics (Pty) Ltd and others [2005] 4 All SA 487 (SCA), Compass Waste Services (Pty) Ltd v Northern Cape Tender Board and others [2005] 4 All SA 425 (NC) and Jicama 17 (Pty) Ltd v West Coast District Municipality 2006 (1) SA 116 (C) reported in the 6th Edition).

Two judgments reported in this Edition of the Newsletter, however, dispose of challenges to tender processes without reference to PAJA (Minister of Social Development and others v Phoenix Cash & Carry - PMB CC [2007] 3 All SA 115 (SCA) (see below ‘Section 6 - Grounds of review’) and Tirhani Auctioneers (Gauteng) (Pty) Ltd v Transnet Ltd and another [2007] 3 All SA 70 (W) (see below ‘Section 6 - Grounds of review’)). Instead, the various parties and the courts before which they appeared relied on the provisions of section 217 of the Constitution and the PPPF Act directly, without referring to PAJA. Although the PPPF Act does not establish grounds of review, the judgments found administrative actions unlawful, apparently on a common-law understanding of unlawfulness, on the basis of non-compliance with the requirements of the PPPF Act. This approach, in light of the Constitutional Court’s comments in the recent case of Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others 2007 (10) BCLR 1059 (CC ) (reported in the 8th edition of this Newsletter), is to be discouraged. The Constitutional Court made it clear in its judgment that administrative challenges to administrative actions must come through the door of PAJA even where the action complained against is in contravention of a statutory provision. In the Fuel Retailers case the legislation concerned was the Environmental Conservation Act 73 of 1989 (ECA). The Court’s treatment of the ECA in the following
paragraphs applies equally to the PPPF Act.:

"In Bato Star (Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC) at para 25) this Court held that "[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." Section 36 of ECA does no more than to provide for the review of decisions of environmental authorities. The grounds upon which decisions under ECA may be reviewed are those set out in PAJA. The clear purpose of PAJA is to codify the grounds of review of administrative action. The fact that section 36 of ECA allows a person whose interests are affected by a decision of an administrative body under ECA to approach the High Court for review, does not detract from this. The provisions of section 36 must therefore be read in conjunction with PAJA which sets out the grounds on which administrative action may now be reviewed." (paras 36-37, footnotes omitted)

A third judgment dealing with a challenge to tender processes, also reported in this Edition of the Newsletter, did dispose of the matter with reference to PAJA (GVK Siyazama Building Contractors (Pty) Ltd v Minister of Public Works and others [2007] 4 All SA 992 (D) (see below under 'Section 6 - Grounds of review')). Read alongside one another, it is clear that the provisions of PAJA apply equally to all three cases. For this reason all three cases are discussed in the same section of this Newsletter ('Section 6 - Grounds of review'), even though only one of the judgments deals directly with PAJA.

Minister of Defence and Others v Dunn 2007 (6) SA 52 (SCA) (see below under 'Section 3 - Procedural fairness in administrative action affecting individuals', 'Section 6 - Grounds of review' and 'Section 8 - Remedies'), was an appeal against a decision of Van Rooyen AJ sitting in the Pretoria High Court (the judgment is reported as Dunn v Minister of Defence and Others 2006 (2) SA 107 (T) and is discussed in the 6th Edition of the PAJA Newsletter). Dunn, (the applicant in the court a quo) had initially sought the review in terms of PAJA of the appellants' decision to appoint one Coetzee rather than Dunn to a post advertised within the South African National Defence Force (SANDF). Considering the applicability of PAJA, Lewis JA said, for the Court:

"The denial is based on the assertion that the decisions do not have a direct external legal effect on the applicants. The assertion is erroneous. The refusal to register an applicant as a private security service provider is an adverse determination of the applicants' rights. The determination has an immediate, final and binding impact on the applicants, who have no connection with the Authority. The decisions therefore do have a direct, external, legal effect and constitute administrative action in terms of PAJA." (para 70)
The determination has an immediate, final and binding impact on the applicants, who have no connection with the Authority. The decisions therefore do have a direct, external, legal effect and constitute administrative action in terms of PAJA.' (para 70)

The SANDF is of course a public sector employee, and the Minister's decision to appoint Coetzee to the post at issue was there a public sector employment decision. It is worth commenting that the conclusion that the Minister's decision was an administrative action seems at odds with the decision of the Constitutional Court in *Chirwa v Transnet Ltd and others [2007] JOL 21166 (CC)* (see above under 'The relationship between administrative law and labour law: recent Constitutional Court decisions') matter discussed above. It might be thought that since the Constitutional Court decision was handed down only after the judgment in this matter, that the Constitutional Court decision impliedly overrules this judgment. On the contrary, the SCA's conclusion that the Minister's decision was administrative action is entirely consistent with the reasoning of the majority of the Constitutional Court, since, it must be remembered, the Labour Relations Act 66 of 1995 (LRA) does not apply to members of the SANDF. The remedies that are available to ordinary employees in terms of the LRA are thus not available to members of the SANDF such as Dunn. Ngcobo J's judgment in the *Chirwa* matter, concurred in by a majority of the Court, held that the application of the labour law regime to public sector employees excludes the application of administrative law to public sector employment decisions (para 148). Where the labour law regime does not apply, as in Dunn's case, there is thus no reason that administrative law does not govern the decision, if the decision meets the other requirements of administrative action.

*Joint Municipal Pension Fund and another v Grobler and others [2007] 4 All SA 855 (SCA)* (see below under 'Section 9 - Variation of time') is a judgment on an appeal against a decision of the Pretoria High Court. The respondents were employed by the first appellant. They were members of the Munpen Pension Fund, the second appellant, and would be paid certain benefits by the Fund in the event of retrenchment. At some point before the respondents' were retrenched, the Fund changed the rules of its pension plan by altering the definition of the phrase 'pensionable service'. The alteration drastically reduced the period in terms of which the respondents' retrenchment benefits would be calculated, and reduced the value of the retrenchment benefits they received. They approached the Pension Funds Adjudicator for relief in terms of the Pension Funds Act 24 of 1956, but the Adjudicator decided that since the amendment had not yet been registered he had no jurisdiction to consider the complaint (paras 4-5). The respondents then approached the High Court seeking the review of the Adjudicator's decision. Such relief was granted, and the High Court made an order setting aside both the Adjudicator's decision and the Fund's decision to amend its rules. The basis of the decision was that rule 49 of the Fund's own rules prevents the amendment of rules where the effect of amendment is to diminish the value of 'an established benefit'. The appellants challenged the High Court's decision on three bases: first, that the High Court's understanding of 'established benefit' was incorrect; second, that since the Adjudicator had no jurisdiction to decide upon the validity of the amendments, the court equally had no jurisdiction, and thirdly, that insofar as the application was for review of the Fund's decision and not the Adjudicator's decision, the review should have been cast in terms of PAJA and was outside the time limits set out in section 7 of PAJA. The first two of these grounds of appeal are not relevant here. Suffice it to say that the SCA agreed with the submission that the Adjudicator had no jurisdiction to hear the complaint, and that the High Court consequently had no basis in law to review and set aside the Adjudicator's decision. The respondents had, however, made an 'unqualified prayer for an order reviewing and setting aside the decision of [the Fund's] trustees relative to the disputed amendment' (para 28). Unfortunately the SCA did not consider at any length the application of section 1 of PAJA. It is not obvious that the second appellant's decision would have satisfied the definitional requirements of 'administrative action' as defined in PAJA, since the Fund is not an organ of state and exercises powers only over its own members. Whether the powers and functions the second appellant exercises or performs are 'public' requires some consideration (in this regard see AAA
In the circumstances I consider that the application to the court below was sufficiently framed to include review relief such as is within the ambit of PAJA even though PAJA is not referred to.’ (para 28)

In Tshona v Principal, Victoria Girls High School, and Others 2007 (5) SA 66 (E) (see below under ‘Section 7 - Procedure for review’), the applicant had been expelled from the school boarding hostel following alleged misconduct and a number of disciplinary procedures instituted by the school. She sought to have those procedures reviewed and the decision expelling her from the hostel set aside. The school, represented by the first respondent, purportedly acted at all times in terms of the South African Schools Act 84 of 1996. Pickering J held that the provisions of PAJA were applicable to the matter:

‘[Counsel for the respondent] concede in favour of the applicant that a decision by the school governing body to expel a learner from a hostel would constitute the exercise of a public power which would fall within the ambit of s 1(b) of the Promotion of Administrative Justice Act 3 of 2000 and would accordingly be reviewable by the Court. In light of this concession I need say no more thereabout.’ (74F-G)

Paragraph (b) of the definition of administrative action in PAJA provides that any decision by ‘a natural or juristic person other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provisions’ is, when it meets the other requirements of the definition, an administrative action.

McDonald and Others v Minister of Minerals and Energy and Others 2007 (5) SA 642 (C) (see below under ‘Section 7 - Procedure for review’ and ‘Review in terms of the Constitution’) involved a challenge to the legality of regulations made by the first respondent in terms of section 38(4) of the National Nuclear Regulator Act 47 of 1999. One of the defences raised by the respondents was that an application for review was premature in light of the requirement in section 7(2) of PAJA that an applicant exhaust internal remedies before approaching a court of review. The applicants had not themselves placed any reliance on PAJA, and it was thus only on the context of the respondents’ reliance on PAJA that the court had occasion to consider the applicability of PAJA. Griesel J (Yekiso J concurring) said this argument

‘presupposes that the provisions of s 7(2) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) are applicable to this case. However, as appears from the various judgments in the New Clicks case [Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae) 2006 (2) SA 311 (CC), reported in the 5th Edition of the PAJA Newsletter] it is still an open question whether the Minister’s decision to make regulations amounts to an administrative action for the purposes of PAJA.’ (para 25)

The judge went on to note that in the circumstances of the case, it could not be said that the regulations had ‘adversely affected’ the applicants (para 27). This was so because the regulations delegated to the National Nuclear Regulator the power to lay down ‘specific requirements’ relating to the subject matter of the regulations. It was these to requirements that the applicants objected - but since the court found that the power to lay down specific requirements had been improperly delegated to the Regulator, it was unnecessary to consider any of the challenges against the requirements or whether the laying down of the requirements amounted to administrative action (para 21).

Section 3 - Procedural fairness in administrative action affecting individuals

In Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others 2007 (4) BCLR 339 (CC) (see above under ‘Section 1 - Administrative action defined’ and below under ‘Section 7 - Procedure on review’) the applicants raised a number of complaints against the first respondent's decision to refuse to allow the second to thirteenth applicants to register as private security service providers in terms of the Private Security Industry Regulation Act 56 of 2001. Section 23(1)(a) of the Act requires applicants for registration to be South African citizens or permanent residents,
which the second the thirteenth applicants, as refugees, were not. Section 23(6) of the Act, however, allows people other than South African citizens or permanent residents to apply for an exemption to the requirements of section 23(1)(a), which the first respondent may consider allowing ‘on good cause shown’. Kondile AJ, writing for the majority of the Court, expressed concern about the lack of guidance and information given to the second to thirteenth applicants in regard to applying for the exemption. The judge intimated, but was by no means unequivocal in stating, that this failure amounted to an infringement of rights to procedurally fair administrative action:

One of the problems associated with this case is the apparent lack of information and assistance provided by the Authority [the first respondent] to refugee applicants in relation to their applications. The applicants submit that, at the absolute least, the respondents could and should have informed the applicants and other refugees wishing to apply for registration that they must submit applications in terms of section 23(6) if they wished to be exempt from the provisions of section 23(1)(a). This expectation is well founded in the light of the extent of refugee participation in this industry at the time of the introduction of the regulatory scheme. Is the provision of this information not an element of procedurally fair administrative action envisaged in section 3 of PAJA? (para 79)

As a result of this failure to provide the applicants with information, none of them applied for an exemption in terms of section 23(6) (para 84). Kondile AJ held that in these circumstances the applicants had failed to exhaust internal remedies in terms of the Act, and made an order requiring the respondents to allow the applicants to apply for an exemption on terms of section 23(6).

HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2007 (5) SA 438 (SCA) (see below under ‘Section 4 - Procedural fairness in administrative action affecting the public’, ‘Section 6 - Grounds of review’ and ‘Review under the Constitution’) contains an important statement of the relationship between procedures prescribed for administrative actions by statutes other than PAJA. The matter concerned an application challenging a directive issued by the third respondent in terms of section 31A(1) of the Environment Conservation Act 73 of 1989. That section allows the Minister of the Environmental Affairs or any other competent authority to direct any person to cease an activity which may seriously damage, endanger or detrimentally affect the environment. The appellant argued that in order for the respondents to act in terms of section 31A, they had first to comply with the procedures set out in section 32 of the Environment Conservation Act (para 10). The majority of the SCA, per Combrinck JA, held that ‘[t]he wording of s 32(1) is clear and unambiguous - if the Minister intends issuing a direction [in terms of s 31A] he “shall” publish a notice.’ (para 12) The majority went on:

‘It is true that thus construed the procedural prerequisites for action by the Minister under s 31A would be more onerous than those imposed by the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). But, if the Legislature chose to afford a party affected by particular administrative action greater procedural protection by means of the specific provisions of the [Environment Conservation] Act, those provisions cannot be ignored in favour of less onerous prescriptions in general legislation such as PAJA. It follows that it was intended that before a direction was issued there had to be compliance with s 32. There was none. The direction was therefore invalid.’ (para 13)

Jafta JA disagreed with the majority’s conclusion for reasons that are discussed below under ‘Section 4 - Procedural fairness in administrative action affecting the public’.

Minister of Defence and Others v Dunn 2007 (6) SA 52 (SCA) (see above under ‘Section 1 - Administrative action defined’, below under ‘Section 6 - Grounds of review’ and ‘Section 8 - Remedies’) was an appeal against a judgment of the Pretoria High Court (Dunn v Minister of Defence and Others 2006 (2) SA 107 (T), discussed in the 6th Edition of the PAJA Newsletter). Dunn had initially sought the review of the Minister’s decision to appoint one Coetzee to a vacant post instead of him. He challenged the decision on grounds, among others, that it was procedurally unfair in terms of section 3 of PAJA. The SCA, per Lewis JA, began its consideration of Dunn’s case on appeal by pointing out that there was no evidentiary support for the claims he advanced:

‘Although the court below appeared to consider that the SMS-DODI [Senior Management Services - Department of Defence Instruction] was applicable at the relevant time, Dunn concedes that the Interim Measures [for the Appointment and/or
The second consideration to which the SCA turned its attention was Dunn's submission that the process had been unfair because he had been invited to an interview which was subsequently cancelled. Dunn claimed that the invitation to an interview had created a legitimate expectation that he be heard by the placement board and that the personal profile of each candidate be evaluated by the board. The evidence of Motumi...indicates that the requirements laid down in the Interim Measures were fulfilled.

The high court's finding that the appellants had not met the requirements of the Interim Measures, and thus acted in breach of s 3 of PAJA, is accordingly also based on the assumption that the appellants were conspiring against Dunn and fabricating their evidence. There is, as I have said, nothing to support this assumption, and the contention that there was dishonest conduct on the part of the appellants and those involved in the procedures could not have been based solely on the papers. If fraud were in issue the court should have referred the matter to oral evidence or trial. But there is nothing in the papers themselves to controvert the evidence of Motumi and Luck, and the finding on this basis is rejected" (paras 22-3, footnotes omitted)

In South African Veterinary Council v Szymanski [2003 (4) SA 42 (SCA)] Cameron JA approved the requirements relating to the legitimacy of an expectation explained by Heher J in National Director of Public Prosecutions v Phillips [2002 (4) SA 60 (W)]. The law, said Heher J, does not protect every expectation. It protects those that are legitimate. To meet this criterion, the representation made by the functionary concerned must be "clear, unambiguous and devoid of relevant qualification". This requirement protects public functionaries against the risk that their "unwitting ambiguous statements may create legitimate expectations". Heher J added that it is always open to those who rely on such statements to obtain clarification. Second, the expectation must be reasonable. Third, it must have been introduced by the decision-maker. And fourth, the representation must be one which it is competent for the decisionmaker to make.

