

Administrative Law

Only study guide for
ADL2601

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INTRODUCTION

Welcome to Administrative Law (ADL2601). The purpose of this module is as follows:

To equip students with knowledge, skills, attitudes and competencies to analyse and critically evaluate legal material (in the light of the right to just administrative action), formulate legal arguments and apply their knowledge to practical problems that may arise due to requirements for valid and fair administrative action.

It is essential for any law student to have a sound knowledge of Administrative Law. While it is important for you to know *why* you should study this module, it is just as important to know *how* to study it.

OUR APPROACH TO THE STUDY OF ADMINISTRATIVE LAW

A number of aspects that concern this module should be stated from the outset:

- **Administrative Law is a LAW module** – it is law just as much as mercantile law or criminal law. Just as you wouldn't attempt to charge a company director with a violation of the Companies Act without having its provisions at your fingertips, so too the **principles** of administrative law must be known. There are essential principles that form part of this field of law that you need to understand in order to pass this module. You therefore need to come to grips with these principles during the course of the semester. You will most certainly not learn them in practice after the completion of your studies. The moment is now, in the present, during the semester. Some "high-profile" cases that deal with administrative law often appear in the media, which shows that it is not only relevant, but sometimes highly political. Administrative law is the legal framework within which the public administration is carried out. This does not mean that the essential principles of administrative are easily understood by the layman; it remains a complex law subject, which deserves your undivided attention.
- **Administrative Law** is a "core subject" in the four-year LLB degree and is presented as a **semester module**. The module is inextricably linked to the other four public law compulsory modules offered in this department, namely Constitutional Law, Fundamental Rights, the Interpretation of Statutes and to a lesser extent, General Principles of International Law. The modules in Constitutional Law, Fundamental Rights and Interpretation of Statutes are crucial for a proper understanding of Administrative Law and ideally you should have either enrolled for or have already passed these modules.

Even though Administrative Law is, as said, presented as a semester module, you should not be fooled by this and underestimate the content. The amount of work is the same as that in any other law module.

Our emphasis is on application and understanding. While as indicated above, you must have the factual "hard law" knowledge, you need to do something with this knowledge. The "something" is the following: (i) you have to identify and describe what the applicable law in a given factual situation, real and invented, is; next you

need to (ii) apply the law to the facts presented; and (iii) based on your discussion/ explanation, reach a definite conclusion.

We expect you to take responsibility for your decisions. If you choose to enrol for ten modules per semester, this is your decision; likewise the fact that you are working and studying at the same time, is simply a fact of life. While we sympathise and are happy to support where we can, these factors can unfortunately not affect the standard that we expect. Our aim is to equip students registered for ADL2601 with a sound knowledge of this field of law that will allow them to understand practical matters concerning Administrative Law.

Finally, as we move into the second decade of the 21st century, we are becoming more geared towards the online environment. This explains why Administrative Law is now available on myUnisa. All the study material for the module is available on myUnisa. You are obliged to use this facility in your studies. Moreover, it is also ideal for setting up discussion groups, which will minimise that feeling of isolation that inevitably goes with distance education. In the light of the postal problems many students experience, tutorial letters and other information relating to the module will be available on myUnisa once the semester begins. Some material will also be posted throughout the semester. We encourage you to use myUnisa to share ideas, form study groups and post questions to your fellow students. It is therefore crucial that you find an avenue to access you study material, quite regularly, on the internet (myUnisa) – at home, the office or an internet café, for example.

YOUR APPROACH TO THE STUDY OF ADMINISTRATIVE LAW

To be successful in this module you must understand how the guide works. This guide is intended to in fact "guide" you through the prescribed work. It is not a textbook.

This guide is divided into four parts, each part consisting of a number of learning units that logically fit together:

Part 1 consists of four learning units, all of which you must study. Part 2 consists of only one learning unit – a most important one.

Part 3 consists of five learning units that form the crux of the module. Part 4 consists of two learning units.

How to use this study guide

In order to help you find your way through the guide, the following "signposts" have been posted throughout the guide. These are:

Outcomes

The "outcomes" tell you what you are supposed to be able to do after working your way through a particular unit. You will find the outcomes bulleted right below the title of each unit.

Principles/concepts

The main purpose of this guide is to provide you with a sound understanding of the principles of administrative law. These principles cannot be studied in isolation by way of "parrot-type" learning; it is essential that you understand the different principles and units as forming part of a coherent whole. It is therefore vital for you to truly understand the administrative law concepts.

However, there are some principles or concepts that you will have to internalise. In other words, you have to make them your own. We shall clearly indicate these with the following:

Activities

Once you have mastered these principles, you will be required to apply them to actual problems encountered in everyday life. These applications will take the form of "activities" in which you will be asked to apply the principles you have learned to the problems. It is essential that you complete these activities to understand and master the principles explained.

The activities are intended to help you to practise the skill of explaining the principles you have learned and of applying them to a particular situation. As an individual studying law, with the hope to someday practice law, you must substantiate your statements with reference to the Constitution, legislation, common law, case law and other sources, such as the opinions of experts in the field of administrative law.

We encourage you to do these exercises by answering them in writing! These are useful forms of self-assessment, meaning that your lecturers will not oversee such exercises. Feedback ("comments on the activities") is provided in the study material.

We shall indicate the activities as follows:

ACTIVITY

COMMENTS ON ACTIVITIES – FEEDBACK

Immediately below each activity, you will find comments on the particular activity, which we call "feedback". These comments will help you to assess your progress in mastering a particular aspect of administrative law. Activities should be mastered throughout the course of the semester; this will enable you to identify aspects of the work that you're struggling with, which should be made known to your lecturers in order for them to assist you in good time.

You will recognise comments by the following:

Scenarios

Several scenarios are used to help you apply administrative-law principles to identified problems. You will recognise these numbered scenarios since they are in the form of illustrations, blocked as follows:

Keeping a "learning journal"

We recommend that you get a notebook or "learning journal" in which you make notes and complete the various activities. You can also use a computer to prepare your notes or answers to the activities in this guide. The point is that you need to *engage* with this guide in order to manage its contents. This means that you need to read and reread the units, do the activities as well as the assignments, and spend time doing previous exam papers; with reference to the memorandums. It is VITAL for you to have a clear understanding of what is expected of you. Simply reading through the guide a day or two before the examination will not enable you to master the basic principles of administrative law, and nor will merely rereading it. A copy of the Constitution of the Republic of South Africa, 1996, is essential. Use and refer to your copy of the Constitution when you deal with these activities. For your convenience we include in annexure A the *Promotion of Administrative Justice Act 3 of 2000* (PAJA). Return to this Act frequently to come to grips with its content.

The process of making notes and completing the activities has become known as keeping a "learning journal". The following guidelines for keeping a learning journal have been adapted by Dr Paul Prinsloo of Unisa's DCLD (Directorate for Continuing Learning Development) from the web pages of Carleton University's Law Faculty in Ottowa, Ontario, Canada.

What is a learning journal?

A learning journal is a way of recording your thoughts, impressions, concerns, questions and reflections systematically. It provides an informal yet focused opportunity to express whatever comes to mind as you read module materials, participate in discussions, read articles and engage in conversations with colleagues.

Why keep a learning journal?

Kept with frequent and fairly regular entries over months or years, a learning journal provides a growing picture of your understanding of [Administrative Law] theory and practice, your professional aspirations, and the ways in which your learning is unfolding. For some, it can be a tool for analysing and solving problems; for others it is a source of new ideas and questions to be explored. Recording concerns and questions allows you to come back to them and address them with new insights and perspectives. In essence, then, a learning journal helps you think about, evaluate and bring together your learning throughout your learning experience.

Objectives of the learning journal

You will find that it will

(1) help you reflect upon your learning experiences
(2) help you to identify your strengths and weaknesses as well as your personal preferences, values, biases and emotional reaction to various activities
(3) help you to evaluate your learning and development throughout the learning experience
(4) facilitate the integration of theory and practice
(5) assist with assignments and examination preparation
(6) help you become a reflective practitioner

How to keep a learning journal?

- There are several ways to keep a learning journal. You may use a notebook specifically for this purpose. Since this module is presented online, you may well use the computer to compile your notes, draft your summaries, et cetera. Experience in the past has taught us, however, that many students prefer to keep a file to which they can add pages they've printed, articles retrieved from the internet, newspaper clippings, and so on.
- Each entry should include the date, a brief description of the situation or learning event, a reflective comment about your learning, assumptions, insights, questions and, when possible, follow-up action, resources, or other "to do" information.
- A learning journal is personal and will reflect your personality. Be creative. Be honest. Be thorough. Challenge yourself.
- Although the learning journal is personal, it may also provide you with evidence of your thought processes and problems, should you wish to contact a lecturer or speak to a colleague or a peer.

Continuing with your learning journal

Your learning journal will become a wonderful resource in your practice (of law in whatever capacity). You will be required to write down your reflections and answers to the questions in the activities. If you write them down in your learning journal, your preparation for the assignments and the examination will be much smoother than if you decide to skip the activities.

ASSESSMENT

The *activities* we require you to do in the course of your studies are what we call "formative assessment" – in other words, they give you the opportunity to develop as an administrative lawyer, and they give us an opportunity to form your administrative law thinking, but they will not contribute towards your year mark. The second (self-assessment) assignment also falls in this category.

In administrative law we have two summative assessment exercises. First the compulsory assignments, which, as you will see in Tutorial Letter 101, count 20% towards your final mark – 10% for each assignment. This may not sound like much, but it has helped a number of students over the exam hurdle. In short, it is essential that you submit both assignments to secure admission to the exam. It is also important that you take it seriously and submit the best answer possible.

The main summative exercise, however, is the two-hour examination you will write at the end of the semester. This will count 80% towards your final mark.

You will recognise assessments by the following:

ASSESSMENT

Good luck with your studies in administrative law! The contact details of your lecturers for ADL2601 are provided in Tutorial Letter 101.

PART 1

STATE AUTHORITY AND THE HOLDERS OF SUCH AUTHORITY

LEARNING UNIT 1

Describing administrative law

Working your way through this learning unit should enable you to

- *identify the areas in which administrative law operates*
- *broadly apply administrative law to everyday life*
- *describe what administrative law is*

The outline of this learning unit is as follows:

1.1 An overview of the general features of administrative law

1.1.1 State authority
1.1.2 Administrative action
1.1.3 Just administrative action
1.1.4 Control of administrative of action

1.2 A list of general concepts and technical terms often encountered in administrative law, and their explanation
1.3 What is administrative law?
1.4 A brief list of abbreviations encountered in administrative law sources
1.5 Conclusion

1.1 AN OVERVIEW OF THE GENERAL FEATURES OF ADMINISTRATIVE LAW

In this guide, the focus is on the basic principles of administrative law. These principles relate to **four** key features of administrative law. At the same time, these features serve as indicators of the area in which administrative law operates. These are discussed hereunder.

1.1.1 State authority

This is the public power – *state authority* – exercised by an organ of state or natural or juristic person over another person or body in a subordinate or subservient position. The exercise of such STATE authority could affect the rights or interests of the last-mentioned.

When confronted with a problem in administrative law, the first question you will need to ask is whether any person or body has acted as an organ of state. In other words, you need to focus on the question whether the person or body possesses *state authority* and is able to exercise public power or perform a public function. If the person exercising a certain authority is not a *state authority*, administrative law does not apply.

1.1.2 Administrative action

This is the conduct of functionaries and institutions – administrators – when exercising a public power or performing a public function in terms of any legislation. This conduct takes a variety of forms, but usually it is in the form of a "decision" of the administrator. Furthermore, the decision ***must have an adverse effect*** on the person or group of persons. Section 1 of PAJA defines "administrative action", which you need to study, by heart, when asked to define "administrative action". See learning unit 5 for a discussion of this concept.

1.1.3 Just administrative action

This is the manner in which any administrative action must be performed by the organ of state or natural or juristic person in exercising state authority. Section 33 of the Constitution imposes a duty on all administrators exercising public power to act *lawfully*, and *reasonably,* to *follow fair procedures,* and to *give written reasons* when the rights of any person in the subordinate position are adversely affected.

The question you need to answer, having established that administrative action was taken by an organ of state or natural or juristic person, is whether such action complied with the requirements for *just administrative action* as found in the Constitution of the Republic of South Africa, 1996, the Promotion of Administrative Justice Act, 3 of 2000 (PAJA), and the common law. In other words, you need to examine whether the action was lawful, reasonable and procedurally fair as well as whether written reasons for the action were provided. The concept of "just administrative action" is discussed in learning units 6 to 10; this is the core of administrative law.

1.1.4 Control of administrative action

This is the means of correcting or rectifying administrative action that is not just or fair – when administrative action is not in line with the prescriptions of the law. In other words, has the person prejudiced by the administrative action any remedy against the administrator? If it is found that the person prejudiced has a remedy, what is he or she entitled to claim with that remedy? In short, the question is the following: What is an aggrieved person entitled to should his or her objection lodged against the administrative action be successful? See learning units 11 to 12 for a discussion of this aspect of administrative law.

While keeping the four key features of administrative law at the back of your mind, read through the account of a juristic person's relationship with an institution set out below. Try to see whether the activities referred to in the report have any relevance to administrative law. What do you think?

Telkom hit by another tender row

A R1.5-BILLION outsourcing tender for the management of telex services is being investigated at Telkom — the second such scandal at the parastatal in months.

It follows an urgent court application by Maredi Telecom and Broadcasting in January to stop Telkom awarding a R1.25-billion microwave tender to Ericsson South Africa and Telsaf Data.

Maredi alleged that Telkom violated the Promotion of Administrative Justice Act, which deals with the awarding of contracts by state-owned entities.

Maredi said Telkom acted in bad faith, flouted procurement regulations and circumvented tender procedures. Judgment in the matter has been reserved.

Now, two months later, similar claims are being made by another BEE company, Phutuma Networks.

Phutuma said the tender was rigged and claimed the outsourced task is already being carried out by rival bidder Network Telex — despite the tender not being awarded yet.

Phutuma chairman Joe Xaba said: "Our investigations reveal ... the other supplier (Network) is currently doing 70% to 80% of the services requested in the formal Telkom bid still under adjudication. This makes a mockery of fair bid governance."

The scandal could not have come at a worse time.

In an unusually busy week for Telkom, the company announced on Wednesday that group executive for network infrastructure provisioning, Marius Mostert, had been suspended.

No reasons were given, but it has been established that Mostert was a key figure in both the disputed tender processes, among others.

Regarding the Maredi matter, Mostert and Telkom chief executive officer Reuben September are alleged to have had close links to Ericsson, which was awarded the tender despite not meeting technical requirements.

In relation to the second tender, Mostert was head of technical services at a time when "unethical behaviour on the part of Telkom officials" prompted Phutuma to lodge its complaint.

However, Telkom spokesman Pynee Chetty said on Friday that Mostert's suspension was "most definitely not" linked to the latest controversy.

Commenting on the telex tender, he said: "It is not yet awarded and will not be awarded until we have fully investigated various complaints."

Chetty said the tender process was initially cancelled in November 2005 for "technical reasons" and "investigations" following initial complaints. The tender was re-advertised in November 2007.

He said as a result of a complaint by Phutuma on January 23 this year "valuations and decisions with regard to the tender were immediately suspended".

He said the cost was "nowhere near" R1.5-billion. "Our indicated value to bidders is an estimated R10-million per annum, which is not guaranteed."

The controversy comes at a bad time for September, who stands accused of signing off the controversial tenders and faces a leadership battle.

Allegations against him first surfaced after the board sacked chief operating officer Motlatsi Nzeku early in February.

Telkom said Nzeku was "divisive and counterproductive", and that his actions had been defamatory to the company.

He also opposed September's restructuring plans, which are scheduled to be implemented on Wednesday.

Nzeku compiled an explosive dossier alleging tender irregularities and casting doubt on September's fitness to carry out his fiduciary duties.

In the document, Nzeku also blew the lid on the Maredi matter.

Asked to comment this week, the sacked executive said: "This vindicates what I've been saying, which is there's been widespread violations of tender procedures."

Xaba, meanwhile, said the telex outsourcing contract was worth at least R10-million a month with the contract running up until 2020 — meaning a R1.44-billion windfall for the lucky bidder.

"We have been working with Telkom since 2003 on this project.

"It was re-advertised in November 2007, with no credible explanation given, and we discovered that the second bidder was a company we had subcontracted in our initial

WHAT WE THINK

A Telkom's tender process should be more vigorously monitored

B As a major shareholder, govt should hold Telkom more accountable

C Local companies, who are compliant, must benefit from state tenders

Should the CEO be brought to book for the parastatals' problems?

WHAT DO YOU THINK?

Write to: tellus@thetimes.co.za

BEE firm says rules flouted in outsource deal, writes Buddy Naidu

Telkom hit by another tender row.

Source: *Sunday Times (Business Times)* March 29 2009

1.2 A LIST OF GENERAL CONCEPTS AND TECHNICAL TERMS OFTEN ENCOUNTERED IN ADMINISTRATIVE LAW, AND THEIR EXPLANATION

For your convenience, we include a list of general concepts and technical terms and their explanation below.

Please note:

This list is intended as a reference aid – if you do not understand a specific technical expression, you could look it up here. You must still study the comprehensive explanations of these concepts on the relevant pages of this study guide. We do encourage you to take special note of these concepts and ensure that you understand each of them before you proceed to study the remaining learning units.

A further very important aid is a dictionary such as the *Compact Oxford English Dictionary* or any other reputable one. Another option is the less expensive *Compact Oxford English Dictionary for Students,* which is freely available at bookstores. However, should you use a computer, and the MS Word program, use the "thesaurus" facility you will find under "review".

Accountability – a means or principle to control the arbitrary exercise of administrative discretion of persons exercising authoritative or public power. Accountability thus prevents erratic and wayward choices.

Administration – that part of the government (national, provincial or local) which is mainly concerned with the implementation of legislation. In general terms, the administration focuses on the day-to-day running or management of the country by various government bodies, such as government departments and their administrators and other organs of state (defined in s 239 of the Constitution). See also "public administration" below.

Administrator – in terms of the PAJA, it means an organ of state or any natural or juristic person taking administrative action.

Arbitrary action – is action based on random choice or impulse and not on reason, in other words, unrestrained action.

Basic values and principles – in section 195(1) of the Constitution, the basic values and principles governing public administration are set out. These values and principles include the promotion of an open and transparent public administration by providing the public with timely, accessible and accurate information and the promotion of a high standard of professional ethics.

Bill of Rights is the term to describe Chapter 2 of the Constitution. This Bill of Rights is a list of basic (fundamental) rights which must be respected, protected and upheld by government and all organs of state (and in certain instances by private individuals as well). The constitutions of most modern countries have a bill of rights (sometimes called a charter).

Case law – is a term describing the decisions of the courts and which are reported in the *Law Reports.*

Common law – is the law which is not written down in legislation.

Constitution – "Constitution" can be understood both broadly and narrowly. In the broad sense it includes the entire body of rules (written and unwritten) governing the exercise of state authority in a particular state, as well as the relationship between the citizens of a state and the state authorities. A constitution also embodies the will of the people, reflecting the popular and current

values. A constitution must, furthermore, enjoy the support of the majority of the people in a state. In short, the constitution of a country sets out the legal rules by which the country is governed or managed. It also sets out the limits to these powers. In the narrow sense it refers to the written document in which these rules are contained. The South African Constitution is the Constitution of the Republic of South Africa, 1996, unless we refer specifically to the interim Constitution Act 200 of 1993.

Constitutionalism – government in accordance with the Constitution. The government derives its powers from and is bound by the Constitution. It refers to a state where the law is supreme, and the government and state authorities are bound by the Constitution.

Constitutional state – refers to a state in which constitutionalism (see constitutionalism) prevails, in other words, a country where the law is supreme.

Delegated (subordinate) legislation – the legislation which is enacted by the executive branch of government. It is not original parliamentary or provincial or local government legislation.

Duty – means something a person or administrator has to do because it is legally necessary. In other words, the person or administrator *must* do something. See too "function" as well as "power".

Executive (authority) – executive (authority) refers first to the political functionaries or officials of the country: the president, deputy president, ministers (the cabinet) and provincial premiers and members of executive councils (MECs). Secondly, the term may also refer to the executive functions performed by these functionaries.

***Fons et origo* –** the Latin term for the "source and origin".

Function – means performing a task (e.g. the administrator's function is to issue a permit). The word "function" encapsulates both the power (as the ability to do something) and the duty (as the obligation to do something).

Government – the term "government" is ambiguous. In a broad sense as a collective noun, it denotes the legislative, executive and judicial authority of the country. As a general term, "government" covers all the functions and organs of the state. In the narrow sense it is used to specify the executive organs of state (the administration). In general, today, "government" is understood as relating mainly to the executive function and bearing on the formation and implementation of policy and law. The government is also the temporary bearer of state authority, in other words, the government in power at a particular time. It acts as the "agent" of the state. See also "state".

Inter se – the Latin term for "between themselves".

Legal subject – a person or entity that can have rights, duties and capacities. A legal subject is a member of the legal community to whom the law applies and for whose benefit the law exists. Legal personality is the capacity of being a legal subject.

Judicial precedent *(stare decisis)* – means that the decision of a higher court is binding on lower courts until such time as the decision is overruled by a higher court. The court is also bound by its own previous decisions unless they are clearly wrong.

Judicial authority – refers to all the courts in the Republic (see s 165(1) of the Constitution).

Judicial review – the power of the higher courts to control administrative action through an inquiry into any excess of power, irregularity of procedure, and

noncompliance with any of the requirements for the performance of any administrative action.

Just administrative action – an umbrella term for action or conduct by any person or body in authority which is lawful, reasonable and procedurally fair (s 33 of the Constitution). It sets the standard for all administrative action.

Law – refers to all forms of law, that is, the Constitution, statute law (legislation), common law and customary law. Common law and customary law are forms of law not contained in legislation, but which have been "handed down" from generation to generation. Today, this form of law is found largely in the judgments of our highest courts.

Legality – refers to the **lawfulness** of state action: in other words, government by the law and under the law. All government action must be performed in accordance with certain set legal principles.

Legislature – is a body of persons who have been elected and who make laws. The collective name for these laws (or statutes) is **legislation**. In South Africa we have the national legislature (parliament) that makes laws for the whole country on any subject. We also have provincial legislatures that make laws for the provinces on certain subjects only, as well as local government legislatures (municipal councils) that make by-laws for their areas (also on certain subjects only). Please make sure you understand the difference between "legislature", "legislation" and "legislative".

Limitation clause – makes it possible for the fundamental rights protected in the Bill of Rights to be limited in certain instances (s 36 of the Constitution).

Ne bis in idem – the rule stating that the same matter may not be heard twice.

Organ of state – "organ of state" is defined in section 239 of the Constitution and includes (a) any department of state or administration in the national, provincial or local sphere of government; or any other functionary or institution that (i) exercises a power or performs a function in terms of the Constitution or a provincial constitution; or (ii) exercises a public power or performs a public function in terms of any legislation. However, a court or a judicial officer is not included.

Parliamentary sovereignty – means that Parliament is supreme. This was the system of government that operated in South Africa before the 1993 Constitution came into operation, and is still the system operating in Britain, called the "Westminster system". In such a system, not only is Parliament the highest legislative body, capable of enacting any laws it wishes, but no court may test the substance of parliamentary Acts or statutes against standards such as fairness and equality. Furthermore, the courts cannot declare such laws invalid if, for example, they are unfair or unreasonable.

Power – means to possess authority. It usually means that the person exercising the power has a discretionary power (to choose between two or more options). Such a power is indicated with the word "may" (expressing a possibility).

Public administration – in the Constitution (ch 10), "public administration" is used to describe the actions of all organs of state (excluding the courts – see below), administrations in all spheres of government and public enterprises. Public administration is also used to describe the institutions involved in these actions. It would seem that "public administration" is used in the broadest sense to include both political functionaries (i.e., the president, cabinet ministers, premiers, members of the provincial executive councils and members of local government) as well as officials entrusted with the implementation of legislation and policies. However, see the definition of "organ of state" above. "A

court or a judicial officer" is excluded from the definition of "organ of state" and therefore logically from "public administration" as well.

Public service – section 197(1) of the Constitution provides: "Within public administration there is a public service for the Republic, which must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day". The public service is used to denote the officials within the public administration who implement government laws (legislation). It does not include political functionaries (like ministers). The Constitutional Court said in the *SARFU* case *(President of the Republic of South Africa v South African Rugby Football Union* 1999 10 BCLR 1059 (CC); 2000 1 SA 1 (CC)) that "the process" of implementation (of legislation) is generally carried out by the public service (par 139).

Res iudicata – the matter has been dealt with and cannot be reconsidered by the same body, but only by a higher-ranking body.

State (the state) – is a term which is often used as though it means the same as "the government". However, the two are not the same. "The state" shows the following characteristics: (a) it is a specific geographically defined territory (e.g. the Republic of South Africa); (b) it comprises a community of people living within that territory; (c) it has a legal order that is accepted by the community and by which it is governed; (d) it has an organised system of government which is able to uphold the legal order, and (e) it has a certain measure of separate political identity, if not fully sovereign political status. It is the permanent bearer of authority within a particular country.

Statutory bodies – bodies created by law to perform certain functions for the state.

Statutory law – the law written down in statutes, parliamentary and provincial Acts, by-laws, proclamations, regulations and other subordinate legislation.

Supreme Constitution – the Constitution is the highest law in the country. Although Parliament remains the highest legislative (law-making) body in a system of government with a **supreme constitution**, any legislation or action of any government body (including parliament) which is in conflict with the Constitution, will be invalid.

Testing of legislation – the process whereby legislation which allegedly conflicts with the Constitution is reviewed or tested by the court. This court, therefore, compares the legislation with the provisions of the Constitution and decides whether the legislation is valid or invalid. This is commonly known as **constitutional review** or **judicial review.**

Ubuntu – can be regarded as an African view of life and of the world. It can be described as "African Humanism", involving alms-giving, sympathy, care and sensitivity for the needs of others, respect, patience and kindness.

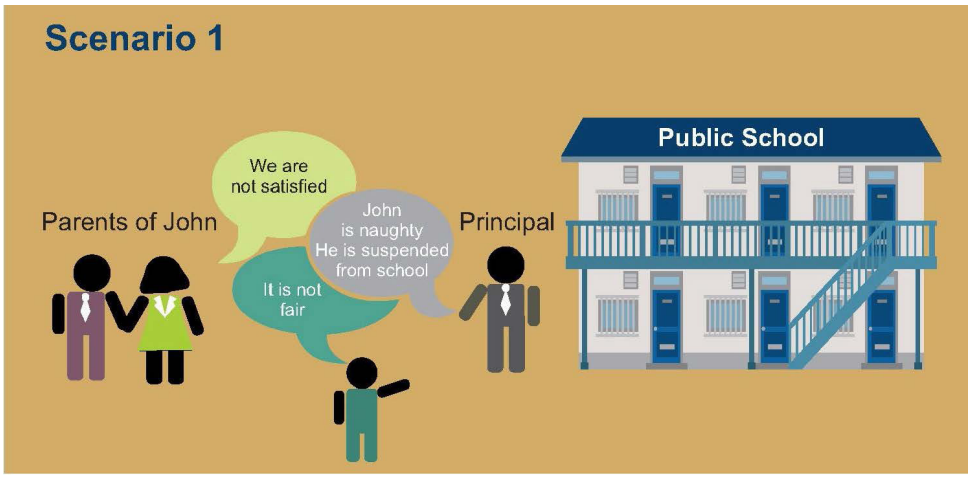
1.3 WHAT IS ADMINISTRATIVE LAW?

To explain the nature or essence of administrative law, its ambit and its function is no easy task. One of the reasons given for this difficulty is that administrative law covers such a wide field. It has been said that it filters through every part of the legal system; and its presence is felt in everyday life.

Here are some examples in the form of illustrated scenarios. Read through each carefully before you attempt the activity that follows.

Scenario 1

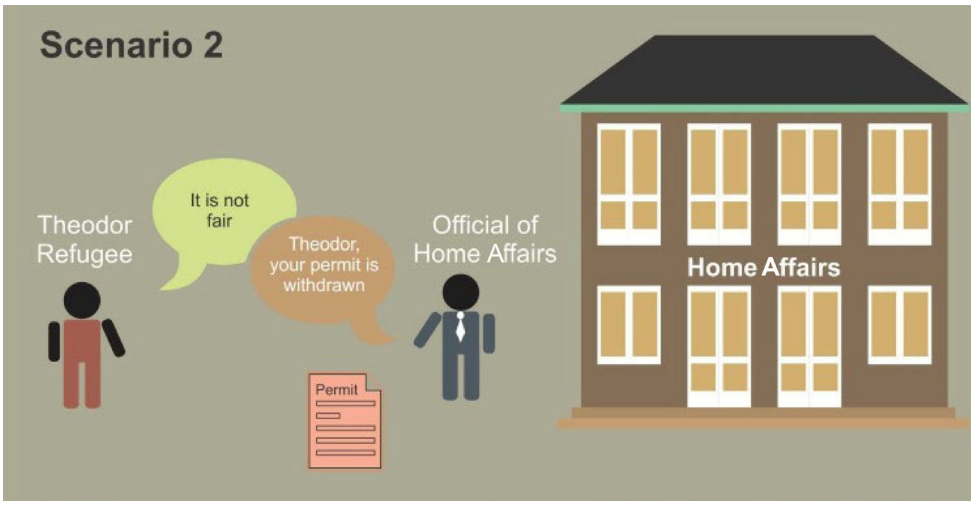
John Learner is a learner at a public school. His behaviour creates disciplinary problems for the principal of his school. John is suspended from school after a disciplinary hearing. His parents are unhappy about this and want to know what the law says about this and what they can do to get John back in school.



Scenario 2

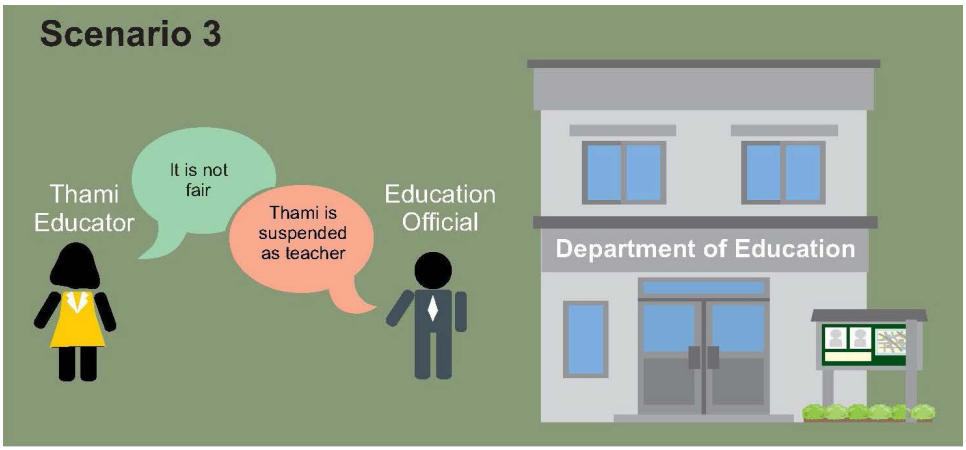
Theodor Refugee is a citizen of the Democratic Republic of the Congo. He fled that country and came to South Africa, where he obtained an asylum seeker permit from the refugee reception officer. Later, however, that permit is summarily withdrawn. Theodor is extremely despondent about this and wants his permit back to allow him to stay at least temporarily in South Africa. He therefore wants to know what the law says about his situation.

(Theodor will feature throughout this guide.)



Scenario 3

Thami Educator is an educator at a public school. He receives a letter from the provincial Department of Education informing him that he has been suspended. The only reason given is that the suspension is pending a departmental investigation into alleged misconduct on his part. He feels that his suspension is unjust and that the reason given by the department is inadequate.



Scenario 4

A municipality calls for tenders for the erection and upkeep of illuminated street signs in the city. Bright Light Company wins the tender to erect the signs against payment of a specific amount. A month before the contract is due to expire, the company's representative attempts to negotiate the renewal of the contract with the municipality. Maria, the official in charge of tenders and contracts of this nature, undertakes to notify the company when the tender documents will be ready. She unfortunately faxes the notification for tenders to a wrong number, with the result that the company does not submit its tender for the contract in time. When the company becomes aware of the situation, it submits its tender 14 days after the closing date. The municipality refuses to consider the tender on the basis that it is late, and awards the contract to a third party.



ACTIVITY 1.1

Although the facts in each of the four scenarios are different, we do find some characteristics common to all of them. Identify these characteristics, using the following questions to help you. Write down your answers in a notebook or if you have access to a computer, on the computer.

(1) Are legal relationships present in each scenario? Write down, for each scenario, the person(s) or institutions that form the relationship.

(2) Are all the parties involved in these relationships acting on equal terms? If not, what distinguishes these relationships from those in which parties act on equal terms?
(3) Describe the administrative action in each scenario.
(4) Was the action authorised by the law?
(5) Did the action comply with the requirements of law? How do you know?
(6) If not, how can the action be controlled and corrected?

If you find answering these questions difficult, don't worry too much about it at this stage. Just write down what you think. We shall try to explain things in due course. In the meantime, keep these questions in mind as you work your way through this guide.

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(1) You will recall from your study of the Introduction to Law module that one of the most distinctive characteristics of the law is that it governs relationships between legal subjects (a legal subject is the bearer of rights and duties). In all the scenarios above we find relationships between particular parties, namely between:

John Learner and the principal of his school (scenario 1); Theodor Refugee and the refugee reception officer (scenario 2); Thami Educator and the Department of Education (scenario 3); Maria and the municipality and the Bright Light Company (scenario 4).

(2) When we look at the scenarios carefully, we immediately notice that the parties involved in the relationships are not acting on an equal footing. In all the scenarios we find someone who exercises authority over another person who is subject to that authority. For example:

The principal of John's school is in authority in scenario 1; the refugee reception officer in scenario 2 exercises authority; the Department of Education in scenario 3 exercises authority; and Maria and the municipality exercise authority in scenario 4.

All of these persons or bodies exercise public power. Or, to put it differently, state authority. The exercise of power leaves the other party in a subordinate or subservient position. The subordinate party could be a private individual or a juristic person like a company – see scenario 4 dealing with a tender application, or even another person with authority (see scenario 3 dealing with the suspension of Thami) under the authority of a superior/senior official.

This exercise of power may affect the rights and interests of the subordinate party in the relationship. For this reason, we say that in any relationship where authority is present, the relationship is one of inequality. In other words, it is a vertical relationship (↕). Typical, too, of the unequal relationship is the power of the body in authority to compel the other party to act in a specific way. In our scenarios, for example, the person in the subordinate position is unable to attend school for a certain period (scenario 1); unable to stay in South Africa (scenario 2); unable to do his work (to educate) for a time (scenario 3); or unable to submit tenders in time (scenario 4).

*(3) You learned in your introductory modules (to law) that another characteristic of law is that it consists of all the rules that facilitate and regulate human action and interaction. The **"action"** of the question refers to the decision*

of the party who exercises authority over the other person. The action in the scenarios is thus:

- *the decision of the relevant authorities of the school to expel John (scenario 1)*
- *the decision to withdraw the permit (scenario 2)*
- *the decision to suspend the educator (scenario 3)*
- *the decision of the official representing the municipality to award the tender to a third party (scenario 4)*

The conduct of these persons in authority in the form of decisions is called "administrative action". "Administrative action" is therefore the term used to refer to decisions by anyone having state authority. When such a person or body takes a decision, he/she/it exercises public power or performs a public function.

Please note (This is REALLY IMPORTANT):

Administrative law students sometimes complain that they get "completely lost" when they read in one page of the guide that a cabinet minister, such as the Minister of Home Affairs, can perform administrative action, yet on the next page it is stated that: "executive powers and functions of the executive in the national sphere are excluded from administrative action". What then "is the real truth"?

The truth is that both statements are true. The reason for the confusion is that you have forgotten your Constitutional Law studies and the basic principles of Constitutional Law. Let me explain: you will learn that, generally speaking, administrative law deals with ***administrative action*** *taken by* ***organs of state.*** *(See s 239 of the Constitution for the definition of organ of state, s 1 of the PAJA for a definition of "administrative action" and, most importantly, exceptions to administrative action instances when an action will not qualify as administrative action.) This is where the distinction comes in. Note that executive action described in the Constitution is very specifically excluded from the definition of "administrative action" found in section 1 of the PAJA (see learning unit 5). These are instances when the ministers take action as the executive at the highest level, for example, when they formulate policy (that is when the cabinet – the President and the ministers – decides what the government's policy will be on housing, for example). Making or deciding on any policy does* ***NOT*** *qualify as administrative action, but as executive action. The reason is that it is a political decision. To help you understand this, take your copy of the Constitution and write down the sections in the Constitution (indicated in s 1 of PAJA – you will find PAJA reproduced in this guide as Annexure A) which deal with executive action, and also write down WHAT EACH SECTION SAYS about executive action. Incidentally, this is the kind of exercise that you should include in your learning journal.*

However, it is quite a different matter when the minister executes *that policy (acts upon it) or when he or she acts in terms of legislation (in other words, implements legislation). When the minister acts upon the policy, he or she acts in an* ***administrative capacity*** *in that case. See later in this guide (in learning unit 5 in particular), where we show you that the Minister of Home Affairs* ***"administers"****, for example, the* ***Refugees Act.***

(4) Whether the action was authorised, that is, permitted, relates to the ***authority to act.***

In other words, was the party in authority allowed to act the way it did? The particular person receives or derives the authority to act from the law. This

particular aspect relates to the sources of administrative law – that is, the places where we can find the legal rules of administrative law. (This is the topic of the next learning unit.) In our scenarios all the parties in authority derive their authority from the Constitution and/or specific legislation.

(5) The answer to the question whether action complies with the requirements of the law relates to the ***way or manner in which public power has been exercised or a public function has been performed.*** *Remember we have said that the exercise of authoritative power affects the rights and interests of the other party in the relationship. Thus, although a particular person may act in an authoritative manner, he or she may not abuse or exploit his/her power. For this reason, we say that administrative law also protects persons who are in a vulnerable position as a result of their subordinate position in the administrative-law relationship. This is even more the case when we consider another feature of public law – it governs relationships involving the public interest, that is, the interests of the community. Suppose, for example, that Theodor Refugee in scenario 2 was told by the refugee reception officer that if he were to pay him R1 000 he would not withdraw the permit. This is not only wrongful towards Theodor, but is against the interests of the community as well. The interests of the people require lawful action, not action that is corrupt.*

The requirements for action which organs of state or natural or juristic persons must adhere to in order to protect the individual as well as the community against any abuse of power, are set out in the Constitution. These requirements are embodied in the right of every individual to "just administrative action" in terms of section 33(1) of the Constitution. All administrative action by organs of state or natural or juristic persons exercising public power must be "lawful, reasonable and procedurally fair". Further, in terms of section 33(2), everyone whose "rights have been adversely affected by administrative action has the right to be given written reasons".

Let us look at these four requirements for just administrative action:

For any administrative action

- *to be* ***"lawful",*** *it must comply with all the requirements of the law (as found in the Constitution, the relevant legislation, common law, customary law and court decisions, in short, the sources of the law). See learning unit 7 for more detail on this requirement.*
- *to be* ***"reasonable",*** *it must have a reasonable effect or result. This means that when the person in authority exercises his or her discretion and takes a decision, such a decision must be correct in that it (the decision) is based on objective facts and circumstances. In short, the decision must be sound and sensible to the extent that a person may say: "Although I don't agree with the result of the decision, I understand why the decision was taken by the administrator." See learning unit 8 for more detail.*
- *to be* ***"procedurally fair",*** *the correct procedure must be used to take a decision. This, in turn, means that the subordinate party must be given the opportunity to explain his or her position or present his or her side of the story before any decision is taken and that the person in authority must act impartially (i.e., not be biased or prejudiced) in exercising his or her power. See learning unit 9 for more detail on this section 33 requirement.*

When a decision has been taken that results in someone's rights being adversely affected, *for example in scenario 1, John's suspension results in his being unable to attend school and receive education and training,* written reasons *for the decision must be given (s 33(2) of the Constitution).*

Rights will be adversely affected when a decision imposes a burden on the individual or when the decision has a negative effect on him or her. The right to written reasons is dealt with in learning unit 10.

*In such a case, "**written reasons"** must be given for a decision.*

The Constitution requires and actively promotes a culture of human rights. With regard to administrative law, this culture starts with the way in which those in authority (in scenario 1 the relevant authorities in the school dealing with disciplinary matters; in scenario 2 the refugee reception officer; the administrators (officials) of the Department of Education in scenario 3, and the administrator (official) of the municipality dealing with tenders in scenario 4) act towards persons under their authority. They must promote a culture of human rights by setting an example. They will do this when they perform all administrative action lawfully, reasonably and in a procedurally fair way and when persons who are adversely affected are given written reasons for their actions.

(6) When administrative action does not meet the standards set by the Constitution, and the party in the subordinate position feels unhappy or aggrieved about the outcome of the action, how can the matter be put right?

The law provides protection against any possible harm resulting from the exercise of power. In other words, the law provides protection against the abuse of power by someone in authority. This is what is meant by the question "how can the action be controlled and corrected?" For example, what can John's parents do to get him back to school? Suppose they are unhappy about the way in which the hearing (at which the decision was made to suspend John) was conducted. Should they immediately approach a court of law and institute legal proceedings? The answer is "no". The courts are only the last resort. A less expensive and cumbersome method of control is by means of the method of internal or administrative control in which more senior officials review the action. John's parents should therefore have been told that an appeal may be lodged through the internal channels of the Department of Education. Only after they have done this, and are still unsuccessful, may they institute judicial proceedings. If the court found that John has indeed been prejudiced, what is he entitled to claim with that remedy? Or, to put it another way, what order is the court allowed to make should it (the court) find in favour of the aggrieved person? See learning units 11 to 12 for a discussion on this aspect.

As we have said, the questions in activity 1.1 above help us to understand what administrative law is all about. From our comments on the questions we can extract the following working definition of administrative law:

> Administrative law forms part of public law. Administrative law regulates the activities of organs of state and natural or juristic persons that exercise public powers or perform public functions. Regulating the activities of organs of state and natural or juristic persons include prescribing the procedures to be followed when public powers are exercised, or public functions performed; and ensuring that such action is within the boundaries of the law. Regulating also includes control over such action.

ACTIVITY 1.2

Can you think of other situations that involve administrative law? Write them down.

The list is literally endless, because administrative law touches upon our daily lives. You could have mentioned the planning of a new township, the provision of water and electricity, the maintenance of roads, the duties of health inspectors, the duties of traffic officials, the provision of health care, the provision of housing, the running of prisons, the provision of entertainment and leisure activities and even the management of sport.

You can assess your examples by using the working definition of administrative law above. Note that the definition coincides with the four key features of administrative law we set out earlier. You could therefore also use those features to guide you in looking for examples.

The next activity – activity 1.3 – will also help you to make the distinctions and identify the applicability of administrative law.

ACTIVITY 1.3

Read scenarios 5, 6 and 7. Next, complete the table below by following the instructions. For each scenario (the left-hand column in table A), write in the middle column whether you regard it as an example of administrative law by merely writing “yes” or “no”. In the last column, write down the reasons for your “yes” or “no” answer. Use all the information you have gained so far in this learning unit.

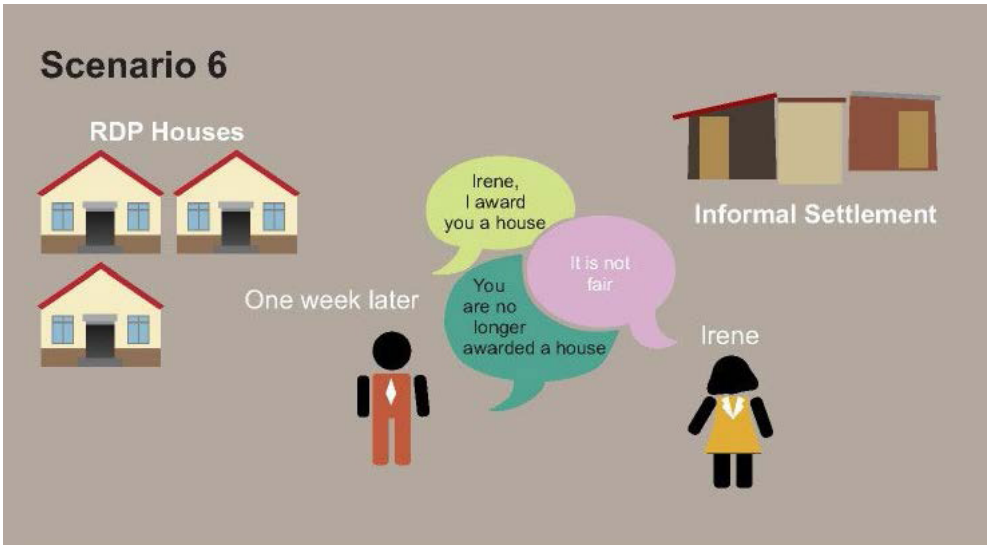
Scenario 5

The Department of Transport buys five cars from the car company, Luxury Cars. The contract of sale is concluded by Dan, the administrator at the head of the department’s procurement section – the section dealing with the buying of goods.



Scenario 6

Irene lives in an informal settlement, but her name is on the waiting list for a house. She is informed by the municipality's director of housing that a low-cost house is available for occupation. A week before she moves into her new house she is informed by the director that the house has been allocated to someone else.



Scenario 7

The director-general of health has been given medical opinions to the effect that one of the senior officials in the department has a medical condition which makes her unfit for continued government service. However, the director-general refuses to allow the official to go on early pension since he is not satisfied that, given the nature of the official's duties, a discharge on medical grounds is called for.

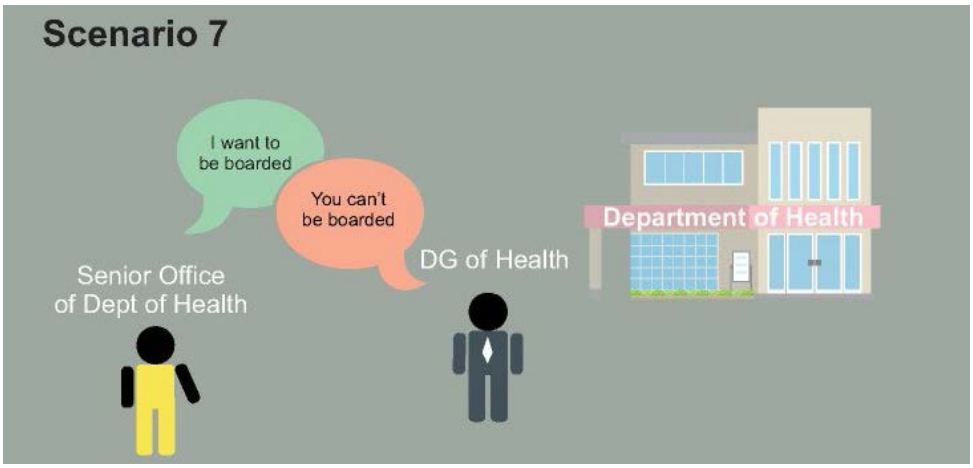


TABLE A

Scenario	Administrative law – "yes" or "no"	Reasons

Scenario	*Administrative law – "yes" or "no"*	*Reasons*
5	*"no"*	*Although the Department of Transport, a government department is involved – Dan, an administrator in the Department is acting on behalf of the department – the Department is not acting from a position of authority when it buys cars from a car dealer. There is no state authority involved. The contractual parties, the Department and the car dealer act within an ordinary contractual (equal) relationship. Private law is therefore involved since none of the parties may force the other into signing the deal (the buying and selling of the cars) and they therefore contract on equal terms.*

Scenario	*Administrative law – "yes" or "no"*	*Reasons*
6	*"yes"*	*The municipality, via its director of housing, is in a position of authority and is capable of exercising that authority. Irene is in a subordinate position. Authority must be exercised in a certain way that is within the boundaries of the law. From the facts it does not seem as if the director has acted and exercised his power in such a manner.*
7	*"yes"*	*She is under the authority of the director-general, the head of the department. The director-general exercises authority over the official and she is subject to the power of the director-general. However, she is not without protection and is protected by the law against the abuse of superior power.*

1.4 A BRIEF LIST OF ABBREVIATIONS ENCOUNTERED IN ADMINISTRATIVE LAW SOURCES

B = Supreme Court of Bophuthatswana
CC = Constitutional Court
BCLR = Butterworths Constitutional Law Reports

CJ = Chief Justice
J = Judge
JA = Judge of the Supreme Court of Appeal
MEC = Member of the Provincial Council
P = President of the Supreme Court of Appeal
PAJA = Promotion of Administrative Justice Act 3 of 2000
RA = Appeal Court of Rhodesia (now Zimbabwe)
SCA = Supreme Court of Appeal

1.5 CONCLUSION

In this learning unit we looked at scenarios which fall within the ambit of administrative law. With the assistance of some activities and by asking some relevant questions we tried to stimulate your thoughts about the applicability of administrative law. From these questions we have worked out a definition of administrative law.

In the next learning unit we will be discussing the administrative-law relationship. If you wonder what such a relationship involves, think of the one feature of administrative law we have mentioned – state authority. The administrative-law relationship

has some bearing on this authoritative power and the way it shows its presence in a given situation.

Before you move on to the next learning unit ensure that you understand what is meant by "state authority" and that you can define "organ of state" with reference to section 239 of the Constitution. If you do not understand how the scenarios fit into this field of law, contact your lecturers.

LEARNING UNIT 2

The administrative-law relationship

Working your way through this learning unit should enable you to

- *explain what an administrative-law relationship entails*
- *list the characteristics of such a relationship*
- *distinguish between general and individual relationships*
- *identify an administrative-law relationship generally and either a general or individual relationship specifically in a factual situation*

The outline of this learning unit is as follows:

2.1 The characteristics of the administrative-law relationship
2.2 The distinction between a general and an individual administrative-law relationship

2.2.1 The general or objective relationship
2.2.2 The individual or subjective relationship

2.3 Conclusion

In learning unit 1 we pointed out that one of the key issues in administrative-law is the exercise of "state authority". "State authority", in a nutshell, refers to the public or authoritative power exercised by a person or body in authority where such power affects the rights or interests of another person – the person in the lesser or subservient position. This does not suggest that a person in such a position is without rights; it simply means that he or she is subject to state power or authority.

We also mentioned in learning unit 1 that one of the distinguishing features of the law is that it regulates relationships between, at least, two legal subjects. A legal relationship is one in which two or more legal subjects enter and it is governed by law. When one of these legal subjects exercises state authority or power over the other legal subject, the relationship created is known as a public-law relationship. One party has state authority, which he or she may exercise in relation to the individual, who does not have such authority.

Before considering the characteristics of the administrative-law relationship, look at the following activity to see whether you can recognise an administrative-law relationship.

ACTIVITY 2.1

Reread scenarios 5, (the story of the buying of cars by the Department of Transport), 6 (the story of Irene) and 7 (the story of the health official). These scenarios are set out in learning unit 1. Are you able to recognise any legal relationship based on authority in these scenarios? Write them down. Don't worry about reasons at this stage.

You could use a table such as the one below.

TABLE B

(We will use the story of John in scenario 1 as an example of what we have in mind.)

Relationship of authority? Yes/No	**Someone exercising state authority**	**Person in subordinate position**
Yes	The principal of the school	John has been suspended from school. The fact that he is a learner in a subordinate position makes him subject to disciplinary measures such as suspension.

In law, a distinction is generally drawn between public and private law. Public law regulates the organisation of the state and the relationship between the state and the individual. Public law is further concerned with the exercise of state authority by the government and deals with relationships where one of the parties is always the state as bearer of state authority. The other party is a private person whose legal position is subject to the state's discretion. Again, this does not mean that the individual does not have rights or that the state can exercise its authority in whichever way it likes, which is where administrative law comes into the picture.

The public-law relationship is therefore a vertical relationship, and a relationship between:

Someone in authority



A subordinate or lower-ranking individual

Private law is concerned with relationships between individuals who are on an equal footing. In other words, it is a relationship of equality. You may well ask "But what about the relationship between a parent and a child"? Note that the relationship is not founded on the state authority of a parent and for this reason the relationship falls within the sphere of private law.

The private-law relationship is therefore a horizontal one:

Individual ⟷ Individual

Relationship of authority? Yes/No	*Someone exercising state authority*	*Person in subordinate position*
5 No	*The official of the Department of Transport is **NOT** exercising state authority*	*The car dealer is **NOT** in a subordinate position*
6 Yes	*The director of housing exercises state authority in that he is involved in the allocation of houses*	*Irene is in the subordinate position since she is "dependent" on the actions of the director of housing*

Relationship of authority? Yes/No	*Someone exercising state authority*	*Person in subordinate position*
7 Yes	*The Director-General of Health exercises state authority in that he decides on the future of the official*	*The official in the Department of Health is dependent on the decision of the Director-General*

Note that in all three of these scenarios (fully explained in learning unit 1) it was easy to recognise the person exercising authority. However, often the same scenario produces a number of different administrative-law relationships. The ability to identify these relationships is the first step before explaining why they qualify as subjects of such a relationship.

2.1 THE CHARACTERISTICS OF THE ADMINISTRATIVE-LAW RELATIONSHIP

(It is important that you grasp the characteristics of the administrative-law relationship before you continue with the remaining learning units. For assessment purposes [assignments and the exam], you should be able to explain this relationship for no less than 8 marks.)

(1) At least one of the **legal subjects must be a person or body who exercises power.**
(2) More important, the position of power must be held by a person or body **clothed with state authority, and who is able to exercise that authority.**

In other words, the authoritative person or body – organ of state or natural or juristic person – must have the power to prescribe, restrain or allow other individuals or juristic persons to act in a certain way. The authoritative person uses the authority to compel the other party to act in a specific way. Moreover, such exercise of power may affect the rights and interests of the person in the relationship, leaving such person in a subservient or subordinate position.

Now that you are familiar with the definition of the relationship, reconsider scenario 1 (explained in learning unit 1). When we think back on the story of John (scenario 1), the principal most certainly is clothed with authority and has the ability to exercise power over him. The punishment meted out to John – to suspend him from school – affects or impinges on John's rights and interests (e.g. to attend school and receive education and training, or even to take part in sport or other school activities).

We have seen in the administrative-law relationship (scenarios 6 and 7) that the administrative law-relationship can exist between

(1) the person who exercises authority and a private individual in the subordinate position (scenario 6), but also between
(2) the person who exercises authority and a lower-ranking official in the same department (scenario 7). In other words, a relationship may exist between government authorities *inter se.*

We could explain the situation as follows: the party in the lower-ranking or subordinate position may be another person under the authority of the superior official. For example, the health official of our story in scenario 7 is under the authority of the director-general of health. The relationship between them is indeed one of authority. After all, the superior government official or body exercises its authority over the lower-ranking official. And the relationship remains a public-law relationship: the subservient official is compelled to submit to the authoritative power exercised by her superior.

Please note:

Relationships between administrative bodies themselves may be further complicated by the concept of delegation of power. This will be discussed in learning unit 7.

ACTIVITY 2.2

First make your own summary of what we have learned so far about the administrative-law relationship. Use the following headings:

(1) What is an administrative-law relationship?
(2) What are the characteristics of the administrative-law relationship?

Then read the decision in Annexure B – the *Earthlife Africa* case – again and make a list of the possible administrative-law relationships in the case (the subjects of the relationship).

This is a self-evaluation activity. Use the information given earlier in this learning unit to guide you through the answer.

2.2 THE DISTINCTION BETWEEN A GENERAL AND AN INDIVIDUAL ADMINISTRATIVE-LAW RELATIONSHIP

Within the administrative-law relationship we distinguish between

(1) the general or objective relationship and
(2) the individual or subjective relationship.

(In addition to you being able to explain the characteristics of an administrative-law relationship [for about 6 to 8 marks], you should also be able to explain the distinction between an individual and a general administrative-law relationship for about 10 marks. Take this into account as you read and carefully study the following paragraphs.)

2.2.1 The general or objective relationship

In the general (or objective) administrative-law relationship, the legal rules governing the relationship between the parties apply to all the subjects within a **particular group**. These rules apply impersonally, that is generally and objectively, and non-specifically and NOT to a particular identifiable legal subject. Note that a particular group is not the public in general; a group must be confined to a certain class of persons, such as refugees, asylum seekers or even a defined group of persons who reside in a certain area. The general relationship is created, changed or ended **by legislation** (including delegated/ subordinate legislation), that is, by general means. In other words, a general administrative-law relationship cannot be created, changed or ended by, for example, a decision by the Director-General of Home Affairs.

For example, when we recall scenario 2 (see learning unit 1) and the story of Theodor Refugee, the provisions of the Refugees Act 130 of 1998 and the regulations made in terms of the Act are applicable to all refugees entering or residing in South Africa. This is therefore an example of a general administrative-law relationship between refugees generally and the Department of Home Affairs, the department responsible for dealing with such matters.

2.2.2 The individual or subjective relationship

In an individual administrative-law relationship, legal rules apply personally and specifically between the parties. In other words, the legal rules apply to specifically identifiable legal subjects. The content of the individual relationship will vary from case to case. Individual relationships are created by individual **administrative decisions.** Individual relationships are therefore not affected by new general legislative provisions, unless the amending Act specifically states that it affects the relationship. The presumption is that an existing individual relationship is not affected by amending legislation – an example of the presumption against retrospectivity. Note that presumptions and their role are dealt with in the Interpretation of Statutes module.

In Theodor's case (see scenario 2 in learning unit 1), the decision to withdraw his asylum seeker permit allowing him to stay in South Africa is an example of an individual relationship, which exists between Theodor and the Department of Home Affairs. This decision by the Department only affects Theodor, not refugees in general.

Scenario 8

It is 1991 and the Reservation of Separate Amenities Act 49 of 1953 has just been repealed. However, the municipality of Old Town makes a decision that only white men may visit the public park in the centre of town. Women and the other residents of the town are not permitted to do so, nor are visitors to the town. (Note: The facts of the scenario are loosely based on the case of Jacobs v Waks *1992 1 SA 521 (A).)*



Scenario 9

The National Students Financial Aid Scheme (NSFAS) is a statutory body regulating and distributing bursary loans for teacher training to students. Tsepo applies for a loan to this body, but the application is refused without any reasons being given.



ACTIVITY 2.3

Are there any administrative-law relationships recognisable in the two scenarios? If so, write down whether they are examples of individual or general administrative-law relationships. Explain briefly.

In scenario 8 we find an example of a general administrative-law relationship between the municipality and all its residents.

In scenario 9 we find an example of a general relationship between NSFAS, the statutory body regulating and distributing bursary loans to prospective education students. However, an individual relationship is recognisable in the relationship between NSFAS and Tsepo when he applied for the loan.

2.3 CONCLUSION

In this learning unit we have explained the features of the administrative-law relationship in general; and the two kinds of administrative-law relationship we find and how to distinguish between these relationships.

In the next learning unit, we examine the legal subjects of administrative law, that is, the organs of state and natural or juristic persons exercising state authority over others, as well as the persons in a subordinate position whose rights and interests may be affected by the exercise of such authority.

LEARNING UNIT 3

The legal subjects of the administrative-law relationship

Working through this learning unit should enable you to

- *describe the organs of state and natural or juristic persons that exercise state authority over other functionaries or individuals*
- *determine whether a particular organ of state or natural or juristic person possesses public power*
- *recognise the legal subjects in a given factual situation and provide a reason or reasons for your view*
- *determine the persons whose rights and interests are adversely affected by the exercise of public power*
- *decide whether persons affected by the exercise of authority are left powerless in the authoritative relationship*
- *describe the object of the administrative-law relationship*

The outline of this learning unit is as follows:

3.1 The identification of the authoritative party in the administrative-law relationship
3.2 The role of associations, clubs and other "private" organisations
3.3 The persons – natural or juristic – whose rights and interests are affected by the exercise of authority
3.4 Is the subordinate person powerless in the authoritative relationship?
3.5 The object of or reason for the administrative-law relationship
3.6 Conclusion

3.1 THE IDENTIFICATION OF THE AUTHORITATIVE PARTY IN THE ADMINISTRATIVE-LAW RELATIONSHIP

It may sometimes be quite difficult to identify the authoritative party. The Constitution has addressed this difficulty by providing a broad definition of such a party in authority, referring to it as an "organ of state" (s 239).

This is an important definition and you **must** *memorise* its contents. Although we are not in favour of studying parrot fashion, there are nonetheless certain concepts that require memorisation. Mastering section 239 is an example of this. For assessment purposes you should be able to define "organ of state" for about 10 marks. Ensure that you understand this definition and that you are able to convey its meaning, as captured in section 239 of the Constitution, word for word. This will not amount to plagiarism if you reference section 239 properly.

Section 239 of the Constitution states as follows:

"organ of state" means

(a) any department of state or administration in the national, provincial or local sphere of government; or
(b) any other functionary or institution
    (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
    (ii) exercising a public power or performing a public function in terms of any legislation,

but does not include a court or a judicial officer.

(*Rewrite this definition and memorise it before you continue to study the rest of this learning unit. This is one of the essential definitions in administrative law.)*

It is also important to fully understand what each word or phrase in section 239 means.

Section 239(a):

any department of state or administration

- In the **national sphere,** "any department of state or administration" refers to departments of state or government departments such as the Departments of Agriculture, Forestry and Fisheries; Arts and Culture; Science and Technology; Communications; Basic Education; Higher Education and Training; Environmental Affairs; Tourism; Finance; Health; Home Affairs; Labour; Trade and Industry; and so on. "Department" or "administration" may refer to an entire department and/or to its administrators (officials or a particular official) – the public servant(s).

  "Organs of state" include the members of cabinet (the ministers who are the executive heads of the various departments of state). Deputy ministers are also "organs of state". Both the President, as head of the national executive (see s 83(a)), and the Deputy President are organs of state as well.

  Note that although the President, Deputy President and ministers are organs of state, not all their functions constitute administrative action. Some of their functions are executive or constitutional functions. This distinction will become clearer when we discuss "administrative action" in the next learning unit where we introduce you to the important case of *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte the President of the Republic of South Africa* 2000 2 BCLR 241 (CC); 2000 2 SA 674 (CC).
- In the **provincial sphere,** "organs of state" would include provincial departments of state – the provincial public service, the Premiers of the nine provinces, and the other Members of Executive Councils (MECs) who are the executive heads of the various provincial departments of state. In the provincial sphere, we must also distinguish between administrative and executive functions of the Premiers and the MECs.
- In the **sphere of local government,** "organs of state" include municipalities and various municipal councils vested with executive authority (s 151(1) and (2) of the Constitution respectively).

In short, in terms of section 239(a), "organ of state" refers to the administrators and the departments of state constituting the **public administration.**

Section 239(b)

any other functionary or institution

(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution;

or

(ii) exercising a public power or performing a public function in terms of any legislation …

In terms of section 239(b), the definition of "organ of state" has been broadened. We notice that this definition now also includes any functionary or institution that is not part of the public administration, but which either exercises power or performs functions in terms of the Constitution or a provincial constitution, or exercises **public** power or performs **public** functions in terms of **any legislation**. It may nevertheless be difficult to decide in a particular case whether the functionary or institution is acting in a public capacity or a private capacity. Or, more correctly, whether the functionary or institution is exercising a public power or performing a public function or a private power or function.

In *Chirwa v Transnet Ltd* 2008 4 SA 367 (CC), 2008 3 BCLR 251 (CC), Langa CJ observed in the minority judgment that "… determining whether a power or function is "public" is a notoriously difficult exercise. There is no simple definition or clear test to be applied" (at para 186).

Notwithstanding Langa CJ's observation, it is possible to submit that we have to determine in each case whether:

(a) the functionary exercises public power or performs public functions, and whether
(b) the functionary is doing so in terms of legislation.

The exercise of *public power* is therefore decisive. Hoexter "Just administrative action" in Currie and De Waal (2013:659) explains:

> This means that whether something is administrative action depends on the public nature of the power that is being exercised rather than the person exercising it. As the Constitutional Court put it in a pre-PAJA case [*President of the Republic of South Africa v South African Rugby Football Union* ("SARFU") 2000 1 SA 1 (CC)], what matters is not the functionary but the function.

ACTIVITY 3.1

Return to Annexure B – our case study, the *Earthlife Africa* decision. Identify the natural or juristic persons exercising state authority in this case. Write them down.

This is a self-assessment exercise.

In this learning unit we enquire into the legal subjects of the administrative-law relationship. We will find that some authoritative functionaries and institutions are easier to recognise than others, while others are downright difficult to identify as authoritative.

One of the reasons why it is difficult to identify authoritative parties relates to the distinction between private and public law. This traditional distinction has lately become artificial and impractical. The modern state is powerful and governs many

traditional private-law relationships through legislation. Think of such an obvious private-law relationship as between lessor and lessee. In this example, legislation often regulates the relationship.

ACTIVITY 3.2

Write down three more examples of private-law issues that are regulated by legislation.

Examples you mention could include the following:

(1) Relationships between employer and employee. Employment contracts are governed by legislation, such as the Employment of Educators Act of 1998, which deals with educators specifically, and the Labour Relationships Act of 1995, which deals with fair labour practices generally.

(2) The relationship between husband and wife (and children) is regulated in part through legislation. Legislation has been adopted to prohibit and prevent domestic violence; see, for instance, the Prevention of Family Violence Act 133 of 1993.

(3) Section 9(4) of the Constitution authorises parliament to adopt legislation to prohibit unfair discrimination by private persons and companies. The Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000 has been adopted to regulate these matters.

While the state has become more powerful on the one hand, we observe a strange contradiction in this respect. The state has started to privatise functions we usually associate with public/state functions, such as public transport, telecommunications and the rendering of public services, including the provision of electricity. These functions are performed in South Africa by authorities such as Transnet, Telkom and Eskom. Although they are no longer part of the public administration as such (return to the list of general terms above to refresh your memory on the meaning of "public administration" and see below), we cannot simply state that since they are not part of the state administration, public law does not come into the picture and only the rules of private law apply.

After all, it is obvious that these bodies operate in the public sphere, since they exercise public power in terms of legislation.

ACTIVITY 3.3

In order to help you remember the elements of section 239 of the Constitution (defining "organ of state"), follow these instructions. Read and reread this definition. Then complete the following question from memory:

Fill in the missing words:

(a) An organ of state includes any ……..…..…. or .....…… in the ……..…….. or ....……..... or ……...…… Also included is:

(b) ..... or .....
which ..... in
terms of ..... as
well as .....
..... Excluded
from this definition is .....
.....

Through your thinking you need to master the elements of this definition. In other words, you have to make this definition your own.

ACTIVITY 3.4

Do you think the following functionaries or institutions would qualify as "organs of state"? Give reasons for your answers:

(1) The National Soccer League, when it disciplines a player
(2) The board of the South African Broadcasting Authority (SABC)
(3) Unisa, when the university expels a student after a disciplinary hearing
(4) The governing body of a private school confirming the suspension of a learner for seven days
(5) The high court issuing an interdict prohibiting the municipality to proceed with plans to expropriate land

(1) At first blush one is tempted to say "yes", given the kind of power exercised by the NSL – public power in the public interest. However, it is another matter whether the NSL qualifies as an organ of state since it does not perform its functions in terms of legislation.
(2) Yes. See section 239(b). The board qualifies as an organ of state, since it is an institution in terms of statute (the Broadcasting Act) and it performs public functions and exercises public power.
(3) Yes. Similar arguments as in 2 apply. Unisa is acting in terms of the Higher Education Act, an Act of parliament.
(4) Probably no, when we consider that the private school is not established in terms of legislation. For this reason, the answer is negative – it is not an organ of state. However, uncertainty arises when we consider that the private school performs public functions in providing learners with an education. We must also remember that even private schools are subject to national (government) laws on education (see the National Education Policy Act 27 of 1995).
(5) Section 239 expressly states that courts and judicial officers are excluded from the definition of an organ of state. Therefore, definitely no, the court is not an organ of state.

3.2 THE ROLE OF ASSOCIATIONS, CLUBS AND OTHER "PRIVATE" ORGANISATIONS

Voluntary associations such as jockey clubs, (note that the national jockey club is at present known as the "South African National Horseracing Authority" (NHA), sports clubs, church associations, and so on are examples of non-statutory bodies. The relationship between the members and management is similar in certain respects to the authoritative and subordinate relationship of public law. In other words, unequal relationships are in evidence. Moreover, in many instances the powers exercised by these institutions may well be said to be public in nature because of the public interest angle.

However, although they have professional status (think of professional soccer clubs like Mamelodi Sundowns, Orlando Pirates, Kaiser Chiefs and others, or the various jockey clubs in the provinces), they nevertheless are not organs of state. These associations are neither created by statute, nor do they possess state authority. In short, they remain private non-statutory bodies.

We nevertheless find that, traditionally, the common-law rules of administrative law have been applied to them. Why are the common-law rules of administrative law applied? It is because the management is in a position of authority over a member (who is in a position of subordination). In other words, since these associations, clubs, unions and so on, have an internal relationship based on authority, the rules are applied. (The relationship is therefore analogous to the administrative-law relationship.)

Because matters such as admission, suspension and other disciplinary actions of voluntary associations are governed by their constitutions, the courts will interpret the powers of these associations strictly on the basis of the agreement between members and the associations as contained in their constitutions. In *Government of the Self-Governing Territory of KwaZulu v Mahlangu* 1994 1 SA 626 (T), the court explained as follows (634 F–G):

> Many decisions were given by way of disciplinary decisions taken concerning jockeys. Those powers of review were exercised because the jockeys concerned contractually bound themselves to a club, and the contract enjoined the disciplinary body of the club to act in a particular way, for example by applying natural justice. The *fons et origo* of the power of review in every instance was the agreement of membership of the jockey club.

It remains unclear whether administrative law, as captured in the Constitution and the PAJA (and not the common-law rules of administrative law), applies to these cases. In *Tirfu Raiders Rugby Club v SARU* [2006] 2 All SA 549 (C), where the rugby union (SARU) had made decisions affecting the log positions of rugby teams, the court saw the "significant public interest" in the affairs of rugby unions and clubs as relevant (par 28). Accordingly, the court held that the **conduct of the rugby union was "sufficiently public in nature" to justify the application of PAJA** (par 29). In this instance, PAJA therefore applied, which meant that administrative-law principles in general were applicable in the case.