In President of the Republic of South Africa v Rugby Football Union [2000 (1) SA 1 (CC)] the court said that meeting the requirement of reasonableness depends not only on the expectation in the mind of the person relying on it but also on whether "viewed objectively such expectation is, in a legal sense, legitimate." In my view, Dunn's claim to a legitimate expectation fails on the reasonableness requirement. There was no representation that he was the likely candidate for the post. There was only an invitation to attend an interview (which could give rise to no more than a procedural expectation of an oral hearing): at most the invitation might amount to a representation that an interview might be of benefit. But it is equally likely that it would not have advanced Dunn's cause. There is nothing to show that anything would have turned on that interview. None of the candidates was interviewed. There was no unequal treatment. And, as I have said, there is no requirement that interviews be conducted. Nor was there evidence of a regular practice of holding interviews by the seminars or placement boards, a further factor referred to by Corbett CJ in Administrator, Transvaal v Traub [1989 (4) SA 731 (A)], and approved by the Constitutional Court in President of the RSA. There was no need, in order for the decision to be made, to have an oral hearing." (paras 31-2, footnotes omitted)

Section 4 - Procedural fairness in administrative action affecting the public

In HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2007 (5) SA 438 (SCA) (see above under 'Section 3 - Procedural fairness in administrative action affecting individuals', below under 'Section 6 - Grounds of review' and 'Review under the Constitution'), the majority of the SCA held that the respondents' failure to comply with procedures set out in section 32 of the Environment Conservation Act 73 of 1989 rendered a direction issued by the third respondent in terms of section 31A of the Act invalid. Jafita JA filed a dissenting minority opinion in which he disagreed with the reasoning of the majority. The majority, Jafita JA argued, erred to the extent that it treated the requirements of section 32 as procedures to be complied with when administrative action affects an individual. Rather, Jafita JA continued, section 32 is to be seen as setting out procedures to be followed when proposed administrative action may affect a range of as-yet unidentified people, who are then afforded an opportunity to make their concerns known to
Section 6 - Grounds of review

GVK Siyazama Building Contractors (Pty) Ltd v Minister of Public Works and others [2007] 4 All SA 992 (D) (see above under 'Section 1 - Administrative action defined') dealt with a challenge to the tender process by which the first respondent awarded a contract for the waterproofing and refurbishment of the Colonial Building in Pietermaritzburg to the second respondent (paras 1-3). The core of the complaint was that the invitation to tender and the tender document itself did not make clear that the applicant was required to furnish certain information if its tender was to meet the requirements for consideration by first respondent. The applicant's tender submission was rejected on the basis that it did not meet the stipulated requirements, and was never evaluated on its merits. The legislative framework governing the tender process was established by the Construction Industry Development Board Act 38 of 2000 (the CIDB Act). The purpose of the CIDB Act is largely to govern the establishment and functioning of the Construction Industry Development Board (the Board), whose role is to ensure 'best practice' that promotes 'procurement and delivery management reform', 'improved public sector delivery management' and 'national and social economic objectives including…growth of the emerging sector' in the construction industry (para 6). For this reason the CIDB Act establishes a national register of contractors. In terms of the regulations promulgated in terms of the CIDB Act, the Board must consider whether a contractor meets certain black economic empowerment objectives and qualifies as a 'potentially emerging enterprise'. A contractor that is determined to be potentially emerging is indicated in the register by the suffix 'PE' (para 11). The register reflects the capacity of each contractor on a rating system from 1-10, based on the Rand value of project that each contractor is equipped to handle. Similarly, the register reflects the type of project that each contractor is equipped to undertake. The only category relevant to the case was the category of 'general building works', designated by the suffix 'GB' (para 12). In the present case the minimum rating a contractor was required to have was 8GB, provided that in the case of a potentially emerging enterprise the rating was 7GB (para 16). The relevant part of the first respondent's invitation to tender in this case read:

inapposite. Jafta JA set out his position thus:

'The purpose of s 32 is to promote the right to administrative justice, particularly the right to procedural fairness. It prescribes the procedure to be followed by administrative functionaries so as to afford persons who may be affected by their decision a hearing before such decisions are taken. The procedure provided for is commonly known as the notice-and-comment procedure, the invocation of which is most suitable to decisions that affect the general public. That much is clear from what the draft notice is required to contain. This view is fortified by the provisions of PAJA. The notice-and-comment procedure appears in s 4 of PAJA which deals specifically with procedural fairness in administrative actions which affect the general public. This procedure does not feature at all under the section dealing with procedural fairness in actions affecting individuals (s 3).

In this context procedural fairness, by its very nature, demands that its requirements be complied with before the performance of an administrative action. This does not, however, mean that the hearing constitutes a prerequisite for the exercise of administrative power. There is, therefore, no justification for reading s 32 as if it creates a prerequisite for the exercise of the power in s 31A.' (paras 19-20)

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The Tender Data went on to provide:

'The following tenderers who are registered with the CIDB or capable of being so registered prior to the evaluation of submissions, are eligible to have their tenders evaluated:

(a) …

(b) contractors registered as potentially emerging enterprises with the CIDB who are registered in one contractor grading designation lower than required in terms of (a) above and who satisfy the following criteria…' (quoted at para 72)

At the time the applicant tendered for the contract, its designation was 7GB (para 12). Both the first and second respondents' case was that the applicant's tender was correctly reject-
ed by the first respondent on the basis that its tender did not comply with the ‘responsiveness criteria’ listed in the tender specifications, and that it was for that reason not an ‘acceptable tender in terms of the PPPF Act’ (see Morley AJ’s summary of the respondents’ respective arguments at paras 51-62). The applicant’s case was, first, that the tender specifications were ambiguous in whether a designation of 7GB or 7GB PE was required, and second, that at the time it tendered, although it was designated as 7GB, it was awaiting registration as 7GB PE:

‘It appears that the applicant was registered by the Board with a contractor grading designation of 7GB on the 19 October 2005. It contends that it was in fact entitled to be registered as a potentially emerging enterprise from that date and its grading certificate should have reflected a grading of 7GB PE. When the time came for it to submit its tender it was not in possession of a certificate reflecting its true status because the Board had not issued such a certificate to it. According to the applicant, the Board had promised to issue a certificate reflecting the applicant’s grading as 7GB PE in time for the tender closing date, but despite enquiries from the applicant, it did not do so.

The applicant stated in its founding affidavit that this omission did not seriously trouble it as it was a potentially emerging enterprise and the tender conditions stated that potentially emerging enterprises could have a designation of 7GB. Accordingly the applicant submitted with the tender the CIDB certificate, which was then in its possession, reflecting a 7GB grading. According to the applicant, the Board had invited the Tender not referred to a grade of 7GB, it would have taken more vigilant steps to obtain from the CIDB, a certificate confirming its 7GB PE status in time for the closing date of the tender. The applicant contends that in all respects its tender complied with the Tender Data and the other requirements for responsiveness.’ (paras 26-7)

The respondents’ position was that it was incumbent on the applicant to ensure that sufficient written documentation proving its status as potentially emerging was attached to its tender. Accepting as a fact that the applicant was entitled to be registered as a potentially emerging enterprise, Morley AJ went on:

‘The submission presupposes that the right to act under s 12(4)(b) and the right to access to adequate housing are reciprocal and that the former is “so is the invitation to Tender prescribed that a CIDB certificate had to be submitted with a tender. The applicant complied with this requirement. The Invitation to Tender, however, did not state what formalities were required in an instance where a tenderer was “capable” of being registered as a potentially emerging enterprise, bit such registration had not as yet taken place. In my view this was also a lacuna in the Invitation to Tender.

… In other words, the Tender Data did not make it clear that those tenderers who were capable of being registered as a potentially emerging enterprise, had to submit specific documentation at the time of submitting a tender reflecting that fact. In my judgment, if this was to be a requirement that could result in a tender being held to be administratively non-responsive, despite the tenderer being factually capable of tendering for the contract. The Invitation to Tender should have stated so in clear and unambiguous terms. If documents had to be submitted to support the fact that a tender was capable of being registered as a potentially emerging enterprise, then the Invitation to Tender should at least have stated what those documents were.’ (paras 74-5)

Continuing, the judge noted that having not stipulated any formal requirements in this regard, ‘it was hardly fair of the first respondent to reject the applicant’s tender out of hand because the applicant did not submit any documentation reflecting that it was capable of being registered as a potentially emerging enterprise’ (para 78). The judge found in the applicant’s favour, holding that the first respondent’s decision was reviewable on the basis of the following grounds of review: section 6(2)(d) of PAJA, because the first respondent’s incorrect interpretation of the tender documents amounted to a material error of law; procedural unfairness (section 6(2)(c) of PAJA), in that the first respondent rejected applicant’s tender on the basis of criteria that were not explained to the applicant at the time of tendering; relevant considerations were not taken into account (section 6(2)(e)(iii) of PAJA) because the first respondent ignored the fact that the applicant, despite tendering outside its tender value range in terms of its designation, was within a ‘reasonable margin’ of the stipulated range (see Regulation 25(7A) of the CIDB Regulations, quoted at para 17); and the decision was ‘otherwise unconstitutional or unlawful in terms of section 6(2)(i) of PAJA in that, in ultimately awarding the tender to a more expensive tenderer, the first respondent ignored the constitutional requirements of competitiveness and cost-effectiveness set out in section 217(1) of the Constitution.’
Heher JA held that given the manifest merits of the respondent's tender, the failure of the first two appellants to even consider the tender raised serious doubt as to the credibility and reliability of the procurement process followed (para 23). In such circumstances it could not be said that the prescriptions of the PPPF Act had been adhered to.

NOTE: Courts have on a few occasions been required to deal with challenges to the manner in which tender committees have construed the PPPF Act's requirement to consider only 'acceptable tenders'. They have approached the issue on the basis of PAJA, finding that a misconstrual of the statutory requirement of an 'acceptable tender' amounted to a material error of law, reviewable in terms of section 6(2)(d) of PAJA (JFE Sapela Electronics (Pty) Ltd v Chairperson, Standing Tender Committee [2004] 3 All SA 715 (C), reported in the 3rd Edition of the PAJA Newsletter). On appeal in the JFE Sapela case the SCA decided the matter on the basis of the doctrine of legality:

'It is well established that the Legislature and executive in all spheres are constrained by the principle that they may exercise no power and perform no function beyond those conferred on them by law. This is the doctrine of legality…. the acceptance by an organ of state of a tender which is not "acceptable" within the meaning of the Preferential Act is therefore an invalid act and falls to be set aside.' (Chairperson: Standing Tender Committee and others v JFE Sapela Electronics (Pty) Ltd and others [2005] 4 All SA 487 (SCA, para 11, reported in the 6th Edition of the PAJA Newsletter)

Tirhani Auctioneers (Gauteng) (Pty) Ltd v Transnet Ltd and another [2007] 3 All SA 70 (W) (see above under 'Section 1 - Administrative action defined') concerned a challenge to the award of a tender to the second respondent by Transnet, the first respondent. The applicant sought the review and setting aside of the decision to award the tender to the second respondent on the grounds that Transnet's decision to award the tender as it did was unlawful and unfair in that it was not in
compliance with a system that is fair, equitable, transparent, competitive and cost effective as required by section 217(1) of the Constitution. The applicant's primary claim, however, was for an interdict preventing the respondents from performing in terms of the contract pending the outcome of review application. Mayat AJ was therefore called on to determine, in terms of the common-law requirements for an interim interdict, whether the applicant had a prima facie right to judicial review of Transnet's decision. The basis of the applicant's complaint was that Transnet had awarded the tender contract to the second respondent despite the fact that the applicant scored better than the second respondent on a number of criteria against which the tenders were evaluated. In particular, while the applicant is 100% black-owned and managed and scored 20 out of a possible 20 points on the criterion of 'broad-based black economic empowerment' during the initial assessment, the second respondent is only 26% black-owned and managed and scored 16 out of a possible 20 points for the same criterion. Despite this difference, the final assessment of the tenders awarded both the applicant and the second respondent a 'BEE Recognition Level' of 80%, and the 'certificate of accreditation with regards black economic empowerment compliance' provided in respect of each company by a private consultant to Transnet awarded both companies 3 points out of a possible 3 in this context (paras 21-25).

The applicant submitted that given the difference in the black economic empowerment credentials of the applicant and second respondent, there was no rational basis on which the two companies could have been awarded the same score in regard to BEE, and that the system according to which the decision was made was therefore not consistent with the requirements of section 217(1) of the Constitution (para 32). Counsel for the first respondent countered that while the Constitution requires procurement to be in accordance with a system that is fair, equitable, transparent, competitive and cost-effective, the manner in which the system is implemented is a matter of policy choice,

'one cannot escape the conclusion that the result of the manner in which the system is implemented must not only be fair, equitable, transparent and cost-effective, but also consistent with the other principles of administrative justice.' (para 35)

The judge concluded:

'I accordingly disagree with [counsel for Transnet's] submission that the implementation of a system as a policy choice, can never be subject to the rationality test. For these reasons, I am of the view that the applicant has established a prima facie case (if not a clear case) for judicial review by virtue of the first respondent's unfair, inequitable and rationally unjustifiable scoring of the applicant and the second respondent in the context of exercisable voting rights of blacks.' (para 36)

NOTE: The conclusions of this judgment are contemplated in PAJA in section 6(2)(c) (review for procedural unfairness), section 6(2)(f)(i) (the action taken contravenes a law, in this case the requirements set out in the PPPF Act), and section 6(2)(f)(ii)(cc) (no rational connection to the information before the administrator).

In Bluelilliebush Dairy Farming and another v Minister of Agriculture and others [2007] 3 All SA 35 (SE) (see below under 'Section 8 - Remedies') Jansen J reviewed and set aside the second respondent's decision (confirmed by the first respondent) on the basis of section 6 of PAJA. The judge found that the decision was reviewable on three grounds set out in PAJA: the decision had been influenced by a material error of law (section 6(2)(d)), relevant considerations were not taken into account (section 6(2)(e)(iii)) and the decision was arbitrary or capricious (section 6(2)(e)(vi)). The case concerned the amount to be paid as compensation for the destruction of livestock in terms of the Animal Diseases Act 35 of 1984. Following an outbreak of bovine tuberculosis (TB) and the introduction of measures to reduce the spread of the outbreak, several of the applicants' dairy cattle were destroyed. The second respondent determined that the compensation to be paid was determined on the basis of the slaughter value of the cattle. The applicants objected, arguing that in terms of the relevant legislative frame-
work compensation should have been determined on the market value of the cattle as milk-producing cows. The respondents' submission in response was that Director: Animal Health in the Department of Agriculture had in 1999 adopted a policy to determine compensation in the case of bovine TB on the basis of slaughter value. The judge found that the relevant section of the Act, section 19, read with Regulation 19 of the Regulations promulgated in terms of the Act (quoted at 38a-j), set clear parameters to the discretion afforded the second respondent in determining compensation (38j-39a). Jansen J referred to a decision of the SCA pointing out that slavish adherence to policy may prevent the proper application of a discretion:

'A public official who is vested with a discretion must exercise it with an open mind but not necessarily a mind that is untrammelled by existing principles or policy. In some cases, the enabling statute may require that to be done, either expressly or by implication from the nature of the particular discretion, but, generally, there can be no objection to an official exercising a discretion in accordance with an existing policy if he or she is independently satisfied that the policy is appropriate to the circumstances of the particular case. What is required is only that he or she does not elevate principles or policies into rules that are considered to be binding with the result that no discretion is exercised at all.' (Kemp NO v Van Wyk 2005 (6) SA 519 (SCA), reported in the 6th Edition of the PAJA Newsletter)

The judge concluded:

'The adoption of the policy in 1999 was prompted by the increase in the number of farmers and a possible increase in claims for compensation without due regard to the statutory provisions dealing with compensation. The fact that the second respondent determined compensation in terms of a policy which was adopted for the wrong reasons resulted in a failure to exercise his discretion in terms of section 19 and regulation 30.' (at 40e-f)

Section 6(2)(b) - mandatory or material procedure or condition not complied with

HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2007 (5) SA 438 (SCA) (see above under 'Section 3 - Procedural fairness in administrative action affecting individuals', 'Section 4 - Procedural fairness in administrative action affecting the public, and 'Review under the Constitution') concerned a challenge to the issuing of a directive by the third respondent in terms of section 31A of the Environment Conservation Act 73 of 1989. In terms of the section the Minister of Environmental Affairs or any other competent authority can direct any person to cease an activity that may seriously damage, endanger or detrimentally affect the environment. The majority upheld the appellant's argument that the exercise of the power conferred by section 31A depended on compliance with the procedures set out in section 32 (paras 10-12). Section 32 requires a competent person seeking to act in terms of section 31A to issue a public notice calling for comments on the proposed action. In this regard the majority found that section 32 set out material and mandatory procedures failure to comply with which would render the administrative action reviewable. Section 6(2)(b) of PAJA provides that an administrative action is reviewable if 'a mandatory and material procedure or condition prescribed by an empowering provision was not complied with'. Although the section was not mentioned by the majority, it is clear from the judgment that PAJA governed the matter.

'In the present matter it is clear in my judgment that the applicant has not formed the required opinion within the meaning of s 31A of the Act. To do so is a prerequisite to the powers conferred upon the applicant in terms of s 31A read with s 32 and before the existence of that jurisdictional fact (the opinion) no rights accrue to the applicant in terms of the Act'. (quoted at para 26)

Jafta JA then concluded:

'For reasons set out above, I conclude that publication of a draft notice is not a prerequisite for the exercise of the power in s 31A. All that the third respondent was required to do, by way of a prerequisite, was to form an opinion that the activities in which the appellant were engaged were damaging to the environment. The evidence in the present case shows that such an opinion was indeed formed prior to the issuing of the direction.' (para 27)

Minister of Defence and Others v Dunn 2007 (6) SA 52 (SCA) (see above under 'Section 1 - Administrative action defined', 'Section 3 - Procedural fairness in administrative action affecting individuals' and 'Section 8 - Remedies') concerned a number of challenges to the first appellant's decision to appoint a candidate other than Dunn to a post in the South African National Defence Force (SANDF). The High Court found that the
process set out in the SANDF’s Interim Measures for the Appointment and/or Promotion of Top Officers had not been followed, and that the decision was reviewable on grounds set out in section 6(2)(a)(i), 6(2)(b) and section 6(2)(f)(i) of PAJA (The High Court decision is reported as Dunn v Minister of Defence and Others 2006 (2) SA 107 (T) and is discussed in the 6th Edition of the PAJA Newsletter). The essence of the High Court's finding, however, was that mandatory and material procedures set out in the Interim Measures had not been complied with and that the decision fell foul of section 6(2)(b) of PAJA (see para 24 of the SCA judgment). The appellants argued that the Interim Measures were 'no more than policy documents' and did not fetter their discretion to make appointments or promotion in accordance with any fair procedures they decide to follow (paras 25-6). Lewis JA did not find it necessary to consider this argument, however. She held on the facts that Dunn had failed to show how the respondents had deviated from the requirements of the Interim Measures at all:

'Dunn does not show, in any event, quite how the Interim Measures were infringed: he does not point to any passage that requires the same board to consider all appointments. Indeed, the Interim Measures themselves indicate that there should be different seminars for different rank levels. There was thus no infringement of s 6(2)(a)(i) nor (b) and no need to decide what the status of the Interim Measures was nor whether the Chief of the SANDF or the Minister could permit deviation from them. This conclusion applies also to the complaint under s 6(2)(f)(i) that there had not been compliance with the empowering provision.' (para 26)

Section 6(2)(c) - procedurally unfair administrative action

In Minister of Defence and Others v Dunn 2007 (6) SA 52 (SCA) (see above under 'Section 1 - Administrative action defined', 'Section 3 - Procedural fairness in administrative action affecting individuals' and 'Section 8 - Remedies'), the court a quo had found that section 6(2)(c) of PAJA had been infringed because Dunn had been invited to an interview for a job placement for which he had applied which was subsequently cancelled. He thus argued that the principles of audi alteram partem had been violated in the denial of an opportunity to be heard. Lewis JA, for the court, rejected this submission:

'It is to be noted that s 3 of PAJA does not afford a right to "appear in person" before a decision is taken. The decision-maker may, in order to give effect to procedurally fair administrative action, afford a person who will be affected the opportunity to be heard in person. Even where that is not the case, the audi alteram partem nonetheless applies: a person in respect of whom administrative action is to be taken is entitled to a hearing and to make representations. But Dunn was not denied that opportunity. He placed information about himself before the special placement board and according to Motumi and Luck it was considered. Although he contends that not all of that information was before the special placement board (because annexures to his curriculum vitae had become detached), there is nothing to suggest that the board did not have sufficient information available and that he was not "heard".' (para 27)

Section 6(2)(e)(iii) - Failure to take relevant considerations into account

In Hangklip Environmental Action Group v MEC for Agriculture, Environemntal Affairs and Development Planning, Western Cape and Others 2007 (6) SA 65 (C) (see below under ‘Section 8 - Remedies’), the court was required to consider whether a factual error on which the first respondent's decision to zone a certain erf for agricultural use in terms of the Land Use and Planning Ordinance 15 of 1985 (C) (LUPO) rendered the decision reviewable. The fourth respondent, the owner of the erf in question, had applied to the third respondent in terms of LUPO in order to begin abalone farming operations from its land (at 69H-J). The third respondent issued a decision zoning the property as requested. This decision was appealed in terms of LUPO to the first respondent by the applicant. The first respondent found that the reasons given by the third respondent for the decision were invalid. On a rehearing of the matter, the first respondent nevertheless zoned the property as requested. This decision was appealed in terms of LUPO to the first respondent by the applicant. The first respondent found that the reasons given by the third respondent for the decision were invalid. On a rehearing of the matter, the first respondent nevertheless zoned the property in the same way, thereby allowing the fourth respondent to commence abalone farming operations and aggrieving the applicant. Turning to the applicable provisions of LUPO, Thring J explained the procedure to be followed by the first respondent when exercising the power conferred on him or her to 'zone' property:

'It is not in dispute, and I think correctly so, that what is envisaged by s 14(1) of LUPO is, in the first place, a process by means of which the local authority concerned "determines(s)" (Afrikaans
Nevertheless, the first respondent had determined that the land had in fact been used for agricultural purposes, and proceeded to exercise the discretion afforded him by LUPO on the basis of this determination. Thring J concluded that the first respondent's decision, resting as it did on this erroneous factual determination, could not stand on review (at 82D-E). He referred to the SCA decision of Pecpor Retirement Fund v Financial Services Board 2003 (6) SA 38 (SCA) at paras 46-7 for authority for the proposition that section 6(2)(e)(iii) of PAJA can be read to accommodate review on the basis of a mistake of fact (at 81G-82D).

Section 6(2)(f)(i) - Administrative action not authorised by empowering provision

Qualidential Laboratories (Pty) Ltd v Heritage Western Cape [2007] SCA 170 (RSA) (unreported, 30 November 2007) is a judgment on appeal against a decision of Davis J in the Cape High Court. That decision is reported as Qualidential Laboratories (Pty) Ltd v Heritage Western Cape and Another 2007 (4) SA 26 (C) and is discussed in the 8th Edition of the PAJA Newsletter. The facts of the case appear in the judgment (paras 2-7). The case concerned the appellant's application for review of a decision by the first respondent to attach conditions to a demolition permit it issued in terms of the National Heritage Resources Act 25 of 1999. The appellant owned a property in Mossel Bay on which a cottage (called the annex by the parties) and a villa had been built. Both structures were over 60 years old and could not be demolished in terms of the Act without a permit issued by the first respondent. The appellant made the necessary application. The first respondent decided that the villa was of significant cultural importance and enjoyed landmark status, and denied permission to demolish it. The first respondent did grant permission to demolish the annex, providing that the appellant submit to it the plans for proposed development for approval. The appellant submitted its plans for development, but the first respondent did not approve them, finding that the proposed development would obscure the villa and 'make a mockery of the villa's landmark status' (para 6). The appellant nevertheless demolished the annex and began construction. Upon service of a stop-works order on the appellant and the threat of criminal prosecution, the appellant sought to have the first respondent's decision

The significance of the two-stage process, Thring J went on, was that failure to comply with the fact-gathering requirements of the first stage would render the exercise of the discretion at the second stage unlawful:

'The third and first respondents were required, for the purposes of "granting" a zoning to the fourth respondent's land under s 14(1) and 14(3) of LUPO, to embark on a process which comprised two separate stages: first, a purely factual enquiry into the "utilisation" of the land as at 1 July 1986; secondly, and thereafter, a choice of the zoning which would be in accordance with the "utilisation" of the land as it had been determined by the third or first respondent. The first stage of this process did not, in my opinion, entail or permit the exercise of a discretion by the third or first respondent; the second one did. The second, discretionary decision could be properly made only if the first, non-discretionary, determination of the factual position had been properly carried out - if it had not been properly carried out, and the factual conclusion reached was flawed as a result, this could have the effect of vitiating the first respondent's second (discretionary) decision. This would be because the latter decision was made by the first respondent under a misapprehension of the true factual position which had been induced by his officials, resulting in his discretion having been trammeled and misled by false information, so that his discretion had not been regularly or lawfully exercised.' (8G-J)

Examining the evidence in the case, Thring J found that there was no basis on which it could be concluded that the land in question had ever been used for agricultural purposes (79J-80G). Nevertheless, the first respondent had deter-
reviewed and set aside on the basis that the Act did not confer on the first respondent the power to attach conditions to demolition permits (para 8). The court noted that the appellant placed reliance in this regard on the principle of legality:

'Any entity like the first respondent exercising public power is confined to exercising only such powers as are lawfully conferred upon it - this is the principle of legality. See Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1999 (1) SA 374 (CC) at 399 para 56 and Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa 2000 (2) SA 674 (CC) at 699 para 50.' (para 9)

Reliance was not placed by the appellant on the provisions of PAJA, but it is clear from the court's consideration of the respondents' objection that the appellant had failed to follow the procedures for review set out in section 7 of PAJA (see para 22), that PAJA was applicable. The court examined section 48(2) of the Act and found it to confer a discretion on the first respondent to attach conditions to permission to demolish:

'It is evident that in terms of s 48(2) the first respondent has a discretion insofar as the granting or refusal of a permit is concerned. The first respondent also has a discretion regarding the imposition of any terms, conditions, restrictions or directions when granting a permit.' (para 14)

The appellant advanced two arguments in this respect. The first was that the objective of the power conferred on the first respondent was the preservation of existing buildings, rather than limitation of the development or construction of new buildings. Second, the appellant argued that section 48(2) confers a discretion only in respect of buildings that are formally recognised as heritage areas, sites or objects or are formally protected in terms of the Act. It was common cause that neither the villa nor the annex were so recognised or protected (para 13). The court, per Mlambo JA, summarised the appellant's submissions as follows:

'It was further submitted in relation to the villa that the only power which the Act confers upon the first respondent is to protect it from alteration or demolition but that the first respondent enjoys no power to regulate any other construction on the property. Counsel submitted that the imposition of the condition in the demolition permit was thus beyond the first respondent's powers. Counsel labelled the condition as one the objective of which was to control development which he submitted was not authorised by s 48 and was beyond the first respondent's power. It was further submitted that the powers contained in s 48(2) (in terms of which the condition was imposed) which entitle the first respondent to impose a condition that design proposals be revised, are exercisable only in the context of control by a heritage resources authority over the alteration or development of heritage resources which enjoy formal protection in terms of the Act through the provisions referred to in paragraph 13 above. In so far as the stop works order is concerned, it is sought to be set aside on the basis that its validity is predicated upon the effectiveness of the condition the validity of which is impugned.' (para 16)

Mlambo JA rejected both of these arguments as inconsistent with the conservation objective of the Act as a whole. He concluded that the Act's 'overarching objective is the identification, protection, preservation and management of heritage resources for posterity' (para 10). The judge said in light of this conclusion:

'The condition imposed by the first respondent therefore accords with its conservation mandate in terms of the Act and is directly in line with the principles of heritage resources management set out in ss 5 and 6. The imposition of the condition is also within the parameters, not only of the Act but is consonant with the overall scheme of the Act. The first respondent's power to impose conditions in my view is not as narrowly circumscribed as contended for by the appellant.

I may add that the purpose and effect of the condition is designed to enable the first respondent to exercise a power vested in it in terms of the Act and which, as pointed out, is consonant with the overall objective of the Act ie the conservation of a heritage resource. Therefore the condition, rather than being one aimed at controlling development, as contended by the appellant, was in actual fact a condition with a conservation objective. It must also follow that, the condition having been validly imposed, the stop works order is also unimpeachable.' (paras 19-20)

The appeals was therefore dismissed and the decision of the High Court upheld.

Section 6(2)(f)(ii)(cc) - Irrational decision

Thring J held in Hangklip Environmental
Action Group v MEC for Agriculture, Environmental Affairs and Development Planning, Western Cape and Others 2007 (6) SA 65 (C) (see below under 'Section 8 - Remedies') that the process for a decision set out in the Land Use and Planning Ordinance 15 of 1985 (C) (LUPO) was a two stage one. The first stage was a fact-gathering exercise, while the second stage involved the exercise of a discretion on the basis of the factual conclusions reached in the first stage. Thring J held that a mistake of fact in the first stage would vitiate the exercise of discretion at the second stage, but he went to add that even if the process required by LUPO did not involve two separate and distinct stages, the decision in the case before him could nevertheless be reviewed on grounds set out in section 6(2)(f)(ii)(cc) of PAJA. On the evidence placed before him the judge held:

‘I am unable to find any rational connection between [the first respondent’s] decision on the one hand and the information which was placed before him on the other, when the latter is properly considered.’ (at 83J-84A)

The judge held for the same reason that the decision could be reviewed on the grounds of unreasonableness (at 84A). The impugned decision was accordingly set aside.

Section 7 - Procedure for review

Section 7(2) - Exhaustion of internal remedies

In Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others 2007 (4) BCLR 339 (CC) (see above under 'Section 1 - Administrative action defined' and 'Section 3 - Procedural fairness in administrative action affecting individuals') the second to thirteenth applicants had been denied registration as private security service providers in terms section 23(1)(a) of the Private Security Industry Regulation Act 56 of 2001 because they were neither South African citizens nor permanent residents. Although some of the applicants had appealed the first respondent’s decision in terms of the Act, none of them had applied for an exemption to the requirements of section 23(1)(a) as provided for by section 23(6). A significant reason for this, however, was that the respondents had failed to provide the applicants with any information or guidance in this respect. The majority of the Constitutional Court, per Kondile AJ, therefore held that the applicants had failed to exhaust internal remedies as required by section 7(2) of PAJA:

‘An application for exemption to the Authority is an internal remedy still available to the applicants. It is only fair, now that the applicants are aware of what is expected as regards an application for exemption, and the Authority has the guidance of this judgment at its disposal when considering exemption applications, that they be given an opportunity to so apply. Accordingly, in terms of section 7(2)(a) of PAJA, this Court is not called upon to make any determination on the granting of exemption. This decision is strengthened by the fact that the correctness or otherwise of the particular administrative decisions was not pronounced upon by the High Court. It should be added however, that in considering the applications, the Authority is obliged to do so in the light of the considerations relevant to “good cause” set out above: (para 87)

In Sechaba v Kotze and others [2007] 4 All SA 811 (NC) (see below under 'Common-law review - unlawfulness') administrative law points were raise by the first and second respondent in a counter-application to the main application. The applicant had been granted a ‘prospecting right’ by the third respondent in terms of the Mineral and Petroleum Rights Development Act 28 of 2002 (MPRDA). The right pertained to land owned by the first respondent. The first respondent refused to allow the applicant access to his land, thereby preventing the applicant from exercising his prospecting right, on the basis that the applicant had not complied with the requirements of section 5(4)(c) of the MPRDA in terms of which the right was granted. That section provides that no person may prospect for any mineral or petroleum without 'notifying and consulting with the land owner or lawful occupier of the land in question'. It was common cause that the applicant had made no effort to consult with the first respondent before demanding access to the land in question (para 10). The applicant then approached the court seeking an order compelling the first respondent to allow the applicant to prospect on his land. The court (Lacock and Olivier JJ) dismissed this application, holding that the applicant had failed to comply with the statutory requirements for access to the land, and that its application was for that rea-
The court then turned to the counter application, the substance of which was an allegation that the applicant's prospecting right was improperly granted, was void ab initio and should be set aside. The applicant raised an objection in limine that the first and second respondent had failed to exhaust internal remedies before seeking judicial review. Section 96(1) of the MPRDA allows for internal appeal processes and judicial review of decision taken in terms of the MPRDA. Section 93(3) provides, however, that 'No person may apply to the court for the review of an administrative decision contemplated in subsection (1) until that person has exhausted his or her remedies in terms of that subsection.' The court noted that the 'deference of review applications until domestic remedies have been exhausted' is a principle of our common law that is now recognised by section 7(2)(a) of PAJA (paras 23-4). Subsection 7(2)(c) of PAJA provides for exceptions to this principle in appropriate circumstances. At the time that the first and second respondents filed their counter-application before the court, the outcome of internal appeal proceedings against the decision of the third respondent granting the applicant's prospecting right was not known. The first and second respondents had not exhausted internal remedies, and therefore applied in terms of section 7(2)(c) of PAJA for an exemption from this requirement. The applicant argued that section 7(2)(c) of PAJA did not apply in light of section 96(3) of the MPRDA. The court gave this summary of the applicant's submission:

"He based this submission on the maxim inclusion unius est exclusion alterius, and on the fact that the Legislature, in enacting the provisions of section 96 of the MPRDA, omitted any reference to section 7(2)(c) of the PAJA when it provided, in section 96(4) of the MPRDA, that "Sections 6, 7(1) and 8 of the Promotion of Administrative Justice Act 2000... apply to any court proceedings contemplated in this section". And he argued that, against the background of the clear prohibition in section 96(3) of the MPRDA, the only reasonable inference is that the Legislature intended to exclude the application of subsection (2)(c) of the PAJA in matters resorting under the MPRDA.' (para 27)

The court found it unnecessary to rule finally on this issue, since by the time the matter was heard by the court, the internal appeal in terms of section 96(1) of the MPRDA had been finalised and internal remedies had in effect been exhausted (para 32). The court went on to point out that the provisions of section 96(3) of the MPRDA have no impact on a party's cause of action. Had the counter-application been launched before the first and second respondents' cause of action had arisen, the situation would have been different, but the effect of section 96(3) is that it 'merely provides for a procedural deference of the remedy of review, and not a complete ouster thereof.' (para 34) In concluding, the court said:

'The key question is whether conditions can be imposed upon an application or demolition or alteration, or whether section 34(1) envisages either a stark positive or a negative response to an application.' (at 646f)

_Tshona v Principal, Victoria Girls High School, and Others 2007 (5) SA 66 (E)_ dealt briefly with the requirement in section 7(2) of PAJA that an applicant must exhaust internal remedies before approaching a court of review for relief. The applicant had alleged that the proceedings by which the Victoria Girls High School, represented by the respondents, had expelled her from the boarding hostel had been unfair. After considering the confusing and ambiguous argument put forward by the applicant and by counsel on her behalf, Pickering J was satisfied in all the circumstances that these proceedings had been procedurally fair. He concluded:

'It is accordingly not necessary to deal with [counsel for the respondents'] further submissions that in the light of the applicant's deliberate failure to exhaust he internal remedies with regard to appeals she was barred in terms of s 7(2) of the Promotion of Administrative Justice Act 3 of 2000 from seeking relief from this Court.' (at 81J-82A)

In _McDonald and Others v Minister of Minerals and Energy and Others 2007 (5) SA 642 (C)_ (see above under 'Section 1 - Administrative action defined' and below under 'Review under the Constitution'), the respondents objected to the application to review the regulations made by the first respondent in terms of the National Nuclear Regulator Act 47 of 1999 on the basis that the applicants had failed to exhaust internal remedies. Griesel J (Yekiso J concurring) rejected this argument on the ground, firstly,
that PAJA did not apply to the matter at all. But secondly, the judge went on:

"Even assuming s 7 of PAJA to be applicable...the provisions of s 46(3) of the Act envisage an appeal to this Court, which must be proceeded with "as if it were an appeal from a magistrates’ court to the High Court". In my view, this is not the kind of "internal" remedy contemplated by s 7(2) of PAJA."  (para 26)

In eThekwini Municipality v Tsogo Sun Kwazulu-Natal (Pty) Ltd 2007 (6) SA 272 (SCA) the respondent had sought an order in terms of section 8(1) of the National Building Regulations and Building Standards Act 103 of 1977 compelling the appellant to take a decision in terms of section 7(1) of the Act approving or refusing to approve its application for building plans. The section requires a local authority to take such a decision within 60 days. Towards the end of the period of 60 days in respect of the respondent, the appellant sent a notice to the respondent indicating that its application could not be considered as it failed to comply with certain formalities. The respondent argued that this was an equivocal response that did not amount to either an approval or a refusal to approve its building plans. The appellant’s failure to take a decision, the respondent continued, was reviewable in terms of section 8(1) of the Act (in this regard see also sections 6(2)(g) and 6(3) of PAJA). The appellant argued that its notice to the respondent did constitute a refusal to approve its application and that it had made a decision. Since the decision amounted to an administrative action, the appellant argued that the respondent was required to exhaust its internal remedies before approaching a court seeking an order that it make a decision. The SCA summarised the arguments as follows:

"The primary dispute between the parties in the application to Court was whether the appellant had, in its letter of 28 January 2005, communicated a decision to refuse to grant approval of the planning application or whether, properly interpreted, the notification merely amounted to a postponement or avoidance of a decision...From the appellant’s side it was contended that the letter in question contained an unequivocal refusal to approve the plans and the only remedy open to the respondent, once that happened, lay in the appeal provided by s 9(1). Until it had exhausted this "domestic remedy", so it was submitted, the Court could not and would not entertain an application to review the appellant’s decision. Suffice it to say at this stage that if the respondent’s reliance on s 8(1) is correct no question of review arises because the section contains express authorisation to approach a Court to compel compliance with the duty imposed by s 7(1); if, on the other hand, its reliance was misplaced, the respondent has set up no alternative basis for interference with the decisions, such as a review.' (para 26)

Upon finding that the appellant’s letter did constitute a decision, the SCA (per Heher JA) concluded that the respondent’s initial application to the High Court had been premature:

"Once it is accepted that the decision communicated to the respondent constituted a refusal to approve, the question arises why the respondent should have been allowed to approach the Court directly as opposed to first exhausting its remedy of an appeal to the review board (the board) pursuant to s 9...In the circumstances the Court a quo should not, in my view, have entertained the application for the declaratory order.’ (para 23)

Section 8 - Remedies

Section 8(1)(c)(ii)(aa) - Substitution

Hangklip Environmental Action Group v MEC for Agriculture, Environment Affairs and Development Planning, Western Cape and Others 2007 (6) SA 65 (C) (see above under ‘Section 6 - Grounds of review’) concerned a finding that the first respondent’s decision was based on a mistake of fact and thus susceptible of review. The empowering provision in terms of which the first respondent had acted required the factual determination of a certain state of affairs on the basis of which the discretion afforded him was to be exercised. Finding on the evidence presented to the court that the first respondent had made an error, Thring J went on to find that there was only one factual conclusion to which the first respondent could have come, and consequently one decision he could have made. The circumstances were in his view ‘exceptional’ in terms of section 8(1)(c)(ii)(aa) of PAJA, justifying the court's substitution of the first respondent's order with its own:

"In the present case it is transparently clear to me that there was only one decision which the first respondent could properly have made on the material available... It has not been suggested that there is any further information or evidence which is not already before the Court which could possibly lead to a different result. Mountains of paper have already been generated by this dispute. There can be no good reason to burden the first respondent with it again. Four and a half years..."
have passed since he made his decision. Further delays and uncertainty should be avoided, if possible. In my view no useful purpose would be served by remitting the matter to the first respondent so that he could reconsider his decision: there is, in my view, as I have said, only one decision which he could properly make in the circumstances. The Court is in as good a position as he is to make it. Nor has anyone, including the first respondent himself, asked that the matter be remitted to him for reconsideration. I consider that these factors, taken cumulatively, constitute this as an "exceptional case" for the purposes of s 8(1)(c)(ii) of PAJA, and that I am consequently justified, not only in setting aside the first respondent's decision, but also in substituting for it the decision which I think that he ought to have made.' (at 84G-85B)

Section 8(1)(c)(ii)(bb) - Compensation

Moniel Holdings (Pty) Ltd v Premier of Limpopo Province and Others [2007] 3 All SA 410 (T) involved a claim for the payment of delictual damages resulting from a reviewable tender process. The plaintiff had sometime during 2003 responded to an invitation by the third defendant, the Limpopo Provincial Government Central Procurement Committee, for the supply of coal to various provincial hospitals. The plaintiff's tender was rejected on the basis that it had failed to comply with one of the requirements of the tender conditions, in that it did not submit a copy of a public indemnity insurance policy (at 413b-c). The third defendant awarded the tender to two other coal-supply concerns. It subsequently emerged, however, that none of the tenderers, including the successful tenderers, had complied with the requirement to submit a public indemnity insurance policy. The plaintiff initially sought the review of the decision in terms of PAJA. In an unreported decision delivered on 27 October 2005, Van der Merwe J reviewed the decision and set it aside, ordering that it be remitted to the respondent (now third defendant) for reconsideration in terms of section 8(1)(c)(i) of PAJA (see para 13.3). However, the contract for which the plaintiff had tendered came to an end on 31 October 2005, just days after Van der Merwe J ordered that the third defendant's decision be set aside. The plaintiff thus had nothing to gain from the reconsideration of the matter, and, given that Van der Merwe J did not exercise the discretion afforded him by section 8(1)(c)(ii)(bb) to order the third defendant to pay compensation, the plaintiff instituted a claim for delictual damages in the amount of R34 million 'in respect of the loss of profit which it would otherwise have derived from the said tenders' (para 9). The defendants excepted to the plaintiff's case, arguing that it had no cause of action. The defendants relied largely in this respect on the judgment of Steenkamp NO v Provincial tender Board, EC [2006] 1 All SA 478 (SCA) (reported in the 6th Edition of the PAJA Newsletter), although by the time the judgment was delivered the Constitutional Court had ruled in the matter (Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC), reported in the 7th Edition of
the PAJA Newsletter), Sithole AJ’s judgment in the present matter relies on the Constitutional Court decision rather than the SCA decision. The Steenkamp matter can be distinguished on the facts from this matter, though, since while the plaintiff here was an unsuccessful tenderer, the applicant in Steenkamp had been a successful tenderer. Sithole AJ referred to the minority judgment of Langa CJ and O’Regan J in the Steenkamp matter in this regard:

‘In my opinion, it important to know whether a particular tenderer is a successful one or not, for the two cannot be tarred with the same brush. The essential difference between the two lies in the fact that, depending on the circumstances of the case, a Tender Board owes a successful tenderer a legal duty not to act negligently in the adjudication of the tender. As was, in my view, rightly stated in the dissenting judgment of Langa, CJ and O’Regan, J in the Steenkamp case (supra):

“In our view, the notion that a successful tenderer should be entitled to recover for actual money spent in good faith by it in pursuance of contractual obligations is quite different to an unsuccessful tenderer being able to recover fully both profits it cannot realise as a result of an improper tender award. The former entitles an applicant to reimbursement for expenses it undertook for the benefit of the government. The latter does in a real sense constitute a ‘windfall’ claim, as the disappointed tenderer will not need to do anything other than litigate to put itself in the position it would have been if it had performed the contract.”

In the premises, I find that in casu the plaintiff is an unsuccessful tenderer who is not owed any legal duty by the third defendant or any of the defendants. Besides, an unsuccessful tenderer who considers the tender award to have been unlawful or improper (as in casu) always has a remedy of judicial review to set aside the tender and thereafter reapply if the tender is advertised. A successful tenderer, on the other hand, does not have this remedy and is indeed a bearer of obligations to comply with the contractual obligations it undertakes once the tender has been awarded. The plaintiff, in casu, is definitely not a bearer of such obligations.’ (para 13.3)

The case was thus not on all fours with the Steenkamp case, and the defendants were wrong to rely on it in support of their exception. Judicial support for the exception is to be found, rather, in the decision in Olitzki Property Holdings v State Tender Board and Another 2001 (3) SA 1247 (SCA). In dealing with a claim that is on all fours with the claim in this case, Cameron JA said:

‘Certainly the contention that it is just and reasonable, or in accord with the community’s sense of justice, or assertive of the interim Constitution’s fundamental values, to award an unsuccessful tenderer who can prove misfeasance in the actual award its lost profit does not strike me in this context as persuasive. As the plaintiff’s claim, which amounts to more than R10 million, illustrates, the resultant imposition on the public purse could be very substantial, involving a double imposition on the State, which would have to pay the successful tenderer the tender amount in contract while paying the same sum in delict to the aggrieved plaintiff. As a matter of public policy the award of such an entitlement seems to me to be so subject to legitimate contention and debate as to impel the conclusion that the scheme of the interim Constitution envisaged that it should be a matter for decision by the bodies upon whom the legislative duties...were imposed. In these circumstances to infer such a remedy judicially would be to venture far beyond the field of statutory construction or constitutional interpretation.’ (para 30, footnotes omitted)

[The applicant] does not seek the revocation of the tender awarded and its re-allocation to itself, but asserts instead that fair process, if followed, would have resulted in its obtaining the award and hence claims damages for profit lost by a denial of fair process. The claim thus derives from a breach of fair process but it seeks to recover the equivalent of a successful outcome. Its failure to challenge the outcome in review proceedings the plaintiff explains on the basis that its option over the building did not last long enough. Leaving aside the conceptual and practical difficulties this omission raises, the rub of the matter is that the plaintiff in effect claims a windfall, and does so on the premise that its gain has also the public dimension of constitutional vindication. Yet, as Ackermann J pointed out in relation to the punitive damages sought in Fose [Fose v Minister of Justice 1997 3] SA 786 (CC), for awards to individuals to have a salutary effect on the conduct of public officials they would have to be very substantial, and “the more substantial they are, the greater the anomaly that a single plaintiff receives a windfall of such magnitude”. Not only is there an anomaly, but the grave impact on the exchequer raises a critical policy consideration, which Ackermann J described thus [para 72]:

“In a country where there is a great demand generally on scarce resources, where the government has various constitutionally prescribed commitments which have substantial economic implications and where there are ‘multifarious demands on the public purse and the machinery of government that flow from the urgent need for economic and social reform’, it seems to me it would be inappropriate to use these scarce resources to pay punitive constitutional damages to plaintiffs who are already compensated...” ‘ (para 41, footnotes omitted)
In concluding, Sithole AJ found that the plaintiff had failed to make out a claim in law and upheld the defendants' exception.

In Minister of Defence and Others v Dunn 2007 (6) SA 52 (SCA) (see above under 'Section 1 - Administrative action defined', 'Section 3 - Procedural fairness in administrative action affecting individuals' and 'Section 6 - Grounds of review'), the SCA dealt with an appeal against a decision of the High Court (Dunn v Minister of Defence and Others 2006 (2) SA 107 (T), discussed in the 6th Edition of the PAJA Newsletter). In the court a quo, Van Rooyen AJ had found that the Minister's decision not to appoint Dunn to a position in the South African National Defence Force was invalid on a number of grounds in PAJA. Instead of setting the decision aside, however, Van Rooyen AJ made an order in terms of section 8(1)(c)(ii)(bb) that the appellants (respondents in the court a quo) pay compensation to Dunn. The order was that Dunn receive the salary that he would have received had he been appointed. This, Lewis JA held on appeal, amounted to an 'effective promotion' (para 39). She went on to hold that there were no exceptional circumstances as required by section 8(1)(c)(ii) of PAJA justifying the order made by Van Rooyen AJ:

"The court considered that that prejudice lay in the "absence of administrative action that complies with the rule of law and fairness in reaching that decision [to appoint Coetzee]". But it also said that "the prejudice does not lie in the result of the appointment procedure" (my emphasis) since non-promotion is always a possibility where there are competing candidates for a position. If that is so, what prejudice did Dunn suffer as a consequence of the decision to appoint Coetzee? None was shown by Dunn to exist.

Even if there were exceptional circumstances, it is impermissible for a court to substitute its own decision - in this case to give Dunn an effective promotion in the Defence Force - for that of the Minister. It is the Minister, in terms of the Defence Act, who has the power to make appointments and promotions.

If it is a monetary award that Dunn wanted then he should have proved some loss. But he did not. Compensation was accordingly not justifiable even had the administrative action complained of been reviewable. The appeal must therefore succeed; the decision to appoint Coetzee rather than to promote Dunn was not reviewable, and the order of the court as to the payment of compensation was impermissible.' (paras 38-40, footnotes omitted)

The order of the High Court was thus set aside and replaced with an order dismissing Dunn's application.

Section 9 - Variation of time

Joint Municipal Pension Fund and another v Grobler and others [2007] 4 All SA 855 (SCA) (see above under 'Section 1 - Administrative action defined') concerned a decision by the second appellant, a Pension Fund, to alter the meaning of the phrase 'pensionable service' in its rules. The appellants appealed against a decision of the High Court setting aside this amendment on grounds, inter alia, that the initial application for review should have been brought in terms of PAJA within the time frames prescribed in section 7. The basis of the appellants' argument in this respect was that the decision sought to be reviewed was made on 13 February 2002, but the review application was made to the High Court only in January 2005, long after the 180 day period after the exhaustion of internal remedies (see section 7(1)(a)). The reason for the delay was that the respondents first approached the Pension Funds Adjudicator in terms of the Pension Funds Act 24 of 1956, only to be told in December 2004 that the Adjudicator had no jurisdiction to review the second appellant's decision. Since there were in effect no internal remedies available to the respondent, the appellants argued that the period within a review application had to be brought began on 13 February 2002. The SCA disagreed, saying the fact that the first respondent had made a good faith effort to exhaust internal remedies, as required by section 7 of PAJA, could not be held against him:

'[C]ounsel for the appellants remarked that a review application under PAJA was out of time...The [second appellant's] decision sought to be reviewed was dated 13 February 2002. Quite patently Grobler and his attorney thought that a complaint to the Adjudicator had to be exhausted before all else, provided he had jurisdiction. In that regard matters dragged unduly, not least because the office of Adjudicator was not filled for some while. Initially they were advised that he did have jurisdiction and they awaited his decision. When the new Adjudicator took office his
final response, dated 19 November 2004, was that he had no jurisdiction. This was received by Grobler’s attorney on 2 December 2004. The application to the court below was launched in January 2005.