For a different view, see *Calibre Clinical Consultants (Pty) Ltd v The National Bargaining Council for the Road Freight Industry* (410/09) [2010] ZASCA 94 (19 July 2010). In this decision, the Supreme Court of Appeal per Nugent, JA concluded that the action (decision) of the Bargaining Council in the particular situation – not to appoint the

appellant as the preferred service provider – was not subject to the provisions of PAJA (par 63).

It is therefore not always clear, from the outset, whether a club, association or "private" organisation will be subject to the rules and principles of administrative law. It would depend on the specific circumstances and the agreement between the club and the individual. Take special note of the two aforementioned court decisions and the public interest in these cases to clarify the position.

ACTIVITY 3.5

Read each of the four statements below and write which part of the statements is true and which part is false. (Note that each statement contains a true statement and a false statement.) Give reasons for your answers:

(1) Swallow is a member of the Birds Soccer Club. He has been suspended for alleged dangerous play in a previous match. The Birds Soccer Club is an organ of state and may therefore suspend Swallow.
(2) The church association known as the Followers of Moses expel Khanyi from the church for disobeying its rules. Church associations are organs of state and may therefore take disciplinary steps against their members.
(3) Television cameras caught jockey Brakes reigning in his horse in the fourth race of the day. Since the Jockey Club is an organ of state exercising public powers, the Jockey Club is empowered to take disciplinary action against the jockey.

(1) The first statement is false. The club is not an organ of state. But the second part of the statement is true, because the management of the club is in a position to take steps against Swallow on the basis of their contractual disciplinary powers (the constitution of the club authorises such disciplinary measures). Hence the Birds Club occupies a position of authority, possibly even public authority.
(2) Again, the first statement is false. As the church association has not been established in terms of legislation, it does not seem to qualify as an organ of state. However, in exercising disciplinary powers, it does possess authoritative powers, again based on the constitution of the church association.
*(3) The first statement is yet again false – the jockey club is not an organ of state. However, given the decision in **Tirfu**, it may be argued that the jockey club exercises public power when taking disciplinary steps against jockey Brakes.*

3.3 THE PERSONS – NATURAL OR JURISTIC – WHOSE RIGHTS AND INTERESTS ARE AFFECTED BY THE EXERCISE OF AUTHORITY

ACTIVITY 3.6

Return to Annexure B for the *Earthlife Africa* decision. Do you think the applicant, Earthlife Africa, is a subject of an administrative-law relationship? Write down what

you think. Also write down whether you think Earthlife Africa is in a subordinate position.

Earthlife Africa is a legal subject in an administrative-law relationship. It finds itself in a subordinate position.

It has repeatedly been said that the most important characteristic of the administrative-law relationship is that it is based on authority and the exercise of public power by a functionary or institution in authority, which means that one party may be compelled to act in a specific way.

The person in the subordinate position could be someone such as Theodor Refugee in scenario 2 (see learning unit 1), or it could be a juristic person such as Earthlife Africa, the non-governmental organisation (NGO) in our case study (see Annexure B).

However, as we pointed out earlier, the person, either natural or juristic, in the subordinate position is not always a person or entity outside the public sphere, but may be another lower-ranking government official under the authority of a superior institution or functionary. For example, when we look again at scenario 3 (the story of Thami Educator; see learning unit 1), we see that the suspended educator is a lower-ranking officer under the authority of superior officials of the provincial department of education.

In such an instance, the superior government official or body – the administrator – exercises its authority over the subordinate official. It remains a public-law relationship – an administrative-law relationship – since the lower-ranking person is compelled to comply with the authoritative power exercised by the superior officer.

Because the administrative-law relationship is one of inequality or subordination, the person in the subordinate position or the lower-ranking officer must obey the instructions of superior administrative authorities and may even be prohibited from acting in a certain way.

3.4 IS THE SUBORDINATE PERSON POWERLESS IN THE AUTHORITATIVE RELATIONSHIP?

A person in a subordinate position is most definitely **NOT** powerless. It should be clear from later discussions (see the learning units dealing with the requirements for just administrative action in part 3 of this study material) that persons in the subordinate position are never stripped of their rights, privileges and interests when entering into such administrative-law relationships. Neither are those in authority – whether organs of state or persons exercising public power – allowed to abuse their superior state power. They are obliged to act in accordance with the law first of all. It is also their duty to act in the interest of the people or society and to serve and promote the public interest.

The person in the subordinate position is protected by the law in general and the Constitution in particular. The Constitution contemplates a culture of human rights and part of such a culture governs the way persons are dealt with by those in authority. Organs of state (and persons exercising state authority in general) are obliged

to comply with section 33 of the Constitution and PAJA. This means that their actions must be in line with *all the requirements* as stated in section 33 as well as *all the provisions* in PAJA. If an organ of state does not comply with these requirements, the person in the subordinate position can resort to internal control or remedies (see specifically learning units 11 and 12) and thereby hold the official accountable.

3.5 THE OBJECT OF OR REASON FOR THE ADMINISTRATIVE-LAW RELATIONSHIP

ACTIVITY 3.7

Return to the newspaper report reproduced at the beginning of this guide (see learning unit 1). Carefully read it again. Write down the reason why the company approached Telkom.

The reason why the company approached Telkom was to submit a tender to render telecommunication services to the parastatal.

*It may be said that the **object** of an administrative-law relationship is the reason why the legal subjects entered into a relationship. In other words, it is the issue which brings about the legal bond linking the two subjects.*

When we link the object of the administrative-law relationship to administrative action, we may say that the object is the subject matter of the administrative action. For example, when a municipality regulates street trade by issuing trade licences, the object of or reason for the relationship is the regulation of trade. We will find that the object of the authorisation to take action is usually described exactly in the empowering Act.

3.6 CONCLUSION

Having examined what administrative law is, the features of the administrative-law relationship and the legal subjects of administrative law, we need to enquire in the next learning unit into the sources of administrative law. In other words, we will discuss where to look for the legal rules which make up administrative law, including the origin of the powers of administrators, and so on. We thus examine the sources of administrative law to find out where to turn to solve administrative-law disputes and problems.

LEARNING UNIT 4

The sources of administrative law

Working through this learning unit should enable you to

- *explain what is meant when we refer to the sources of law in general*
- *explain the importance of the identification of the sources of law in general and administrative law in particular*
- *classify and examine the sources of administrative law*
- *apply these sources to factual/concrete situations*

The outline of this learning unit is as follows:

4.1 What are the sources of law?
4.2 The sources of administrative law
  4.2.1 Binding or authoritative sources
  4.2.2 Persuasive sources
4.3 Where to find administrative-law sources
4.4 How to find the sources of administrative law in a particular situation
4.5 Conclusion

4.1 WHAT ARE THE SOURCES OF LAW?

The "sources" of law are the places where we can find the legal rules, norms, principles and values that govern a particular branch of the law. In the context of administrative law, as part of public law, we could say that the "sources of law" refer to the sources of public or authoritative power. It is in this sense – as a reference to the source of power – that the PAJA refers in section 1 to an "empowering provision". The state authority to act, in terms of administrative law, must therefore be authorised in a specific source of law.

Where are the legal rules, but also the principles, norms and values, governing administrative law to be found? In other words, where do we find the legal rules that confer the power on an organ of state or functionary or institution to take administrative action, prescribe the procedures for conduct by anyone in authority, and control their conduct? It has been said that administrative power is not "self-generating", but is conferred by law. Baxter (1984:384), one of the ground-breaking writers on administrative law, wrote in the early 1980s – long before the new constitutional dispensation came about – that power means *"lawfully authorized power"* and that "[p]ublic authorities possess only so much power as is lawfully authorized, and every administrative act must be justified by reference to some lawful authority for that act". The power to act must therefore be authorised, mostly in terms of legislation.

When you think back on your Introduction to Law module, you will recall that not all the sources of law have the same authority. Some laws are more authoritative than others, hence the distinction between laws that have **binding authority** and

those which merely have **persuasive authority.** For example, our Constitution is the most authoritative and thus binding source of law. The laws of foreign countries such as India, the United States of America, Germany or Canada have only persuasive authority or influence. The laws of these countries can be examined when more guidance is needed to decide cases dealing with issues that our courts have not been faced with before.

ACTIVITY 4.1

We have just explained what the sources of law in general are. We have also explained what sources of law refer to in the context of administrative law. Now that you have a general idea of what sources of law refer to, try to answer the following question: "Where would you look for the legal rules governing administrative law?" Make a list of the sources you can think of, and compare your list to that contained in the discussion which follows below. Keep in mind that some sources are more authoritative than others.

4.2 THE SOURCES OF ADMINISTRATIVE LAW

Binding or authoritative sources

(1) The Constitution of the Republic of South Africa, 1996
(2) Legislation
(3) Case law or judicial precedent
(4) Common law
(5) Administrative practice (custom or usage)
(6) Ubuntu
(7) International law

Persuasive sources

(1) Writings in books and journals expressing academic opinions
(2) Policy documents such as Green and White Papers
(3) Reports by "state institutions supporting constitutional democracy", such as reports of the Human Rights Commission
(4) Foreign law

Please note!

It should be noted from the outset that section 33 of the Constitution and the provisions in PAJA are intended to regulate administrative law in South Africa. The most important rules and principles that apply to this area of law are therefore covered in these provisions. Whenever you are required to answer a question for assessment purposes, keep in mind that the most authoritative sources for this module are section 33 of the Constitution and the enabling provisions in PAJA. In addition to these sources, case law, the common law, and so forth, are also sources of administrative law, which may very well cover certain aspects not covered by section 33 and PAJA. The sources of law that are applicable to administrative law are covered in this guide; there is no need to consult any additional sources.

4.2.1 Binding or authoritative sources

1 The Constitution

The 1996 Constitution, with its entrenched Bill of Rights, is the supreme law of South Africa. As the supreme law of the country, it is the ultimate source of law, and ranks above all the other laws of the country. In relation to administrative law, as with other branches of public law, the Constitution is also the principal source of power. No other law, whether legislation, case law, common law and customary or indigenous law or conduct may be in conflict with the Constitution.

Section 2 of the Constitution reads:

Supremacy of the Constitution

"This Constitution is the supreme law of the Republic; any law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

The supreme Constitution is thus not only by far the most important statutory source of administrative law, but the most authoritative source as well. Moreover, the supreme Constitution also serves as a check on (public) power since the exercise of such power must be in line with the Constitution.

The implications of this supremacy for administrative law are twofold.

- First, as the supreme law, the Constitution sets the standard for the exercise of power and thus the actions of every organ of state or functionary or institution in South Africa.
- Secondly, the Constitution promotes and guarantees a culture of human rights. In the administrative-law context, the Constitution insists on justice for the individual by commanding that all the requisites for valid administrative action, lawfulness, reasonableness and procedural fairness must be met. The Constitution therefore guarantees the right to just administrative action to any individual in terms of section 33.

In *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the RSA* 2000 2 SA 674 (CC), Chaskalson P (the then President of the Constitutional Court) observed the following about the interim Constitution (para 45):

"The interim Constitution … shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law."

Note that this observation holds true for the 1996 Constitution (the final Constitution) as well.

Note:

The concept "administrative action" is discussed in the next learning unit and the content of the right to just administrative action is discussed fully in learning units 7 to 10.

ACTIVITY 4.2

Reread scenarios 1 to 4 in learning unit 1. For which of these scenarios would you use the Constitution as source? Explain why you would turn to the Constitution.

We must use the Constitution in each of the four scenarios. We have said the Constitution sets the standard for the exercise of administrative power by organs of state and functionaries as well as institutions. Reading the scenarios, we find that power was exercised by organs of state, functionaries and institutions. This conduct must therefore be in line with the Constitution's provisions. We have learned that the Constitution supports a culture of human rights. A culture of human rights starts with the way such authoritative power is exercised.

2 Legislation

Legislation is the primary source of administrative power. One of the reasons given for this is that administrative law is a relatively modern branch of public law. A more convincing explanation is that since legislation is "readily accessible and knowable" (Du Plessis 2002:22), it logically follows that administrative power has almost always legislation as source. All legislation must comply with the provisions of the Constitution, however.

Note further that although the Constitution sets the standard for conduct, it obviously cannot deal with every aspect of interaction between authorities and individuals. Parliament – the legislature – is often expressly instructed to adopt legislation to give effect to a constitutional provision. Legislation adds flesh to the bones of principles, norms and values expressed in the Constitution. For example, the Constitution requires that Parliament comply with its constitutional duty to pass legislation dealing with just administrative action to make it effective (s 33(3) of the Constitution).

We distinguish between original and delegated legislation. (This distinction and its validity in the light of the supreme Constitution are dealt with in the Interpretation of Statutes module. We only provide a brief explanation of original and delegated, also called "subordinate" legislation, and examples of each.)

Enabling (original) legislation

Enabling (original) legislation is passed by Parliament in the national sphere of government. Two examples of Acts of Parliament that complement the provisions of the Constitution and are crucial to Administrative law as well, are

(a) the Promotion of Administrative Justice Act 3 of 2000 (PAJA)
(b) the Promotion of Access to Information Act 2 of 2000 (PAIA) (see s 32(2) of the Constitution)

Note (VERY IMPORTANT):

The provisions of PAJA will be discussed in learning unit 5 when we examine the concept of "administrative action" and in subsequent learning units when we deal with just administrative action and remedies. **PAJA, read with section 33 of the Constitution, is the principle Act that regulates administrative law**; most aspects

of this area of law are therefore dealt with in the Act. If a certain administrative-law principle is covered by PAJA, then that would be your main authority, read with section 33 of the Constitution.

Original legislation is also passed by the nine provincial legislatures in the provincial sphere of government in terms of section 104, read with Schedules 4 and 5 of the Constitution. For example, the Constitution provides that school education is a matter that is primarily governed by the provincial sphere of government. Examples of provincial legislation are the various Schools Education Acts passed by the legislatures of the nine provinces, such as the Gauteng Schools Education Act 6 of 1995.

In the local sphere of government, original legislation is also passed by elected local governments, the municipal councils. A local government has the power to enact by-laws that do not conflict with the Constitution or any parliamentary statute or any applicable provincial statute in terms of section 156(2). In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 12 BCLR 1458 (CC), 1999 1 SA 374 (CC), the Constitutional Court said (para 38):

> The constitutional status of a local government is materially different to what it was when Parliament was supreme … Local governments (now) have a place in the constitutional order, have to be established by a competent authority, and are entitled to certain powers, including the power to make by-laws and impose rates.

The Constitutional Court concluded that these by-laws constitute original legislation. The reason put forward by the Court was that the municipal council was an elected, deliberative body which, like the national and provincial legislatures, derived original legislative power directly from the Constitution (para 26).

Delegated legislation

Delegated legislation is also called "subordinate legislation". The distinctive characteristic of delegated legislation is that it must be enacted in terms of original legislation. In other words, such legislation must be authorised by the enabling or empowering (original) legislation. Another feature of delegated legislation is that such delegated legislation must not conflict with the provisions of the enabling Act.

Du Plessis (1998:2C–19) explains that the objective of delegated legislation is to regulate matters provided for by the original legislation in broad outline only. He explains further (*ibid*):

> "Organs of the executive are often in a better position to deal with certain matters once the parameters within which it is competent for them to do so have been set by empowering, original legislation."

Regulation through delegated legislation is often resorted to when the matters to be regulated are of a specialised or technical nature. In the national sphere of government, delegated legislation is passed by functionaries who are empowered to make these rules. Examples are

- proclamations of the President (in his executive capacity), such as proclamations issued in terms of the empowering statute to declare the date of commencement of a particular statute

- regulations made by ministers (the members of the cabinet in the national executive)

in terms of an enabling statute.

For example:

Government Gazette No. 21075 PRETORIA, 6 April 2000

PROCLAMATION

by the

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA No. R. 22, 2000

DECLARATION OF 1 APRIL 2000 AS THE COMMENCEMENT DATE OF THE REFUGEE ACT, 1998 (ACT No. 130 OF 1998)

Under the powers vested in me by section 41 of the Refugees Act, 1998 (Act No. 130 of 1998), I hereby declare 1 April 2000 as the commencement date of the Refugees Act, 1998 (Act No.

130 of 1998).

Given under my Hand and the Seal of the Republic of South Africa at Pretoria this Thirty-first day of March, Two Thousand.

T.M. MBEKI President

By Order of the President-in-Cabinet:

M. BUTHELEZI Minister of the Cabinet

Another example:

GOVERNMENT NOTICE DEPARTMENT OF HOME AFFAIRS

No. 938

15 September 2000

Refugees Act, 1998 (Act 130 of 1998)

The Minister of Home Affairs has, in terms of Section 38 of the Refugees Act (Act 130 of

1998) made the Regulations in the Schedule.

SCHEDULE

… [The Schedule contains the regulations.]

M. BUTHELEZI
Minister of Home Affairs

Delegated legislation may be found in the provincial sphere of government as well. For instance, regulations issued in terms of the Schools Education Act 6 of 1995 (Gauteng) by that province's Member of the Executive Council for Education (the MEC), and so on.

Regulations are also issued in the sphere of local government. For example, regulations in terms of the relevant by-laws are issued to regulate traffic in a particular municipal area, and so on.

ACTIVITY 4.3

Return to scenarios 1 to 4 in learning unit 1. Do you think it will be necessary to consult legislation to know what the law says about the different situations the characters find themselves in?

Explain your views.

Would you look at original legislation only or would you extend your search to include subordinate legislation?

What we have said about legislation is relevant to all four scenarios. The Constitution has created the broad constitutional framework. It is then left to legislation to address and control particular identified issues. In all our scenarios – the expulsion from a school (scenario 1), the withdrawal of a temporary permit of a refugee to stay in the country (scenario 2), the suspension of an educator (scenario 3), and the refusal to give a tender (scenario 4) – we must search for legislation dealing with such matters. (The legislation constitutes the empowering provisions allowing the administrators to act.) We then need to extend our search and enquire whether any delegated legislation was passed dealing with these matters in more detail.

3 Case law (judicial precedent)

It is the task of the courts to determine the meaning of a particular legal rule, that is, to interpret a legal rule in line with the prescripts and values of the supreme Constitution and relevant statute law and to apply such rules to concrete particular factual situations. Exactly how this is done, for example the application of the rules and guidelines of interpretation of legislation as prescribed by the Constitution, is the area of focus of the Interpretation of Statutes module. Note, specifically, that the interpretation of statutes, such as PAJA, by the courts is an essential part of administrative law; some core principles, as stated in PAJA, are defined and clarified by the courts. We will specifically mention these cases where applicable.

An even more important role of the courts is to *control* the exercise of public power and the performance of public functions by organs of state, functionaries and institutions. In *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the RSA* referred to above, Chaskalson P held that the change brought about by the new constitutional dispensation meant that the courts

> … no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution, which defines the role of the courts, their powers in relation to other arms of government and constraints subject to which public power has to be exercised (para 45).

The structure of the South African judicial system and the functions of the judicial authority as provided for in the Constitution and relevant statute law are dealt with in the Constitutional Law module.

It is important to remember that because past judgments are binding on other courts in subsequent cases – the judicial precedent *(stare decisis)* rule – it is obvious that case law forms a material source of administrative law.

ACTIVITY 4.4

Read the court decision included in this study guide as Annexure B – the *Earthlife Africa* case. Start by reading rapidly through the text to get a general idea of the issues involved, watching out for the rules of administrative law that may be involved. Then reread the decision and make notes under the following headings:

(1) the facts of the decision
(2) identification of administrative-law issues

Remember to indicate in your notes where in the decision you found your answers. This is important, whether you are writing an essay or article for academic purposes or developing an argument to present in court.

If you feel uncertain about how to go about reading a court case, you will find useful guidance in the textbook *English for law students* by Van der Walt and Nienaber.

Another useful work is *Beginner's guide for law students* by Kleyn and Viljoen.

Since this decision will feature in this guide again, we will concentrate only on the facts and the question whether administrative-law issues are involved. We will be focusing on the use of case law to determine how the courts have interpreted the applicable legal rules of administrative law and how the court has applied them to a particular situation.

(1) The facts of the decision

The facts of any decision are usually set out right at the beginning of the report. In ***Earthlife Africa*** *(the decision under discussion), the facts are quite straightforward. The story is told in paragraphs 10 to 20 under the heading "factual background". You should not have any difficulty summing up the facts in a few lines.*

Unfortunately, the facts of some cases are extremely complicated and very technical. This makes the reading of such decisions more difficult.

(2) Identification of administrative-law issues

The decision is "user-friendly" in that the issues to be dealt with by the court were spelled out: an application for review of administrative action – a decision – on certain grounds and the merits (or demerits) of the requirement that internal remedies should be exhausted first.

4 Common law

You encountered the meaning of "common law" in the Introduction to Law module. But to refresh your memory, the common law is the unwritten law of South Africa in the sense that it is not written up in legislation.

Common law is not an important source of South African administrative law. We have seen that the main sources of administrative law are the Constitution, PAJA and other legislation. Nevertheless, English law in particular, and Roman-Dutch law to a lesser extent, have both contributed to the development of administrative law.

Two examples of common-law rules of English-law origin are: (1) the principle of *ultra vires;* and (2) the development of the rules of natural justice. (The meaning of the principle of *ultra vires* will be discussed more fully in learning unit 7 and the rules of natural justice in learning unit 9.)

Note that many common-law rules are now included in legislation. We will see, for example, that the rules of natural justice we have referred to are now included in PAJA – the Act to be discussed in detail in later learning units.

5 Administrative practice/custom or usage

Custom is made up of unwritten rules or fixed practices, which communities have carried down from generation to generation and which they regard as binding. African customary law also forms part of the broad definition of custom. This fact is acknowledged by PAJA through the inclusion of "customary law" in the definition of "empowering provision" in section 1. A custom must meet certain requirements before it is recognised as such:

- It must be reasonable.
- It must have existed over a long period.
- It must be generally recognised, accepted and observed by the community.
- The content of the custom must be certain and clear.

In administrative law, the question must be asked whether administrative practice or custom can acquire the force of law. In other words, does administrative practice, such as internal directives, circulars, policy guidelines and so on – that is, instructions to make the management or running of a department easier – acquire the force of law and be regarded as a source of power over time? This is a difficult question to answer. It would appear, though, as if the definition of "empowering provision" in section 1 of PAJA includes such circulars and directives with its reference to "… an instrument or other document in terms of which an administrative action was purportedly taken".

For the purposes of this module, it is enough to remember that custom as a source of administrative law is the exception rather than the rule. Moreover, like legislation, common law and custom – including African customary law – are subject to the Constitution. In other words, the courts will not recognise a custom that conflicts with either the Constitution or legislation.

6 Ubuntu

At a conference of the Commonwealth Legal Education Association (CLEA), Professor Emeritus George Devenish, Senior Research Associate, University of KwaZulu-Natal, presented a paper entitled **"Preventing corruption and the misuse of funds: How can law teachers assist in fighting the scourge of corruption in Commonwealth countries and other common law countries?"**. In this paper he also briefly explained the meaning of ubuntu.

(The paper is available on the internet at www.clea-web-com/event-conferences/

durban2013/2013-conference-papers/devenish/ (accessed 2013–04–19) He wrote the following:

UBUNTU

Ubuntu actually means humanness, (see *S v Makwanyane* 1995 (6) BCLR 665 (CC) par 308) and it was acutely reflected in the preservation and stability of the whole community. Its operation within their codes of tradition and law was evident in times of war, when women and children were never killed (see Mostert Frontiers 197 [Mostert *Frontiers: The epic of South Africa's creation and the tragedy of the Xhosa people* (1993]). Ubuntu therefore underlined the entire basis of their intricate code of social laws. The African scholar Sogo explained that 'the primary object of Xhosa law … is to preserve tribal equilibrium. The law therefore guides the individual towards keeping the tribe from disintegration …' (see *Amakosa Customs*).

Constitutional Court judge, Yvonne Mokgoro, explains that ubuntu serves 'as the basis for a morality of co-operation, compassion, community-spiritness and concern for the interests of the collective, for others and respect for the dignity of personhood; all the time emphasising the virtues of that dignity in social relationships and practices' (*S v Makwanyane* par 308).

In the social and political culture of the Xhosa people, the chief played a pivotal role. In principle everything, and everyone belonged to the chief (see Mostert *Frontiers* 199). On the face of it he possessed unlimited power, and was able to impose any tyranny he wished (see Mostert *Frontiers* 199). However, in reality the situation was vastly different. The relationship, as explains Mostert, between the Xhosa chief and his subjects was finely balanced. So for instance the loyalty a Xhosa chief commanded depended upon the way in which he used his privileges and prerogatives. This meant in practice there was no unconditional acceptance of a tyrant (see Mostert *Frontiers* 199). In practice the chief was accountable, and subjected to checks and balances upon his power. This arose from the fact that the lack of any central apparatus through which absolute control could be exercised. An important safeguard against the abuse of power by the chief was effected by the influence of his group of councillors, known as the amapakati or the middle ones (see Mostert *Frontiers* 199). In effect they constituted his Parliament and Supreme Court (see Mostert *Frontiers* 199). He governed on their advice and was indeed not expected to go against it. Although the chief was the head of the council, whether this applied to a chiefdom or a nation, he dare not veto a decision of his court except at the peril of his reputation and authority (see Mostert *Frontiers* 199).

The Xhosa people had laws and courts of law. Furthermore, there was a powerful tradition for democratic debate and a gift of logic that impressed outsiders. Nevertheless, the Xhosa world was most certainly not perfect, like other societies, including European ones, was as susceptible to greed, malice, envy conspiracy and darkness as any.

African people had their own religion, their own ethical views, and their political systems and philosophy before the advent of European colonisation. There was a distinctive collective consciousness that manifested itself in certain behavioural patterns, and spiritual self-fulfilment. This as indicated above, is described as Ubuntu, and is an African view of life and world view. It can be described as African Humanism, involving, alms-giving, sympathy, care and sensitivity for the needs of others, respect, patience and kindness.

Ubuntu takes seriously the view that man is essentially a social being. African ubuntu thinkers formulate their views in terms of 'a person is a person through other persons'. Ubuntu style management involves a departure from hierarchically structured management, as well as the introduction of cooperative and supportive form of management in which the collective solidarity of various groups employed is respected and enhanced. Ubuntu is a social survival technique that developed from socio-economic and demographic circumstances in which African people had to cooperate to survive. In certain respects Ubuntu corresponds to social democracy, to which it has a 'certain affinity in terms of industrious individual efforts which are lauded and rewarded as long as they are altruistic'. Ubuntu requires the right balance between individualism and collectivism and it is made possible by taking 'people's need for dignity, self-respect, and regard for others seriously'. It requires consensus management, in that its emphasis is not on differences, but on accommodating differences. It should be noted that the interim Constitution stated the need for ubuntu, but unfortunately this authentic African concept does not feature in the current Constitution. We have sacrificed the textual foundation and encouragement for the furtherance of a truly African jurisprudence. Nevertheless, the idea has a universal significance, lives on and has most certainly not been extinguished.

7 International law

In terms of the Constitution, international law is an equally important source of law. As far as administrative law is concerned, however, it plays a lesser role. Nevertheless, should it become necessary to look into international law, we have to examine what sections 39(1)(b), 231 to 233 of the Constitution prescribe in this regard. (You will learn more about the topic of international law in the International Law module.)

International law regulates the relationship between states and/or international organisations. It comprises mainly treaty law and international usage.

4.2.2 Persuasive sources

There are other sources of South African law that are not authoritative sources, that is, they do not have the same binding force as the Constitution, legislation or case law. However, they do have persuasive influence in our law. In other words, they influence legislative and judicial decision-making and are therefore important.

Examples are discussed below.

1 Writings in books and journals expressing academic opinions

The courts often refer to academic opinions expressed in law journals and books.

2 Policy documents such as Green and White Papers

Current government policy on various topics is expressed in so-called White Papers and Green Papers. In these documents the government's policies on a vast range of matters are set out. A Green Paper is a consultative document. In a participatory democracy, the people – "we, the people of South Africa" – should participate in our governance. Or, to put it differently, we should have a say in how we are "ruled" by the authorities in power. Through Green Papers, the people are invited to comment on various matters to be regulated by the government. A White Paper is the final

document in the process, which includes the expression of the government's commitment to something, the action that will be taken and the implementation of the policy. A White Paper is the blueprint or outline of the government's policy on various matters. An example is the *White Paper on the Renewable Energy Policy of the Republic of South Africa* N 513/2004 in *Government Gazette* No 26169 of 14 May 2004.

3 Reports by "state institutions supporting constitutional democracy"

These institutions, such as the Public Protector and the Auditor-General, also called Chapter 9 institutions – report on administrative conduct and make recommendations to the legislature on how to cure any maladministration or abuse in the exercise of authoritative power. (You will learn more about these institutions in learning unit 11.)

4 Foreign law

Section 39(1)(c) of the Constitution states that the courts *may* consider foreign law. They may choose whether to turn to the laws of other countries to assist them in cases where insufficient guidance from South African law is available. By foreign law we mean the law as found in the law (case law in particular) of countries such as the USA, Germany, Canada, India and Namibia.

4.3 WHERE TO FIND ADMINISTRATIVE-LAW SOURCES

If you are looking for **legislation,** you may consult any of the following:

- *Government Gazettes* published and printed by the Government Printer
- a loose-leaf annual collection of statutes published by LexisNexis/Butterworths
- Internet

http://www.polity.org.za/legislation http://www.acts.co.za http://www.saflii.org

If you are looking for **case law,** there are a number of places where you can find case law relating to administrative law and administrative matters, including the following:

- The most comprehensive collection or compilation of South African case law is to be found in the *South African Law Reports,* which are published monthly by Juta. The *SA Law Reports* contain cases of every kind, not only those of a constitutional nature.
- Constitutional cases, including administrative-law cases, are also published separately in the *Butterworths Constitutional Law Reports (BCLR).*

If you have access to the internet, you may also access the latest decisions of the Constitutional Court (CC) and Supreme Court of Appeal (SCA) on the web page of the Law School of the University of the Witwatersrand, at http://www.law/wits.ac.za or at the website of http://www.saflii.org. "Saflii" is the acronym of the Southern African Legal Information Institute.

If you are looking for **articles** dealing with administrative-law topics, these are published in several journals. Two of these South African journals specialise in public law (constitutional, administrative and human-rights) issues:

- *Southern African Public Law (SAPL),* which is published by the VerLoren van Themaat Centre for Public Law Studies, Unisa
- *South African Journal on Human Rights (SAJHR),* which is published by Juta.

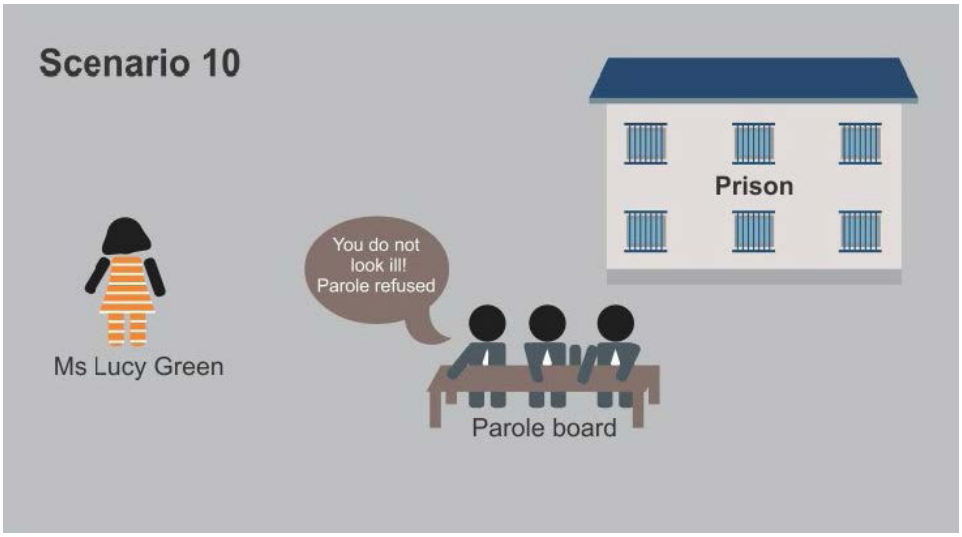
If you are looking for **policy documents** and the reports of government institutions and you have access to the internet, you may access them on the government's website, at http://www.polity.org.za and also at http://www.saflii.org

4.4 HOW TO FIND THE SOURCES OF ADMINISTRATIVE LAW IN A PARTICULAR SITUATION

Scenario 10

Ms Lucy Green is a convicted prisoner serving a sentence of six years' imprisonment (she was convicted of fraud in the form of tax evasion exceeding two million rand). After 13 months in prison, she is diagnosed with an incurable and inoperable illness and is not expected to survive for more than a further 12 months. She applies to be placed on parole on medical grounds.

The application to be placed on parole is rejected. The grounds for refusal are, amongst others, that to all appearances Lucy does not look ill and is still in good health, hers is a high-profile case, there are penal consequences attached to her parole in that she has served less than one-third of her prison term and there is the possibility that she will commit a crime again. Moreover, one of the policy guidelines of the Department to determine whether parole is in actual fact "expedient on the grounds of his physical condition" is that an injudicious placement or release on parole "may foil the penal objectives of the sentencing authority".



ACTIVITY 4.5

Carefully read through scenario 10 again. Which sources would you use to argue Lucy's case against the Department of Correctional Services?

Since the Department of Correctional Services is involved – a government department with public power – and, since Lucy finds herself in a vulnerable position in terms of the Department (she is terminally ill and her application for parole has

been refused), you may safely say that administrative law is involved. You would obviously first turn your attention to

- ***The Constitution***

The Constitution sets out the standards that will have to be used to protect the individual against any abuse of power by the organs of state, functionaries and institutions in authority. One of the fundamental rules of the Constitution is that all such action must be consistent with the provisions of the Constitution (s 2).

Also, the Constitution contains in the Bill of Rights

- *the right of everyone to administrative action that is lawful, reasonable and procedurally fair (s 33), read together with the relevant provisions of PAJA*.

Lucy may claim the protection of the Bill of Rights against the power of the state. (See more about this aspect later in the guide.)

We have seen that the Constitution creates only the broad constitutional framework for government action and interaction with the people and the community. To argue Lucy's case, you have to investigate further whether

- *there are any specific legislative provisions dealing with someone in the position of Lucy.*

You need first to turn to empowering (original) legislation. You will find that the Correctional Services Act deals with, amongst others, matters of parole.

Although the minister or an administrator to whom this power has been delegated (we will learn more about "delegation" later in the guide) is empowered to refuse parole, the Act provides when and under what circumstances such refusal may occur – the grounds for refusal of parole. It also provides the procedure to be followed in the event of refusal and whether and when a person may appeal to a higher authority within the department against the refusal.

You also have to examine the

- ***Regulations***

which the minister is empowered to issue in terms of the Act (delegated legislation). Such regulations may regulate certain specific issues relating to the granting or refusal of parole in greater detail. The regulations may therefore contain more detailed information on how to deal with matters of parole, for example matters such as the form of the application for parole, the composition of the body or bodies deciding on such matters and their functions, and so on.

You may, of course, also consult

- ***Policy guidelines***

Another source of law you need to consult is

- ***Case law/judicial decisions***

You obviously need to enquire whether the courts have already decided on situations similar to Lucy's and whether any precedent exists which may have to be followed in her case.

You therefore have to consult:

(a) the Constitution as well as PAJA
(b) the Correctional Services Act
(c) regulations issued in terms of the Act

(d) policy guidelines
(e) case law

Only when all these sources have been examined and applied to the set of facts, can you say that you have consulted all the sources to argue Lucy's case against the Department of Correctional Services.

ACTIVITY 4.6

Read the *Earthlife Africa* decision included in this guide (see Annexure B). Make a list of the sources used in the decision. Indicate which ones were more important and explain your views.

This is a self-evaluation activity. Apply the discussion of activity 4.5 to guide you through your answer.

4.5 CONCLUSION

In this learning unit we discussed the sources of administrative law. We explained what is meant when we refer to the "sources" of the law in general, we examined the sources of administrative law and we discussed where to find these sources.

Having examined in this first part of the study guide headed "State authority and the holders of such authority" questions pertaining to what administrative law is, the characteristics of the administrative-law relationship, the legal subjects of the administrative-law relationship and the sources of administrative law, we next need to examine what administrative action is.

In part 2 of this study guide (learning unit 5) we examine the concept "administrative action" and its importance.

PART 2

ADMINISTRATIVE ACTION

LEARNING UNIT 5

Administrative action

Working your way through this learning unit should enable you to

- *explain why it is important to establish whether administrative action is involved*
- *set out the definition of administrative action as provided in section 1 of PAJA*
- *discuss the various elements of this definition*
- *determine when action will NOT qualify as administrative action*
- *list the traditional classes of administrative action*
- *briefly explain why this classification has been made*
- *reflect on the legal force of administrative action*

The outline of this learning unit is as follows:

5.1 The definition of "administrative action"

5.1.1 Section 1 of PAJA
5.1.2 Action that does not qualify as administrative action
5.1.3 Judicial interpretation of administrative action
5.1.4 Constitutional instruction (background to section 1)

5.2 The need to establish whether administrative action is involved
5.3 The classes of administrative action

5.3.1 The three classes of administrative action and the distinctive characteristics of each
5.3.2 Separation of powers and three classes of administrative action

5.4 The legal force of administrative action

5.4.1 When does administrative action take effect?
5.4.2 Termination of the legal force of administrative action

5.5 Conclusion

5.1 THE DEFINITION OF "ADMINISTRATIVE ACTION"

5.1.1 Section 1 of PAJA

Section 1 of PAJA reads as follows:

'administrative action' means any decision taken, or any failure to take a decision, by –

(a) an organ of state, when –

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) 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 provision,

which adversely affects the rights of any person and which has a direct, external legal effect, *but does not include*

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

(bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121(1) and (2), 125(2)(d), (e) and (f), 126, 127(2), 132(2), 133(3)(b), 137, 138, 139 and 145(1) of the Constitution;

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

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

(ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act No 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;

(ff) a decision to institute or continue a prosecution;

(gg) a decision relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person, by the Judicial Service Commission in terms of any law; [Para (gg) substituted by s 26 of Act 55 of 2003 – the Judicial Matters Second Amendment Act.]

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

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

(It is crucial that you understand **the definition in section 1 of PAJA and memorise it [at least up to the exclusions]; we encourage you to do so *before* you continue to look at the rest of this learning unit and guide.** The definition of administrative action can count around 13 marks for assessment purposes – you should therefore be able to identify the exclusions in a set of facts.)

The following definitions, for purposes of section 1, are also important:

'administrator' means an organ of state or any natural or juristic person taking administrative action;

'decision' means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to –

(a) making, suspending, revoking or refusing to make an order, award or determination;
(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
(c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;

(d) imposing a condition or restriction;
(e) making a declaration, demand or requirement;
(f) retaining, or refusing to deliver up, an article; or
(g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly;

'empowering provision' means a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken;
'failure', in relation to the taking of a decision, includes a refusal to take the decision;
'organ of state' bears the meaning assigned to it in section 239 of the Constitution

Please note:

You must make sure of this definition of administrative action and do **not** confuse it with the definition of organ of state. They share many of the same phrases. Remember that organ of state is an **entity** and administrative action **a decision.**

ACTIVITY 5.1

Read through section 1 carefully and then make a numbered list of all the points you will have to bear in mind when you explain to someone what would qualify as administrative action for the purpose of applying PAJA.

Imagine you are building a puzzle and you are first trying to collect all the various pieces of the puzzle.

In order to build a full picture of what action qualifies as administrative action, we have to collect the pieces first. Having read these definitions, you will be left with the following pieces of information, words and phrases, which you should have written down as they are the building blocks of administrative action:

(1) decision, including a proposed decision, as well as the failure to take a decision
(2) of an administrative nature
(3) under an empowering provision
(4) organ of state or natural or juristic person when exercising public power or performing a public function
(5) that adversely affects the rights of any person
(6) that has a direct, external legal effect
(7) that is not specifically excluded by the list of nine broad categories of exclusions mentioned in subparagraphs (aa) to (ii). (Note that the wording is in actual fact, "but does not include" …)

Having collected the building blocks of administrative action, we next need to look at the interpretation or construction of these blocks. In other words, we have to examine the contents of these building blocks or elements of the definition.

1 Decision

We see, first, that action will qualify as administrative action when it takes the form of a decision. Reading on, we see that what constitutes a decision is explained in the definition of decision.

What is noticeable about the definition of a decision is its scope. The definition provides several examples of conduct that will qualify as a decision. Return to the definition to see what the legislature regards as a decision for purposes of PAJA. It even includes decisions that have not yet been made, but that have only been proposed. A decision will also qualify as administrative action when it involves the refusal to take a decision – see the definition of failure above. Moreover, the examples are not limited to those given, since the legislature also included a "catch-all" paragraph *(g)* to the effect that a decision also includes "doing or refusing to do any other act or thing of an administrative nature …"

In *Melani and Others v City of Johannesburg and Others* 2016 (5) SA 67 (GJ), the South Gauteng High Court had to decide whether the City of Johannesburg's decisions regarding the progressive realisation of the right of access to adequate housing (section 26 of the Constitution) for residents of the Slovo Park Informal Settlement amounted to administrative action. The residents argued that the state should fulfil its section 26 obligation in terms of the Upgrading of Informal Settlement Policy (UISP), which the City neither decided to implement, nor not implement. The residents further argued that the City's failure to apply the UISP amounted to administrative action, which is reviewable under PAJA. The court held that the decision to implement a policy in a specific case amounts to an administrative decision since it affects the rights and legitimate expectations of individuals. It was further decided that the City's failure to apply the UISP was unlawful.

Does the extensive description of a decision mean that virtually any type of action or conduct will qualify as administrative action? For an answer to this question, we need to turn to the element "of an administrative nature".

2 Of an administrative nature

An enquiry into the element "of an administrative nature" brings us to the distinction between constitutional law and administrative law.

Both constitutional law and administrative law form part of public law and are concerned with the way the state is governed and with the distribution and exercise of public or authoritative power.

Although we cannot distinguish between the two branches of the law on the basis of their nature and content, the following distinction is nevertheless drawn for the sake of convenience:

- Constitutional law deals with the actions of and interaction between the organs of state of the three branches of government: the legislature, the executive and the judiciary. It regulates the powers of the highest organs of state, such as those of the President and his cabinet. It also regulates the powers of the judiciary. Furthermore, it controls the legislative powers of Parliament in the national sphere, of the provincial legislatures in the provincial sphere and of municipal councils in the local sphere of government.

- Administrative law, in contrast, is concerned with only one branch of the state system, namely the executive. More specifically, it is concerned with what has been described as the "conduct of the bureaucracy … in carrying out the daily functions of the State" (see *Grey's Marine* referred to above).

In other words, constitutional law and administrative law have the following different areas of focus:

- Constitutional law is concerned with the structure of the organs of state at the highest level (i.e. with Parliament, the executive and the judiciary). It is also concerned with matters such as the formulation of policy by government – a matter of politics. This policy is usually set out in legislation. (See the glossary for the definition of constitutional law and government.)
- Administrative law is concerned with the day-to-day business of implementing and administering/applying this policy.

We propose that the element that the decision needs to be of an administrative nature merely stresses that decisions need to relate to the day-to-day business of implementing and administering policy. Decisions at the highest level by the executive, the legislature and the judiciary do not constitute administrative action. We will return to this topic when we discuss the list of specific exclusions below. This element will also be addressed once again when we briefly look into the classes of administrative action in the last part of this learning unit.

3 Under an empowering provision

We see further that the decision must be taken in terms of an empowering provision. Empowering provision is defined as "a law, a rule of common law, customary law, or an agreement, instrument or other document". This element underscores one of the most important features of administrative law in general and administrative action in particular, that the exercise of public power or the performance of a public function must have an authoritative foundation of some kind. In other words, the decision must be permitted by law (not only legislation, but other kinds of "empowering provisions" which have an authoritative basis).

Note that this particular element is further echoed in the requirement that all administrative action must be validly exercised. This particular feature forms the subject of part 3 of this study guide when we discuss in the next five learning units (learning units 6–10) the requirements for just/valid administrative action.

4 Organ of state or natural or juristic person when exercising public power or performing a public function

The action of organs of state as defined in section 239 of the Constitution will qualify as administrative action when they exercise power in terms of the Constitution or a provincial constitution, or when they exercise public powers or perform public functions in terms of legislation.

Note that PAJA also allows for administrative action to be carried out by persons other than the constitutionally defined organs of state, that is, natural or juristic persons. However, these actions will only qualify as administrative action when these persons exercise public power or perform a public function "in terms of an empowering provision".

In *Eden Security Services CC and Others v Cape Peninsula University of Technology and Others* [2014] ZAWCHC 148, the Court held that an institution like the University was excluded from the definition of "organ of state", which meant that its procurement processes should not be regarded as administrative action for purposes of section 33 of the Constitution. This decision is open for criticism on the basis that some private bodies may perform administrative action if their **conduct is public in nature**.

In *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* 2017 (3) SA 242 (CC), the Court had to decide whether the power afforded by section 23(1)(d) of the Labour Relations Act 66 of 1995 (LRA) was indeed public. This section authorises an employer to extend a collective bargaining agreement between it and a majority union, also to employees who are not members of that majority union. The Court held that the question whether a power/function is public, was complex and needed to be determined on a case-by-case basis; such powers should be scrutinised on a continuum between what is considered to be public and private; all relevant circumstances should be taken into account, including the extent to which the power is coercive, its source, its relation to a statutory framework, the impact of the power on the public and whether there is a need for the power to be exercised in the public interest. Even though the power was held to be public, it was not of an administrative nature since the exercise thereof did not amount to the administration of policy or statute, but rather by way of agreement between the parties.

5 Adversely affects the rights of any person

To qualify as administrative action, the decision's effect must be to "adversely affect the rights of any person". This requirement is closely related to the next few learning units, where we will enquire into the lawfulness or, to use the language of the Constitution, the "legality" of administrative action. However, for the purposes of our present examination of the elements of administrative action, suffice it to say that by including this element the legislature's intention was ostensibly to create a restriction to the reach of PAJA. Thus, only when the action imposes a burden on someone (e.g., in our example of the suspended educator in scenario 3, the suspension imposes a burden on the educator) will such action qualify as administrative action.

6 That has a direct, external legal effect

Just as the element that the effect of the decision must be to adversely affect the rights of any person, the element that the administrative action must have a "direct external legal effect" is aimed at restricting the reach of PAJA. This element was a late addition to the definition of "administrative action" and the legislature adopted it from the German Federal Law of Administrative Procedure of 1976. The meaning and content of this element was the subject of careful analysis in several articles and textbooks, as well as a few court decisions. We will not examine this thorny element here. For our purposes, suffice it to say that among the various meanings attached to and purposes ascribed to this particular element, De Ville's (2005:58) proposal is an acceptable one. He is of the opinion that "… [I]t appears that the inclusion of this phrase was simply an attempt to avoid challenges to administrative decisions without any real impact".

ACTIVITY 5.2

Having noted these various components of the puzzle of what administrative action is and enquiring into the content of the various parts, write down in one or two sentences what you think administrative action is in terms of PAJA.

This is a self-evaluation activity. You have enough information at hand to compile such a sentence or two. However, note that at this stage your answer will lack any examples of action that do NOT constitute administrative action. This is the topic of our next enquiry

5.1.2 Action that does NOT qualify as administrative action

In this section we will look at actions/decisions that are excluded from the definition of administrative action. These exclusions constitute the seventh element in the analysis of the various building blocks of the definition of administrative action. Therefore, to qualify as administrative action, it must be a decision.

7 … that is not specifically excluded by the list of nine broad categories of exclusions mentioned in subparagraphs (aa) to (ii) of PAJA

We could say that administrative action as defined by PAJA embraces the decisions of all organs of state or natural or juristic persons when exercising public power or performing public functions. However, PAJA also excludes certain powers or functions from the definition of administrative action. In other words, some actions performed by either organs of state or natural/juristic persons exercising public power do ***NOT*** qualify as administrative action.

ACTIVITY 5.3

Paragraphs *(aa)* to *(ii)* contain a list (in all, 9 broad categories) of the exclusions; decisions that do not qualify as administrative action.

Make a list of these exclusions.

Look up the specific sections of the Constitution mentioned in some of the categories and write down what they deal with.

For example:

(a) Executive powers and functions of the executive in the national sphere	*Examples:* • *the President assenting to bills in terms of s 84(2)*(a) *of the Constitution* • *the President appointing commissions of inquiry in terms of s 84(2)*(f) *of the Constitution* • *et cetera*
(b)	
(c)	
(d)	
(e)	
(f)	
(g)	
(h)	
(i)	

Again, this is a self-evaluation activity. However, if you are uncertain about these exclusions, we hope the discussion will help to clarify matters.

Looking carefully at these exclusions, we notice that five of these categories can be traced back to the distinction between constitutional and administrative law. You will remember, too, that the Constitutional Court (and other courts) described administrative action in terms of what is NOT administrative action. The first five categories reflect this way of describing administrative action – in a negative sense.

Action will not qualify as administrative action when it involves the following:

(a) Executive powers and functions

The powers and functions of the *national executive* (the President and the cabinet ministers) are excluded, as well as those of the *provincial executives* (the nine premiers and their executive councils) and the *local executive* (municipal councils). In other words, those functions at the highest level which are constitutional in nature are excluded.

Under this exclusion, we also find the President's actions as the head of state in the national sphere. These last-mentioned actions are traditionally of a ceremonial nature and include, amongst others

- calling a national referendum in terms of an Act of Parliament
- receiving and accrediting – recognising – foreign diplomatic and consular representatives and appointing ambassadors
- conferring honours
- appointing commissions of inquiry

These powers are listed in section 84(2) of the Constitution and do not qualify as administrative actions, as they relate to policy or politics, the area of focus of constitutional law.

In the *Pharmaceutical* case, for example, the President's decision to bring an Act of Parliament into force – by signing it – was held by the Constitutional Court NOT to be administrative action. Chaskalson P held (para 79) that the President's decision to bring the Act into operation required him to make a policy (political) judgement, which therefore lay somewhere between the law-making power (a legislative function which was not administrative action) and the administrative process (the implementation of legislation, which is administrative action). He had the following to say in this regard (para 79):

> When he purported to exercise the power the President was neither making the law, nor administering it. Parliament had made the law, and the executive would administer it once it had been brought into force.

This observation corresponds to a large extent with the general exclusion of the executive powers and functions of the National Executive in subparagraph (aa) of the definition of administrative action.

In *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC), the Constitutional Court held that a decision by the Minister of Defence to terminate board membership of Armaments Corporation of South Africa amounted to an executive decision, rather than an administrative action. This decision was founded on the nature of the Minister's power. The Court held that "the important question in this context is whether the power is more closely related to the formulation of policy, which would render it executive in nature, or the implementation of legislation, which would make it administrative" (para 44). In addition, the appointment and dismissal of Board members is the means by which the Minister governs military procurement, which is adjunct to her executive policy formulation function.

In *University of the Free State v Afriforum and Another* 2017 (4) SA 283 (SCA), the appellants challenged the University's decision to adopt a new language policy. The Court held that the nature of such a decision involved the formulation and adoption of a policy, rather than the implementation thereof. A decision of this kind was therefore executive rather than administrative in nature.

ACTIVITY 5.4

Return to the list of sections relating to executive actions set out in paragraph *(aa)* of PAJA. Take particular note of the reference to section 84. Write down which of the paragraphs of section 84 are NOT included amongst them. Having written

them down, return to your copy of the Constitution and look up what these two paragraphs provide. Write them down.

There is a snag to the list of exclusions pertaining to section 84(2). Not all of the paragraphs are included in this list of PAJA. This activity compels you to read provisions in an Act with care and not to be caught unawares by them.

(b) The legislative functions of Parliament, the provincial legislatures and municipal councils

Section 1*(dd)* excludes the legislative functions of Parliament, the provincial legislatures and municipal councils. This exclusion is in line with the Constitutional Court's distinction between legislation and administrative action as set out in, amongst others, the *Fedsure* decision. Note that this distinction also relates to the distinction between constitutional and administrative law. Administrative law deals with the implementation of legislation and NOT with the making of legislation through the exercise of original, deliberative law-making powers, which is the functional area of constitutional law.

(c) The judicial functions of a judicial officer of a court

The *judicial functions* of a judicial officer of a court – judges and magistrates – as set out in section 166 of the Constitution, are excluded under section 1 *(ee)*. So too are the judicial functions of traditional leaders exercised under customary law or any other law. Also excluded are the judicial functions of a special tribunal established in terms of section 2 of the *Special Investigating Units and Special Tribunals Act* 74 of 1996.

Section 1*(ff)* excludes a decision to institute or continue a prosecution.

In *National Director of Public Prosecutions and Others v Freedom Under Law* 2014 (4) SA 298 (SCA), the Supreme Court of Appeal held that a decision to withdraw prosecution also fell under the ambit of section 1(*ff*) of PAJA. Such a decision is therefore not an administrative decision and subject to review.

The decisions relating to any aspect regarding "the nomination, selection or appointment of a judicial officer or any other person" by the Judicial Service Commission (JSC) are excluded by section 1*(gg)*. Section 178 of the Constitution established the JSC to advise the government on the appointment of judges and other matters relating to the judiciary.

(d) Decisions under the Promotion of Access to Information Act 2 of 2000

Decisions under the Promotion of Access to Information Act 2 of 2000 (PAIA) are excluded under section 1*(hh)*. Hoexter "Just administrative action" in Currie and De Waal (2013:666) explains that this exception is for the sake of simplifying matters. Since PAIA has its own prescripts about review, procedures to take into consideration when one requests information and so on, "it therefore simplifies matters considerably to exclude the PAIA from operating additionally in respect of these".

(e) Decisions in terms of section 4(1) of PAJA

Section 4 deals with the procedural fairness of administrative action when such action affects the rights of the public. We will return to this matter when we examine the requirement of the procedural fairness of administrative action in learning unit 9.

Section 1*(ii)* excludes from administrative action "any decision taken, or failure to take a decision in terms of section 4(1) [of PAJA]".

The effect of this exclusion is to prevent review of the administrator's discretion to choose the particular procedure to follow before making a decision affecting the public (see Hoexter "Just administrative action" in Currie and De Waal 2013:666).

Please note:

Having looked into the list of exclusions, your first reaction to them could possibly be the following:

Does this mean that NO rules apply to these actions or is the performance of these actions above the law?

The answer is a definite "no". In a system of constitutional supremacy, no public action is ever above the law. However, these actions are generally speaking in the territory of constitutional law and are regulated by the rules and practices of constitutional law rather than those of administrative law. Therefore, these actions are reviewable under the Constitution and not under the prescripts of review set out in PAJA.

ACTIVITY 5.5

Decide whether the following are examples of administrative action. Give reasons for your answers.

(1) The President signs the new Promotion of Administrative Justice Act on 3 February 2000.
(2) The President receives Madame Juliette as the new ambassador of France at a ceremony at the Union Buildings in Pretoria.
(3) The Minister of Education issues new regulations prohibiting all politicians from addressing learners at schools.
(4) The Premier of the Northern Province refers a bill back to the provincial legislature for reconsideration of its constitutionality.
(5) The Director of Public Prosecutions refuses to institute proceeding against Lily for allegedly laundering money.

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(1) No. The signing of new legislation into law is not administrative action in terms of the provisions of the PAJA. The reason is that this action deals with the action of the President as ceremonial head of state. In this capacity, he is responsible for assenting to and signing bills in terms of section 84(2)(a) of the Constitution.

(2) No. In terms of the PAJA, ceremonial functions of the President as head of state are excluded – see section 84(2)(h). In terms of this paragraph, the President is responsible for "receiving and recognising foreign diplomatic and consular representatives".

(3) Yes, the making of regulations is administrative action. Du Plessis (1998:2C–19) explains as follows: "A delegated enactment, in other words, owes both its existence and its authority to an empowering original law". He wrote further:

The capacity to enact delegated legislation normally (but not invariably) vests in organs of the executive, and the enactment of such legislation could, thus, broadly speaking, be seen as administrative action. In the light of the advent of constitutionalism, legislative acts of the executive are indeed "administrative action", as contemplated in section 33 of the Constitution, and are, therefore, justiciable in terms of that section.

(4) No. The referral of bills is not administrative action. Like the President in the national sphere, a premier in the provincial sphere is responsible for referring a bill back to the provincial legislature for reconsideration of the bill's constitutionality – see section 127(2)(b) of the Constitution.

(5) No. This is specifically excluded and therefore not administrative action – see section 1(ff) of PAJA.

5.1.3 Judicial interpretation of administrative action

In *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 6 SA 313 (SCA), the Supreme Court of Appeal said the following about the definition of "administrative action":

> … the cumbersome definition in PAJA serves not so much as to attribute meaning to the term as to limit its meaning by surrounding it within a palisade of qualifications.

This "palisade of qualifications" the court referred to is illustrated by the fact that when we need to find out what conduct qualifies as "administrative action", we have to look very carefully at various definitions in section 1 of PAJA.

We find that **administrative action** is confined to decisions in terms of PAJA. The legislature thereupon provides a definition of the term **decision** as well. We must therefore turn to the definition of decision to see what the legislature regards as a decision for the purposes of PAJA. However, our enquiry does not end there, since a decision is confined to conduct – **"a decision of an administrative nature"** in terms of an **"empowering provision"**. We therefore need to look into the meaning of the empowering provision as provided by the legislature as well. And because the legislature regards failure to take a decision as a decision, we need to enquire into the meaning attached to **failure** to take a decision too. Such a decision must be taken by an **administrator,** so we need to refresh our memory about, among other things, the meaning of organ of state – discussed in part 1 of this study guide. What is more, the definition of administrative action is limited by certain qualifications – that the decision must "adversely affect the rights of any person" and that the decision has a "direct, external legal effect". We therefore need to enquire into the meaning and reach of these qualifications. And finally, PAJA lists nine specific exclusions from the definition of administrative action. No wonder then that Hoexter (2012:195) describes the definition as "highly convoluted".

In *Grey's Marine*, the SCA also adopted a broad interpretation of "administrative action":

> The conduct of the bureaucracy … in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for groups or individuals (par 24).

This description looks simple enough. It is, after all, broad enough to cover most conduct when the exercise of public power is in evidence. Unfortunately, we find that uncertainty crops up the moment we need to apply this definition to factual situations such as those in the scenarios of our first activity. This uncertainty is reflected in the huge number of court decisions since the inception of the new constitutional dispensation that deal with the question on what is, and what is not, administrative action.

Before the enactment of PAJA, the Constitutional Court's approach was to let us know what is **NOT** administrative action rather than what it is. Thus, the Constitutional Court held that legislative action is **not** administrative action. Nor is conduct by the President when he acts as head of state and exercises constitutional functions considered to be administrative action. The judiciary also does not exercise administrative functions when exercising judicial functions – see scenario 5 (learning unit 1).

The two leading decisions in this regard are *President of the Republic of South Africa v South African Rugby Football Union (SARFU)* (mentioned earlier) and *Pharmaceutical Manufacturers Association of South Africa: In re: ex parte President of the Republic of South Africa* 2000 2 BCLR 241 (CC), 2000 2 SA 674 (CC). Although both these cases have wider constitutional and administrative-law implications, we mention them here because they help us to determine whether an action qualifies as administrative action. (Note that the *Pharmaceutical* decision has important consequences for the control of administrative action as well, and we will return to it when we discuss this in the last learning unit [learning unit 12].)

In essence, the actions excluded by the Constitutional Court are those performed by the three branches of government – executive, legislative and judicial – related to the separation of powers doctrine we learn about in constitutional law.

5.1.4 Constitutional instruction (background to section 1)

Section 33 of the Constitution reads as follows:

Just administrative action

33(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

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

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

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

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

(c) promote an efficient administration.

Section 33 is an example of where the Constitution contains only the broad framework but (in s 33(3)) has instructed the legislature, that is Parliament, to provide details.

In other words, Parliament has been instructed to give effect to the constitutional provision. According to Hoexter "Just administrative action" in Currie and De Waal (2013:649), "to give effect to the rights" means to make them effective by "providing an elaborated and detailed expression of the rights to just administrative action and providing remedies to vindicate them". (To "vindicate" in the sense to which they refer means to assert or to defend the rights.)

The deadline for the adoption of such legislation was February 2000 – a period of three years from the date of commencement of the 1996 Constitution. The legislation was drafted and redrafted by the SA Law Commission. A revised *Administrative Justice Bill* 56 of 1999 by the State Law Advisors was presented to Parliament and finally passed by Parliament as the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The Act was signed by the President and promulgated in the *Government Gazette* on 3 February 2000. This Act gives effect to the rights contained in section 33 of the 1996 Constitution. The Act, with the exceptions of sections 4 and 10, came into operation on 30 November 2000 (Procl R73, *Gov Gazette* 21806 of 29 November 2000).

ACTIVITY 5.6

Would you say the following are examples of administration action?

(1) The President appoints a commission of enquiry to examine the financial position of the South African Rugby Union.
(2) The transitional Metropolitan Council of Johannesburg adopts a resolution that deals with the payment of rates and taxes by the residents of the area.
(3) Parliament adopts the Refugees Act.
(4) The Minister of Home Affairs makes regulations in terms of the Refugees Act.
(5) The court issues an interdict against a company to prohibit the company from polluting a river.
(6) The refugee status determination officer refuses Theodor Refugee's application for asylum on the grounds that it is unfounded.
(7) Theodor Refugee appeals against the refusal of his application for asylum to the Refugee Appeal Board.

When we answer these questions, we must consider them very carefully. Although at first glance all of them may look like administrative action, not all of them are indeed examples of administrative action.

And this is the purpose of this learning unit – to determine exactly when action will qualify as administrative action. You will remember that we identified four key features of administrative law. In learning unit 1 we discussed the first feature: that of the exercise of state authority or public power by organs of state or functionaries or institutions over another person in a subordinate position. The exercise of such public power or state authority is perhaps one of the most crucial features to assist us in determining whether we are dealing with administrative action and thus administrative law.

In this learning unit, we will discuss the second key feature of administrative law, that of administrative action and how to go about determining whether action indeed qualifies as administrative action. We will concentrate chiefly on the provisions of PAJA for this discussion.

Let us now look into the examples given above and provide answers to the question whether the action qualifies as administrative action or not.

(1) Since the President is acting as head of state, in other words, performing constitutional functions, the appointment of a commission of inquiry is not administrative action. (You will learn more about these functions and the difference between functions as head of state and head of government in the module Constitutional Law.) This is what the Constitutional Court held in President of the Republic of South Africa v South African Rugby Football Union (SARFU) 1999 10 BCLR 1059 (CC), 2000 1 SA 1 (CC). This function is closely related to policy or politics and not to the implementation of legislation, which is administrative action.

(2) The transitional metropolitan council's resolution is also not administrative action because it is a resolution taken by a democratically elected legislative body. It is an example of original legislation, as decided in Fedsure Life Insurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1998 12 BCLR 1458 (CC), 1999 1 SA 374 (CC).

(3) The adoption of the Refugees Act by Parliament is not administrative action because Parliament is performing its legislative functions, that of enactment of legislation.

(4) When the Minister of Home Affairs makes regulations in terms of the Refugees Act, he is performing administrative action. Regulations constitute delegated/subordinate legislation and are an example of legislative administrative action. (See below.)

(5) A court issuing an interdict against a company is not performing administrative action since it is exercising its judicial functions.

(6) The refugee status determination officer's refusal of Theodor Refugee's application for asylum is a typical example of administrative action.

(7) The appeal of Theodor Refugee to the Refugee Appeal Board is not administrative action. Theodor Refugee is the subordinate party in the relationship (i.e., in the relationship between him and the administrators of the Department of Home Affairs) and Theodor's decision to appeal can never be administrative action. (See below.)

5.2 THE NEED TO ESTABLISH WHETHER ADMINISTRATIVE ACTION IS INVOLVED

It is important to determine exactly what administrative action is and whether administrative action is involved in a particular situation. The main reason for this is that the application of the right to just administrative action (s 33 of the Constitution) depends on whether administrative action has been performed by either an organ of state or any person exercising public power or performing a public function in terms of legislation. In other words, administrative action is the entrance – literally the doorstep or threshold – requirement for the application of the right to just administration action. (You will learn more about the content of this right to just administrative action in the learning units in Part 3 of this guide when we discuss the third pillar of administrative law: that administrative actions must be performed validly or lawfully.)

Another reason is the long list of exclusions of what constitutes administrative action. In other words, we find action that looks like administrative action, but in fact does NOT qualify as administrative action.

5.3 THE CLASSES OF ADMINISTRATIVE ACTION

5.3.1 The three classes of administrative action and the distinctive characteristics of each

The three classes of conduct are:

(a) legislative administrative acts
(b) judicial administrative acts
(c) administrative acts

Legislative administrative acts

What are the characteristics of legislative administrative acts?

(a) Legislative administrative acts are the most easily recognised action of the administration. They have a specific form and are published in an official document, such as the *Government Gazette.* (See our examples of subordinate legislation in the learning unit dealing with the sources of administrative law.)
(b) General relationships are created, varied and/or ended by administrative legislative acts. The administrative institution cannot therefore regulate this general relationship by way of a decision. (If you feel uncertain about the administrative-law relationship, return to that unit and look at it again.)
(c) Specific rules apply to the adoption, repeal or amendment of all legislative administrative acts. (These rules are dealt with in the Interpretation of Statutes module and will not be discussed here.)
(d) The power to delegate a legislative power exists only when there is express statutory authority for this. (We will discuss "delegation" in learning unit 7. This rule will then make more sense.)
(e) Any administrative legislative act must be within the framework of the authority given by the original Act. This means that the regulations may not conflict with any statute or restrict the provisions of a statute. Also, they may not be vague and unclear. The reason for this requirement is that the public must know what is expected of them or what they may do or not do.

Judicial administrative acts

In terms of the separation of powers doctrine, the judiciary is responsible for adjudication and settlement of disputes between individuals, between different administrators or organs of state, and between individuals and administrators or organs of state. The judiciary is also empowered to control both legislative and executive authority. The question arises whether judicial acts are also in evidence in conduct of the administrators. The answer is "yes, we do encounter judicial administrative acts". A judicial administrative act is action that is almost like that of a court. This explains its characterisation as a "*quasi-judicial*" act. Like the courts, administrators interpret and apply legal rules to disputes in concrete situations. Administrative adjudication is usually undertaken by specialist bodies, known as administrative tribunals. Currently, not many examples of such administrative tribunals exist, but the Films and Publications Appeal Board provides such an example. However, this situation may change, since new legislation regulating public relationships between organs of state and the individual increasingly provides for appeals by the affected person to specially established boards or tribunals.

It is important to keep in mind that the specialist bodies – administrative tribunals – are **NOT** courts within the South African court hierarchy, as provided for in the Constitution. Another proof of this fact is that administrative tribunals are subject to the supervision of the judiciary – the ordinary civil courts – through the system of appeal and review. In other words, the rulings of these administrative tribunals are subject to judicial control.

Administrative acts

This class of administrative act refers to the "true" administrative act, where individual administrative-law relationships are created or varied. Administrative acts relate to the day-to-day business of implementing and applying policy, legislation or an adjudicative decision. In short, administrative acts include literally every possible aspect of government activity, such as "granting a licence, promoting an employee, stamping a passport, arresting a suspect, paying out a pension" (Hoexter 2012:55).

- **Police acts**

The arrest of a suspect brings a particular category of administrative act into the picture, namely that of police acts. Police acts constitute a very special form of authoritative action since it usually takes place on the spur of the moment and in an emergency situation. Police action such as arrest, detention and interrogation constitutes a serious infringement of personality rights, apart from being an infringement of the right to freedom. It is common knowledge that the police are often forced to act drastically to prevent crime. However, notwithstanding the wide powers of the police, they may not do as they like. Police powers are subject to the law.

- **Discretionary administrative acts**

The particular characteristic of administrative acts that involves the exercise of discretionary power warrants further explanation. The idea of exercising "discretionary power" is explained in the *Compact Oxford English Dictionary* as "the freedom to decide what should be done in a particular situation".

We often find that the administrator or organ of state has a choice about the action concerned. In other words, the organ of state has a discretion about how the action is to be performed. **It therefore has the power to make a choice between two or more alternatives.**

In some instances, the decision-maker has a *wide* discretionary power. This means that the law leaves a large measure of freedom to the decision-maker in his or her choice of options. We find this when a phrase such as "in his or her opinion" is used in relation to the discretion. Take the example of an application for a liquor licence.

In some instances, the organ of state has a *narrow* or *circumscribed* discretion. The enabling provision may lay down a number of circumstances or conditions which the organ of state must take into account before exercising its discretion.

Even though exercising a discretion entails having a measure of choice, this does not imply that the decision-maker is absolutely free to act – the "freedom" the dictionary definition refers to notwithstanding. Even a wide discretion does not mean a free discretion to act or to decide as one pleases. The choice must be made lawfully (i.e., between two or more lawful alternatives and in accordance with legal requirements).

We can use the referee of a match to illustrate what we have in mind: a referee's discretion during a match is governed by the rules of the game. Therefore, even though discretion involves a choice, this choice is always limited by legal rules and directives.

Please note:

The exercise of discretion forms an important part of administrative action. This is not the first and last reference to discretion you will find. It features throughout this study guide, for example, when we discuss the powers of the organ of state in learning unit 7, and the reasonableness of the organ of state's action in learning unit 8. It also features in learning units 11 and 12 when we examine administrative control.

Also note that we use the words "act" or "acts" to distinguish them from the concept "administrative action" as provided for in the Constitution and PAJA. The reason is that, at present, there is a measure of uncertainty whether legislative administrative acts indeed qualify as administrative action. We also use this terminology because, notwithstanding the statement by Du Plessis (about delegated legislation being administrative action), his view is not universally shared, as evidenced by different views expressed in court decisions. Doubt has been expressed about the need for distinguishing between the various classes of administrative action, particularly in the light of the fact that in the pre-1994 era, the classification of functions led to a "rigid and insensitive application of the law" (Hoexter 2012:51 and the decision *Administrator, Transvaal v Traub* 1989 4 SA 731 (A)). Nonetheless, the classification remains of service, not only as an illustration of the various kinds of activities administrators perform, but also as an explanation of the consequences the law attaches to the various forms of conduct of administrators – the legal force of such conduct. These consequences will become apparent during the course of the discussion.