PAJA requires a judicial review to be brought without unreasonable delay and in any case within 180 days after, inter alia, exhaustion of internal remedies. Despite the absence in law of the supposed internal remedy of recourse to the Adjudicator, it seems to me that the interests of justice warranted the court below’s decision to entertain the application.’ (paras 29-30)

The SCA’s comments are somewhat complicated by the fact that the initial application was not brought in terms of PAJA at all. Section 9 provides that the time periods stipulated in section 7 can be varied either by agreement between the parties or by a court or tribunal on application by either party (section 9(1)). A court or tribunal may grant an application in terms of subsection (1) ‘where the interests of justice so require’ (section 9(2)). In this case, since the review application was not brought before the High Court in terms of PAJA, no application for variation of time was ever made. The SCA nevertheless referred to section 9 of PAJA in condoning the respondents’ delay in approaching the court below, and applied section 9 as if an application in terms of section 9 had been made.

REVIEW IN TERMS OF THE CONSTITUTION

The doctrine of legality

In HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2007 (5) SA 438 (SCA) (see above under ‘Section 3 - Procedural fairness in administrative action affecting individuals’, 'Section 4 - Procedural fairness in administrative action affecting the public’, and ‘Section 6 - Grounds of review’), the applicant challenged the validity of a notice issued by the third respondent in terms of section 31A(1) of the Environment Conservation Act 73 of 1989. This provision allows the Minister or a person delegated by him or her to require any person who performs an activity as a result of which the environment may be seriously damaged to cease such an activity or to take steps to remedy the ill-effects of that activity. Section 21 of the Act allows the Minister to identify by notice any activities which ‘in his opinion may have a substantial detrimental effect on the environment’. In regulations promulgated on 5 September 1997 (GN 1183), the Minister identified the activities referred to in section 21. These are set out in Regulation 182. Item 10 of that regulation was at issue in this case. The activity it identified was ‘[t]he cultivation or any other use of virgin ground’. 'Virgin ground' was itself defined as ‘land which has at no time during the preceding 10 years been cultivated’.

The appellant submitted before the High Court that item 10 was concerned with agricultural land, and did not therefore apply to land located in a proclaimed township (para 4). The High Court rejected this argument, finding that the item could be interpreted widely enough to include activities other than agricultural ones (HTF Developers v Minister of Environmental Affairs and Tourism and Others 2006 (5) SA 512 (T) at para 28, quoted by the SCA at para 6). The SCA found, however, that the item failed to comply with the rule of law and the doctrine of legality because it was vague. It was therefore ‘void for vagueness’ (para 8). Combrinck JA, writing for the majority, said:

‘In Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC) [reported in the 4th Edition of the PAJA Newsletter] in para [108] Ngcobo J said the following:

“The doctrine of vagueness is founded on the rule of law, which, as pointed out earlier, is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those bound by it what is required of them so that they may regulate their activity accordingly.”

As mentioned, it is an offence to undertake any of the s 21 identified activities in the absence of written authorisation by the Minister or other competent authority (s 22(1) read with s 29(4) of the [Environment Conservation] Act. What “reasonable certainty” does the owner of land have that he is not committing an offence when he puts part of his property which has not been utilized for ten years to a particular use?” (para 9)

The judge concluded by contrasting Item 10 to the regulations that replaced it in terms of the
National Environmental Management Act 107 of 1998, pointing out that the concept of 'virgin ground' was abandoned in favour of a far more certain and clear definition of proscribed activities (para 9). Since the empowering provision in terms of which the third respondent had acted was void for vagueness, the majority of the SCA held that the directive issued was invalid and had to be set aside.

McDonald and Others v Minister of Minerals and Energy and Others 2007 (5) SA 642 (C) (see above under 'Section 1- Administrative Action defined' and 'Section 7 - Procedure for review') concerned a challenge to the legality of 'the Regulatory framework restricting the development of property located within a 5 km radius of the Koeberg Nuclear Power Station' (para 1). Section 38(4) of the National Nuclear Regulator Act 47 of 1999 confers on the Minister on Minerals and Energy the power to make certain regulations. The section provides:

>'The Minister may, on recommendation of the board [of the Regulator] and in consultation with relevant municipalities, make regulations on the development surrounding any nuclear installation to ensure the effective implementation of any applicable emergency plan.' (quoted at para 4)

The Minister exercised this power, promulgating regulations which included the following provision in Regulation 3:

>'The regulator shall lay down, where appropriate, specific requirements relating to the control and/or monitoring of developments within the formal emergency planning zone surrounding a specific nuclear installation, after consultation with the relevant provincial and/or municipal authorities.' (quoted at para 5)

The regulator, for its part, laid down requirements aggrieving the applicants. The applicants argued that the Minister's sub-delegation of regulation-making power to the regulator was unlawful. It relied on the administrative law principle delegatus delegare non potest (para 8). In terms of this principle,

>'a functionary entrusted with powers in terms of empowering legislation has to exercise those powers itself and may not delegate such powers to any other body or person unless authorised to do so by the authorising powers - either expressly or by implication.' (para 8)

Referring to the scheme in which regulation-making power was conferred on the Minister, Griesel J (Yekiso J concurring) held:

>'Having regard to the provisions of the Act presently under consideration, such delegation by the Minister was clearly unauthorised. Section 48 provides as follows:

'(1) Subject to ss (2), the Minister may delegate any power and assign any duty conferred or imposed upon the Minister in terms of the Act to the Director-General: Minerals and Energy.

(2) Any power or duty conferred or imposed upon the Minister in terms of s 2, Ch 3 and ss...38(4) may not be delegated or assigned in terms of ss (1)

The effect of this section is clear: to the extent that the Minister may delegate power, she may delegate it only to the Director-General of her Department. However, the powers conferred upon her, inter alia, in terms of s 38(4) may not be delegated to anyone. The Act therefore contemplates that the Minister is the only functionary who may exercise the power conferred upon her in terms of s 38(4) thereof. Far from authorising the delegation of her powers in terms of that subsection, s 48(2) expressly prohibits such delegation.' (paras 11-12)

The Minister argued in response that she had not delegated the power to regulate, but the power to set out 'requirements' (para 9). The judge rejected this argument, stating that the regulations promulgated by the Minister did not deal with the substance of the subject matter at hand. Instead, substantive matters were dealt with in the regulator's requirements. The Minister's argument was dismissed as 'pure semantics' (para 10).

Finally, the judge held that the process that Regulation 3 set up was fundamentally different to that envisaged by the Act (paras 15-19). The applicants’ challenge to the legality of Regulation 3, as an impermissible delegation of power, was upheld.

Section 33 of the Constitution

Islamic Unity Convention v Minister of Telecommunications and Others [2007] ZACC 26 (unreported, 7 December 2007) concerned a challenge to the constitutional validity of several statutory and delegated legislative provisions. The applicant's complaint was that a range of statutory provisions and delegated legislation was inconsistent with rights to
administrative justice in section 33 of the Constitution (in this regard the case is similar to Zondi v MEC for Traditional and Local Government Affairs and Others 2005 (3) SA 589 (CC) - see the 5th Edition of the PAJA Newsletter), as well as rights of access to court in section 34 of the Constitution. The matter has a long and varied history before our courts that is usefully laid out (this summary relies on paras 1-12 of the judgment). The applicant operated a community radio station, Radio 786, in terms of a community broadcasting licence issued to it in terms of the Independent Broadcasting Act 153 of 1993 (the IBA Act). The IBA Act also established the Independent Broadcasting Authority (IBA) to regulate the broadcasting industry. The IBA Act required the establishment of the Broadcasting Monitoring and Complaints Commission (BMCC). Both the IBA Act and regulations promulgated in terms of the IBA Act by the IBA in 1995 set out the powers of the BMCC to investigate and adjudicate complaints. The Independent Communications Authority of South Africa Act 13 of 2000 (the ICASA Act) established the Independent Communications Authority of South Africa (ICASA) which largely replaced the IBA. Certain section of the IBA Act remained in force, however, and the BMCC became a standing committee of ICASA. It was not until the Electronic Communications Act 36 of 2005 repealed the remaining operative sections of the IBA Act that the BMCC was replaced with the Complaints and Compliance Committee (CCC). In the context of this judgment, the differences between the BMCC and the CCC are immaterial, and the two organs will be referred to here, as they were in the judgment, interchangeably.

In 1998 a complaint was lodged with the IBA by the fourth respondent, the South African Jewish Board of Deputies. The complaint was referred to the BMCC who decide that the complaint should be dealt with by way of formal hearing. The applicant, however, brought a challenge against the constitutional validity of a certain clause of the Code of Conduct for Broadcasting Services (schedule 1 to the IBA Act). The High Court set aside the BMCC’s decision that the complaint should be dealt with by means of a formal hearing, but did not entertain the constitutional challenge to the Code of Conduct. The Constitutional Court held on appeal that the impugned clause was inconsistent with rights to free speech contained in section 16 of the Constitution (this judgment is reported as Islamic Unity Convention v Independent Broadcasting Authority 2002 (4) SA 294 (CC)). The Constitutional Court found a certain prohibition in Code of Conduct to be an unconstitutional infringement of the right to free speech contained in section 16(1) of the Constitution and invalid to that extent. Following this decision, the Jewish Board of Deputies requested that ICASA investigate its complaint in the light of the Constitutional Court’s judgment. The Chairman of the BMCC decided that the complaint did not warrant a hearing. This decision was reviewed and set aside by the High Court at the instance of the Jewish Board of Deputies. Malan J ordered that a formal hearing be convened (South African Jewish Board of Deputies v Sutherland NO and Others 2004 (4) SA 368 (W), discussed in the 3rd Edition of the PAJA Newsletter). The complaint was finally set down for hearing before the BMCC in March 2006. In February 2006, however, the applicant applied to the High Court for an order that certain provisions of the IBA Act and the ICASA Act in terms of which the complaint against it would be adjudicated were inconsistent with the Constitution and invalid. A request that the hearing be postponed in light of this challenge was refused, and the BMCC handed down its decision upholding the Jewish Board of Deputies’ complaint. That decision has been challenged before the Cape High Court, and a review application in that respect is pending. Nearly a year after the BMCC decision, the Johannesburg High Court declared the impugned legislative provisions to be unconstitutional and invalid (Islamic Unity Convention v Minister of Telecommunications Case no 06/3431, 26 April 2007, unreported). The present judgment was a judgment in confirmation proceedings in terms of section 172(2)(a) of the Constitution, which requires any order of constitutional invalidity made by a High Court to be confirmed by the Constitutional Court.

The basis of the applicant's challenge to the various statutory and other provisions was that they violated rights to reasonable, lawful and procedurally fair administrative action in terms of section 33 of the Constitution and the right to have any dispute that can be settled by the application of law adjudicated by a fair, independent and impartial tribunal. The judgment
holds implications both for fairness as it understood in terms of section 33 of the Constitution, and for the relationship between sections 33 and 34 of the Constitution.

The applicant's submissions
The applicant's constitutional complaints fell into two broad categories. The first category concerned the fairness of the procedures by which the BMCC and subsequently the CCC fulfilled their functions. The structure of these procedures, the applicant argued, as such that they would inevitably lead biased outcomes or a perception of bias:

'If' it was submitted that the BMCC was the sole functionary charged both with investigating a complaint and deciding whether the complaint merited a formal hearing. The same body would then adjudicate the complaint. The applicant contended that an objective licensee, "charged with contravening the Code of Conduct", would reasonably apprehend that the BMCC would not be impartial in the adjudication of the complaint. The impugned provisions, therefore, gave rise to an inherent bias, alternatively, a reasonable apprehension of bias. The investigation of a complaint by the BMCC and its referral to the same body for adjudication represented an after-the-fact justification for a decision already made. The impugned provisions of the ICASA Act were challenged on the same grounds.' (para 29)

'On the question of impartiality, the argument on behalf of the applicant was that a "litigant" in the position of the applicant would reasonably apprehend that the CCC might not be impartial because the CCC acts as prosecutor, in that the Chairperson decides whether a complaint prima facie has merit and must formulate and provide a licensee with a charge sheet. It was submitted that there is a direct connection between the prosecutor (the Chairperson) and the decision-maker (the CCC) which gives rise to a reasonable apprehension of influence or dependency. It was further contended that given the legal qualifications of the Chairperson, a reasonable litigant would apprehend that the other members of the CCC might easily form the view that a Chairperson would not refer a complaint to the CCC unless it had substance. The prosecutor (the Chairperson) is obliged, in terms of the ICASA Act, to preside at the hearing of the very complaint that she or he prima facie found to have merit. Moreover, the Chairperson has a deliberate vote and a casting vote in the event of a deadlock. Consequently, the argument proceeded, the very structure of the CCC as expressly authorised by the ICASA Act, creates a reasonable apprehension that the members of the CCC might be predisposed to decide a complaint in a certain way. (para 37, footnotes omitted)

The second category of complaint concerned the powers of the Monitoring and Complaints Unit (MCU). The applicant argued that the powers the MCU exercised had been unlawfully delegated to it by and ICASA:
The disputed paragraphs were challenged on the basis that ICASA's purported conferral of monitoring, investigative and adjudicative functions on the MCU violated the principle of legality. It was contended that only the BMCC had the power, in terms of sections 62 and 63 of the IBA Act, to monitor non-compliance or non-adherence by licensees as contemplated in section 62(1). (para 31)

**High Court's findings**

The High Court agreed with both avenues of attack followed by the applicant. Van Oosten J noted that the offices and functions of prosecutor and decision-maker are distinctly separate and independent, and that in the absence of such separation a reasonable suspicion of bias is unavoidable. There is no reason, he went on, that the principles underscoring 'fundamental concepts such as independence, impartiality and resulting fairness' should not apply with equal force to administrative bodies like the BMCC and CCC (para 32). Van Oosten J also held that the conferral of investigative and adjudicative powers on the MCU breached the principle of legality, since in terms of the IBA Act those powers could only be exercised by the BMCC (para 33).

**Constitutional Court's findings**

The Constitutional Court began it consideration of the applicant's case by looking at the test for bias in recusal applications. The Court referred to the cases of BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another 1992 (3) SA 673 (A) and President of the Republic of South Africa and Others v South African Rugby Football Union and Others 1999 (4) SA 147 (CC) (SARFU). Those cases are authority for the principle that a reasonable apprehension of bias will suffice to render a procedure unfair - an applicant need not show actual bias on the part of the decision-maker. The Court then pointed out that those cases dealt with circumstances different to those of the present matter:

'The present matter does not concern the recusal of a presiding officer. The applicant asserts bias at a structural level. In as much as the applicant raises the issue of a relationship of influence and dependency between the Chairperson of the CCC and other individual members, the argument was that the decision-maker (CCC) is inevitably biased as a result of institutional factors rather than an individual member being biased by virtue of personal traits.' (para 41)

The Court accepted that in circumstances where institutional bias is alleged, the test as set out in BTR Industries and confirmed by the Constitutional Court in SARFU is appropriately applied (para 44).

The high-water mark of the applicant's case was that the conferral of investigatory or inquisitorial powers as well as adjudicatory powers on the BMCC and CCC compromised the fairness of the procedures by which they functioned. In dealing with this argument the Court, per Mpati AJ, considered the nature of investigative powers conferred on the BMCC and CCC:

'To "investigate" or "inquire into" a complaint means more than simply to sit back and decide on the complaint on an adversarial basis in the same way as a criminal court. The term "investigate" means to "search or inquire into" or "examine", while "inquire" means to "seek knowledge of (a thing) by putting a question" or to "request to be told." As counsel for the second respondent suggested, the BMCC was required to play an active and inquisitorial role in determining matters before it. If the investigative powers that were conferred on the BMCC were understood, as they must, to have referred to the inquisitorial role played by the BMCC, then there was nothing unconstitutional and thus impermissible, in the arrangement. In S v Baloyi (Minister of Justice and Another Intervening) [2000 (2) SA 425 (CC)] this Court considered the constitutionality of section 3(5) of the Prevention of Family Violence Act [133 of 1993], which allowed for an inquisitorial process in terms of which the magistrate enquired into the reasons for the accused's failure to comply with an interdict and allowed the court to sentence him to a fine and imprisonment. This Court held that fairness to the complainant required that the proceedings be inquisitorial in that it places- "the judicial officer in an active role to get at the truth, which usually will be done through questioning the accused. Fairness to the accused, on the other hand, dictates that within this format the general protection granted by the CPA should apply in measure similar to that available to a person charged under s 170. Such a balancing of constitutional concerns leaves the presumption of innocence undisturbed. At most it may affect the right to silence. The procedure involved in the Magistrate's Court in the present case did not raise this issue, nor was it an issue before us in the confirmation. That issue would have to be resolved when it arises." (Footnotes omitted.)