5.3.2 Separation of powers and three classes of administrative action

The classification of administrative action into three classes has its roots in the principle of separation of powers. If you have enrolled for or have already passed the Constitutional-Law module, you will be familiar with this principle (the separation of powers or *trias politica*). In terms of this principle, state authority is divided into legislative, executive and judicial authority.

To refresh your memory:

- Legislative authority is the power to create, amend and/or repeal legal rules.
- Executive authority is the power to formulate policy, and then to give effect to this policy through the execution and administration of legal rules.
- Judicial authority is the power to control both the legislative and the executive authority through interpreting legal rules, and applying them to concrete situations when legal disputes are resolved.

You will also recall that the principle of separation of powers teaches us that it is important for state authority to be divided to prevent an excess of power in the hands of one branch of government. This provides a way of guaranteeing that the freedoms, rights and interests of the citizen are protected against abuse of power, as it prevents the concentration of power in one institution.

In administrative law, an important principle is that of "deference", which entails that the courts should show respect towards the powers of the administrator; the court should defer to the administrator when assessing administrative decisions made by

the administrator. This principle is quite complex since courts are still duty-bound to assess administrative decisions on certain grounds (see learning unit 12, specifically). In such an assessment, the court must be cautious not to usurp the functions of the executive, while at the same time it should scrutinise its decisions in accordance with constitutional rights, rules and principles. *Department of Transport and Others v Tasima (Pty) Ltd; Tasima (Pty) Ltd and Others v Road Traffic Management Corporation and Others* [2018] ZACC 21 and *Merafong City Local Municipality v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC) show the extent to which the justices differ on this principle; also referred to as the permitted extent of judicial control over administrative conduct.

Borrowing from and in keeping with the separation of powers principle, administrative action is also classified into three classes. Furthermore, these classes of action reflect the function of the particular act.

ACTIVITY 5.7

You will remember from your study of constitutional law and interpretation of statutes that legislation has certain characteristics. Return to the Refugees Act (annexure C), page through the Act and look for a provision you would regard as a reference to "legislative administrative action".

You will find such a reference towards the end of the Act, section 38 ("Regulations") to be precise. This section empowers the Minister of Home Affairs to make regulations that deal with particular aspects relating to refugees.

A legislative administrative act refers to administrative rules that are legislative in nature. It is characterised by the making and issuing of rules by the administrator, when authorised to do so by original legislation. This feature is illustrated by the Refugees Act, which provides for the minister to make regulations. It is therefore a legislative act by an executive functionary. In essence, the making of regulations is what is called "delegated legislation" (also known as subordinate legislation in the pre-democratic era). Although regulations are perhaps the best example of such delegated legislation, proclamations, directives and orders are examples as well.

ACTIVITY 5.8

Suppose Theodor Refugee's application for asylum (see scenario 2) has been refused. Is he powerless against the refugee status determination officer's decision or is there any way he may challenge it?

We will find that he is not powerless. He may lodge an appeal against the decision with the Refugee Appeal Board. Return to the Refugees Act, look up the provisions relating to this board and take note of the functions of the board.

ACTIVITY 5.9

Page down to annexure B (the *Earthlife Africa* decision). Read the facts carefully and then do the following:

(1) Identify the class of administrative acts involved in the facts.
(2) See whether any exercise of a discretionary power is in evidence.
(3) If any discretion is in evidence, is it an example of the exercise of a wide or a narrow discretion?

(1) The decision to allow the installation of a pebble bed nuclear reactor is an example of an administrative act. See the discussion again for the reasons why we say that.
(2) The decision to permit the installation obviously involves the exercise of discretionary power.
(3) It is an example of the exercise of a wide discretion, since we do not find any requirements as to which circumstances should have been considered. However, the mere fact that it is a wide discretion does not mean that the Director-General may act as he pleases.

5.4 THE LEGAL FORCE OF ADMINISTRATIVE ACTION

The legal force of administrative action refers to the effect of such action in law. We distinguish between the moment administrative action takes effect (i.e., becomes operative or comes into force) and the point when the legal force of administrative action is terminated.

5.4.1 When does administrative action take effect?

Legislative administrative acts

Legislative administrative acts affect an individual as soon as the regulation or proclamation has been promulgated and/or the stated date of commencement arrives. (For the distinction between adoption, promulgation and commencement, see the Interpretation of Statutes module.)

Judicial administrative acts

Judicial or adjudicative administrative acts usually take effect as soon as the particular judicial institution – the tribunal or board – gives its ruling or delivers its judgment, unless the statute provides for a period in which an appeal may be lodged.

Administrative acts

Administrative acts will take effect upon the decision becoming known, either by publication or announcement (in an official publication such as the *Government Gazette*) or by individual notification (e.g. by letter, electronic mail).

It is often important to determine exactly when administrative action takes effect or becomes operative. This is necessary for various reasons. Not only for the sake of obedience (Baxter 1984:367) but also in order to compute expiry dates "for the lodging of appeals, objections, applications for review, and actions for damages" (Baxter 1984:367). (See too the last learning unit for a discussion of the control of administrative action.)

5.4.2 Termination of the legal force of administrative action

The legal force of administrative action is ended by repeal or revocation, amendment, lapse of time, withdrawal of one of the subjects to the relationship, or by court order.

When the administrator or organ of state cannot amend, repeal, revoke or vary its decision, it is said to be *functus officio* (roughly translated it means "having completed the task or duty; no longer functioning"). In other words, the matter has been finally dealt with and the administrator or organ of state is no longer able to change his or her or its mind and revoke, withdraw or revisit the decision. In short, the organ of state has "discharged his or her or its official function" and he or she or it cannot re-examine or change the decision afterwards.

We must therefore establish when – at what moment – the organ of state will be *functus officio.* To answer this question, we must again distinguish between the three classes of administrative acts.

Legislative administrative acts

Legislative administrative acts may be repealed, revoked or amended at any time. The power to repeal or amend legislative administrative acts generally relates only to the future. The repeal may not have retrospective effect (i.e. apply to the past).

When an individual has acquired rights as a result of the legislative act, the repeal, revocation or amendment does not affect these acquired rights. Therefore, although the administrator, the legislative body, can always repeal legislative action, he or she or it cannot make it applicable retrospectively once rights have been acquired.

Judicial administrative acts

The administrative tribunal, such as the Refugee Appeal Board, is *functus officio* once it has made its ruling, and it cannot vary or revoke the decision.

Judicial administrative acts have the force of *res iudicata* and may consequently only be altered, rescinded or upheld by a higher judicial body – usually the High Court.

Administrative acts

We must distinguish between **valid** and **invalid** action.

Invalid administrative action

Administrative action can be invalid for various reasons. In the next learning units, we will discuss the various requirements for valid administrative action. If any of these requirements have not been met, the administrative action is said to be invalid.

The administrator may alter or withdraw any invalid administrative acts (i.e. invalid decision). After all, the administrator is rectifying action which was defective in the first place. However, should the affected person have questioned or challenged the validity of the administrative act before a court or a higher domestic tribunal, or if the individual has acquired rights and privileges as a result of such invalid administrative act, the authority cannot alter such act. Remember that the decision has individual effect, in other words, it will not affect anyone except someone "targeted" by the decision.

An **invalid administrative act must be set aside by way of judicial review**. This was confirmed in *Merafong City Local Municipality v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC). The Court held that unlawful (or invalid) administrative action "is not void or non-existent, but exists as a fact and may provide the basis for lawful acts pursuant to it" (para 36). The Court also held that an **organ of state must challenge an unlawful (or invalid) administrative act, without any unwarranted delay**. See learning unit 12 for more detail.

In *Kwa Sani Municipality v Underberg/Himeville Community Watch Association and Another* [2015] 2 All SA 657 (SCA), the Supreme Court of Appeal held that an administrative body may not ignore one of its administrative acts if it is invalid. The administrative body **must approach a court to have the decision set aside**.

Valid administrative action

We must distinguish between valid **onerous or burdensome**, **beneficial** and **status- affecting** administrative action.

The administrator may alter valid **onerous or burdensome** administrative acts.

Onerous or burdensome administrative acts place a duty on the individual, or prohibit an individual from doing something or refuse to grant him or her something such as a licence. For example, the individual applies for the grant of a licence and the application for a licence is refused. If the official decides that the decision, though valid, may be a bit harsh, or if policy changes, and so on, the decision may be changed at any stage. The reason for this rule is that the administration must be given an opportunity of correcting its own mistakes.

Valid beneficial administrative acts may be altered by the authority only where the power to do so has been conferred expressly or by necessary implication. For example, if a licence has been issued, it cannot simply be revoked by the licensing officer.

Where administrative acts affect the **status** of individuals, the authority may not rescind or withdraw this decision unless the revocation is authorised expressly or by necessary implication. The administrator who takes a decision relating to status is *functus officio* after he or she has made the decision. The best-known example of this type of administrative action is an adoption order.

ACTIVITY 5.10

You have read what we have said about the legal force of administrative action and what we have said about *functus officio* in particular. Go back to the decision reprinted in annexure B, – the *Earthlife Africa* decision. Would you say the decision-maker was *functus officio*? In your answer you need to explain first what

the maxim *"functus officio"* means. Having provided an explanation, you must proceed to the application phase of the answer – to apply the maxim to the set of facts and to reach a conclusion.

This is a self-evaluation activity. Go back to our discussion for the required information

5.5 CONCLUSION

In this learning unit we learned about administrative action and described what it is. We learned that administrative action is the gateway for the application of section 33 of the Constitution via the provisions of PAJA. We also learned about the various classes of administrative action and examined the legal force of such action. You should now be able to answer questions on these particular aspects.

In the next learning units (6–10) in part 3, we turn to the third pillar of the study of administrative law, that is, that administrative action must be performed lawfully. In other words, we address the requirements for valid or just administrative action. These units deal with the core of administrative law – the content of the right to lawful, reasonable and procedurally fair administrative action and the right to written reasons when a person's rights are adversely affected.

PART 3

JUST ADMINISTRATIVE ACTION

LEARNING UNIT 6

Just administrative action – setting the scene

Working your way through this learning unit should enable you to

- *explain what just administrative action involves, drawing on section 33 of the Constitution*
- *explain what is meant when reference is made to the requirements for valid administrative action*
- *describe other overarching terms that refer to just administrative action or administrative validity*

The outline of this learning unit is as follows:

6.1 Introductory remarks
6.2 An explanation of the concept of just administrative action
  6.2.1 Section 33 of the Constitution
  6.2.2 The principles and values of section 195(1) of the Constitution and their relation to just administrative action
6.3 Other overarching terms used to refer to just administrative action
6.4 Conclusion

6.1 INTRODUCTORY REMARKS

In parts 1 and 2 of this study guide, we discussed the administrative-law relationship, the subjects of the relationship, the characteristics of administrative action and the various classes of administrative acts.

In this part of the study guide (part 3, learning units 6–10) we will concentrate on the essence of administrative law, namely that administrative action must be exercised validly.

The question we need to ask is: "When is administrative action performed validly?" In other words, what are the requirements for valid administrative action?

At its most basic, the answer is: Administrative action is valid when the decision of the administrator or organ of state is authorised in law and all the requirements set by the law are met. In other words, valid administrative action is in evidence when the law is obeyed by the administrator or organ of state.

To find all these legal requirements, we need first to refer to the sources of administrative law discussed in learning unit 2. To refresh your memory, the sources of administrative law include

(1) the Constitution
(2) legislation
(3) case law

(4) common law
(5) administrative practice
(6) ubuntu
(7) international law
(8) writings in books and journals expressing academic opinions
(9) policy documents such as Green and White Papers
(10) reports by functionaries such as the public protector
(11) foreign law

However, to determine the requirements for valid administrative action, we focus on the Constitution and specifically on section 33 – the right to just administrative action.

Section 33 represents the overarching constitutional requirement that all administrative action must comply with if it is to be "just" (i.e. constitutionally valid).

Such action must be

(a) **lawful**
(b) **reasonable**
(c) **procedurally fair**

and

(d) **written reasons** must be provided for any administrative action that **adversely affects rights**.

Before the new constitutional dispensation came into operation (the introduction of the interim Constitution in 1994 and the final Constitution in 1996), we had to rely mainly on

(i) legislation
(ii) common law
(iii) judicial precedent or court decisions

to determine the requirements for valid administration action. Although we now have the Constitution, which is our supreme law and which constitutes the supreme source for determining the validity of administrative action, we still have to look at all other sources, but more particularly both empowering legislation (before and after the Constitution) and PAJA, common law and case law to understand how the requirements for validity have developed over the years and how they contribute to the complete picture.

Please note:

(a) Other requirements for validity, for example those found in and developed by legislation, court decisions and common law, will be discussed in terms of this overarching constitutional requirement of section 33 of the Constitution.
(b) Students often struggle with this part of administrative law because of the many facts and the technical detail they have to grasp. We are going to simplify matters somewhat by guiding you through the topics step by step, starting off with a broad outline of the themes in each of the next five learning units (learning units 6–10). This will help you understand and manage the content of these learning units.

Broad outline of the content of learning units 6 to 10 in table format

Study unit 6:	**Study unit 7:**	**Study unit 8:**	**Study unit 9:**	**Study unit 10:**
Just administrative action Introducing the provisions of section 33 What just administrative action involves Explaining the requirements for valid administrative action Other overarching terms used to explain just administrative action	**The right to lawful administrative action** Describing the concept of lawfulness Provisions dealing with the administrator of administrative action The powers of the administrator	**The right to reasonable or justifiable administrative action** An explanation of the idea of reasonableness Justifiable administrative action The courts' interpretation of justifiability PAJA and unreasonable-ness	**The right to procedurally fair administrative action** An explanation of the idea of procedural fairness The nature and content of the common-law rules of natural justice A precondition for the application of the rules of natural justice The content of the right to procedural fairness PAJA and procedural fairness	**The right to be given written reasons** When an organ of state is required to give reasons The courts' approach to the provision of reasons PAJA and the provision of reasons

By the end of part 3 of the study guide, you will have covered all the provisions relating to administrative validity put in a nutshell or encapsulated in the header of section 33 – *just administrative action.* In fact, by then you should have acquired a good understanding of just administrative action in its widest sense.

For example, in a wide sense, just administrative action relates to the authority of the administrator to act or take a decision. In other words, the administrator must be "legally empowered to perform the act", as Baxter (1984:301) explained this particular feature of valid administrative action. The performance of the act must be by the "lawfully constituted authority" only. In taking the decision, the administrator must obey the prescriptions of the law, exercise his or her discretion impartially, follow the correct procedure in taking the decision – act procedurally fairly by, for example, listening to what the person has to say. Also, the decision-maker needs to justify the decision. In other words, the decision must be reasonable. The best way to justify the decision is to provide adequate reasons for the decision.

Scenario 11

Sello has been issued with a licence to sell food from his food stall. The licensing officer who issued the licence followed the written and formal requirements for the issuing of licences set out in the municipal by-law to the letter. However, he also demanded that Sello pay him an amount of R500 as "commission" for issuing the licence. (There is no such provision in the by-law.)

Every day, Sello sells food at his stall. A few months later, the municipality opens a community centre next to his stall. Amongst other things, food is sold at the community centre. One day Sello is told by Ms Justina from the centre to remove his stall. He refuses. The next day, Ms Justina arrives at the stall with a letter from the municipality informing Sello that the municipality has decided to cancel or revoke his licence with immediate effect and that he must remove his stall immediately.

Sello approaches the licensing department at the municipality. The officials refuse to give him any reasons for the cancellation of his licence. However, he is told he may appear in person before a special meeting of a licence review committee in a week's time. At the hearing he is not allowed to present his side of the story, neither is he allowed to raise any questions about the cancellation of the licence. He is also prevented by the chairman of the committee, Mrs Shady Dealings, from cross-examining the witnesses.

The review committee rules that the cancellation of Sello's licence was lawful, since provision is made for the cancellation of licences in the by-law. Sello suddenly remembers that he has heard that Mrs Dealings is the manager of the community centre in terms of a licence issued by the municipality.

(The facts of this scenario are loosely based on a scene depicted by Greer Hogan in Nutshells: Constitutional and Administrative Law *(1993:106.)*



ACTIVITY 6.1

Reread the above scenario very carefully. Write down what you think are poor examples of just administrative action. Give reasons for your views. Don't worry about terminology at this stage.

This is a self-evaluation exercise. However, you must write down all those examples where the acts of the officials in the scenario make you feel like saying "But this is not right!" Next to your examples, write down why you feel that "this is not right".

6.2 AN EXPLANATION OF THE CONCEPT OF JUST ADMINISTRATIVE ACTION

6.2.1 Section 33 of the Constitution

Section 33 reads as follows:

Just administrative action

33(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
(3) National legislation must be enacted to give effect to these rights, and must –
(a) provide for the review of administrative action by a court, or, where appropriate, an independent and impartial tribunal;
(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
(c) promote an efficient administration.

It is essential that you memorise this definition; each requirement (in specifically sections 33(1) and (2)) are further defined and explained in PAJA, which is dealt with learning units 7 to 10.

Hoexter "Just administrative action" in Currie and De Waal (2013:644–645) remarks as follows on section 33 (and the subsequent enactment of PAJA):

> The entrenchment of fundamental principles of administrative law in the Constitution and the Bill of Rights should be seen against the background of a long history of abuse of government power in South Africa. … The Constitution seeks to prevent this history from being repeated by protecting the institution of judicial review of administrative power from legislative interference, while providing individuals with justiciable rights to claim relief from the effects of unlawful administrative action. The Constitution requires the administration to act in accordance with fundamental principles of justice, fairness and reasonableness. It prohibits the legislatures from allowing any departure from these principles and requires Parliament to enact legislation to govern the performance of administrative action and judicial review of such action.

From these remarks we can draw the following conclusions:

(a) Just administrative action is aimed at preventing organs of state, public institutions and functionaries, as well as natural and juristic persons – administrators – from abusing or misusing their power in their dealings with an individual who is in subordinate position. Hence the constitutional demand that administrative action must be performed lawfully, reasonably and in a procedurally fair manner.
(b) From the perspective of the individual, just administrative action is directed at protecting him or her in any dealings with administrators. It guarantees the individual just treatment/justice, fairness and reasonableness in his or her relationship and dealings with administrators.

6.2.2 The principles and values of section 195(1) of the Constitution and their relation to just administrative action

The importance of the protection of the individual and the prevention of the abuse of power on the part of administrators are emphasised through the listing of a number of values and principles. We find these principles and values outlined in chapter 10 of the Constitution, entitled "Public administration". It contains an inventory of values to which the public administration must adhere.

Section 195(1), entitled "Basic values and principles governing [the] public administration", lists the principles that the public administration must not only take account of but must also obey. Note that the peremptory word "must" is used in this regard.

Public administration must be governed by the "democratic values and principles enshrined in the Constitution", including the following:

(a) the promotion and maintenance of a high standard of professional ethics;
(b) the promotion of efficient, economic and effective use of resources;
(c) a development-oriented public administration;
(d) the provision of services impartially, fairly, equitably and without bias;
(e) a responsiveness to people's needs and the encouragement of the public to participate in policy-making;
(f) an accountable public administration;
(g) the fostering of transparency by providing the public with timely, accessible and accurate information;
(h) the cultivation of good human-resource management and career-development practices, to maximise human potential;
(i) a public administration which is broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve such broad representation.

In terms of subsection (2), the above-mentioned principles apply to (a) [the] administration in every sphere of government; (b) organs of state; and (c) public enterprises.

Submission to these values and principles will be in evidence when administrators abide by and obey them. Moreover, the Constitution also demands compliance with values underpinning "South Africa [as] one, sovereign democratic state". Amongst the values crucially important to administrators are the following: "… [a] democratic government to ensure accountability, responsiveness and openness" (see s 1 of the Constitution). In complying with and acting upon these principles, the administration

of the state is kept on a sound legal footing and the requirements of just administrative action are met.

The provisions of sections 1 and 195, particularly when we read them with section 33, are therefore aimed at creating a duty to achieve and uphold a fair and honest administration that serves the interests of the general public. A variety of terms explain the "interests of the general public", amongst others "the common good", "the common interest", "the common weal", "the general wellbeing of the people", and so on.

We can therefore say that just administrative action, which by its very nature includes and incorporates accountability, responsiveness, openness and transparency in the execution of functions, will ensure:

(a) increased participation by the public in the exercise of public functions
(b) that the administration will weigh up their decisions against the values enshrined in the Constitution
(c) administrative accountability

Fitting the requirement of just administrative action into the framework of the requirements for the validity of any administrative action, we can say that

> **"Just administrative action or administrative justice" is an umbrella or overarching requirement that relates to ALL the requirements for valid administrative action. As an overarching requirement, just administrative action determines the legal boundaries of any administrative action and ensures that administrative action is performed in accordance with all the relevant rules prescribed by law.**

Getting back to scenario 11 (the story of Sello), you could have written down the following examples of action that do not constitute just administrative action:

(1) The insistence that Sello pay a commission. What does section 195 say about such conduct?
(2) No reasons were given for the cancellation of his licence.
(3) At the hearing, Sello was not allowed to present his side of the story or to ask questions about the cancellation.
(4) And what about the fact that Ms Dealings is the manager of the community centre?

6.3 OTHER OVERARCHING TERMS USED TO REFER TO JUST ADMINISTRATIVE ACTION

"Just administrative action" is not the only term used to describe the overall validity of administrative action or the requirement that all the aspects of a particular matter must be considered by the administration. Other collective concepts relating to just administrative action have developed over the years – primarily through case law.

When you study court decisions in which administrative-law principles have been applied, you will come across terms such as

- *intra vires or ultra vires*
- *applying one's mind to the matter*
- *legality*

These are synonyms for just administrative action, as we will show you below.

Ultra vires or intra vires

The concept *ultra vires* has always been used under common law to enquire whether administrative action was not performed outside the boundaries of the powers granted to administrators. *Ultra vires* literally means "to act beyond one's powers" (*vires* means "powers" and *ultra* means "beyond"). It therefore means to exceed one's powers.

The opposite of *ultra vires* is *intra vires* ("within the power").

Administrative action is invalid – it has no legal effect and is therefore not officially recognised – when the administrator goes beyond the powers that have been conferred on it by law. This power is conferred by the empowering legislation.

ACTIVITY 6.2

Let us return to Sello's scenario. Suppose the licensing official is authorised in terms of the municipal by-law to issue only ten trading licences in the particular municipal area. Is he acting within his power if he issues 15 licences instead?

ACTIVITY 6.3

Suppose the by-law stipulates that the licensing official must have a specific rank (e.g. be a senior officer with the rank of deputy-director) before he or she can approve applications for licences. However, a junior clerk in the office issues the licences.

What do you think? Would this be *ultra or intra vires*?

It is clear that in both cases the specific provisions of the legislation (the municipal by-law) have not been met. Therefore, the action performed will be ultra vires, *beyond the powers, of the official.*

The question arises whether all administrative action will be valid as long as it falls within the framework of the enabling statute, or whether there are other additional requirements for valid administrative action. If one takes a narrow approach to ultra vires, *one may conclude that compliance with provisions of the empowering legislation is all that is needed. However, modern thinking prefers a broader approach. The narrow approach to* ultra vires *is outdated and would not pass the test for just administrative action in terms of the Constitution. Why is this?*

ACTIVITY 6.4

Return to the story of Sello. The objective of licensing is to regulate trade through a just and lawful administrative process governing the issue of licences.

Suppose the licensing officer follows the correct procedure in issuing the licence. However, he demands that Sello pays him a percentage of his earnings weekly. Do you think this action by the licensing officer meets the requirements of lawfulness? What would your reaction be to such conduct by the licensing officer?

Although the written and formal provisions of the by-law have been complied with, it obviously is not a lawful exercise of functions. The licensing officer has not acted in a fair manner. Moreover, his dishonest conduct or bad faith (his mala fides *– see learning unit 7 for a discussion of this concept) is a denial of the objectives and purpose of the enabling legislation in this case, to serve the public interest and ensure the lawful and fair administration of licences.*

When we examine action as closely as this, we are in actual fact following a wide approach to ultra vires. *The wide approach requires that administrative action must comply with* **ALL** *the requirements set by the law; not only those prescribed by the enabling legislation. When we refer to* intra vires *administrative action today, we refer to administrative action that is valid in terms of*

- *the Constitution*
- *PAJA*
- *legislation*
- *common law*
- *case law*

> ***Intra vires,* in the wide sense, is an overarching or collective concept, because it encapsulates or includes all the requirements for valid administrative action as found in the requirements of section 33 of the Constitution – lawfulness, reasonableness or justifiability and procedural fairness – as well as the requirements for valid administrative action as set out in the empowering legislation.**

Applying one's mind to the matter

When we read older pre-1994 court cases dealing with administrative-law principles, we frequently notice that the courts rule that the public functionary "had failed (duly) to apply his or her mind to the matter".

When the public functionary has not complied with all the requirements for validity, we could say that he or she has not "applied his or her mind" to the task or function at hand. The public functionary has indeed "applied his or her mind to the matter" when all the requirements of the law have been met.

Applying one's mind is not an independent requirement for validity. However, like just administrative action and *intra vires* (in the wide sense), it is an overarching concept that incorporates all the requirements for valid administrative action.

Legality

The principle of legality – administrative legality – originated at common law and was employed to point towards all the legal requirements that administrators must meet and obey to act lawfully. Baxter (1984:301) wrote that the principle of legality constituted the "obverse facet of the *ultra vires* doctrine". In that sense, legality was one of the principles used by the courts to determine whether administrative action was not only authorised by law, but also performed in accordance with the prescripts laid down by the law.

The basis of legality is that the public administration must

(a) serve and promote the public interest
(b) protect and respect fundamental or human rights

When we look at the principle of legality in the constitutional framework, we notice that

- the Constitution is the supreme law of the country and is elevated above all state legislation. In terms of section 2 of the Constitution, any law or conduct that is not in line with the Constitution may be declared invalid by the court. In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC), Chaskalson P held that the executive "may exercise no power and perform no function beyond that conferred upon them by law" (para 56).
- Section 8 provides that the Bill of Rights binds the executive authority – the state administration in all spheres of government – and all organs of state. This means that organs of state and individuals exercising public power are bound by the law and not elevated above it.

Legality requires that any administrative action should be in accordance with ALL the requirements of the law. Legality should therefore be regarded as the basis of all administrative action.

ACTIVITY 6.5

Return to the press cutting at the beginning of this study guide. Do you think the conduct of Telkom is such that it qualifies as just administrative action? Has the institution applied its mind to the matter? Has it considered the factors that it should have before deciding whether or not the tender should be granted? What about possible *ultra vires* action? Do you think the principle of legality finds application?

This is a self-evaluation activity. However, you must keep in mind what we said about adhering to the requirements of the law. Do you think that section 195 of the Constitution plays a role as well? Do you think section 1 of the Constitution plays a role?

6.4 CONCLUSION

In this learning unit, we have given you an overview of the nature of the constitutional concept of just administrative action under the heading "setting the scene". We have also drawn your attention to certain principles that reflect the same idea of administrative action within the boundaries of the law.

In the next learning units, we examine the contents of the right to just administrative action in greater detail. We concentrate on each of the subsections of the just administrative action clause and examine how and to what extent the requirements of administrative validity are incorporated in this right.

You will note that, in reality, each of the subsections – sections 33(1) and (2) – identify different rights of the individual in his or her dealings with the administration. In this way, it can be said that the individual has a right to lawful administrative action, to reasonable administrative action and to procedurally fair administrative action under section 33(1). The individual also has a right to written reasons should the administrative action adversely affect his or her rights in terms of section 33(2).

STUDY UNIT 7

The right to lawful administrative action as requirement for valid administrative action

Having worked your way through this learning unit, you should be able to

- *describe the requirement of lawful in relation to and in the context of administrative action*
- *explain the meaning of lawfulness as described in the Constitution, PAJA and other legislation*
- *identify and describe the administrator (i.e. the person who performs administrative action)*
- *describe the qualifications of the administrator*
- *describe the powers of the administrator*
- *describe the way these powers must be exercised to constitute lawful administrative action*

The outline of this unit is as follows:

7.1 Introductory remarks
7.2 The concept of lawfulness
- 7.2.1 PAJA and lawful administrative action
- 7.2.2 The meaning of "lawful" in the context of a right to lawful administrative action in section 33(1)
- 7.2.3 Lawfulness as reflected in other provisions of the Constitution
- 7.2.4 Lawfulness and the enabling or empowering statute
- 7.2.5 Other legislation

7.3 Provisions dealing with the administrator
- 7.3.1 Introduction
- 7.3.2 Who is the administrator?
- 7.3.3 Qualifications of the administrator: proper appointment and other provisions

7.4 Delegation
- 7.4.1 The rule about delegation
- 7.4.2 When is delegation of powers permissible?
- 7.4.3 The various forms of delegation

7.5 The powers of the administrator
- 7.5.1 The powers of the administrator prescribed by law
- 7.5.2 The geographical area or place where the administrator must exercise power
- 7.5.3 The time within which the administrator must exercise power
- 7.5.4 The object or subject matter of the power or authority
- 7.5.5 Prohibition of or restriction on the abuse of power by the administrator

7.5.6 The administrator and the exercise of power in bad faith (*mala fides*)

7.6 Conclusion

7.1 INTRODUCTORY REMARKS

We have seen that the Constitution entrenches a right to just administrative action. This means that every person has a right to just administrative action, and that all administrative action must be performed lawfully by public functionaries and institutions, organs of state, natural and juristic persons exercising public powers and performing public functions.

A question arises, though. If the right to **just** administration action incorporates **lawful** administrative action – remember our discussion of legality in the previous learning unit – why is the requirement of lawfulness repeated in subsection (1)? You will recall that section 33(1) reads as follows:

Section 33 – **Just administrative action**

"(1) Everyone has the right to administrative action that is lawful …"

This is one of the questions to be answered in this learning unit when we examine in more depth how the concept of lawfulness has developed and what it should mean in terms of the Constitution as our supreme law.

To grasp the development of the term "lawfulness" fully, and to understand why it has become the cornerstone of administrative validity, we also have to examine other sources of law, in particular legislation, common law and case law. There are various reasons for studying these sources:

(a) Studying them will help us to understand the practical functioning of lawful administrative action, because these sources provided lawfulness with its substance or content long before it was constitutionalised by the Constitution as a fundamental right in section 33(1).
(b) It is indeed as a result of the influence of the other legal sources, that the concept of lawfulness in the Constitution may be regarded as the umbrella concept that covers all the requirements for administrative validity.
(c) It is therefore important to know the sources of administrative law (discussed in learning unit 2) very well and we should keep them in mind throughout.

To help you understand the outline of this learning unit, the following broad structure will be followed in presenting the various aspects of the right to lawful administrative action:

(1) We shall first describe what the term "lawful" involves and go on to examine the relevant sections of the Constitution and PAJA. Lawfulness also features (in a narrow sense) in legislation generally as enabling/empowering provision governing administrative action.
(2) Secondly, because it is difficult to completely separate the diverse influences of other legislation, common law and case law on the development of lawfulness, we shall also tackle the more "independent" requirements for validity or lawfulness as they have crystallised over the years – more particularly those requirements dealing with the administrator, that is, the public institution or functionary, organ of state or natural or juristic person that performs the public action.

(3) Thirdly, we will discuss the administrator's powers as prescribed by law. In this context we will also examine those instances when the administrator departs from these powers and therefore acts in an unlawful manner.

You will notice that all these requirements for lawful administrative action have been influenced and developed (albeit in varying degrees) by all the legal sources.

7.2 THE CONCEPT OF LAWFULNESS

7.2.1 PAJA and lawful administrative action

In essence, PAJA gives effect to the right to lawful administrative action by providing for the judicial review of action that is unlawful. The requirement of lawfulness has the effect that judicial review can no longer be excluded. PAJA relates to lawful administrative action by including unlawful administrative action as a general ground among the grounds for judicial review. Section 6(2)*(i)* states that

"A court or tribunal has the power to judicially review an administrative action if the action is otherwise unconstitutional or unlawful."

The preamble to PAJA clarifies that the Act is intended to:

- provide for the review of administrative action by a court – this is control of administrative action
- impose a duty on the state to give effect to the section 33 rights – the obligation on the government to act justly in its relationship with its citizens
- promote an efficient administration and good governance
- create a culture of accountability, openness and transparency – the means of ensuring an efficient administration and good governance – in the public administration or in the exercise of a public power or the performance of a public function

Note:

The review of administrative action is discussed fully in learning unit 12. The various grounds for review are discussed under various headings throughout this guide. Hoexter "Just administrative action" in Currie and De Waal (2013:668) wrote in this regard that some of the specific grounds for review, as provided for in section 6 of PAJA, can be categorised under the right to lawful administrative action. She gives as examples the grounds relating to unauthorised delegation (see below in this learning unit), bias (see learning unit 9) and failure to comply with an empowering provision.

7.2.2 The meaning of "lawful" in the context of a right to lawful administrative action in section 33(1)

Section 33 of the Constitution guarantees everyone the right to administrative action that is lawful. It should also be noted that the common-law requirement of administrative legality prescribes that all requirements of the law must be met when administrative action is taken.

It has been argued that the lawfulness requirement is merely a re-enactment or restatement of the requirement of (administrative) legality that all administrative actions must comply with all the rules and principles set by the law.

Moreover, one of the most important principles underpinning any democratic state is that all organs of state must comply with all law. Or, to put it differently, the key principle of administrative law – and of the rule of law in general – is that any exercise of power must be authorised by law. This is the principle of legality or lawfulness.

However, the **fact of the matter is that a right to lawful administrative action has been expressly guaranteed by the Constitution**. Among the reasons put forward for the inclusion of the right to lawful administrative are the following:

- The guarantee of lawful administrative action is **to prevent and to prohibit the adoption of any laws that will exclude judicial control over administrative action.**

We need to explain this reason by referring you to the pre-1994 situation. Before 1993 – under the Westminster system – Parliament was sovereign. This means that Parliament could pass any law, regardless of whether it was unreasonable or discriminatory, provided Parliament followed the correct procedure for making the law. In this way, Parliament could pass legislation that overruled common-law principles. Another characteristic of parliamentary sovereignty was that the courts were unable to question the validity or legality of laws correctly or properly adopted by Parliament. The only question open to the courts was whether the correct procedure had been followed.

Yet another feature of the pre-1994 situation was that the legislature was able to enact a provision (called an "ouster clause") in an empowering statute, which excluded or restricted judicial review of administrative action in a particular sphere by the courts. One of the most notorious examples is to be found in the security legislation of that time. Section 29(6) of the Internal Security Act 74 of 1982 (now repealed) provided the following:

> No court of law shall have jurisdiction to pronounce on any action taken in terms of this section, or to order the release of any person detained in terms of the provisions of this section.

The argument put forward for including the right to lawful administrative action in the Constitution was that it restricted the introduction and application of ouster clauses. Klaaren and Penfold (2008:63–76):

> Under our system of constitutional supremacy … an Act of Parliament can no longer unjustifiably oust a court's constitutional jurisdiction and deprive the courts of their review function to ensure the lawfulness of administrative action.