I mention Baloyi to illustrate that even regarding certain aspects or instances in judicial proceedings an inquisitorial process is countenanced, provided that fairness to the accused is assured.' (para 47, footnotes omitted)
Mpati AJ found on a reading of the statutory scheme that safeguards were built into the functioning of the BMCC and CCC to ensure that fairness was afforded to those subject to its powers:

'Section 63(4) enjoined the BMCC, when investigating and adjudicating a complaint, to afford the complainant and the licensee a reasonable opportunity to make representations and to be heard. In terms of section 63(6), both were entitled to legal representation. Disputed paragraph 1.24 of the Complaints Procedures also made provision for the licensee, where the finding was against it, to be afforded an opportunity to make representations with regard to the BMCC's recommendations to ICASA as to what penalty, if any, should be imposed. Should ICASA consider that a heavier penalty than that recommended by the BMCC was warranted, the licensee would be given yet another opportunity to make representations. Section 22(3)(a) provided that the Chairperson of the BMCC must be a judge of the High Court, whether in active service or retired, a practising advocate or attorney with at least ten years' appropriate experience, or a magistrate with at least ten years' appropriate experience. This requirement, in my view, was aimed at ensuring fairness, impartiality and independence. The Chairperson was an experienced, legally trained person. In my view, the scheme adequately ensured fairness.' (para 49, footnotes omitted)

As to the applicant's argument that the scheme infringed section 34 of the Constitution, Mpati AJ questioned whether section 34 was even implicated. In doing so, the judge commented on the relationship between sections 33 and 34 of the Constitution:

'Some writers hold the view that where legislation gives decision-making powers to a tribunal which lacks the required impartiality because of its composition or structure, the constitutional validity of such legislation would have to be determined under section 33(1) of the Constitution, where the issue would be whether the scheme set out in the legislation is procedurally fair.

In this case we are not concerned with a court of law or with the fair resolution of social conflict, but with a regulatory body that performed an administrative function. The question is whether a constitutional challenge against legislation conferring investigative and adjudicative powers on an administrative tribunal like the BMCC, based on institutional bias, can be sustained under the right of access to court provisions of section 34 of the Constitution.

It was submitted on behalf of the first respondent that section 34 was not implicated in this case and that section 33 was. Counsel for the applicant argued, however, that the "dispute" was whether the applicant had breached the Code of Conduct which was determined by the BMCC by the application of that Code of Conduct (a law) to the facts in relation to the complaint. The guarantees of independence, impartiality and fairness in section 34 are not limited to a hearing before a court, but extend to a hearing before other tribunals or fora resolving disputes by the application of law. This is buttressed, so the argument continued, by section 8(1) of the Constitution which provides, inter alia, that the Bill of Rights applies to all law and all organs of state, including the BMCC.

In view of the basis of the applicant's constitutional challenge, it is unnecessary to express a firm opinion on this issue. It suffices to say that it is doubtful whether section 34 is implicated in the present matter. Even if the complaint could be characterised as a "dispute" the BMCC did not resolve it. The BMCC's function of investigating and adjudicating the complaint was but the first of a two-stage process. It was a higher authority, namely ICASA, which took the final decision. The writers Currie and De Waal submit on this issue that before an administrative agency has taken a final decision, there is no "dispute" that can be resolved by an application of law [Bill of Rights Handbook 5 ed ay 707]. This view is indeed persuasive. Moreover, ICASA was not bound by the recommendations of the BMCC regarding the sanction to be imposed. As the record of the proceedings before the BMCC was transmitted to it with the BMCC's recommendations, ICASA could, for whatever reason, which, in my view could include a disagreement with the findings of the BMCC, decide not to impose any sanction. The final determination was thus the responsibility of ICASA.' (paras 52-55, footnotes omitted)

As to the applicant's final ground of complaint, that the powers enjoyed by the MCU were unlawfully delegated to it, Mpati AJ found that since the MCU had not played any significant role in the proceedings a finding of invalidity relating to it would have no practical effect (para 61). The Constitutional Court therefore declined to confirm the High Court's declaration of constitutional invalidity.

Mazibuko v Minister of Correctional Services and others [2007] 4 All SA 1023 (T) deals with an application for the review of the respondent Minister's decision to refuse the applicant's request for medical parole. The applicant had been sentenced to life imprisonment for a variety of crimes, including murder, assault and armed robbery. He applied for medical parole in light of a terminal illness and rapidly deterio-
rating health. There are several problems with Makhafola AJ's treatment of the matter. First, the judge refers to section 69 of the Correctional Services Act 8 of 1959, stating that the provisions of that section 'are to the same effect' as section 69 of the Correctional Services Act 11 of 1998. Section 69 of the 1959 Act provides:

'A prisoner serving any sentence in a prison:

(a) who suffers from infectious or contagious disease, or
(b) whose placement on parole is expedient on the grounds of his physical condition, or in the case of a woman, her advanced pregnancy, may at any time, on the recommendation of the medical officer, be placed on parole by the commission, provided that a prisoner sentenced to imprisonment for life, shall not be placed on parole, without the consent of the Minister.' (quoted at 1026h)

The 1998 Act, however, repealed the 1959 Act in its entirety. Further, Section 69 of the 1998 Act does not deal with medical parole at all. It is rather section 79 of the 1998 Act that deals with medical parole. That section provides:

'Any person serving any sentence in a prison and who, based on the written evidence of the medical practitioner treating that person, is diagnosed as being in the final phase of any terminal disease or condition may be considered for placement under correctional supervision or on parole, by the Commissioner, Correctional Supervision and Parole Board or the court, as the case may be, to die a consolatory and dignified death.'

It is unclear from the judgment what the legislative framework governing the action complained against was. It appears as though all parties believed that the Minister was required in terms of section 69 of the 1959 Act to consent to the applicant's medical parole. However, at all material times, the 1959 Act was not in force given its repeal by the 1998 Act. Further, section 79 of the 1998 Act makes no mention of any requirement that the Minister approve or consent to the medical parole of a person on medical grounds. It would appear then that the judge based his assessment of the lawfulness of the conduct complained against on the wrong legislation.

Second, the judge found that the respondents' refusal to release the applicant on medical parole in circumstances where the latter had complied with the requirements of the Act, 'amounts to an infringement of section 33(1) of the Constitution' (at 1028g-h). Concluding, the judge stated: 'I find that the refusal to release the applicant on medical parole, is unjust, unlawful, unreasonable and procedurally unfair.' (at 1028h) There was, however, no discussion of how or on what basis the judge concluded the decision was unlawful, unreasonable or procedurally unfair.

Third, as the courts have made clear on a number of occasions, where section 33 of the Constitution is sought to be relied upon the threshold inquiry must be whether the conduct complained against amounts to 'administrative action'. In addition, the doorway to the rights laid out in section 33 of the Constitution is PAJA. No mention of PAJA was made in the judgment.

Common-law review - Unlawfulness

In South African Police Service v Public Servants Association 2007 (3) SA 521 (CC) the Constitutional Court traversed the proper interpretation to be given to the word 'may' in the context of a regulation empowering the National Police Commissioner to take certain decisions. The judgment holds important implications for the understanding of administrative discretion and thus for lawfulness. The regulation in question, regulation 24(6) of the South African Police Service Regulations, provides:

'If the National Commissioner raises the salary of a post as provided under subreg (5), she or he may continue to employ the incumbent employee in the higher-graded post without advertising the post if the incumbent -
(a) already performs the duties of the post;
(b) has received a satisfactory rating in her or his most recent performance assessment; and
(c) starts employment at the minimum notch of the higher salary range.'

The dispute between the parties revolved around the extent of the discretion conferred on the national commissioner by the subregulation. Sachs J, whose judgment together with Yacoob J's separate judgment represents the
The commissioner claimed that although subreg (6) vested a discretion in him when upgrading post to allow an incumbent to remain undisturbed and enjoy a higher salary without competing for the newly regarded post, it did not oblige the commissioner to do so automatically and mechanically. The police unions on the other hand insisted that the subregulation did not give a discretionary power to the commissioner, but rather established that the ordinary process of filling posts through advertisement was not to be applied in situations where an incumbent employee is working satisfactorily in a post which is upgraded and carries a higher salary. (para 3. See also the comments of O'Regan J at para 91)

The commissioner initially approached the High Court seeking a declaratory order on the position in terms of the subregulation. The court favoured its view, and made an order declaring that the commissioner is vested with a discretion to advertise the post or to continue to employ the incumbent without advertising the post (para 7). The respondent unions appealed the judgment to the SCA, arguing that such an interpretation of the subregulation infringed the right to fair labour practices in section 23 of the Constitution and the right not to be dismissed unfairly in the Labour Relations Act 66 of 1995, since exercising the discretion to advertise the post would effectively dismiss the incumbent (para 8). The majority of the SCA agreed with the unions’ argument, holding that where the conditions on paragraphs (a) and (b) of the subregulation are met, the commissioner has a duty to appoint the incumbent employee (the judgment is reported as Public Servants Association v National Commissioner of SA Police Service [2007] 1 All SA 363 (SCA)). The minority of the SCA disagreed, finding that an incumbent not appointed to the regarded and advertised post could seek to have the decision reviewed as an administrative action (para 10). In light of the judgment of the Constitutional Court in Chirwa v Transnet Ltd and others [2007] JOL 21166 (CC) (see above under ‘The relationship between administrative law and labour law: recent constitutional court decisions’) the finding that a decision whether or not to appoint a person is an administrative action is to be doubted. After considering the meaning of the word ‘may’ in its ordinary sense, as well as in the constitutional, statutory and factual con-

texts, the majority of the Constitutional Court disagreed with the majority decision in the SCA to the extent that it imposed an absolute duty on the commissioner to appoint the incumbent when the conditions set out in paragraphs (a) and (b) are met. However, the majority in the Constitutional Court also disagreed with the minority of the SCA to the extent that its decision created the risk of redundancy consequent upon the advertisement of the post. Sachs J, writing for the majority, held that the subregulation had to be interpreted so as to harmonise two competing considerations:

‘The first is the need to give the commissioner the necessary flexibility to strengthen the leadership capacity of the service in a transparent manner. The second is the requirement that incumbents whose work is satisfactory should not be subjected to the anxiety of possibly losing their jobs simply because their posts are being upgraded.

In my view, then, the regulations can and should be read in a way that neither produces the rigidity of outcome that would flow from the view of the majority in the Supreme Court of Appeal, nor carries the risk of consequent redundancy, implicit in the minority approach. It is indeed possible to harmonise flexibility of application with respect for appropriate job security. This can be achieved by acknowledging that the Commissioner does have a discretion whether to advertise or not, but that the discretion must in each case be exercised in such a way as to not lead to the loss of employment by a satisfactory incumbent as a consequence of the upgrading of his or her post. Nor should incumbents who are threatened with retrenchment because their posts have been upgraded, be obliged on a case by case basis to invoke administrative or labour law mechanisms to secure their positions in the service. Since retrenchment utilising the provisions of regulation 24(6) would be manifestly unfair, the regulation should be interpreted as a matter of law as requiring the Commissioner to exercise his discretion in a manner which does not lead to job loss. An incumbent whose work is satisfactory should not be subjected to the anxiety of losing employment simply because the work he or she is doing is considered to be worthy of an upgrade and better pay.’ (paras 33-4, footnotes omitted)

Yacoob J, also writing for the majority, expressed the same point in slightly different terms:

‘The Minister could never have contemplated that this regulation aimed at dealing with the consequences of the upgrading of a post could result in the dismissal of the incumbent of that
post in circumstances where he had been performing satisfactorily in the upgraded post. If this had been the intention, I would have expected this to have been said in so many words. And even if this had been expressly said in the regulations, the constitutionality of a provision of this kind would, in my view, be extremely doubtful. In the circumstances, I conclude that the exercise of the Commissioner's discretion is limited. The discretion cannot be exercised in such a way as to raise the possibility of the dismissal of the satisfactorily performing incumbent. If it does, the exercise of that discretion will be invalid. To put it positively, it is implied in the regulation that the Commissioner may only exercise a discretion not to appoint the incumbent if satisfied that the incumbent would not find herself out of a job merely by reason of the decision of the Commissioner to advertise the post and the fact of the incumbent not being appointed to that post.' (para 81, footnote omitted)

O'Regan J dissented from the majority position. Although she agreed with the majority that the ordinary meaning of a word may be superseded by an interpretation that takes other factors into account, she pointed out that any interpretation that is applied to a statutory provision must remain reasonably supported by the plain text of the provision. She stated in this regard:

'Although I agree that reg 24(6) should not be read to create the possibility of job losses, to ensure that the interpretation afforded to the regulation is consonant with the spirit, purport and object of the Bill of Rights, I am not persuaded that the approach to the regulation adopted by Sachs J and Yacoob J is correct.

In the first place, their interpretation may stretch the text of regulation 24(6) beyond its reasonable bounds. If the text is read to permit a choice as to whether to advertise or not, the inevitable consequence is that a person other than a satisfactorily performing incumbent may be appointed to the newly re-graded post with the effect that the incumbent no longer has a post. The requirement that the discretion may only be exercised if job losses will not result is not explicitly mentioned in the regulation. At times, to comply with section 39(2) of the Constitution, a provision must be given a meaning which may not be the first meaning that springs to mind. However, it may not be given a meaning beyond that which it is reasonably capable of bearing. It seems to me that the interpretation suggested by Sachs J and Yacoob J may well fall foul of this requirement.

As importantly, however, it seems to me that the interpretation will, in effect, result in the Commissioner often not genuinely being able to exercise a choice. Indeed, he will not be able to advertise the post unless there is a suitable vacant position at an appropriate level to which the incumbent can be moved. Bear in mind, that if after advertisement a candidate other than the incumbent is selected for the position, the incumbent will have no post unless moved to another vacant post. She or he will only be able to be moved into another vacant post in accordance with regulation 36(2)(e) if there is such a vacant post in existence at a similar grading level. Moreover, given that job evaluation exercises the evaluation of large numbers of posts, it is clear what will happen should more incumbents be rendered supernumerary that the number of available suitable vacant posts. In the circumstances, unless there is a vacant post to which the incumbent can, without contest from other candidates, be moved, the Commissioner cannot be sure that a job loss will not result, once he commences the process of advertisement. In the circumstances, it is not clear to me, how often the Commissioner will really have a choice on the interpretation proposed by Sachs J and Yacoob J. (paras 93-5)

O'Regan J noted that it is well recognised that the word 'may' does not always confer a choice, and that this is one of those occasions (para 97). She endorsed the view of the majority in the SCA that where the conditions set out in paragraphs (a) and (b) of the subregulation are met, the commissioner has no choice but to appoint the incumbent to the newly graded post. This interpretation, she held, also avoids the risk that satisfactorily performing incumbents will lose their jobs just because of the regarding of their posts.

The case of CDA Boerdery (Edms) Bpk and Others v Nelson Mandela Metropolitan Municipality ad Others 2007 (4) SA 276 (SCA) dealt with an objection to the power of the Respondent municipality to assess certain rates against the property of the appellants. The appellants' argument was essentially that, in terms of applicable legislative provisions the municipality was required to obtain the consent of the Premier of the Eastern Province in order to assess a rate of more than two cents in the Rand on their respective properties. The appellant's argument was based on a reading of the Local Government Transition Act 209 of 1993 and the Municipal Ordinance 20 of 1974. While
the earlier ordinance required the provincial Administrator (now the Premier) to approve rates over two cents in the Rand for certain types of property, the later Act made no mention of such a requirement. It was the municipality’s argument that the new legislative and constitutional framework had impliedly repealed the requirement set out in the Ordinance, while the appellant landowners relied on the fact that the relevant provisions of the Ordinance remained nominally in force. The SCA was divided in its judgment, the minority (Conradie JA) finding in favour of the municipality. The two contrasting judgments illustrate an important characteristic of the powers of municipalities under the constitutional dispensation, and highlight the difference in the nature of the powers that municipalities enjoyed in the preconstitutional and constitutional eras. The first of the relevant legislative provisions, section 10G(6) of the Transition Act, provides:

‘A local council, metropolitan local council and rural council shall, subject to any other law, ensure that-
(a) properties within its area of jurisdiction are valued or measured at intervals prescribed by law;
(b) a single valuation roll of all properties so valued or measured is compiled and is open for public inspection; and
(c) all procedures prescribed by law regarding the valuation or measurement of properties are complied with’.