- Another interpretation of this section is in line with the wide approach adopted with regard to *intra or ultra vires* and all the other umbrella concepts we discussed in learning unit 6 that require compliance with **ALL** statutory and common-law requirements for lawful administrative action – that is the Constitution, the provisions of PAJA and the empowering statute, as well as the common-law rules and principles.

In short, section 33(1) entrenches or anchors the principle of ***legality,*** which demands compliance with all law.

This last-mentioned interpretation reflects what we have stressed throughout, namely that lawful administrative action and the principle of legality are synonymous and

encompass all the requirements for valid administrative action. We therefore speak of administrative action **permitted by law.** Klaaren and Penfold (63:76) explain this particular aspect as follows:

> The right to lawful administrative action therefore constitutionalises the fundamental right of administrative law that a decision-maker must act within his or her powers and must not act *ultra vires*.

Strictly speaking, this would mean that the rights to administrative action that are "reasonable and procedurally fair" – see learning units 8 and 9 – are superfluous. But the constitutional drafters regarded the rights to procedural fairness and justifiable and reasonable administrative action as so important that specific and separate constitutional protection was given to these rights, despite the fact that in the common law both reasonable administrative action and procedural fairness form part of the general requirement of administrative legality.

7.2.3 Lawfulness as reflected in other provisions of the Constitution

The Constitution is the foundation of the South African democratic state. One of the most important principles underpinning a democratic state, also called the "constitutional state", is that all organs of state must comply with all law – which is nothing more than the principle of legality or lawfulness. In any constitutional state we therefore have a system of government in which the law reigns supreme.

Another feature of the Constitution, closely related to the supremacy of the law, is that it sets out the guidelines or standards that must be used to protect the individual against abuse of power by any public functionary or organ of state. You will recall that the relationship between the administration and the individual is an unequal one, with the individual in the subordinate position.

The Constitution expresses the values and beliefs of the community it serves. These values relate to the interests of the community – the welfare and needs of the people.

7.2.4 Lawfulness and the enabling or empowering statute

If you recall the discussion of the sources of administrative law (learning unit 2), you will remember that administrative authority and power derive mainly from legislation. Legislation that confers administrative authority is termed the "enabling or empowering act or statute". In the enabling statute we find commands or directives relating to the scope and content or nature of administrative power.

We may also find instructions in the specific statute requiring the administrator, who is to exercise the power, to possess specific knowledge, experience or other qualifications. (These requirements for the administrator will be discussed in 7.2 under the heading "requirements relating to the administrator".)

The empowering statute may also prescribe specific procedures to be followed. (The requirements for procedure will be examined in the discussion on the requirement of fair procedure of administrative action in learning unit 9.)

As a threshold requirement, that is the point at which something would begin – in our discussion, particular administrative action – any administrator must act within the powers conferred on him or her by the empowering statute. If any administra-

tor exceeds the statutory powers laid down in the enabling statute, we say that the action is *ultra vires* (or beyond the official statutory jurisdiction). In other words, the administrator *exceeded* his or her authority. As you will recall from our discussion in the previous learning unit, we are here referring to *ultra vires* in the narrow sense.

There is a vast number of examples of empowering legislation. For example, the South African Sports Commission Act 109 of 1998 established a sports commission to oversee matters relating to the administration and promotion of sport under the direction and with the support of the Minister of Sport and Recreation.

The Employment of Educators Act of 1998 is the enabling Act dealing with all aspects of the employment of educators. Remember scenario 3 (the story of the suspension of the educator)? He was suspended in terms of the formal procedures prescribed by this very Act.

ACTIVITY 7.1

Annexure C contains the Refugees Act. Read this Act. How would you explain to someone what this Act enables or empowers the administrator to do?

The Refugees Act of 1998 is the enabling statute dealing with all aspects of the status and treatment of refugees in South Africa.

We must examine the Act to determine who the administrators or officials are who deal with refugees, what requirements the Act sets for the qualifications of the officials, how they must deal with refugees and so on.

7.2.5 Other legislation

Other legislation – apart from the Constitution, PAJA and an enabling statute – may also have a direct or indirect effect on determining the lawfulness of administrative action. For example, in implementing measures to develop skills in the workplace in terms of the *Skills Development Act 97 of 1998,* the administrator should also consider statutes and regulations regulating employment.

ACTIVITY 7.2

Return to scenario 2 (the story of Theodor Refugee; learning unit 1).

Suppose Theodor's application for asylum was refused because the refugee status determination officer hates French-speaking people. Or, suppose the "administrator" is not employed by the Department of Home Affairs, and has no experience or knowledge of refugee matters.

(1) Was the refugee status determination officer authorised by law to refuse asylum because he hates French-speaking people?
(2) Do you think there was any abuse or misuse of power? What kind of misuse?

(1) The answer to this question relates to the meaning of lawfulness – not only must the decision-maker comply with the law, but he or she must also have the authority in law to make the decision. Do you think the decision-maker can ever have the authority to refuse an application on the basis of personal prejudice? This is one of the things we will look at in this learning unit.

(2) We must look at the circumstances in which the decision was taken. What was the purpose of the action? Was the officer authorised to act or not? Did the administrator act in good faith or not? (The meaning of these concepts will be discussed below.)

ACTIVITY 7.3

Section 1 contains a list of values upon which the Constitution is based. It is submitted that these values are important for all administrators since they set the boundaries within which all administrative action must take place. List these values. Indicate which of these values you think are closely linked with action by public functionaries and institutions, in other words, whether they are examples of how the Constitution deals with administrative validity.

Next, skim through the Constitution and try to find other references to values closely related to administrative action. List the sections in which you find these values.

This exercise of finding the values expressed in section 1 of the Constitution in particular and in general throughout the Constitution helps us to recognise the yardsticks or standards that determine the validity or lawfulness of any administrative action that affects both the community and the individual.

(1) You could have referred to the provisions of section 1(a) in particular – to the values of "human dignity, the achievement of equality and advancement of human rights and freedoms". This is particularly important in the light of the unequal relationship between administrator and individual or group of individuals.

(2) You could have referred to the provisions of section 2 – that the Constitution is the supreme law and any law or conduct, that is all administrative action, inconsistent with the Constitution is invalid.

(3) You could have referred to ubuntu – briefly discussed in learning unit 4 ("sources of law"). The mere fact that ubuntu is not expressly acknowledged in the Constitution, does not mean that ubuntu is no longer a recognised value. It is submitted that the values encapsulated by ubuntu are so all-embracing that they are by implication incorporated into the value-laden Constitution.

(5) You would obviously have found most references to values and standards in the Bill of Rights – Chapter 2 of the Constitution. The Bill of Rights protects everyone's identified rights against violation and constitutes the most important check on or restriction of the possible abuse of public or administrative power.

Section 7 provides that the state must respect, protect, promote and fulfil the rights in the Bill of Rights. This includes the right to just administrative action provided for in section 33. Section 8 prescribes that the Bill of Rights applies to all law – all legislation, case law, common law and customary law.

Although the subject of fundamental or human rights is a wholly separate field of study covered in the module on Fundamental Rights, a specific characteristic of human rights is relevant for our purposes.

You will probably recall from the Introduction to Law module that no rights apply absolutely. The boundaries of all rights are set by the rights of others and by the public interest – the welfare and needs of the people/community. Consequently, rights may be limited, including the rights relating to just administrative action. But, in turn, any limitation of rights must be authorised by law, that is, it must be lawful.

Section 36 of the Constitution is the general limitation clause and applies to all rights in the Bill of Rights. Section 36 will always feature when a court and even an administrative tribunal must determine whether a limitation of a right is lawful.

(a) Before limiting a right, the administration must ensure that the limitation is permissible, because rights may only be limited by way of a "law of general application" in terms of section 36(1). Where administrative law is concerned, this refers to legal rules contained in a statute or in common law
(b) All limitations must be "reasonable and justifiable" in an:

(i) open and democratic society based on
(ii) human dignity
(iii) equality
(iv) freedom

(Take note once again of the values spelled out in the Constitution.)

This requirement means that there must be a balance or proportionality between the limitation of the right and the purpose for which the right is being limited.

Remember our very first scenario in learning unit 1 when John was expelled? Do you think there was proportionality – a proper balance – between his expulsion and the purpose of his expulsion?

To determine this proportionality, section 36 also contains the following list of factors that must be considered before limiting any right:

(a) the nature of the right
(b) the importance of the purpose of the limitation
(c) the nature and extent of the limitation
(d) the relation between the limitation and its purpose
(e) less restrictive means of achieving the purpose

Note:

As we have said before, you will learn more about the more difficult questions surrounding the limitation of rights in the module Fundamental Rights. However, what we have discussed above is enough for our purposes now.

(5) Section 39 is the interpretation clause of the Bill of Rights. It contains the rules for the interpretation of the Bill of Rights.

Section 39(1) reads as follows:

When interpreting the Bill of Rights, a court, tribunal or forum –

(a) Must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
(b) Must consider international law;

(c) May consider foreign law.

In terms of section 39(2), when interpreting any legislation and developing common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(6) Other constitutional provisions, which may either affect the lawfulness of administrative action, or indicate the values to which the administrative action must remain true, include Chapter 10 – "The basic values and principles governing public administration". Under section 195(1), all organs of state and every sphere of government "must be governed by the democratic values and principles enshrined in the Constitution …".

(7) In Chapter 14, under the heading "General provisions", we find a very brief section – section 237 – which all of us, administrators and public alike, tend to ignore. Although not directly relevant to lawfulness, it nevertheless shows how any lawful action should be informed. This section reads as follows:

Diligent performance of obligations

All constitutional obligations must be performed diligently and without delay.

7.3 PROVISIONS DEALING WITH THE ADMINISTRATOR

7.3.1 Introduction

This section deals with the authority or power of the administrator. This aspect of lawfulness relates to the administrator, that is, the organ of state or natural or juristic person who is authorised to exercise the power or to perform the function. The administrator's authority and power to take administrative action must be authorised by law. We find the description of exactly who the administrator is as well as what he or she is allowed or authorised to do in the empowering statute.

This empowering legislation generally lays down the provisions relating to the administrator who performs the administrative action. These provisions cover, for example, the qualifications of the administrator. Under these qualifications we may find provisions regarding the place or geographical area where the administrator must perform administrative action, the time at or within which the action must be performed and the subject matter of the administrative action.

The enabling statute also determines the scope or reach of the administrator's authority and power. When it is said that the administrator must act within the scope of its jurisdiction, it means that it must act within the scope of its official statutory authority.

ACTIVITY 7.4

Return to scenario 2 (the story of Theodor Refugee; learning unit 1), and this time look at what the Refugees Act says about the administrators or officials who deal with refugees. (You will find the Act in annexure C.) Make a list of those who deal with refugees and write down their functions as well.

Take note, too, of what the Act says about the minister's functions as regards the Act. Do these functions qualify as administrative action? What do you think?

You will find exactly who the administrators or officials are in the Refugees Act in chapter 2 of the Act. Their functions are set out in this chapter as well.

The minister is indicated as the person responsible for administering the Act. All functions dealing with the administration of the Act qualify as administrative action.

7.3.2 Who is the administrator?

The administrator is the public functionary or institution performing administrative action. The PAJA introduced the term "administrator" for such a person or body. Section 1 reads as follows:

> **"administrator"** means an organ of state or any natural or juristic person taking administrative action

If you think back to our discussion of the legal subjects in an administrative-law relationship in learning unit 2, you will remember that, in performing administrative action, the administrator is always a:

(a) natural or juristic person, that is an administrative functionary, such as the President, premiers, ministers when they act in an administrative capacity, heads of and officials in state departments, et cetera
or
(b) an organ of state as described in section 239 of the Constitution, that is, departments of state or administration and any other functionary or institution … "but does not include a court or a judicial officer"

Furthermore, when performing administrative action, the administrator is always

- clothed with state authority (the administrator holds the superior position in the administrative-law relationship), and in this superior capacity, has
- legal power of discretion (i.e. the power of choice between alternatives), which may vary from a wide, almost independent discretion to a narrow or carefully demarcated discretion.

Note:

The exercise of discretionary power crops up later in this learning unit when we discuss the purpose, aim or objective of the administrator's performance of administrative action and the requirement that no administrator should be allowed to abuse his or her power. See also justifiability or reasonableness in learning unit 8. Discretionary power will again surface in learning units 11 and 12 when we discuss administrative and judicial control.

7.3.3 Qualifications of the administrator: proper appointment and other provisions

We have repeatedly said that the administrator derives the authority to act mainly from legislation. The empowering Act often prescribes that the administrator must possess a certain status, qualification, attributes, experience or knowledge. If the administrator does not possess the necessary qualifications, he or she cannot perform a valid administrative action, even though his or her action may meet all the other statutory requirements. The possession of the required qualifications may therefore be said to be the absolutely minimum requirement – the threshold requirement – for any valid administrative action. In this regard Hoexter (2012:256) writes the following:

> … it is axiomatic that administrators must be properly appointed, properly qualified and properly constituted when they take administrative action.

A statute may require members of an administrative body to possess specific professional qualifications. An example, albeit from a repealed Act – the Liquor Act 27 of 1989 – required that the chairman of the Liquor Board should be qualified in law.

Section 7(2) required as follows:

> No person shall be appointed as chairperson or deputy chairperson under subsection (1) or as an alternate to the deputy chairperson under subsection (3) unless he or she possesses such qualification in law and such experience in the administration of justice as renders him or her suitable for appointment as such.

If a chairman of the board does not possess these necessary professional qualifications, the actions of the board are invalid. An empowering Act often assumes the existence of a particular status before powers or rights are conferred on an administrative organ.

In *Awumey v Fort Cox Agricultural College* 2003 (8) BCLR 861 (Ck), a board decided to suspend the principal of a college and eventually to terminate his services. The board's decisions were set aside on the basis that it (the board) was not properly constituted at the time and some of its members were unqualified (869G–870F).

ACTIVITY 7.5

Return to the Refugees Act (annexure C to this guide). What does the Act say about the qualifications of the various officers who deal with refugees? Make a list in which you indicate the various officers and their qualifications. Indicate too the sections in which you found these provisions.

This is a self-evaluation activity. However, take note of what the Act provides as to the training of officers. Take a look, as well, at the regulations that the minister may make with regard to officers and their qualifications.

A question that relates to the requirement that an administrator must be properly authorised to take administrative action is whether the administrator may delegate or hand over his or her powers to another administrator. The question in this regard is whether such handing over or transfer of power or delegation boils down to the

abandonment or abdication of his or her powers or functions. In other words, will such delegation be regarded as an example of an administrator exceeding his or her powers?

7.4 DELEGATION

7.4.1 The rule about delegation

To "delegate" means to entrust a task, responsibility or power to somebody else – that is, to an agent of the original holder of the power. The purpose behind the delegation of powers is to facilitate the quick and efficient division of labour within the administration, since administrators and administrative bodies very often cannot cope with the exercise of all their administrative functions.

One of the basic rules of administrative law is that delegation is **unlawful, unless certain requirements have been met**.

The general rule against delegation

An important part of the provisions dealing with the qualifications of the administrator relates to the prohibition on the delegation of power. This rule is contained in the Latin maxim or saying *delegatus delegare non potest.* Roughly translated it means that "the person to whom a power is granted may not delegate it to another".

In *Foster v Chairman, Commission for Administration* 1991 4 SA 403 (C), this common-law rule was explained as follows:

> It is a trite principle of our law that where a power is entrusted to a person to exercise his own individual judgment and discretion, it is not competent for him to delegate such power unless he has been empowered to do so expressly or by necessary implication by the empowering statute. (See eg *Shidiack v Union Government (Minister of the Interior)* 1912 AD 642 at 648-9, Attorney-General OFS v Cyril Anderson Investments (Pty) Ltd 1965 (4) SA 628 (A) 639.)

This rule expresses the idea that the administrator who has authority to take administrative action must exercise that authority himself or herself. The general rule is that where a discretionary power has been granted to a particular functionary because of his or her specific qualifications, knowledge or expertise, the exercise of this discretion cannot be delegated to another functionary or institution. The original administrator must perform the function personally.

After all, if the administrator may freely transfer or delegate his or her powers to somebody else, it would undermine the requirement that powers must be exercised by an administrator with a particular qualification, status, knowledge or responsibility.

The key judgment dealing with delegation is the case of *Shidiack v Union Government* 1912 AD 642. Innes ACJ explained delegation (at 648) thus:

> Where the legislature places upon any official the responsibility of exercising a discretion which the nature of the subject-matter and the language of the section show can only be properly exercised in a judicial spirit, then that responsibility cannot be vicariously discharged ["vicarious" means by some-

one else]. The persons concerned have a right to demand the judgment of the specially selected officer.

7.4.2 When is delegation of powers permissible?

There are instances where public functionaries and institutions would stop functioning effectively if delegation of authority or power were to be forbidden altogether. Think of all the functions in a state department, for example. It is impossible for the head of such a department – the director-general – to perform all administrative action him- or herself. We already referred to this aspect above.

Provision is therefore made for the delegation of powers under certain circumstances. The purpose of delegation of powers is to effect quick and efficient division of labour within the administration. The Constitution, for example, contains a general authorisation to delegate functions. Section 238 reads as follows:

> An executive organ of state in any sphere of government may –
>
> (a) delegate any power or function that is to be exercised or performed in terms of legislation to any other executive organ of state, provided the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed;
> or
> (b) exercise any power or perform any function for any other executive organ of state on an agency or delegation basis.

Note that this general authority to delegate as recognised by the Constitution is qualified by the requirement that the delegation must be consistent with the enabling legislation. We find, therefore, in most legislation that ministers, heads of departments and other senior administrators are authorised to delegate their powers.

The following rules apply when delegation of powers is permitted:

(1) If the administrator is authorised to perform a particular action and this entails the exercise of discretion, the task concerned may not be delegated unless the delegation is authorised by statute.
(2) An administrator who exercises a discretionary power and makes a decision is not prevented from instructing a subordinate administrator merely to implement the decision. This does not constitute an unauthorised delegation, as the superior administrator merely issues a mandate or instruction. (See below where we discuss the forms of delegation.)
(3) The rule against further delegation also implies that an administrator may not, in the exercise of his or her discretion, put him- or herself in the situation of having to accept directions, orders or commands from another body. In other words, he or she must apply his or her own mind to the matter.
(4) An administrator may, without contravening the rule against delegation, appoint a fact-finding committee to assist him or her, provided the actual discretion is ultimately exercised by the proper authority (i.e. the administrator).

ACTIVITY 7.6

Return to the Refugees Act (enclosed in this guide as annexure C).

(1) Find the section dealing with the delegation of powers and summarise it.

(2) Return to your summary of the provisions in the Refugees Act dealing with delegation.

Suppose now that the refugee status determination officer is out of town for a while and he gives instructions to a colleague to implement his decisions. Is this a lawful delegation of powers?

Would your answer be different if he appoints an informal fact-finding committee to assist him with a very difficult decision, but ultimately decides the matter himself?

---

(1) This is another self-evaluation activity. However, note that in your summary you should have referred to the powers that may not be delegated.
(2) See what we have explained about the rules dealing with delegation above.

7.4.3 The various forms of delegation

In the eighties, Wiechers (1985:56–62) demarcated three kinds of delegation and called them *mandate,* and the *deconcentration* and *decentralisation* of power. These kinds of delegation depend largely on the degree of transfer of power by the original holder of the power or authority.

(a) The mandate or instruction/command

The simplest form of delegation occurs in the form of a mandate, that is, an instruction or command. The senior administrator makes a decision and then hands it over to another administrator to implement or execute – strictly speaking, there is no proper delegation of power.

(b) Deconcentration

Deconcentration of activities is a type of delegation that takes place within departments of state. Within a department we find an internal hierarchical relationship. A hierarchy is described in the C*ompact Oxford English Dictionary* as "a system in which people are ranked one above the other according to their status or authority".

The **internal hierarchical system** thus features in a state or government department where we encounter the different ranks of administrators. In the national sphere of government, for example, we find the Minister of Education at the top. Then, working from top to bottom, we find the director-general and other officials, right down to the various levels of administrative officers. Think of this ranking system as a pyramid with the Minister at the top of the pyramid down to the officials at the bottom. For example:



For example, section 7 of the Refugees Act gives the minister the power to delegate any of his or her powers to an officer or administrator in the department.

You will note that our Department of Home Affairs scenario (see p 110) contains an example of authorisation to delegate between administrators within the same hierarchy (an internal hierarchical relationship, therefore). This type of delegation is also found within a municipal council or any institution exercising public power in terms of legislation.

The main reason for this type of delegation is to ensure a division of labour and a quick and efficient execution of a government function. The minister, as the head of a specific department, is simply not able to perform all the functions of his or her department. He or she then delegates his or her powers to the director-general, who in turn delegates them to heads of departments, who in turn delegate them to administrators, and so on.

The following important rules apply to this form of delegation of administrative functions:

(1) The head of the administrative hierarchy – the *delegator* or *delegans* – may withdraw the delegation at any time and perform the function personally, or he or she may prescribe certain requirements relating to the performance of the function by the delegate. The delegator retains control at all time.

(2) When the *delegate* – the person to whom the functions or powers or responsibilities are delegated – performs a function on behalf of the *delegator* – the person who delegates – he or she acts in the place of the delegator, and the function is regarded as having been performed by the delegator.

(3) The delegator may exercise various types of control over the delegate, for instance, he or she may require a report from him or her and if the task is not correctly executed, he or she may relieve him or her of his or her duty. If the matter has not been concluded, the delegator may intervene and conclude the matter personally.

    The delegator is not *functus officio* prior to the conclusion of the matter. (You will recall that *functus officio* means that the administrator or official has completed his or her task. This particular point was discussed in learning unit 3.) Where the matter has been concluded, however, the delegator cannot undo the execution of the delegated function, although he or she may decide to withdraw the delegation.

(4) Authoritative functionaries within the same administrative hierarchy cannot become involved in a legal dispute with one another. For example, an administrator cannot enter into a legal dispute with his or her head of department

about a matter that does not affect his or her rights or interests personally. In this regard we say that there should be solidarity within the same administrative hierarchy.

(c) Decentralisation

Decentralisation of administrative power is characterised by the senior functionary transferring certain powers and activities to an independent organ or body "which carries out these powers and functions entirely in its own name". See *SA Freight Consolidators (Pty) Ltd v Chairman, National Transport Commission* 1987 4 SA 155 (W) at 167, quoting Wiechers (at 54). For example, a minister appoints a board to issue transport permits or a council is appointed to run university matters. In this relationship of decentralisation, the delegator cannot interfere with the activities of the board.

Control is exercised indirectly over the decentralised institution. The minister may not personally perform the function which he or she has delegated. This does not mean that the minister now has no power of control or supervision over the body. He or she exercises control

(1) by way of the appointment of the body's members
(2) by way of appeal to or review by the minister of the decisions made

We speak here of an "independent control relationship" or decentralisation.

Apart from this power of appointment and the power of appeal or review, the two institutions function independently, each in its own name. In other words, we may state that there is a "full delegation of power and the subdelegee [subdelegate] becomes fully responsible for the exercise of the power" (Baxter 1984:436 n 317).

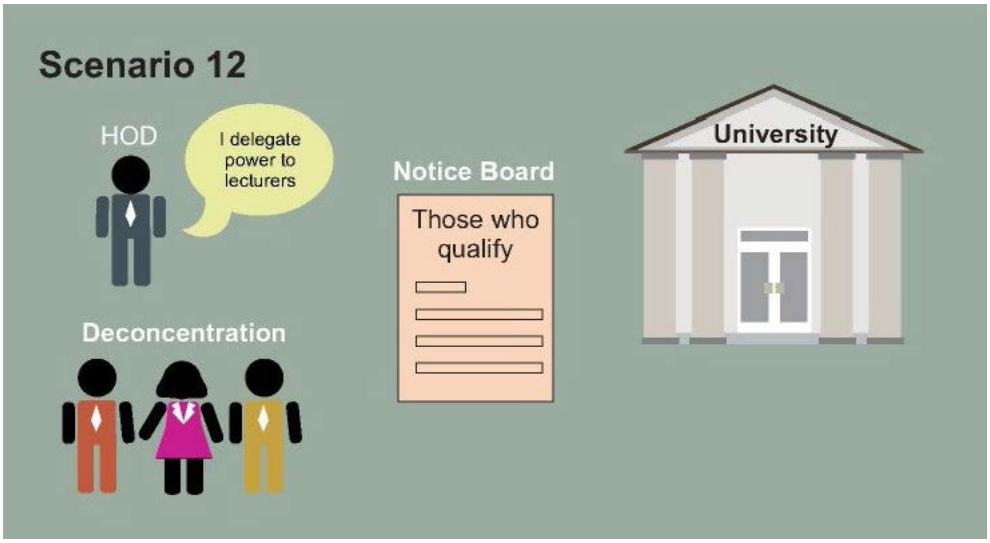
Strictly speaking, there is no question of delegation when a decentralised body is created. Rather, the exercise of public (administrative) power by independent bodies is subject to management and control of the controlling body. In *University of Pretoria v Minister of Education* 1948 4 SA 79 (T), the court found that the Minister of Education did not have the power to appoint the principal of a university, and that this appointment fell within the power of the university council. The appointment by the council had to be approved or ratified by the minister, but he or she could not substitute his or her decision for that of the council.

ACTIVITY 7.7

Read the following scenarios (scenarios 12, 13, 14, 15 and 16). Then complete the table below by following the instructions. For each scenario (the left-hand column in table C), write in the middle column whether you regard it as authorised or unauthorised delegation. In the last column, write down what form of delegation it is and give a brief reason for your answers.

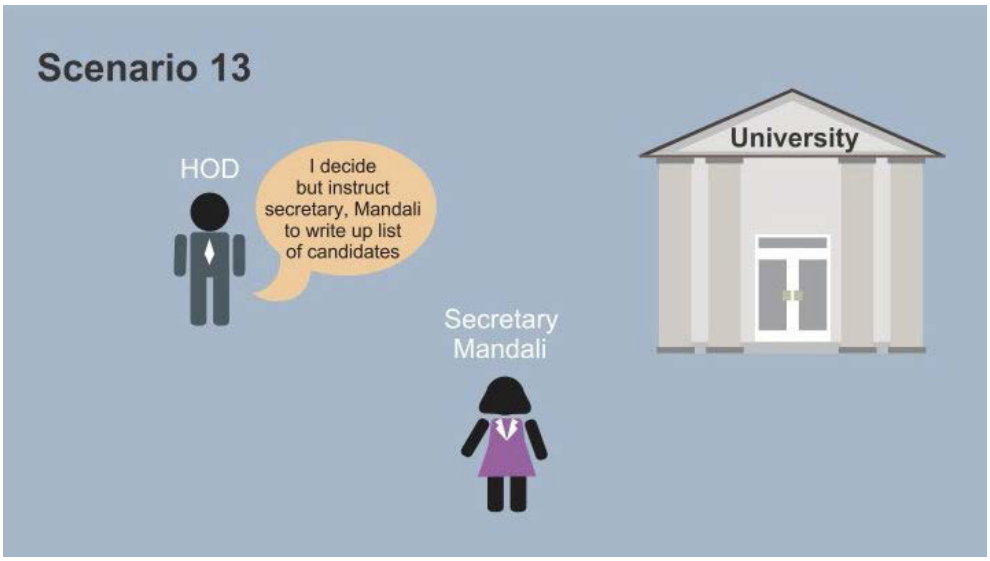
Scenario 12

At a certain university, the power to decide at the end of a semester which students qualify for admission to the examination is delegated to the head of department (HOD). The head of department in turn delegates this power to the lecturers who are the subject heads.



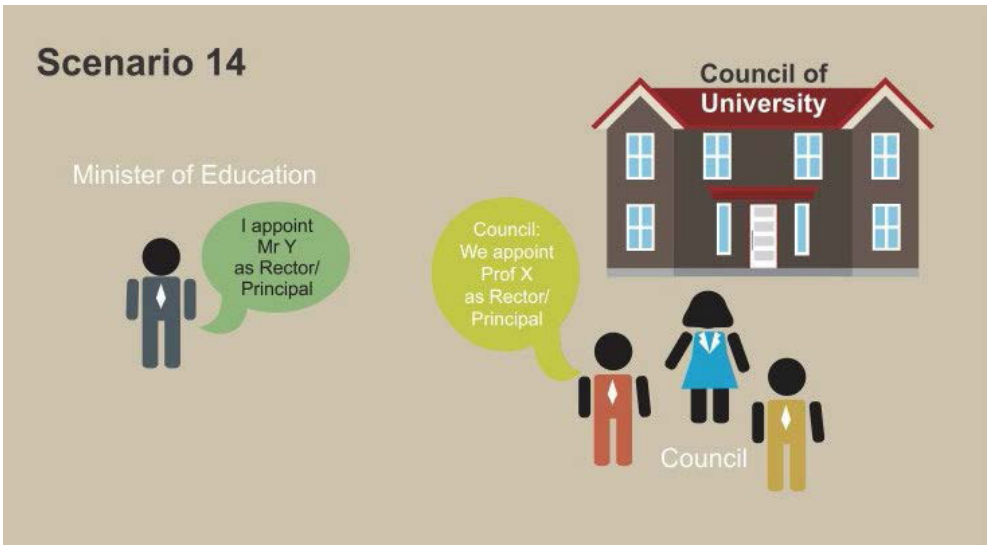
Scenario 13

Would it change your answer if he exercises this power himself but then instructs his personal assistant to compile the list of candidates?



Scenario 14

The council of a university is authorised to appoint the rector or principal of the university. The Minister of Education is not pleased with the appointment made by the council and appoints a principal of his own choice.



Scenario 15

In terms of the authority granted to it, a municipality wants to expropriate certain properties for the purpose of improving the town's roads. The municipality instructs the town secretary to negotiate the acquisition of the properties with the owners. Having received the information, the municipality decides to expropriate the properties.



Scenario 16

The power to set certain conditions for the sale of coal is delegated to the price controller. Without further ado he, in turn, delegates this discretion to another officer in another department because he is too busy to draft the conditions.

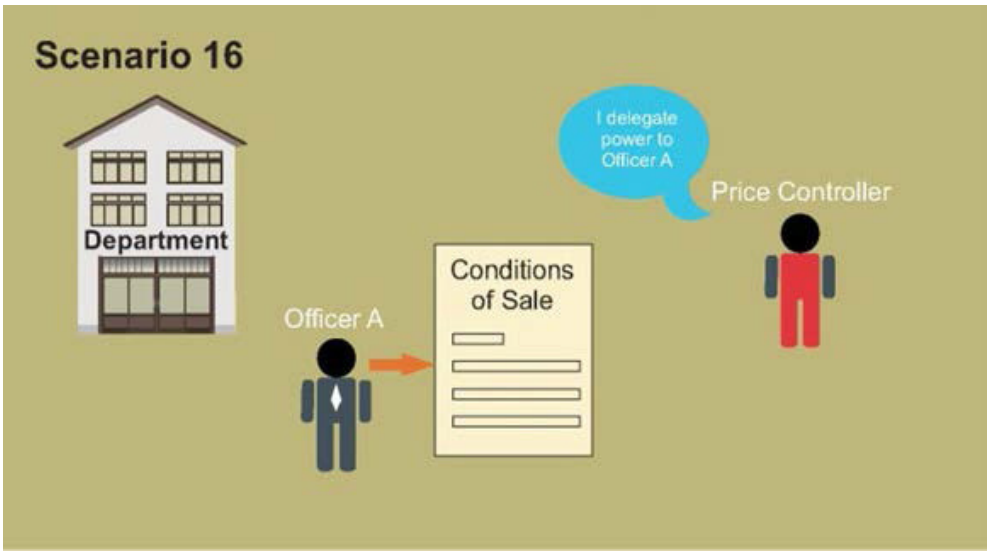


TABLE C

Scenario	***Authorised/unauthorised delegation***	***Form of delegation***
12		
13		
14		
15		
16		

TABLE C

Scenario	***Authorised/unauthorised delegation***	***Form of delegation***
12	*Authorised delegation*	*Deconcentration of power. The lecturers and the HOD are in the same hierarchy. Moreover, the HOD remains in control.*
13	*Authorised delegation*	*This is an example of a mandate or an instruction. He took the decision and instructed someone else to execute it.*

Scenario	Authorised/unauthorised delegation	Form of delegation
14	*Yes, the original delegation from the Minister to the university council is authorised as a form of decentralisation. However, this is not the end of the matter. Since the Minister thereupon appointed a principal of his own choice (which is not allowed), there is strictly speaking no delegation at all involved. Delegation cannot take place upwards. The Minister's action is simply unlawful*	*Having delegated the task to the university council as a decentralised form of delegation, the Minister does not retain the original power (as would be the case in a deconcentrated form of delegation). He/she may therefore not intervene in the decision. (See the Pretoria University v the Minister of Education decision we gave as example above.)* *Since the Minister appointed a principal of his own choice (which is simply unlawful), there is strictly speaking no delegation at all involved in this part of the scenario.*
15	*Authorised delegation*	*A mandate or instruction. See above.*
16	*Unauthorised delegation*	*No authority to delegate to someone outside the departmental hierarchy is permitted.*

7.5 THE POWERS OF THE ADMINISTRATOR

7.5.1 The powers of the administrator prescribed by law

It must by clear by now that the administrator is not allowed to take any administrative action that has not been authorised by law. We have also learned that the description or content of what the administrator is authorised by law to do in a particular situation is found in the empowering statute. For example, the Refugees Act (annexure C), sets out the powers of the administrators who deal with the admission of refugees to this country.

However, we must keep in mind that when the administrator's powers are interpreted, common-law rules, which form part of the rules of the interpretation of statutes, are used. These rules assist in determining the scope and content of the authoritative statutory powers. Over the years the courts have applied and developed the rules relating to statutory authority in accordance with the general principles of administrative law. For these reasons we say that the content and scope of administrative authority – the powers – depend on the following:

(a) the statute in question, and of course the Constitution, which provides the framework within which the powers are exercised through the concept of constitutional legality;

(b) the appropriate rules of statutory interpretation (Since you learn more about these rules of statutory interpretation in the Interpretation of Statutes module, we will not expand on this here.); and
(c) the general principles of administrative law as applied and developed by the courts.

In the empowering legislation we will find provisions that demarcate or delimit the administrator's powers as to

(i) the geographical area within which or where he or she must exercise his or her powers – the place where these powers may be exercised
(ii) the time within which these powers must be exercised
(iii) the object that is the subject matter of the action

7.5.2 The geographical area or place where the administrator must exercise power

Where an administrator is empowered to carry out administrative action by taking decisions, to perform certain functions and to exercise powers within a specific geographical area, the administrator must keep within the boundaries thus prescribed.

ACTIVITY 7.8

The road transportation board for the Gauteng Province is empowered to issue transport permits for Gauteng. However, at a meeting, the board decides to issue transport permits for the Northern Province as well, since the members of the transportation board of the Northern Province are all on strike because they have not been paid their allowances. May the road transportation board of Gauteng do this?

No. The administrator is empowered to exercise its powers within a particular geographical area or in a specific place only. Since the road transportation board has no status or authority as regards Northern Province, it also has no authority to act in that particular area. The road transportation board would therefore be exceeding its authority and powers and the action – the issue of transport permits for the Northern Province – would be invalid.

7.5.3 The time within which the administrator must exercise power

If a specific time is prescribed for the performance of his or her functions, the administrator has no authority to exceed the time limits prescribed.

A rule which also falls under this heading is that administrative action must be prospective, therefore applying to the future and not retrospective, that is, relating to past actions – the rule against retrospectivity.

Any action will have retrospective effect only where the administrator has been empowered by statute to make it retrospective. The reason behind this rule is that

any administrative action which is retrospective will affect existing rights, privileges and freedoms.

ACTIVITY 7.9

Return to scenario 11 (the story of Sello and his food stall). Suppose the municipality is empowered to regulate street trade by means of issuing trading licences. The empowering by-law provides that renewals of trading licences must take place between January and March each year. Would the municipality be acting within its powers if it were to renew trading licences in September only?

No, its action would be unlawful since the empowering by-law's rules about time limits were ignored.

ACTIVITY 7.10

Go through the Refugees Act (annexure C) and see whether you can find any provisions relating to place and time. Write them down, and also write down what the provisions require in this regard.

This is a self-evaluation activity, the objective of which is to familiarise you with the requirements that demarcate the powers of the administrator in relation to time and place.

7.5.4 The object or subject matter of the power or authority

Requirements that relate to the subject matter of the administrator's power or authority relate to the object of the administrative-law relationship. In other words, they relate to the rationale or reason why the administrator is exercising his or her power or the **purpose** for which the power was granted. (See also learning unit 3, where we discussed the object of the administrative-law relationship.) We find that the subject matter of the power to decide about something, for example to issue a licence or to make any order, is usually described with precision in the empowering Act.

You will recall that we said earlier that the rules of statutory interpretation sometimes come into the picture to assist in establishing the powers of the administrator. This will happen, for example, when the boundaries of the administrator's powers are not sufficiently clearly defined in the empowering Act and these rules are called upon to assist. As we have said, we will not go into them here. These rules are the topic of discussion in the Interpretation of Statutes module.

ACTIVITY 7.11

In South Africa, national – the South African Schools Act 84 of 1996 – and provincial legislation dealing with school education forbids corporal punishment as a form of disciplinary action in any school. The legislation also requires that school policy and codes of behaviour must be drafted by the governing bodies of schools. In addition, it provides that the majority of members of the governing body must be parents. Imagine that we are dealing with John Learner's school (scenario 1) and that the governing body decides that in future corporal punishment will be the preferred form of discipline and accordingly provides for it in the disciplinary code. Do you think this decision is in line with the requirement that powers must be exercised as provided in the empowering Act?

No. Although the empowering legislation compels the governing body to adopt a disciplinary code, it also provides that corporal punishment may not form part of that code. By including corporal punishment in its code, the governing body has therefore breached the powers conferred by the empowering legislation and acted ultra vires.

It is clear that the administrator extended the object or subject matter of the action in an unauthorised manner. For this reason the action was unlawful.

7.5.5 Prohibition of or restriction on the abuse of power by the administrator

The enquiry into the subject matter of the administrator's powers or authority leads us to the following question: what happens when the administrator abuses his or her power? Or, to put it differently, what happens when the administrator abuses his or her discretion?

There are various forms of abuse of power by the administrator. Whatever the form of abuse, one feature is in evidence in all the forms of abuse relating to the administrator's actions: the abuse relates to the misuse of discretion.

The following are forms of abuse of power by the administrator:

(a) exercising power with an unauthorised or ulterior purpose
(b) exercising power using an unauthorised procedure
(c) exercising power using ulterior motives to defeat the purpose of the law – expressed in the Latin phrase *in fraudem legis*

Please note:

We will refer back to these forms of abuse of discretion when we discuss the grounds of review provided for in section 6 of PAJA. See learning unit 12.

7.5.5.1 *Unauthorised or ulterior purpose*

What is meant when it is said that the administrator exercises his or her power with an unauthorised or ulterior purpose?

As we have learned, the administrator must exercise his or her power for an authorised purpose. The administrator must use his or power for the object identified in the empowering Act. When the administrator uses his or her power for a purpose other than that set out in the enabling statute, the action amounts to the abuse of a power for an unauthorised purpose.

Please note:

You will encounter the terms "unauthorised purpose" and "ulterior purpose". In relation to the abuse of power by an administrator, these two terms mean the same thing, although we need to keep in mind that the word "ulterior" has a negative connotation, implying an underhand or clandestine action. For our purposes, however, we will regard the two words as synonymous to indicate that the administrator may not exercise his or her power for a purpose to achieve a goal not set out in the empowering Act. See below for a more extensive explanation. To avoid confusion, we use the term "unauthorised purpose" only.

Baxter (1984:508), quoting from *Oranjezicht Estates Ltd v Cape Town Council* (1906) 23 SC 296 at 308, wrote as follows:

> It is a "well-established" principle of South African law that "powers given to a public body for one purpose cannot be used for ulterior purposes which are not contemplated at the time when the powers were conferred.

When an administrator exercises his or her powers for an unauthorised purpose, the legal force of the empowering statute is extended in an unauthorised manner. In other words, the administrator takes over the functions of the legislature by extending the legal force of the particular legislation. This in turn conflicts with the entire principle of legality, as well as with the doctrine of separation of powers.

The test for determining whether the administrator has used his or her power to achieve the authorised purpose is objective. This means that we do not ask whether the administrator thought or believed that he was serving the authorised purpose, but rather whether, objectively speaking, the authorised purpose has been achieved. The proof of unauthorised purpose therefore depends on the results or effects of the exercise of power.

Note, too, that an administrator who exercises his or her power for an unauthorised purpose does not necessarily have a fraudulent, deceitful or dishonest, or even sinister or evil intention; he may be acting in absolute good faith or *bona fide* when exercising power for an unauthorised purpose.

Nevertheless, the exercise of administrative power for an unauthorised purpose amounts to invalid action – the furtherance of an unauthorised purpose remains unauthorised or unlawful, no matter how commendable or laudable the intention of the administrator may be.

Case law provides the following examples of the exercise of power for an unauthorised purpose.

(1) In *University of Cape Town v Ministers of Education and Culture (House of Assembly and House of Representatives)* 1988 3 SA 203 (C), the Minister of Education stopped payment of state subsidies to the university on the basis that the university had not upheld law and order on campus. This power was exercised in terms section 25 of the University Act 61 of 1955.

The university argued that the purpose of the payment of subsidies was to promote tertiary education, and not to uphold law and order on campus. The court found that the ministerial conditions were indeed invalid, since the purpose behind them – the promotion of law and order – did not coincide with the purpose of the Act, which was to promote higher education.

(2) In *Rikhoto v East Rand Administration Board* 1983 4 SA 278 (W), the erstwhile administration board had implemented section 10(1)(b) of the Blacks (Urban Areas) Consolidation Act 25 of 1945 (now repealed), in such a way as to exclude the applicant from qualifying as a resident in the prescribed area. The applicant alleged that he had worked in the area for one employer continuously for a period of not less than ten years, which meant that he qualified as a resident as defined in the Act.

The court rejected the respondent's allegation that the applicant had not worked for one employer continuously. The respondent alleged that the call-in procedure – the procedure whereby certain workers were required to renew their service contracts annually – had created periodic breaks in his term of service. The court found that the respondent and its officials were not empowered to rely on the "call-in" procedure as a means of frustrating the purpose of section 10(1)(b), and the applicant's right of residence was confirmed. The decision was confirmed on appeal (*Oos-Randse Administrasieraad v Rikhoto* 1983 3 SA 595 (A)).

(3) In *Cassiem v Commanding Officer, Victor Verster Prison* 1982 2 SA 547 (C), the power to revoke prisoners' privileges in the event of abuse of those privileges was improperly used to punish prisoners for other transgressions.

ACTIVITY 7.12

Return to Sello and the food stall in scenario 11. Suppose his trading licence has been cancelled to punish him for calling the manager of the community centre "a mad old cow hellbent on ruining all men trying to make a living". By cancelling his licence, the manager had made an example of Sello to warn other traders not to cross swords with her. Do you think this action is in order?

The purpose of a trading licence is to regulate trade. The cancellation of Sello's licence to make an example of him and to serve as a warning to others was therefore the use of power for an unauthorised purpose.

See the discussion above and take particular note of the test for determining whether power has been exercised for an unauthorised purpose.

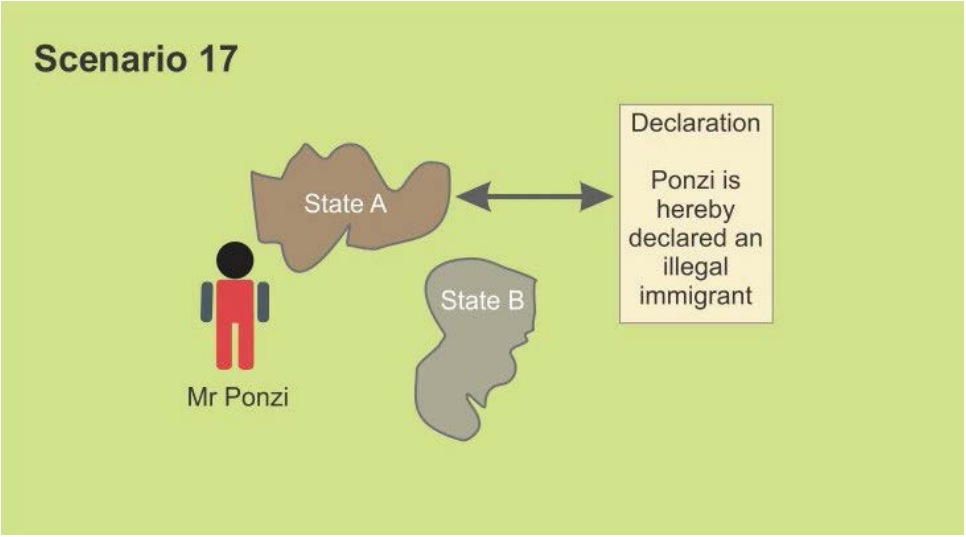
7.5.5.2 Exercising power using an unauthorised procedure

Scenario 17

State A has no extradition agreement with state B (extradition has been defined as "the delivery of an accused or convicted individual to the state where he is accused of, or has been convicted of, a crime, by the state on whose territory he happens for the time to be").

To bypass this problem, state A declares Ponzi a prohibited immigrant under its Immigration Act and detains him in gaol pending deportation to state B to face charges of fraud. In effect, state A is using deportation to achieve extradition.

(The facts are loosely based on Mackeson v Minister of Information *1980 1 SA 747 (R).)*



ACTIVITY 7.13

Do you spot any difference between the exercise of power in the above scenario and our earlier explanation of the use of power for an unauthorised purpose? Write down what you think.

The difference we notice is that it wasn't the **purpose** *served that was unauthorised, but the* **procedure** *used was not the one authorised or prescribed.*

We find that the administrator usually uses an unauthorised procedure when the proper and correct procedure is more difficult, time-consuming and cumbersome. The administrator then circumvents this correct, but difficult procedure by using a short cut. This form of abuse of power actually undermines the law and boils down to action *in fraudem legis* – fraudulent action – since the administrator is consciously trying to evade the procedural provisions. We will return to this topic below when we discuss exercising power using ulterior motives.

We find the following examples of the exercise of power using an unauthorised procedure, a short cut, in case law.

(1) In *Van Coller v Administrator Transvaal* 1960 1 SA 110 (T), the director of education transferred an educator whose conduct had elicited many complaints to another post instead of taking disciplinary steps against him. The court found that this amounted to a disciplinary measure against the educator. In transferring the educator, the director circumvented the rules of natural justice, which would have given the educator the opportunity to state his case, which is applicable to disciplinary proceedings. The director therefore acted unlawfully by taking the short cut of transferring the educator, while the more complex procedure in line with natural justice and prescribed in disciplinary hearings was side-stepped. In learning unit 9 we will discuss the rules of natural justice.

(2) In *Pretoria City Council v Meerlust Investments (Pty) Ltd* 1962 (1) SA 328 (T), the court found that the city council had relied on a private-law purchase and sale procedure to enforce an expropriation of property. In other words, the city council had not used the proper procedures.

Yet another form of abuse of power by the administrator occurs when, in exercising power, he or she uses ulterior motives to "defeat" the law. This form of abuse is expressed in the Latin phrase *in fraudem legis.* What does this mean?

7.5.5.3 Exercising power using ulterior motives (acting in fraudem legis*)*

ACTIVITY 7.14

Read the following scenario and write down whether you think this way of exercising power differs in any way from using power for an unauthorised purpose and from exercising power using an unauthorised or incorrect procedure.

Scenario 18

The chief traffic officer of the municipality of Newtown instructs his traffic officials to write X number of traffic fines per day. It later transpires that the purpose of this instruction is not to control the traffic of Newtown at all, but to pocket some of the income from the fines for his own use.



You will immediately realise when reading this example that there is evidence of the perversion or undermining of the purpose of controlling traffic. The writing of a number of traffic fines takes place for something other than the control of traffic. In fact, a particular state of mind is shown in our scenario – a dishonest one – to make money in a dishonest way, not to control traffic.

In the past, our courts tended to equate the exercise of an administrative power for an unauthorised purpose with exercising power with an ulterior motive. The Latin phrase which was used to describe exercising power with an ulterior motive is *in fraudem legis*. Roughly translated, it means "to defeat the law".

However, we must distinguish clearly between the two. When exercising power *in fraudem legis,* the administrator deliberately and intentionally evades the provisions of the empowering statute. The court described such exercise of power as follows in *Dadoo Limited v Krugersdorp Municipal Council* 1920 AD 530 at 547:

> An examination of the authorities therefore leads me to the conclusion that a transaction is *in fraudem legis* when it is *designedly disguised* [emphasis added] so as to escape the provisions of the law, but falls in truth within these provisions.

In our scenario, the chief traffic officer deliberately deviated from the authorised purpose of controlling traffic found in the provisions of the enabling by-law.

We must remember then that using power for an ulterior motive (*fraus legis*) cannot be equated to an unauthorised purpose. To exercise power *in fraudem legis* presupposes a fraudulent intention, which is not necessarily found in the case of the abuse of power for an unauthorised purpose. However, it is possible for an unauthorised purpose and ulterior motive to be present in the same action.

ACTIVITY 7.15

Write your own summary or short note in which you distinguish between unauthorised purpose, procedural evasion and *fraus legis*. Refer to the following in your summary:

(1) the fact that in all the instances the purpose of the enabling statute is being negated
(2) the basic difference between them
(3) in which of them the administrator may have acted with the best of intentions
(4) in which he did not do so

This is a self-evaluation activity. Use the preceding discussion to guide you through the note.

The use of power *in fraudem legis* to deviate deliberately from the purpose of the empowering statute brings us to the last aspect of the power of the administrator.

7.5.6 The administrator and the exercise of power in bad faith (*mala fides*)

ACTIVITY 7.16

Return to the newspaper clipping reproduced in the introduction to this guide. How do you regard this exercise of public power? Does such conduct show honest intentions? Does the conduct truly reflect what the exercise of public power should be? What do you think? Write down your thoughts on this.

Public power is involved when Telkom performs a public function of issuing an advertisement inviting tenders. It has been said that such power is not held "at public whim" but as a kind of public trust. It therefore follows that a high standard of public conduct should be expected in the public interest. This high standard was not met by the administrators at Telkom when they exercised their power the way they did.

We have learned that "applying one's mind to the matter" is an overarching requirement for all administrative action. A similar idea is expressed when it is said that all administrators must exercise their power in good faith or *bona fide* because they must consciously apply their minds to all the requirements for valid or just administrative action.

The opposite of good faith is bad faith or *mala fide*. *Mala fides* may be understood in a wide as well as a narrow sense. In the narrow sense it refers to fraud, dishonesty or corrupt action and in the wider sense to the wrongful use of power. When the administrator has exercised his or her power in bad faith, he or she could not have applied his or her mind to the requirements for validity of administrative action. It also shows a deliberate disregard of the basic requirement that public power must be exercised in the public interest.

An example:

In *Hart v Van Niekerk* 1991 3 SA 689 (W), the court held that the decision of the municipality to close swimming pools was for an improper purpose – to circumvent the effects of the repeal of the Reservation of Separate Amenities Act. What is more, the municipality did not act in a *bona fide* manner nor did it properly apply its mind to the matter.

Please note:

We will return to this requirement of exercising power in good faith when we discuss control of administrative action in the last learning unit. There we discuss forms of control such as review of administrative action. One of the grounds for review is that administrative action was taken "in bad faith" in terms of section 6(2)*(e)*(v) of PAJA. We will then pay attention to the consequences the court attaches to such action in bad faith.

7.6 CONCLUSION

The above examination of the need for exercising power in good faith by the administrator concludes this long learning unit dealing with the right to lawful administrative action. In the next learning unit we will examine the right to reasonable administrative action.

LEARNING UNIT 8

The constitutional right to reasonable administrative action

Working your way through this learning unit should enable you to

- *reflect on the position at common law: when unreasonableness was not regarded as an independent and separate ground of review and the reasons for this situation*
- *reflect on and explain the reasoning in some earlier court decisions dealing with unreasonableness*
- *consider the reasoning behind the setting of rationality as a requirement for administrative action in the interim Constitution*
- *describe the novelty of a right to reasonableness in the Constitution*
- *demonstrate the present position in terms of the 1996 Constitution and PAJA*
- *describe the Constitutional Court's reading of the constitutional right to reasonableness*

The outline of the learning unit is as follows:

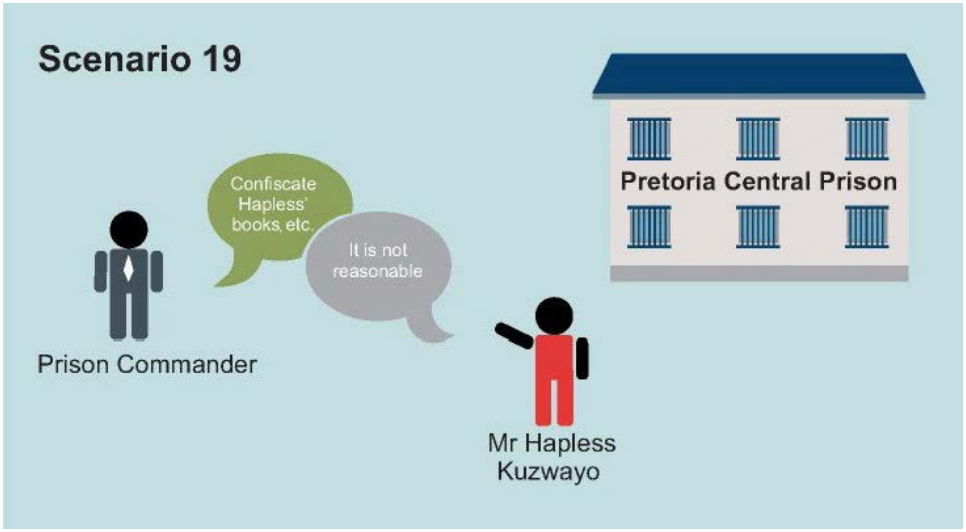
8.1 Introductory remarks
8.2 The present position in terms of the 1996 Constitution and the provisions of PAJA
  8.2.1 Section 33(1) of the 1996 Constitution
  8.2.2 PAJA and the right to reasonable administrative action
  8.2.3 The Constitutional Court's interpretation of the right to reasonable administrative action
8.3 Justifiable administrative action in terms of section 24(d) of the interim Constitution
  8.3.1 Section 24
  8.3.2 The courts' approach to justifiability in section 24(d) of the interim Constitution
  8.3.3 Proportionality
8.4 The common law and reasonableness
  8.4.1 Introductory remarks
  8.4.2 Some earlier decisions on reasonableness
8.5 Conclusion

8.1 INTRODUCTORY REMARKS

Scenario 19

Mr Hapless Kuzwayo is a prisoner in Pretoria Central Prison. He was convicted of a serious white- collar crime and the prison authorities regard him as an extremely difficult prisoner. For this reason, the prison authorities decide to take away certain

of his privileges which the authorities in any event regard as luxuries. Amongst the things they take away are his iPod, cellphone, small television set and all his books. He is also allowed no visitors.



ACTIVITY 8.1

Do you think this is reasonable administrative action? Write down what you think.

All administrative action must have a reasonable effect.

The word "unreasonableness" does not carry one single meaning. Any dictionary explanation of the adjective "unreasonable" will confirm this truth. For example, the *Compact Oxford English Dictionary* (2005) defines "unreasonable" as follows: "1 not guided by or based on good sense. 2 beyond the limits of what is acceptable or achievable".

The semantics of the word "unreasonable" helps us in our enquiry into the reasonableness or unreasonableness of administrative action. Administrative action may be regarded as unreasonable when the decision-maker's decision is irrational or nonsensical (that is, "not guided by or based on good sense" as explained in the dictionary). A decision may also be unreasonable when there is no evidence of an even balance – proportionality – between the outcome the decision-maker wants to achieve and the means he or she uses to achieve the result. (The reference to "balance" is reflected in the dictionary explanation of "beyond the limits of what is acceptable or achievable".)

Having looked into the semantics of unreasonableness, we now need to enquire into the way the law deals with the reasonableness or unreasonableness of administrative action.

8.2 THE PRESENT POSITION IN TERMS OF THE 1996 CONSTITUTION AND THE PROVISIONS OF PAJA

8.2.1 Section 33(1) of the 1996 Constitution

Section 33(1) simply requires that everyone has the right to administrative action that is reasonable.

8.2.2 PAJA and the right to reasonable administrative action

PAJA gives effect to the right to reasonable administrative action by giving an individual the capacity under section 6(1) "to institute proceedings in a court or a tribunal for the judicial review of an administrative action" on the ground that

> the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is *so unreasonable that no reasonable person could have so exercised the power or performed the function* [our emphasis] (s 6(2)*(h)*).

It is striking that the Act does not refer to the unreasonable effect, result, consequence or impact of the action.

The legislature stopped short of providing a wide and general ground of review based on the effect or consequence of the action. It has limited the ground for review to the requirement of "action which is so unreasonable that no reasonable person could have exercised it" – a "reasonable person test". This particular test preferred by the legislature is more or less similar to the formulation we find in the English decision of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA) at 233–234 ([1947] 2 All ER 680 (CA)) and now known as "*Wednesbury* unreasonableness" or the "*Wednesbury* test". Lord Greene held as follows:

> It is true to say that if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That I think is quite right; but to prove a case of that kind would require something overwhelming.

The wording of section 6(2)*(h)* seems to reintroduce the old, traditional approach to reasonableness, that of gross unreasonableness. This would mean that only shocking or really bad instances of unreasonableness will be reviewable on this basis, given the acceptance of the *Wednesbury* test.

8.2.3 The Constitutional Court's interpretation of the right to reasonable administrative action

The Constitutional Court had the opportunity to pronounce on the meaning and content of section 6(2)*(h)* in the landmark decision of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490; 2004 7 BCLR 687 (CC). **This is an EXTREMELY important pronouncement by the Constitutional Court on the meaning of "reasonableness" for purposes of section 33 and PAJA. You should be able to explain this requirement with reference to the case for approximately 15 marks.**

This decision dealt with the allocation of fishing quotas by the Chief Director (responsible for marine management) in the Department of Environmental Affairs and Tourism. The appellant challenged the Chief Director's allocation of his (the appellant's) fishing quota in terms of the provisions of the Marine Living Resources Act 18 of 1998 (MLRA).

One of the questions before the Court related to the alleged unreasonableness of the Chief Director's action. The Court, per O'Regan J, acknowledged the pre-Constitutional jurisprudence which failed to establish reasonableness or rationality as a free-standing ground of review (at para 43).

O'Regan J referred further to the *Wednesbury* decision and held that the PAJA test draws directly on the language of that decision. However, she emphasised the importance of reading section 6(2)*(h)* in line with the wording of section 33(1) of the Constitution. She held (at para 44) that

> Even if it may be thought that the language of section 6(2)*(h)*, if taken literally, might set a standard such that a decision would rarely if ever be found unreasonable, that is not the proper constitutional meaning which should be attached to the subsection. The subsection must be construed consistently with the Constitution and in particular section 33 which requires a simple test, namely, that an administrative decision will be reviewable if, in Lord Cooke's words [Lord Cooke in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd* [1999] 1 All ER 129 (HL) at 157], it is one that a reasonable decision-maker could not reach.

The simple test is therefore one that states that administrative action will be reviewable, if it is one that a reasonable decision-maker could not reach. What will constitute a reasonable decision will depend on the circumstances of each case as it is context based.

O'Regan J then proceeded to enumerate the factors relevant to determining whether a decision is reasonable. They include

(a) the nature of the decision
(b) the identity and expertise of the decision-maker
(c) the range of factors relevant to the decision
(d) the reasons given for the decision
(e) the nature of the competing interests involved
(f) the impact of the decision on the lives and wellbeing of those affected [para 45]

Please note:

In learning unit 12 we discuss the remedies available to a person if his or her right to just administrative action is infringed. You will learn more about the distinction between appeal and review in that learning unit. In the meantime, though, please take note of the following: We wrote above that the reason for not recognising reasonableness as an independent ground of review was the view that such acceptance may impinge on the separation of powers doctrine. In essence, such impingement may also blur the distinction between appeal and review. O'Regan J recognised this problem in *Bato Star* and held (at para 45)

> Although the review functions of the court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The court should take care not to usurp the functions

> of administrative agency. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.

Her solution to these problems – how not to negate the distinction between appeal and review and how not to do harm to the doctrine of separation of powers – was for the courts to treat decision-makers with appropriate respect when they apply the reasonableness test. (You will find that in articles and/or academic papers the authors refer to the word "deference" when they discuss the meaning and content of such respect accorded to decision-makers.) She nonetheless warned that a court may not rubber-stamp a decision merely because of its complexity or the identity of the decision-maker (at para 48). She explained as follows:

> A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. … This does not mean however that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported by the facts or not reasonable in the light of the reasons given for it, a court may not review that decision. A court should not rubberstamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.

Note further:

In learning unit 12 we will discuss the courts' duty to review the legality of the administration's or administrator's action. This particular feature of administrative law is found in section 6 of PAJA under the heading "Judicial review of administrative action". Section 6(2) sets out the grounds on which an individual may "institute proceedings in a court or a tribunal" for the "judicial review of an administrative action". Amongst the grounds (more than 20 in all) is one closely related to unreasonableness, that of the irrationality of administrative action (s 6*(f)*(ii)*(aa)-(dd)*).

ACTIVITY 8.2

Revive Construction is a company specialising in reconstructing and reviving decaying open urban spaces in the city. During the past few years, the municipality of the city has awarded the company several contracts to reconstruct such open spaces in the city. The municipality invites tenders for a contract which involves "the hard and soft landscaping of the Stony Corridor to create dignified urban spaces for the people". Revive Construction is one of five companies vying for the tender contract. However, the company is not awarded the tender and no reasons are given to the company.

The municipal by-laws provide that a committee consisting of the councillor responsible for finance, the municipal manager and the chief financial officer decide on the award of municipal tenders. The committee delegates this task of awarding the tender (for "the hard and soft landscaping of the Stony Corridor to create dignified urban spaces") to a member of the "goods, services and property advisory committee". It transpires that no member of the committee has any decision-making power and the committee's only function is to make recommendations to the city's council.

Suppose the reason that the city gives Revive Construction for refusing the tender is that it (Revive Construction) has been awarded several contracts and it is only proper that some other companies should now get an opportunity. Would you regard the city's action as reasonable? Introduce your discussion with an explanation of the concept of reasonableness.

Hint:

Since the 1996 Constitution specifically provides that all administrative action must be reasonable, a reviewing court must now also enquire into the substance of the decision. In other words, the court needs to enquire whether the decision has been taken objectively in view of all the relevant facts and circumstances.

Again, this is a self-evaluation activity. Use the preceding comments to guide you when you tackle this activity.

8.3 JUSTIFIABLE ADMINISTRATIVE ACTION IN TERMS OF SECTION 24(D) OF THE INTERIM CONSTITUTION

8.3.1 Section 24

Section 24 of the interim Constitution of 1993 was the predecessor of the present section 33 and under the heading of administrative justice paragraph *(d)* provided the following:

> Every person shall have the right to – *(d)* administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened.

It is noticeable that the legislator resisted reference to the word "unreasonableness". The question would now be: What do "justifiable" and "justifiable in relation to the reasons given for it …" mean? Many commentators commented on this paragraph and their opinions were varied. We limit our remarks to the commentary of Davis and Marcus.

According to them (1997:161), section 24*(d)* "introduces another innovation into our administrative law". They explain their view as follows (at 161):

> It requires administrative action to be justifiable 'in relation to the reasons given'. It is submitted that this introduces the requirement that administrative decisions must be rational, coherent and capable of being reasonably sustained having due regard to the reasons for the decisions. In short, there must be a rational link between the decision and the reasons given therefor.

See in this regard the scenario in activity 8.4, in which Ms Petunia's application for a post is turned down due to her being pregnant. Rationality demands the achievement of a justifiable balance between the extent to which the rights have been affected and the reasons for the decision. It is clear that an irrational decision will never be justifiable since an irrational decision is one that cannot be said to be based on reason.

To sum up, a justifiable decision is one based on reason, and although there is always a certain subjective element involved in every decision because the administrator has personal expertise and qualifications, the decision must nevertheless be such that an objective bystander can "go along with it" or accept it, even if the bystander himself or herself may have come to a different decision. Thus, the question is whether the purpose for which a decision has been taken is important enough to outweigh the right of the individual.

8.3.2 The courts' approach to justifiability in section 24(d) of the interim Constitution

In a number of post-1994 cases the courts have had to deal with the interpretation of section 24*(d)* of the interim Constitution.

In *Standard Bank of Bophuthatswana Limited v Reynolds* 1995 3 BCLR 305 (B); 1995 3 SA 74 (B), the court had to enquire into the content of the concept of reasonableness in the light of the new constitutional order. The court, per Friedman JP, advocated a move away from the narrow approach to the review of unreasonable administrative action – the gross unreasonableness standard or formal standard. He stated (at 325) the following:

> [t]he test of "gross unreasonableness" in view of the testing rights given to the courts in the Constitution of the Republic of South Africa, 1993 [Interim Constitution] does not accord with the modern approach to judicial review, particularly when applied to a Constitution such as the South African one, which contains a chapter of fundamental rights, binding on all "legislative and executive organs of state at all levels of Government" and which "shall apply to all law in force and all administrative decisions taken and acts performed during the operation of this Constitution". From the foregoing it is necessary that the courts adopt the less stringent test of "unreasonableness" rather than the more restricted one of "gross unreasonableness".

The meaning of the phrase "justifiable administrative action" also arose in *Kotzé v Minister of Health* 1996 3 BCLR 417 (T). The applicant applied to have the director-general's refusal to allow him early retirement on the grounds of continued ill-health reviewed and set aside. The director-general had been furnished with medical opinions to the effect that the applicant was unfit for continued government service. However, the director-general was not satisfied (given the sedentary nature of the applicant's duties and given the remoteness of any substantial risk of his suffering trauma in consequence of those duties or that his condition would affect his ability to perform his duties) that his discharge was warranted on medical grounds.

The reviewing court found that the reasons advanced for the action under review were not supported by the facts or the law, in other words, that the decision had been taken based on incorrect facts.

Spoelstra J held that section 24*(d)* of the interim Constitution had widened the reach of judicial review. He said the following regarding the content of this paragraph at 425E–G:

> The word "justifiable" as used in section 24*(d)* of the Constitution will receive proper judicial consideration in the years to come. Its meaning will become clearer as it comes more definite/precise/better defined by such careful de-

> liberation. According to the *New Shorter Oxford English Dictionary* "justifiable" means "capable of being justified or shown to be just".

The Afrikaans text uses the word "regverdigbaar". These words denote something that can be defended. As I understand it, the section requires that the reasons advanced for the administrative action must show that the action is adequately just or right. In other words, it must be clear from the reasons that the action is based on accurate findings of fact and a correct application of the law. In this regard the difference between a review and an appeal may have been largely eroded. If a review under this section is to succeed, a court of review must be satisfied that the reasons given for the action under review are not supported by the facts or the law or both.

The court found that the assumption of the director-general that none of the medical experts had taken the trouble to enquire into the nature and extent of the applicant's duties was groundless and unjustified. The director-general had consequently failed to apply her mind properly to the issue, and she had not reached her conclusion on facts that were relevant to the matter before her (at 426A–B).

Incidentally, take note of the use of the words "had failed properly to apply her mind to the issue". It is somewhat ironic that, having explained the content of section 24*(d)* of the interim Constitution, the judge reverted to pre-1994 language and in essence applied the gross or symptomatic unreasonableness standard (when he concluded that the director-general had not applied her mind).

The justifiability of administrative action also came before the court in *Roman v Williams* 1997 9 BCLR 1267 (C); 1998 1 SA 270 (C). The applicant, a former prisoner, was placed under correctional supervision. He sought review of the decision of the commissioner of prisons to re-imprison him for non-compliance with the conditions of correctional supervision. The commissioner of prisons answered that he had exercised his discretion to send the applicant back to prison granted to him by the Correctional Services Act 8 of 1959 in a *bona fide* manner and with due consideration of the facts (the common-law grounds for review, i.e. symptomatic and gross unreasonableness).

Van Deventer J (at 1278) held the following:

> A decision of the Commissioner of Prisons to re-imprison a probationer … is reviewable administrative action … and such a decision must be justifiable, in relation to the reasons given for it. Justifiability as specified is to be objectively tested. The scope of this constitutional test is clearly much wider than that of the common law test and it overrides the common law review grounds as set out in *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd.* Administrative action, in order to prove justifiable in relation to the reasons given for it, must be objectively tested against the three requirements of suitability, necessity and proportionality which requirements involve a test of reasonableness. Gross unreasonableness is no longer a requirement for review. The constitutional test embodies the requirement of proportionality between the means and the end. The role of the courts in judicial reviews is no longer confined to the way in which an administrative decision was reached but extends to its substance and merits as well.

Thus, the test of justifiability is objective. Its essence is that the decision must be capable of objective substantiation. Administrative action must meet the requirements of "suitability, necessity and proportionality", in order to qualify as justifiable

in relation to the reasons given. This requires the purpose of the decision-maker being determined in order to assess suitability and necessity.

8.3.3 Proportionality

The judge's reference to the three requirements of suitability, necessity and proportionality relates to the question whether reasonableness (or justifiability) includes adherence to proportionality as well. Proportionality relates to the means or method used to achieve the purpose; whether the means are proportional to the purpose. In short, is there an even balance between the means used and the ends envisaged? Proportionality requires that in achieving a statutory purpose, the harm to the individual should not be disproportionate to that which the community gains.

It is also worth knowing that the "suitability, necessity and proportionality" referred to by the judge are the three elements of the principle of proportionality known as *Verhältnismäßigkeit* in German law. Administrative action will "pass" the proportionality test in German law when the following elements are considered and found present:

(1) the suitability of the administrative measure
(2) the necessity of the measure
(3) a weighing up of the advantages and disadvantages when considering the end (purpose or objective) to be attained (narrow proportionality)

(1) Suitability

In accordance with this requirement, when exercising his or her powers, the administrator must choose only those means (from the variety of means available) that are most appropriate for achieving the desired end. This element is more or less the same as rationality. In other words, there must be a rational connection between the end and the means.