Section 10G(7), the second of the relevant provisions, stipulates:

‘A local council, metropolitan local council and rural council may by resolution, levy and recover property rates in respect of immovable property in the area of jurisdiction of the council concerned: Provided that a common rating system as determined by the metropolitan council shall be applicable within the area of jurisdiction of that metropolitan council: Provided further that the council concerned shall in levying rates take into account the levy referred to in item 1(c) of Schedule 2: Provided further that this subparagraph shall apply to a district council in so far as such council is responsible for the levying and recovery of property rates in respect of immovable property within a remaining area or in the area of jurisdiction of a representative council.’

The court was asked to determine the proper relationship between these two provisions and the provision of the Ordinance providing that certain rates assessed by the municipality require approval by the Premier before they can be said to be lawful. Conradie JA’s minority’s view was the following:

‘Section 10G(6) of the Transition Act which dealt with valuations, acknowledged the Municipal Ordinance by providing that a municipality should, subject to any other law, ensure that properties within its area were valued or measured at intervals prescribed by law. Moreover, ‘all procedures prescribed by law regarding the valuation or measurement of properties’ had to be complied with. In the case of the Eastern Cape this was the Valuation Ordinance of 1993 or the Valuation Ordinance of 1944. There was a dispute between the parties as to which of these laws applied but that is unimportant. The point is that s 10G(6) in express terms envisaged the incorporation of existing provincial laws into the Transition Act in the sense that they were to be taken into account in the rating scheme. Section 10G(7) does not have such an express incorporation provision. It seems to me to have been a legislative oversight that must be adjusted by interpretation. Valuation of immovable property is an integral part of rating property: The imposition of a rate envisages a levy of so many cents in the Rand of the value of property. Rating without valuation is impossible.’ (para 14)

Conradie JA went on to note that an implied repeal of legislation is never lightly inferred (para 24), and that the greater power afforded the Minister of Local Government over municipal rating powers in terms of the Local Government: Municipal Property Rates Act 6 of 2004 which replaced the Transition Act indicated that municipalities were never intended to have unrestricted rating powers (para 25). The ordinance and the Transition Act, he accordingly held, were complimentary and had to be read alongside each other. Their complimentary effect was only repealed by the Local Government: Municipal Property Rates Act in 2004 (para 26). Cameron JA’s disagreement with Conradie JA’s position rested largely on an assessment of the different positions occupied by municipalities under the distribution of power before and after the coming into effect of the Constitution. This difference of view resolved itself into a difference in opinion as to whether the Ordinance governed the municipality’s assessment of rates or not (para 32). In drawing the distinction between the pre-constitutional and post-constitutional eras, Cameron JA said:

‘Under the pre-constitutional dispensation, munic-
Municipalities owed their existence to and derived their powers from provincial ordinances. Those ordinances were passed by provincial legislatures which themselves had limited law-making authority, conferred on them and circumscribed by Parliamentary legislation. Parliament's law-making power was untrammelled, and it could determine how much legislative power provinces exercised. The provinces in turn could largely determine the powers and capacities of local authorities. Municipalities were therefore at the bottom of a hierarchy of law-making power: constitutionally unrecognised and unprotected, they were by their very nature "subordinate members of the government vested with prescribed, controlled governmental powers". (para 33, footnotes omitted)

'The new constitutional order conferred a radically enhanced status on municipalities. Under the interim Constitution, each level of government (national, provincial and local) derived its powers directly from the Constitution (though local government's powers were subject to definition and regulation by either the national or provincial governments). The constitutional status of local government was therefore 'materially different' from the pre-constitutional era.' (para 37)

... 'Can the Ordinance's requirement that the Administrator (now the Premier) must approve rates over 2 cents in the Rand survive this radically different and enhanced realisation of local government powers? In my view, the answer must be No. Under the old dispensation, it was both natural and appropriate that central government's superior position over municipalities, and the province's role as the source of local government's power, should find expression in the power of government's chief provincial executive official, the Administrator, to approve rates.

Under the Constitution both the province generally and the Premier specifically have an entirely different role in relation to local authorities. Though provincial government has important functions in relation to municipalities, its role is constitutionally described and circumscribed. Nothing in the Constitution suggests that the Premier of a province enjoys special supervisory powers over the exercise of local government functions, or special duties in relation to the determination of rates.' (paras 39-40)

The majority of the SCA thus dismissed the appeal, concluding that there is 'a clear repugnancy between the scheme of the preconstitutional distribution of power, which gave rise to the requirement of the Administrator's approval, and the scheme under the Constitution' (para 44).

NOTE: It was not considered in this case, nor indeed any of the cases that have dealt with the rating power of municipalities (see Howick District Landowners Association v uMngeni Municipality and others 2007 (1) SA 206 (SCA) reported in the 8th Edition of the PAJA Newsletter), whether the imposition of rates by municipalities amounts to an administrative action in terms of section 1 of PAJA. The definition of administrative action in PAJA excludes 'the executive powers or functions of a municipal council'. Whether the power of municipalities to impose rates is an administrative action or not awaits judicial consideration.

In Sechaba v Kotze and others [2007] 4 All SA 811 (NC) (see above under 'Section 7 - Procedure on review'), the first and second respondents sought by way of a counter-application the review of the third respondent's decision granting the applicant a prospecting right in terms of the Minerals and Petroleum Rights Development Act 28 of 2002 (MPRDA). The main application, while discussed briefly above under 'Section 7 - Procedure on review', has no bearing on the contents of this Newsletter. The first and second respondents' challenge against the third respondent's decision was that, in terms of the MPRDA, the third respondent, the Department of Minerals and Energy Regional Manager for the Northern Cape, was not authorised to grant a prospecting right to the applicant. In terms of section 17 of the Act the Minister is empowered to grant prospecting rights, but in terms of section 103 the Minister may delegate any power he or she has to any the Director-General, the Regional Manager or any officer. It was common cause in the case that the Minister had delegated the power to grant prospecting rights onto the Deputy Director-General (the DDG) of the Department of Minerals and Energy, and that further delegation of the power had been expressly prohibited by the Minister (para 45.2). After reviewing the applicant's application for a prospecting right, the Regional Manager wrote a letter to the DDG requesting that he grant the applicant a prospecting right and sign a power of attorney authorising the Regional Manager to 'sign on [the DDG's] behalf the prospecting right to be granted to' the applicant (para 45.2). The DDG complied with both of these requests. The applicant relied on the DDG's actions as granting the prospecting right it had sought, but the court (Lacock and Olivier JJ) disagreed, holding that all the DDG had done was agree to the
Regional Manager's request that a prospecting right be granted at some point in the future (para 46.2). The court reached this conclusion on the basis that section 17 of the MPRDA requires 'terms and conditions' of the prospecting right to be determined. On the facts, no such terms and conditions had been determined, and in the absence of such terms and conditions it could not be said that a prospecting right had been granted to the applicant (para 46.3). The court went on to deal with the lawfulness of the Regional Manager's action even if it could be said that a prospecting right had been granted to the applicant:

'If the relevant prospecting right...was granted to [the applicant]...that right was granted by the Regional Manager, who was not authorised to grant the right on behalf of either the Minister or the DDG. It was conceded by [counsel for the Regional Manager] that the aforementioned power of attorney was not a valid delegation of power by the DDG to the Regional Manager, and it was further conceded that, should we find that the...prospecting right was granted to [the applicant] by the Regional Manager, that conduct by the Regional Manager would be ultra vires his authority, rendering the right void.' (para 47)

Common-law review - Jurisdictional facts

When an empowering provision requires certain conditions to be satisfied before a power can be exercised, those conditions are referred to in South African common law as 'jurisdictional facts'. They are facts which in effect establish the jurisdiction of the official to act. In the absence of these facts, the official's actions are unlawful. PAJA codifies this common-law principle in section 6(2)(b), but several cases covered on this edition of the Newsletter deal with jurisdictional facts without reference to PAJA. Rudolph and others v Minister of Safety and Security and Another [2007] 3 All SA 271 (T) involved a claim of wrongful arrest. The plaintiffs had gathered along with others to take part in a demonstration, during which certain banners and information critical of the South African government were displayed and disseminated. The Regulation of Gatherings Act 205 of 1993 requires in section 3 that adequate notice of an intended gathering be given, and provides in section 12(1)(a) that 'any person who convenes a gathering in respect of which no notice or adequate notice was given in accordance with the provisions of section 3...shall be guilty of an offence'. It was common cause in the case that no notice had given for the gathering in which the plaintiffs had taken part (para 143). When members of the South African Police Services (SAPS) instructed the plaintiffs to disperse as the gathering was unlawful, they refused to do so (para 145-6). The plaintiffs were subsequently arrested on suspicion of committing the crime of sedition. The source of the police officers' legal power to arrest the plaintiffs in the absence of a warrant of arrest in this case is provided by section 40(1)(b) of the Criminal Procedure Act 51 of 1977. A peace officer, including a member of the SAPS, may arrest any person whom he or she 'reasonably suspects' of having committed an offence. The existence of a reasonable suspicion that an offence has been committed is thus a jurisdictional fact on which the power to arrest a person without a warrant rests (para 129). Although PAJA was not referred to in the judgment, in the language of section 6(2)(b) of PAJA the existence of a reasonable suspicion is a 'mandatory and material...condition' that must exist before the power conferred by section 40(1) of the Criminal Procedure Act can lawfully be exercised. Relying on Duncan v Minister of Law and Order 1986 (2) SA 805 (A) at 818G-819B, the judge held that where the jurisdictional requirements are satisfied, the peace officer has a discretion whether to exercise the power or not. The exercise of that discretion will clearly be unlawful, however, if the arrestor knowingly invokes the power to arrest for a purpose not contemplated by the legislator (para 130). The judge could not, on the evidence before him, find any indication of mala fides or ulterior motive on the part of the arresting officers (para 172). The judge therefore concluded that on the facts, there requirement that a reasonable suspicion that a crime had been committed had been satisfied, and the arrest was made lawfully.

See also Cele v Minister of Safety and Security [2007] 3 All SA 365 (D) for a similar discussion of jurisdictional facts necessary for the exercise of police powers of arrest.

The failure to comply with a statutory jurisdictional condition was again argued in the case of Jeebhai v Minister of Home Affairs and another [2007] 4 All SA 773 (T), again without reference to PAJA. The case concerned the
highly publicised deportation of one Khalid Rashid to Pakistan by the respondents, the South African authorities responsible for immigration control. The applicant sought a number of declaratory orders relating to the lawfulness of the arrest, detention and subsequent removal of Rashid from the country (para 4). The applicant was a businessman acting on behalf of Rashid (para 1). It was common cause that at all times the respondents purported to act in terms of the Immigration Act 13 of 2002. The applicant’s main argument that the decision to deport Rashid in terms of section 34 of the Act was unlawful because the jurisdictional conditions for invoking the powers conferred by section 34, set out in section 8, had not been complied with. It was common cause that the requirements set out in section 8 of the Act had at no time been followed or complied with by the respondents.

Section 34 deals with actions taken by the authorities once a person has already been identified as, and is known to be an 'illegal foreigner' for the purposes of the Act. Section 8, on the other hand, prescribes conduct to be taken if an immigration official determines that a person is an illegal foreigner. The applicant relied on the judgment in Muhammed v Minister of Home Affairs and others [2007] JOL 18935 (T), where Southwood J found that the procedure in section 8(1) and (2) had to be followed before arrest and detention in terms of section 34 (para 19). On Southwood J’s reading and on the facts of that case, compliance with section 8 was held to be a jurisdictional condition for the exercise of the powers conferred by section 34. In the absence of compliance with the provisions of section 8, action taken purportedly in terms of section 34 would be unlawful. The court distinguished the present matter from that case, however, by pointing out that a person may come to be identified as an illegal foreigner through means other than section 8. Section 8 does not always apply, and is therefore not a jurisdictional prerequisite for action empowered by section 34:

In the language of section 6(2)(b) of PAJA, compliance with section 8 was not a ‘mandatory and material…condition’ for the exercise of the powers conferred by section 34.

In Saleem v Minister of Finance and another [2007] All SA 1040 (T) Van Rooyen AJ held that the failure of an officer acting in terms of the Customs and Excise Act 91 of 1964 to ‘apply his mind’ to the jurisdictional requirements establishing his power to seize goods suspected of being imported illegally justified the setting aside of the seizure. A senior anti-smuggling officer in the employ of the second respondent, the South African Revenue Service, detained goods in a certain shop in terms of section 88(1)(a) of the Act. That section entitles an officer to detain goods at any place for the purpose of establishing whether they are liable to seizure by the second respondent in terms of section 88(1)(c) the Act. In dealing with this initial detention of goods, Van Rooyen AJ held:

‘Section 88(1)(a) must, in terms of section 39(2) of the Constitution of the Republic of South Africa, be interpreted on accordance with the spirit, purport, and objects of the Bill of Rights. Section 14 of that Bill protects privacy as a fundamental right. Privacy includes the right of everyone not to have their possessions seized. Section 36 sets out the justifiable limitations. The limits of protection will vary according to the circumstances. What will be unreasonable in regard to a private home could very well be reasonable in connection with a business. Section 88(1)(a) should, accordingly, be interpreted as requir-
Van Rooyen AJ concluded that the officer was, on the facts, entitled to detain the goods for the purpose of determining whether the goods were subject to seizure (para 15). The jurisdictional requirement for detention, reasonable grounds to believe that the goods had been imported and were liable to seizure, had been satisfied. The goods were later seized in terms of section 88(1)(c) of the Act because the applicant failed to produce evidence in the forms of invoices or documentation proving the goods had been lawfully imported. In respect of the lawfulness of the seizure, Van Rooyen AJ said the following:

'I believe that it was not enough for [the second respondent's officer] - judged on the papers - to have done nothing more than wait upon the applicant to provide proof. The term "establish" must surely mean much more than waiting upon the applicant. It implies investigation. The inactivity after detention of the officer involved justifies the reasonable inference that he never intended to investigate further. ...In the present matter there could not, reasonably, have been more than a suspicion that the goods were imported goods in terms of section 88(1). [The officer] states that he was prima facie of the view that the goods were subject to forfeiture as a result of the "Made in China" tags and the absence of importation documentation or proof from whom the goods were purchased...I am of the view that the mere fact that the goods bear tags that they are "Made in China" is not sufficient in itself to justify an inference that the goods were imported.' (para 15)

...[T]he officer should have investigated further whether the goods were indeed imported goods. For all he knew the goods were manufactured in South Africa, in spite of the "Made in China" tags and the Chinese inscriptions on the goods. My impression is that the officer focused only on one aspect: the insufficiency of invoices. The officer has, with respect, misunderstood the jurisdictional facts of which he should have been convinced in terms of section 102 when he decided to seize...The officer had seriously to apply his mind to the existence of the jurisdictional facts and it was not for the applicant to convince him in the sense of an onus. (paras 20-21)

The judge concluded that the officer 'did not apply his mind rationally to the relevant issues' and that the seizure of goods was accordingly invalid (para 22).

NOTE: No reference was made to PAJA in the judgment, despite the fact that the matter could have been resolved with regard to section 6(2)(b) of PAJA ('mandatory and material procedure or condition prescribed by an empowering provision was not complied with'), section 6(2)(e)(iii) ('relevant considerations were not considered'), or section 6(2)(f)(ii)(cc) (the decision was not rationally connected to the information before the administrator).

**Common-law review - Unreasonableness**

Radio Pretoria v Chairperson of the Independent Communications Authority of South Africa [2007] 3 All SA 484 (SCA) is the latest judgment in a matter that has had a long history before our courts. In 1995 the Independent Broadcasting Authority (the predecessor to the second respondent, the Independent Communications Authority of South Africa (ICASA)), granted Radio Pretoria a temporary one-year license to operate as a community radio station. Further one-year licenses were granted in 1996, 1997 and 1998. After a dispute that has no bearing on subsequent events, a fifth temporary license was issued for 1999. In 2000 ICASA took over the role of the IBA in terms of the Independent Communications Act 13 of 2000. The sixth temporary broadcasting license for which Radio Pretoria applied was refused by ICASA in terms of the Independent Communications Act and the Broadcasting Act 4 of 1999, because its employment practices discriminated against people who were not 'Boer-Afrikaners', and was not representative of the broader community to which it broadcast. ICASA had asked Radio Pretoria to supply a written explanation of its employment practices prior to making its decision. Radio Pretoria challenged this decision before the Pretoria High Court, arguing that in affording Radio Pretoria the opportunity to make written representations alone, ICASA had acted in violation of the principles of audi alteram partem. Bosielo J found, however, that the actions of ICASA had been administratively fair. This decision is reported as Radio Pretoria v Chairman, Independent Communications
Authority of South Africa, and Another 2003 (5) SA 451 (T). Radio Pretoria appealed Bosielo J’s decision to the SCA. Sometime previously, however, Radio Pretoria had applied to ICASA for a four-year broadcasting license. That application was refused after Bosielo J delivered judgment in regard to the sixth temporary one-year license, but before the appeal was heard in the SCA. Radio Pretoria then approached the Pretoria High Court on an urgent basis seeking an interim order allowing it to continue to broadcast pending the outcome of a review of ICASA’s decision to refuse a four-year license. An order to this effect was granted by Preller J on 30 June 2004 (unreported). By the time the appeal regarding ICASA’s refusal of the sixth one-year license was heard by the SCA, events had overtaken the issues such that no live dispute existed between the parties. The SCA therefore dismissed the application on the basis of mootness. This decision is reported as Radio Pretoria v Chairman, Independent Communications Authority of South Africa, and Another 2005 (1) SA 47 (SCA) and is noted in the 4th Edition of the PAJA Newsletter. An application for leave to appeal to the Constitutional Court was refused. This judgment is reported as 2005 (3) BCLR 231 (CC). The review application in respect of ICASA’s decision to refuse a four-year broadcasting license was eventually dismissed by the Pretoria High Court. This decision is reported as Radio Pretoria (geregistreer ooreenkomstig artikel 21 van die Maatskappywet van SA van 1973 soos gewysig) v Voorsitter van die Onafhanklike Kmmunikasie-owerheid van SA en ’n ander [2006] 1 All SA 143 (T) and is discussed in the 6th Edition of the PAJA Newsletter. ICASA had given four reasons for the refusal of the license, and although Smit J found in the High Court that the one of these reasons was not rationally supported by the facts, the other three reasons given by ICASA were well-founded and dismissed the application. The present case is an appeal against this judgment of Smit J.

Radio Pretoria’s main contention on appeal before the SCA is, however, quite unrelated to the grounds on which it challenged the decision before the High Court:

‘The main contention of the appellant on appeal is that the second respondent [ICASA] treated the appellant’s application as an application for a licence to broadcast to a certain area whereas the applicant's application was for a licence in respect of a different area.’ (para 1)

In terms of ICASA’s ‘radio frequency plan’ or RFP, each province was divided up into numbered radio coverage areas. Each community radio station’s radio coverage was determined according to which area it could broadcast to, and limited by the allowed strength of its transmitters and the height of its transmitting radio antennae. It was common cause that while Radio Pretoria had applied for a licence in respect of RFP 17-23, ICASA treated the application as one for a licence in respect of RFP licence area 18 alone (para 14). The court, per Streicher JA, responded as follows:

‘Although the appellant did not specifically say that ICASA’s decision should be reviewed because it never considered its application for a licence in respect of a target area comprising RFP licence areas17-23 it did say that ICASA erred in confining its application to RFP licence area 18 in that its target area is much wider. The allegation provided a sufficient basis for the submission now advanced namely that ICASA treated the application as being an application in respect of RFP licence area 18 and failed to consider the real application being an application for a licence in respect of a much wider area namely a target area comprising RFP licence areas 17-23.’ (para 17)

Radio Pretoria had applied for a licence in respect of RFP 17-23, ICASA treated the application as one for a licence in respect of RFP licence area 18 alone (para 14). The court, per Streicher JA, responded as follows:

‘The respondents [ICASA and its chairperson] also submit that ICASA’s reasons for refusing the appellant’s application for a licence applied with equal force to an application by the appellant for a licence in respect of the target area identified in its application and that the application for the review of ICASA’s decision should, in any event, for this not have succeeded. The submission is wrong in that some of the reasons do not apply with equal force to an application for a licence in respect of the target area. It is, in any event, no answer to the appellant’s complaint to say that the reasons for the dismissal apply with equal force to an application.'
for a licence in respect of the appellant’s target area. The appellant is entitled to have its application considered by Icasa. Icasa failed to consider the appellant’s application for a community broadcasting licence in respect of the target area identified by it and by treating it as an application for a licence in respect of RFP licence area 18 it acted so unreasonably and irrationally that its decision should be set aside.’ (para 20)

The court remitted the decision back to ICASA for reconsideration. It is worth mentioning in this respect that while the court a quo decided the matter on the basis of section 6(2)(f)(ii) of PAJA, which allows courts to review administrative actions on the basis of rationality, the SCA made no mention of PAJA and decided the case apparently on the basis of common-law grounds review for rationality and reasonableness.

**Common-law review - Estoppel**

The plaintiff in RPM Bricks (Pty) Ltd v City of Tshwane Metropolitan Municipality [2007] 3 All SA 423 (T) raised estoppel in response to the defence raised by defendant. The defendant awarded a tender contract to the plaintiff for the delivery of coal, for a period of three years, to two power stations operated by the defendant (para 3). At some point during the course of the contract, the plaintiff requested an increase in the unit price of coal, assessed on the basis of the quality of the coal measured in megajoules per kilogram. The defendant claimed that the price increase was not validly authorised, and refused to pay the plaintiff at a rate higher than the original contract price. The plaintiff’s claim amounts to the difference between the original contract price and the requested increase. Patel J summarised the questions before the court thus:

‘The nub of the dispute is whether the price increase requested by the plaintiff was validly granted by the defendant. If it was then the defendant is indebted to the plaintiff in the sum of R2 646 134, 40… On the other hand, if the price increase was not validly granted then what needs to be determined is, whether the defendant is estopped from denying that the price increase was in fact granted or whether the defendant has been enriched at the expense of the plaintiff in respect of the coal delivered during December 2002 and January 2003, and if so, to what extent the defendant has been enriched.’ (para 7)

The defendant raised two broad arguments in defence. First, it argued that its employees who had signed the letter purportedly authorising the requested price increase had no authority to do so, and second, it argued that the increase of the contract price violated several national and regional statutory rules. These defences are summarised by Patel J:

‘The defendant, however, endeavoured to avoid payment by raising several defences. These are first, although the defendant admits that the letter confirming the price increase requested by the plaintiff was addressed to the plaintiff but alleges that it was drafted by CH Arlow and signed by D Strydom. Both of them were defendant’s employees, but neither of whom were authorised to draft or to agree to the contents of the letter, or to confirm the contents of such letter to the plaintiff, or to address such a letter to the plaintiff. It was alleged that when Strydom signed the letter confirming the price increase, he bona fide and reasonably believed that the price increase as set out in the annexure to the letter was that provided for in paragraph 3 of the tender award, that is the annual PPI increases. It was also alleged that he never intended to sign the letter to which the annexures were attached containing the price increase in excess of the price increase provided for in the tender award, or price increase calculated on a different basis than provided for in the tender award. Secondly, that at no stage did the defendant resolve to vary the supply contract or the terms and conditions set out in annexure “POC4” as required by section 38(1) of the Rationalisation of Local Government Affairs Act 10 of 1998 [Gauteng] ("the Rationalisation Act"). Nor did it comply with the formalities prescribed in section 38(3) of the Rationalisation Act. Thirdly, that the purported variation of the supply contract in terms of annexure "POC4" would have increased the tender value of the supply contract by more than 20% and consequently would in terms of section 38(2)(c) of the Rationalisation Act have been void. Fourthly, that in terms of section 10G(5)(a) of the Local Government Transition Act, Act 209 of 1993 ("the Transition Act") and the regulations thereto the defendant was not empowered to vary the supply contract on the terms and conditions set out in annexure "POC4", but had to call for tenders with a view to entering into a new supply contract, which it failed to do.’ (para 13)

The plaintiff’s response, however, was that the defendant could not rely on its own error in order to escape liability for the increased contract price. The defendant, the plaintiff argued,
is estopped from denying the validity of its own actions:

'The plaintiff avers that the defendant is estopped from denying the authority of its officials. The plaintiff also avers that the defendant is estopped from denying that it resolved, as required by section 38(2) of the Rationalisation Act, to vary the supply contract by increasing the contract price.' (para 14)

Patel J then proceeded to consider the statutory provisions on which the defendant relied to argue that the price increase was bad in law. Section 38 of the Rationalisation Act set out the circumstances under which a municipal council may on its own initiative 'extend or vary a tender agreement'. Applying the provision to the facts, Patel J found that the defendant's action had not been unlawful - that is, he found that the authorisation of the price increase had not been ultra vires the statutory powers of the defendant. He concluded that the defendant could therefore be estopped from relying on the alleged non-compliance with the formalities on which it seeks to avoid liability (para 29). It must be pointed out here that, given Patel J's finding that the defendant's actions had not been ultra vires, the issue of estoppel should never have arisen. A claim of estoppel, if upheld, prevents a public authority from relying on the unlawfulness of its actions to escape the consequences of those actions. Necessary for a successful estoppel, then, is a finding that the public authority's conduct was unlawful in the first place. Here, however, Patel J found that the defendant's actions were not unlawful. There is no need to estop the defendant from relying on the unlawfulness of its actions in approving the price increase, since its actions in doing so were lawful to begin with. Where estoppel is correctly considered is in relation to the defendant's claim that its employees who had purportedly authorised the price increase were not empowered to do so. The defendant's argument in this respect was that certain internal formalities relating to the variation of the contract, set out in section 38(3) and (4) of the Rationalisation Act, had not been met. The defendant's employees' representation that the price increase had been approved and would take effect was thus, in the absence of compliance with these formalities, of no legal force or effect. Patel J rejected this argument, correctly upholding the plaintiff's claim that the defendant was estopped from relying on its own unilateral error in not meeting statutory formalities:

'Under the circumstances, it is clear that the requirements of estoppel are satisfied because first, a representation was made by the defendant that the price increase had been approved...Secondly, the representations were made by various officials of the defendant and not merely by the officials who addressed the letter to the plaintiff confirming that the price increase requested by the plaintiff had been approved. Thirdly, the representations were in a form that the defendant should reasonably have expected that outsiders, like the plaintiff would act on the strength of such representation. This is evident from the fact that the plaintiff undertook delivery by road which it would not have done in the absence of the price increase because to have done so would have resulted in the plaintiff incurring loss...

In dealing with the plaintiff's claim of estoppel, the judge had to consider the principle of our administrative law that estoppel will not be allowed to validate action that is otherwise not authorised in law. After restating this principle and citing the relevant authority, Patel J went on to draw an important distinction in application of the principle:
the defendant's approval was indeed reasonable given that notice of the price increase was issued by the defendant's officials, who had ostensible authority to approve such increase. Last, the prejudice to the plaintiff is self-evident.' (para 35)

The case of Margate Clinic (Pty) Ltd v genesis Medical Scheme 2007 (4) SA 639 (D) similarly considers the circumstances under which estoppel will be allowed to operate in an administrative law setting.

In Van Wyk v Unitas Hospital and ANither (Open Democratic Advice Centre as Amicus Curiae) [2007] ZACC 24 (unreported, 6 December 2007), the Constitutional Court considered an application for leave to appeal against a judgment of the SCA (reported as Unitas Hospital v Van Wyk and Another 2006 (4) SA436 (SCA), discussed in the 7th Edition of the PAJA Newsletter). The case concerned an attempt by the applicant to obtain an internal report commissioned by the respondent hospital pertaining to the quality of nursing in the hospital's intensive care unit. The applicant's husband had died while receiving treatment in the hospital's intensive care unit. She had initially sought the report in order to aid in determining the prospects of success in a delictual claim against the hospital for the death of her husband. Although she would have access to the report under the rules of pre-trial discovery set out in the Uniform Rules of Court, this would only assist her once she had already issued summons. The applicant's argument in both the court of first instance and the SCA was that she 'required' access to the information contained in the report 'for the exercise or protection of...rights' to claim damages from the hospital (see section 50(1)(a) of PAIA). A majority of the SCA (Brand, Cloete, Conradie and Harms JJ) upheld the hospital's appeal and overturned the High Court's order, finding that the applicant had not shown that the report was 'required for the exercise or protection of any rights', especially in circumstances where the applicant could gain access to the report through rules of discovery. A minority of the SCA (Cameron JA) reached the

opposite conclusion, finding that pre-discovery access to the report would have afforded the applicant a 'substantial advantage' in formulating her claim, and that this satisfied the requirements of section 50(1)(a) of PAIA.

The applicant sought leave to appeal the SCA's decision to the Constitutional Court. It is clear from the disagreement in the SCA and the persuasively argued judgments of both the majority and the minority that the case raises important and contentious issues. Unfortunately, the Constitutional Court did not address the merits of the matter, and dismissed the application for leave to appeal on procedural grounds. The circumstances leading to this result are easily summarised: first, the applicant had waited 11 months before filing her application for leave to appeal to the Constitutional Court, and had failed, in the Court's view, to offer a reasonable explanation for her delay (para 22). In addition, the Court noted that since the applicant had already obtained the report she sought by way of discovery proceedings in the delictual claim against the hospital, the issue between the parties had become moot. The Court did recognise that mootness is not an absolute bar to the justiciability of an issue (para 29). In addition, the Court had regard to the point made by the amicus curiae, that the issue of mootness is likely always to arise in cases such as this:

'The amicus curiae submitted that it is nevertheless in the public interest that the main issue be resolved. It submitted that issues relating to the right of access to information are, as a general matter, a moving target. This is so because the time taken for the court process to take its course is so long that people who seek information will no longer be in a position to use the information to their advantage by the time the proceedings (including any appeal) are finalised. Or by the time the matter comes on appeal, the information would have been obtained through the rules relating to discovery and therefore arguably render the matter moot. Therefore, the argument goes, issues relating to the right of access to information will invariably be moot by the time they reach this Court. These submissions are not without force.' (para 28)

The Court however concluded that in circumstances where there had been an inordinate delay, the applicant had failed to provide a reasonable explanation for the delay, and the issue between the parties was moot, it was not
in the interests of justice to consider the merits of the matter (para 34). The disagreement between the majority and the minority in the SCA thus remains unresolved.

**ARTICLES AND REVIEWS**

David Dyzenhaus 'The Pasts and Future of the Rule of Law in South Africa' (2007) 124(4) South African Law Journal pp 734-61. This article is an investigation of the role that the doctrine of legality has come to play in judicial checks on the power of government. Dyzenhaus argues that the doctrine of legality installs courts as the ultimate arbiter of questions even of central governance. The Constitutional Court has nevertheless exercised this power judiciously, showing open respect and deference to the authority of the government. It is by no means clear, Dyzenhaus continues, that the government will continue to pay reciprocal respect to the judiciary. The article examines the contested terrain between the judiciary and the government that the concept of the rule of law occupies.

Kerry Williams 'Pharmaceutical Price Regulation' (2007) 23(1) South African Journal on Human Rights pp 1-12: Pharmaceutical price regulation is highly politicised, both globally and in South Africa. As a result misinformation and rhetoric is common. Regulators (whose duty it is to represent the public interest) face difficult policy decisions and are subject to pressure from all stakeholders. Despite these challenges, complex economic and legal solutions may be employed to ensure the accessibility of affordable medicines in the developing world. The nature of the pharmaceutical industry gives rise to unique economic problems which may be resolved through Ramsey optimal pricing (also referred to as differential pricing) which allows pharmaceutical manufacturers to price according to the price sensitivity of consumers, thereby ensuring that poorer consumers can afford essential medicines. This must be done within the legal flexibilities of the TRIPS Agreement. This article examines the theory of differential pricing, how it is constrained by TRIPS and how it is beginning to be implemented by way of international agreements and through specific policy choices made by national regulators. Examples from Europe and South Africa are considered and criticised. The European tiered pricing regulation offers the possibility of accessible and affordable medicines in the developing world but is vastly underutilised. South African law and policy makers ought to consider the principles of differential pricing in greater detail so that it may be worked into the current regulatory framework. In the interim, there is some potential in the possibility of granting compulsory licences.

Phoebe Bolton 'Incorporating environmental considerations into government procurement in South Africa' (2008) 1 Tydskrif vir die Suid-Afrikaanse Reg pp 31-51: This article begins with the premise that government procurement is not 'just business', as the public procurement of goods and services has wider social, economic and political implications. Procurement is often used to pursue 'secondary' goals such as the pursuit of national social, industrial and environmental policies. This article illustrates that ideals of sustainable development require the South African government to pursue environmental goals in its procurement policy, and argues that doing so would not fall outside the current legislative framework.