(2) Necessity

Necessity means that the administrator must take only such steps as are necessary if any prejudice to an individual is involved. In other words, the administrator must choose the action that causes least harm to those who will be affected by the measure.

(3) Weighing up the advantages and disadvantages

This is a very important requirement in that it requires weighing up the advantages and disadvantages, and considering the injury to the general public or the individual. The method or means must not be out of proportion to the advantages – the ends to the community. In short, proportionality requires the achievement of an even balance.

ACTIVITY 8.3

Return to the story of Theodor Refugee (scenario 2). Do you think the decision of the refugee status determination officer would be justifiable (reasonable) if he were to refuse the application for asylum as unfounded because there are too many refugees in South Africa?

Look at what we have said about balance and the justifiability of the process used to reach this decision.

8.4 THE COMMON LAW AND REASONABLENESS

8.4.1 Introductory remarks

There has always been uncertainty about the requirement of reasonableness of administrative action. Or, more accurately, the courts have been hesitant to pronounce on the reasonableness or unreasonableness of administrative action through their powers of review (we will discuss these powers of review in learning units 11 and 12). We find the reason for this uncertainty in the tension between two positions. On the one hand, we see the impact of separation of powers – it is not the function of the courts to substitute its decisions (the exercise of its discretionary powers) for those of the public administration.

Administrative action is usually directly related to the exercise of a discretionary power by the administrator. In instances where an administrator has a discretionary power – where he or she exercises a choice between two options – we should ask whether the exercise of this discretion was reasonable or not. It has been argued that this reasonableness relates to the merits or substance of the decision, an area in which the courts should not intervene. When reviewing administrative action on the basis of unreasonableness, so the argument goes, the courts are required to act as super-administrative organs, and to substitute their opinions for those of the administration. In other words, to review administrative action on the ground of unreasonableness would be as good as interference with the decisions of the administration, an action which is in conflict with the separation of powers.

On the other hand, however, the courts must ensure that the decisions of the administration are in line with the requirements of basic fairness (we will examine the requirement of – and right to – procedural fairness in the next learning unit) and rationality. This process of review is one of the mechanisms ensuring that the right to just administrative action as provided for in section 33 of the Constitution is realised.

The task of a reviewing court (reviewing unreasonableness) is not to determine or question administrative policy or to determine whether a decision is *correct* or not, or even to agree with the decision, but to apply legal norms to ensure that the procedure followed by the administrator was formally correct. In other words, it is always the task of a reviewing court to determine whether the discretion has been exercised properly within the confines of the law.

We can illustrate what we mean by "properly" with the following simple example (although it is not an administrative-law example, it is an example from daily life). Suppose there are two routes to your destination – the one is a direct route, the other is a scenic one. Whichever route you decide to take, either decision is reasonable; there is no question of "right" or "wrong" as long as the rationale or reason for your decision is sound.

8.4.2 Some earlier decisions on reasonableness

The courts are reluctant to question unreasonableness as such because they hold that reasonableness in itself is not a separate, distinct and independent requirement for valid administrative action. Therefore, they rely on what is called the principle of "symptomatic unreasonableness". The courts thus argue that any unreasonable administrative action is merely an indication (symptomatic/a symptom) that some other requirements for valid administrative action have not been met. In other words, unreasonableness is not in itself a reviewable defect, but is relevant only in so far as it points to some other defect in the decision or administrative action.

Closely linked to symptomatic unreasonableness is the idea of "gross unreasonableness". It has been held that judicial intervention is permitted only when the degree of unreasonableness is so "gross" or glaring that something else could be inferred from it. In other words, the unreasonableness must be so "gross" that it is incomprehensible except on grounds such as bad faith *(mala fides)* or ulterior motive or that it points to a failure on the part of the administrator to apply his or her mind duly and properly to the matter before him or her.

In the leading decision to illustrate this view, *Union Government (Minister of Mines and Industries) v Union Steel Corporation* (SA) Ltd 1928 AD 220, the court held (236–237):

> There is no authority that I know of, and none has been cited for the proposition that a court of law will interfere with the exercise of a discretion on the mere ground of its unreasonableness. It is true the word is often used in the cases on the subject, but nowhere has it been held that unreasonableness is sufficient ground for interference: emphasis is always laid upon the necessity of the unreasonableness being so gross that something else can be inferred from it, either that it is "inexplicable except on the assumption of *mala fides* or ulterior motive," … or that it amounts to proof that the person on whom the discretion is conferred, has not applied his mind to the matter.

In *National Transport Commission v Chetty's Motor Transport* 1972 3 SA 726 (A), Holmes JA held that the court would intervene only in cases where the administrative decision is so grossly unreasonable as to warrant the inference that the authority had failed to apply its mind to the matter.

The effect of this narrow approach to unreasonableness is that it is not the unreasonable result or effect of administrative action on the individual that is considered, but the unreasonable disposition or mindset (i.e. the subjective approach) of the administrator. In other words, the test is not objective – aimed at testing the consequences or effect of the administrative action, but subjective – it examines the mental condition, psychological attitude and morality of the administrator.

ACTIVITY 8.4

Suppose Ms Petunia is pregnant. She applies for the post of deputy director at the Department of Trade and Industry. However, her application is turned down because of her pregnancy. The department argues that she will neglect her duties once the baby is born.

Do you think this is a reasonable decision? Substantiate your answer.

This is a self-evaluation activity. Use the preceding comments for guidance when you tackle this activity.

8.5 CONCLUSION

We have seen that reasonableness is now a requirement for any just administrative action. However, it remains problematic and uncertain exactly how this requirement will be applied in practice – the guidance provided by the O'Regan J in *Bato Star* notwithstanding – in the light of different opinions of what is reasonable in a particular case.

In the next learning unit we will examine the right to procedurally fair administrative action as provided for in section 33(1) of the Constitution and elaborated upon in PAJA.

LEARNING UNIT 9

The right to procedurally fair administrative action

Working your way through this learning unit, should enable you to

- *understand (and explain), by way of introduction to this learning unit, what is intended with the recognition of the right to procedurally fair administrative action*
- *explain the origin of the right to procedurally fair administrative action in the common-law rules of natural justice*
- *identify and describe the content of these rules*
- *apply the rules of natural justice in a given factual situation*
- *describe the constitutional right to procedurally fair administrative action*
- *describe the doctrine of legitimate expectation, its development at common law and recognition in PAJA*
- *describe the application of the right in PAJA and distinguish between the provisions in sections 3 and 4, respectively*
- *identify whether the right is applicable in a given factual situation*
- *write an essay setting out the contents of section 3 of PAJA*
- *determine at what stage of the decision-making process the right should be applied*

The outline of this learning unit is as follows:

9.1 Introduction: the purpose of the right to procedurally fair administrative action

9.2 PAJA and the right to procedurally fair administrative action

- 9.2.1 Introduction
- 9.2.2 Section 3 of PAJA and the application of procedural fairness
- 9.2.3 Section 4 of PAJA and the application of procedural fairness (decisions affecting the public)

9.3 Legitimate expectation: its development at common law and its recognition in section 3(1) of PAJA

- 9.3.1 Introductory remarks
- 9.3.2 Legitimate expectation and its development at common law
- 9.3.3 Decisions dealing with legitimate expectation after 1994
- 9.3.4 Current application

9.4 The constitutional right to procedurally fair administrative action: Some general observations

- 9.4.1 Introductory remarks
- 9.4.2 The content of the right to procedurally fair administrative action
- 9.4.3 The courts' interpretation of the constitutional right to procedural fairness before PAJA

9.5 The origin of the right to procedurally fair administrative action

9.6 The common-law rules of natural justice

9.6.1 The *audi alteram partem* rule ("to hear the other side")
9.6.2 The *nemo iudex in sua causa* rule ("no one should be judge in his or her own case" – the rule against bias or prejudice)

9.7 At what stage of the decision-making process should procedural fairness be applied?
9.8 Conclusion

9.1 INTRODUCTION: THE PURPOSE OF THE RIGHT TO PROCEDURALLY FAIR ADMINISTRATIVE ACTION

The right to procedural fairness is to be characterised as a right of participation, as Klaaren and Penfold characterise it. They explain: "This right entitles persons to participate in the decision-making process in relation to administrative decisions that affect them" (2008:63–80). To illustrate what they have in mind, return to the scenario of Sello (scenario 11) and his food stall and take note of the absence of participation in the process to cancel his licence. For it to have been procedurally fair, Sello needed to have had some say in the cancellation of his licence.

Secondly, it is important to remember that the right relates to procedural fairness only. This means that the right is not concerned with the rightness or correctness of the decision in the substantive sense. In other words, procedural fairness does not relate to the *merits* of the administrative action (whether the decision was right or wrong), but relates to the duty of the administrator to act towards a person in a procedurally fair manner. "Fair procedure" thus refers to the question whether the administrator has acted in a fair manner in reaching a decision.

Moreover, procedural fairness "improves the quality of decision-making" as Klaaren and Penfold (2008:63–81) explain. The better informed the decision-making, the less the potential for resentment and anger on the part of the individual against whom a particular decision has gone. This particular rationale links to what we said before about the reasonableness of administrative action in a situation when a person may say that he or she "can go along" with a particular decision, without being particularly "happy" about it. (We will touch on this particular aspect once again when we discuss the importance of the provision of adequate reasons in the next learning unit.)

ACTIVITY 9.1

Reread scenario 11 (the story of Sello's food stall). Write down what you think was not fair procedure.

You will have noticed that it seems that the procedures followed were not in accordance with any rules and therefore not exactly fair. In your opinion, was it fair to Sello simply to cancel his licence?

Have you considered the events at the hearing? He was not allowed to put his case or to cross-examine any witnesses. In short, he was not allowed to participate in the proceedings. He was not given a chance to obtain the help of a lawyer.

And, what is more, the chairperson who prevented him from cross-examining the witnesses was, on the face of it, involved in the matter, as she was the owner and manager of the community centre. In other words, have you considered the possibility of bias (partiality) on the part of the chairperson?

Do you think not giving any reasons for the cancellation was fair?

9.2 PAJA AND THE RIGHT TO PROCEDURALLY FAIR ADMINISTRATIVE ACTION

9.2.1 Introduction

When will any administrative procedure be fair? For an answer we need to turn to PAJA itself and the requirements it sets for procedural fairness. We need to distinguish between the provisions of sections 3 and 4, respectively. Section 3 deals with "procedurally fair administrative action affecting *any person*" [our emphasis]. Section 3(1) reads as follows:

> Administrative action which materially and adversely affects the rights or *legitimate expectations* [our emphasis] of any person must be procedurally fair.

This section thus applies to the individual administrative-law relationship (see learning unit 4 where the individual administrative-law relationship is discussed and carefully study it again).

Section 4, however, takes care of administrative action affecting the public. This section therefore applies to the general administrative-law relationship and provides for situations where administrative action affects the rights of the public.

9.2.2 Section 3 of PAJA and the application of procedural fairness

It is essential that you study the following sections in PAJA – you should be able to explain procedural fairness for roughly 15 marks, referring to section 3 in all its facets.

(1) Section 3(2)(a)

PAJA specifically states that a fair administrative procedure depends on the circumstances of each case (s 3(2)(a)). Academics agree, and so do the courts, that section 3(2)(a) reflects the reality that the content of procedural fairness varies depending on the contexts in which it is applied. Cora Hoexter (2012:364) refers in this regard to the "highly variable content" of fairness.

Chairman, Board on Tariffs and Trade v Brenco Inc 2001 4 SA 511 (SCA), for example, is a case dealing with an investigation conducted by the first appellant (BTT) into alleged dumping by the respondents upon receiving a complaint from another company. Acting upon the investigation and subsequent recommendation by the BTT, and in terms of the Board on Tariffs and Trade Act 107 of 1986, the Minister of Trade and Industry (the second appellant) and the Minister of Finance (the third appellant) imposed antidumping duties on the respondents. The respondents chal-

lenged the decisions of the three appellants to impose the duties. They argued that those decisions were taken in a procedurally unfair manner.

In his judgment, Zulman JA held as point of departure that the requirements of *audi* are "contextual and relative" (at para 19).

In *Masetlha v President of the Republic of South Africa* 2008 1 BCLR 1 (CC); 2008 1 SA 566 (CC), Ngcobo J noted that "[t]he very essence of the requirement to act fairly is its flexibility and practicability" (at para 190). This case dealt with the former head of the National Intelligence Agency (NIA), Mr Billy Masetlha, contesting his dismissal.

(2) Section 3(2)(b): The peremptory/mandatory or minimum/core requirements for procedural fairness

This subsection reads:

> In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)
>
> (i) adequate notice of the nature and purpose of the proposed administrative action;
> (ii) a reasonable opportunity to make representations;
> (iii) a clear statement of the administrative action;
> (iv) adequate notice of any right of review or internal appeal, where applicable; and
> (v) adequate notice of the right to request reasons in terms of section 5

Please note:

The subparagraphs were re-numbered by section 46 of the Judicial Matters Amendment Act 42 of 2001.

When one reads subsection (2)(b), it appears at first as if this subsection is a codification of the common-law principles of natural justice in that, in order to give effect to the right to procedurally fair administrative action, the administrator *must* (this is a mandatory provision) give the affected person referred to in subsection (1)

(a) adequate notice of the nature and purpose of the proposed administrative action
(b) reasonable opportunity to make representations
(c) a clear statement of the administrative action
(d) adequate notice of any right of review or internal appeal
(e) adequate notice of the right to request reasons in terms of section 5 (see learning unit 10 for a discussion of this requirement)

Bear in mind as well the decision in *Van Huyssteen NO v Minister of Environmental Affairs and Tourism*, that the right to procedurally fair administrative action must be given a generous interpretation. The purpose of this generous interpretation is to include any situations not covered by the Act.

Nevertheless, it is important to remember that the aim of the mandatory elements is to provide the affected person with adequate notice and a reasonable opportunity to make representations ***before*** a decision is taken. Note further that the use of the words "adequate" and "reasonable" leave the administrator with some flexibility to decide on the precise content (Klaaren & Penfold 2008:63–96) of the notice and

the opportunity given to make representations. At the very least, though, affected persons must be provided with sufficient information in order for them to "know the case they have to meet and so that their opportunity to make representations is a meaningful one" (Klaaren & Penfold 2008:63–96).

See, for example, *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism* 2005 3 SA 156 (C), which is reproduced in the guide as Annexure B. The case deals with the intended construction of a pebble bed modular reactor ("PBMR") at Koeberg in Cape Town and the applicants' challenge of the decision to authorise the construction. The court per Griesel J held (at para 53) that:

> What is required in order to give effect to the right to a fair hearing is that the interested party must be placed in a position to present and controvert evidence in a meaningful way. In order to do so, the aggrieved party should know the 'gist' or substance of the case that it has to meet.

The third requirement, that "a clear statement of the administrative action" must be given to the affected person, relates in all probability to administrative action that has already been taken, in other words, "after a course of action has been decided on" (De Ville 2005:255). The affected person should "at least be able to tell from the statement what has been decided, when, by whom, and on what legal and factual basis" (Hoexter 2012:376).

The fourth and fifth mandatory elements, namely that of adequate notice of any right of review or internal appeal and adequate notice of the right to request reasons in terms of section 5, are discussed in greater detail in learning units 11, 12 (as regards adequate notice of any right of review or internal appeal) and in learning unit 10 (as regards the provision of adequate notice of the right to request reasons in terms of section 5).

(3) Section 3(3): The discretionary requirements for procedural fairness

Subsection (3) of section 3 reads as follows:

> In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person referred to in subsection (1) an opportunity to –
>
> (a) obtain assistance and, in serious or complex cases, legal representation;
> (b) present and dispute information and arguments; and
> (c) appear in person.

It is important that we take particular note of the fact that the administrator has a discretionary power under subsection (3) regarding certain issues pertaining to fair procedure. An administrator ***may*** give a person whose rights or legitimate expectations have been materially and adversely affected, an opportunity to

(a) Obtain assistance and legal representation in serious or complex cases

Leaving the administrator with a discretionary power either to allow legal representation or not is in line with the common law. At common law it is generally accepted that no general right to legal representation exists (see above). However, it is also accepted that such assistance is essential where the matter involves complex legal

issues. In short, whether assistance or legal representation is required will depend on the circumstances of each case and the consideration of all the relevant facts.

(b) Present and dispute information and arguments

This discretionary requirement for procedural fairness (to present and dispute information and arguments) is closely and logically linked to the mandatory requirement that an affected person must be granted the reasonable opportunity to make representations.

We find the common-law equivalent of presenting and disputing information and arguments in the requirement to lead or present evidence and to challenge evidence against the case (i.e. to cross-examine). Baxter (1984:553) calls this opportunity to present evidence, and to contradict or challenge evidence which is brought against the affected person, "the essence of a fair hearing". Note further that the discretionary requirement of an opportunity to present and dispute information and arguments also shows a close relationship to the ability to reply to or counter a particular allegation on the part of the administrator.

(c) Personal appearance

At common law, personal appearance was not a requirement, unless the empowering statute made express provision for this. The reason for this is a practical one: written hearings (hearings on paper) are theoretically, at least, quicker and may be dealt with immediately.

In *Cekeshe v Premier, Eastern Cape* 1998 4 SA 935 (Ck) and *Bam-Mugwanya v Minister of Finance and Provincial Expenditure* 2002 3 BCLR 312 (Ck); 2002 4 SA 120 (Ck), the court held that a fair hearing does not necessarily require that an affected person should have an opportunity to appear personally at an oral hearing (at 962 and paras 24 and 26, respectively).

Please note, however:

Bear in mind that administrative convenience is not the underlying philosophical basis for the requirement of personal appearance. The purpose is to achieve procedural fairness. We need to remind you of the position of the disadvantaged person in this regard. When a person is poorly educated and even illiterate, will it be to his or her advantage to appear personally to present his or her case?

(4) Section 3(4): Departures from the requirements of fair procedure set out in section 3(2)

PAJA also allows for departures from the requirements of procedural fairness. Section 3(4)(a) reads as follows:

> If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).

This subsection represents **a limitation of the right to fair procedure.**

Section 3(4)(b) sets out the factors to be considered to determine whether a departure is reasonable and justifiable. They include

(i) the objects of the empowering provision;
(ii) the nature and purpose of and the need to take administrative action;
(iii) the likely effect of the administrative action;
(iv) the urgency of taking the administrative action or the urgency of the matter; and
(v) the need to promote an efficient administration and good governance.

These requirements for lawful limitation of the right to fair procedure set out in sections 3(4)*(a)* and *(b)* represent an approximate rewording of the requirements set out in section 36 of the Constitution (the limitation clause). However, one may argue that the paraphrase of section 36 notwithstanding, the limitation must also be in accord with section 36. In other words, any limitation of the right to fair procedure must not only comply with section 3(4)*(a)*, but also comply with section 36 of the Constitution. Thus, any limitation on the right to fair procedure must comply with the following:

(a) The right in question must be limited by law of general application
(b) The limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.
(c) Certain relevant factors must be taken into account, namely the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means of achieving the purpose.

(5) Section 3(5): Fair but different procedure

Section 3(5) permits an administrator to follow a different procedure, subject to certain requirements. These requirements are that the (different) procedure must be fair, and that there is an empowering provision that authorises the administrator to follow a different procedure.

It is important to note that it will be a matter of statutory interpretation (and with due consideration of the right to procedural fairness provided for in s 33(1) of the Constitution) whether a particular procedure provided for in an empowering provision is fair or not.

ACTIVITY 9.2

Mr S Ordid is a journalism student at the Free-for-all University. He writes an article which is carried by the university's newspaper, *Truth*. The article alleges that drug use and prostitution are rife, not only in the university's school of journalism, but all over the campus as well. Matters are made worse by the fact that the university authorities openly accept the situation and do nothing about it. Mr Ordid is notified by letter signed by a director of the National Department of Education that he has been summarily expelled from the university.

Do you think Mr Ordid's summary expulsion from the university is procedurally fair taking into consideration the provisions of PAJA?

This is a standard question to test knowledge about the content of section 3 of PAJA. For a proper answer, you need to do the following: describe the applicable law with respect to this issue. In other words, you need to INFORM Mr Ordid about the content of the legal provisions dealing with procedural fairness. It will not do him (or anybody else for that matter) any good merely to say or write: "Yes, the summary expulsion is or was procedurally unfair" and leave it at that. You need to EXPLAIN to him why the expulsion was unfair. Should you be of a different view, you need to explain that view to him. Secondly, you need to apply the law to the facts presented, and finally, based on your explanation, reach a definite conclusion.

9.2.3 Section 4 of PAJA and the application of procedural fairness (decisions affecting the public)

Section 4(1) reads as follows:

> In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether –
>
> (a) to hold a public enquiry in terms of subsection (2);
> (b) to follow a notice and comment procedure in terms of subsection (3)
> (c) to follow the procedures in both subsections (2) and (3);
> (d) where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure; or
> (e) to follow another appropriate procedure which gives effect to section 3.

Section 4 commenced only on 31st July 2002. This section applies to the general administrative-law relationship (turn to learning unit 4 for a discussion of this) and provides for situations where the rights of the ***public*** are affected by administrative action.

The purpose of this section is to remedy the past position – when the general public had little or no input prior to the promulgation of delegated (previously known as subordinate) legislation, or before administrative decisions of general application were taken (i.e. decisions affecting the public in general and not only one person) – and to provide the general public with a right to be heard on issues of public concern, through a public hearing or notice and comment procedure. Klaaren and Penfold welcome the public input when administrative rule-making (i.e. delegated legislation) is involved. They explain (2008:63–99) as follows:

> Given that the administrative rule-making process is frequently employed by modern legislatures that devolve their law-making powers to administrative functionaries, a legal regime that enhances access to this process is a necessary complement to the constitutional commitment to participatory democracy.

When we are confronted with the question "who constitutes 'the public'?", we only need to turn to PAJA. Section 1 ("definitions") defines "public" for the purposes of section 4 to "include any group or class of the public". We nonetheless need to refer back to the general administrative-law relationship to determine exactly who the public is. When administrative action adversely affects people generally, impersonally and non-specifically, then one can safely assume that section 4 will apply.

Section 4 will thus find application when the administrative action has

(i) a general impact
(ii) the impact has a significant public effect
(iii) constitutional, statutory, or common-law rights of members of the public are at issue

An example of administrative action that may have an impact on the public is found in the Marine Living Resources Act 18 of 1998 (the Act which was at issue in the *Bato Star* decision), which provides for the allocation of fishing quotas. The grant or refusal of such quotas has a general impact on the fishing industry (a group or class of the public) as such.

In these instances – where the rights of the public are involved – an administrator must, in order to give effect to the right to procedurally fair administrative action, decide whether

(a) to hold a public enquiry (ss (1)(a))
(b) to follow a notice and comment procedure (ss (1)(b))
(c) to adopt a combination of the two (ss (1)(c))
(d) where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure (ss (1)(d))
(e) to adopt another appropriate procedure which gives effect to section 4 (ss (1)(e))

- **Section 4(2): The holding and procedure for a public enquiry**

If the administrator decides to hold a public enquiry, he or she must comply with certain requirements (s 4(2)). The administrator must conduct the public enquiry himself or herself or appoint a suitably qualified person, or panel of persons, to do so. The administrator must determine the procedure (which must include a public hearing and compliance with prescribed procedures). The public enquiry must then be conducted in accordance with that procedure. A written report must be compiled, and reasons given for any administrative action taken or recommended.

A notice containing a concise summary of the report and particulars of the places and times at which the report may be inspected and copied must be published in English and one of the other official languages in the *Gazette* or relevant provincial *Gazette* as soon as possible. Further, the administrator must convey the information contained in the notice and report to the public effectively.

- **Section 4(3): A notice and comment procedure**

A notice and comment procedure is less formal procedurally. It is usually followed when the procedures will not have an onerous impact on the general public.

If an administrator decides to follow a notice and comment procedure, he or she must

(1) take appropriate steps to communicate the administrative action to those likely to be materially and adversely affected by it and call for comments from them
(2) consider any comments received
(3) decide whether or not to take the administrative action, with or without changes
(4) comply with the prescribed procedures relating to notice and comment procedures

- **Section 4(4): Allowing for a departure from the requirement of fair administrative procedure affecting the general public where it is reasonable and justifiable to do so**

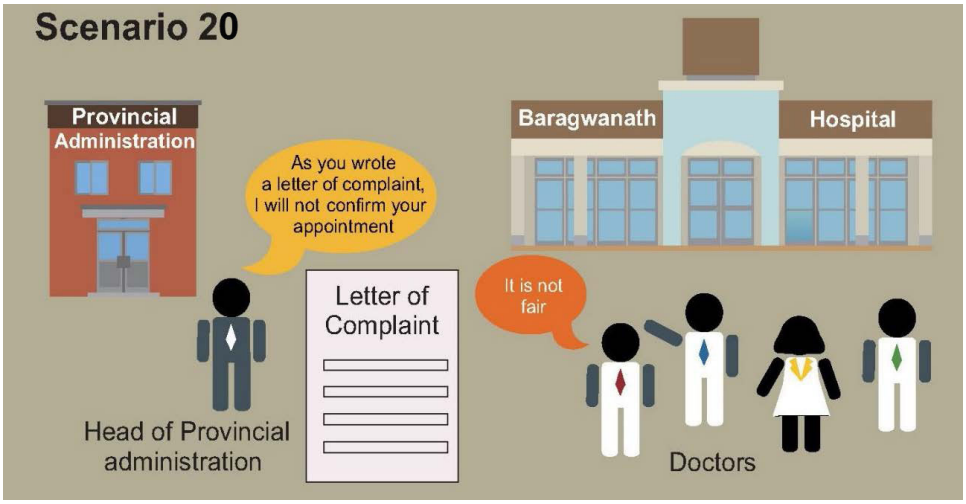
This subsection also represents a limitation on the right to fair procedure. The same considerations set out in section 3(4) apply here as well – the administrator must take all relevant factors into account, including the objectives of the empowering provision; the nature and purpose of, and the need to take, the administrative action; the likely effect of the administrative action; the urgency of taking the administrative action or the urgency of the matter; and the need to promote an efficient administration and good governance (ss 4*(a)* and *(b)*).

The inclusion of section 4 will go a long way towards ensuring open and transparent government by state departments, municipalities and those public functionaries who are required to inform the public of proposed administrative action. Our history has shown that the executive has generally not afforded the public a right to be heard before adopting subordinate legislation. The argument has generally been that the interests of many members of the public are affected by delegated legislation, and efficiency in public administration therefore rules out giving a hearing to all those members of the public who are affected.

9.3 LEGITIMATE EXPECTATION, ITS DEVELOPMENT AT COMMON LAW AND ITS RECOGNITION IN SECTION 3(1) OF PAJA

Scenario 20

In accordance with a practice that has existed for decades, the heads of department of the medical faculty of a certain university select the students on merit and recommend their appointment as senior house officers to the particular provincial authority. The provincial authority (the director of hospital services), in turn, approves and confirms the appointments as a matter of course.



A group of "properly qualified, committed and highly competent doctors" sign a letter drawing attention to the unacceptable conditions in the medical wards at Baragwanath Hospital (now the Baragwanath/ Chris Hani Hospital). Afterwards, the provincial authority refuses to confirm their appointments as senior house officers because they have signed the letter in question. At no time had they (the doctors) been heard on the matter of the refusal to confirm their appointments. In other words, they were not allowed to state their side of the story.

They had no right to be appointed to the posts they had applied for, since the provincial authority was only under the statutory duty to consider their applications without favour or prejudice and in the light of the criteria laid down, namely their qualifications, level of training, relative merit, efficiency and suitability. The provincial authority's refusal to appoint them indeed did not affect an existing right.

ACTIVITY 9.3

Was the refusal by the provincial authority fair to the doctors? What do you think? (Forget for the moment about the letter they signed and think in terms of the punitive nature of the refusal.)

Concentrate on the procedure and especially on the practice of decades to confirm the appointments made by the heads of departments. Concentrate too on the absence of a hearing on the refusal of the confirmation of the appointments.

The scenario's facts (those of Administrator, Transvaal v Traub *1989 4 SA 731 (A)) lead us to examine what the rule of legitimate expectation is all about. Legitimate expectation comes into the picture when a decision is taken and it will only be fair towards the affected person that he or she is given the opportunity to be heard. The problem is that he or she has no existing right on which to depend. For example, in our scenario the doctors had no right to be appointed or to have their appointments confirmed.*

9.3.1 Introductory remarks

By way of introduction it must be noted that the recognition of legitimate expectations is in line with our case law. After 1994, for example, the court held in *Jenkins v Government of the Republic of South Africa* 1996 3 SA 1083 (Tk) that the doctrine of legitimate expectation had become part of our common law, even though no reference is made to it in section 33 of the 1996 Constitution.

Earlier, the courts insisted that before an individual could raise the rules of natural justice, he or she had to show the presence of an existing right. For example, in *Laubscher v Native Commissioner, Piet Retief* 1958 1 SA 546 (A), the application for a permit to enter a restricted area was denied. It was decided that the applicant had no vested right and he was therefore not allowed to put his case. Schreiner JA held that the rules of natural justice did not find application since Laubscher did not have a pre-existing right to enter the area.

It is obvious that this insistence on existing rights produced unfair results.

9.3.2 Legitimate expectation and its development at common law

The doctrine of legitimate expectation was developed by British courts in a process "of imposing upon administrative decision-makers a general duty to act fairly" (Riggs at 395 as referred to by Corbett CJ in *Traub* at 755).

The application of the principle means that the application of the rules of natural justice is extended to cases where the affected party has no vested right, but he or she does have a potential right or legitimate expectation. In other words, the rules of fair procedure are extended to those cases where no vested right exists, but only a legitimate expectation of a benefit that may be granted or a benefit that will not be withdrawn before a hearing has occurred.

The first South African case in which the doctrine of legitimate expectation was raised was *Everett v Minister of the Interior* 1981 2 SA 453 (C). The court found that a person who has acquired a temporary residence permit cannot expect to remain in the country for longer than the stipulated period. However, if he is granted entry and residence for a specific period, and he is instructed to leave before the expiry of that period, he or she has "acquired a right consisting of a legitimate expectation of being allowed to stay for a permitted time".

In *Administrator, Transvaal v Traub* (the case of our scenario), the appeal court gave full recognition to the doctrine of legitimate expectation. The issue before the court was whether the rules of natural justice (or the *audi* principle, as the court called it), are "confined to cases where the decision affects the liberty, property or existing rights of the individual concerned, or whether the impact is wider than this" (at 748).

Corbett CJ found that the doctors had legitimate expectations (since their applications for the posts of senior house officers had been recommended by the departmental heads) that the appointment by the provincial authority would follow as a matter of course, upon the recommendations of the heads of department. If the authority intended some change, it (the provincial authority) should have given a fair hearing to each of the respondents before it (the authority) took its decision (at 762).

The Chief Justice (at 756H-I), quoting Lord Fraser in the English decision of *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 (HL) at 943j–944, held that such a legitimate expectation could arise at least

- either from an express promise given by the authoritative body (the public authority); or
- from a regular practice which the claimant of a legitimate expectation reasonably expects to continue.

You must remember that a legitimate expectation gives you a right to a hearing, but NOT necessarily to succeed in the application (to get what you want). For example, in Laurie Fraser's case (see discussion at 9.4.3 below), legitimate expectation gave him a right to be heard, but NOT necessarily to veto the adoption of the child. Legitimate expectation doesn't mean you will win your case.

9.3.3 Decisions dealing with legitimate expectation after 1994

The concept of legitimate expectation has been at issue in a number of cases since 1994. A reference to the following two will suffice:

- In *Claude Neon v City Council of Germiston* 1995 5 BCLR 554 (W), the facts were the same as in scenario 4 of the guide. The court found that the applicant had a legitimate expectation that he would be notified when the tender documents were ready. The council's conduct thus amounted to a failure of administrative justice within the meaning of section 24 of the interim Constitution. This failure justified the setting aside of the contract which had been awarded to a third party and the court ordered the local authority to call for fresh tenders.
- In *Jenkins v Government of the Republic of South Africa* 1996 3 SA 1083 (TK), the conditions of service of the applicant, a public servant, allowed her to use an official vehicle and free housing. After she had made use of the benefits for a period of 18 months, they were summarily withdrawn. The court held that in these circumstances she had a legitimate expectation that she would be given a hearing before any decision was taken to withdraw the benefits.

The court stated that the doctrine of legitimate expectation has become part of our law. This means that the doctrine will continue to exist and apply to situations in which the application of procedural fairness is in issue.

In *Drift Supersand (Pty) Ltd v Mogale City Local Municipality and Another* [2017] 4 All SA 624 (SCA), the Supreme Court of Appeal held that an owner of land in the Mogale City Local Municipality had a legitimate expectation that it would be consulted prior to the establishment of a township on land bordering one of its properties. Failure to first consult the appellant rendered the Municipality's decision procedurally unfair, because the "appellant was an interested party who had as a matter of fact objected to the application; it had a legitimate expectation to a hearing which was breached; and it was denied the opportunity of having its views considered by the relevant functionary by reason of an unfair process that was adopted" (para 43).

ACTIVITY 9.4

Ling, a foreign national, enters the Republic illegally. After his entry into the country, he hands himself over to the officials in the Department of Home Affairs. He agrees to assist the authorities with their investigation into the conduct of certain officials from whom he purchased his irregular documents. He is told that if he assists in the investigation and subsequent prosecution of the officials, his application for residence will be favourably considered. A temporary residence permit is then issued, which finally expires, and he is ordered to leave the country.

Does Ling have a legitimate expectation to stay in South Africa? In your answer, explain what a legitimate expectation is, how the principle developed and what the present situation is.

The facts of the activity are based on Tettey v Minister of Home Affairs 1999 1 BCLR 68 (D). *The court examined the legitimate expectation doctrine in the light of section 33 of the Constitution. The question before the court was whether the undertaking given by the officials in the Department of Home Affairs gave rise to a legitimate expectation or an interest in residence or continued residence in South Africa.*

The court found that legitimate expectations include expectations that go beyond enforceable legal rights, provided they have some reasonable basis (at 76). The court accepted that a person would have a legitimate expectation under the circumstances of the particular case. The court found that the applicant had established a legitimate expectation that he would be permitted to apply to regularise his residence, and that the application would be favourably considered, or at the very least, that his application would be considered.

9.3.4 Current application

Upon reading subsection (1) of section 3 of PAJA, we notice that the words "legitimate expectations" have been added. This corresponds to the wording of section 24*(b)* of the interim Constitution, which required the application of procedural fairness where individual rights or legitimate expectations were affected or threatened. However, in section 33(1) of the 1996 Constitution, we find no reference to legitimate expectations and nowhere else in PAJA do we find any reference to legitimate expectations either – apart from the reference in section 3(1). Moreover, we definitely do not encounter any definition of or reference to legitimate expectations in section 1 of PAJA. O'Regan ADCJ highlighted this contradiction in *Walele v City of Cape Town* 2008 11 BCLR 1067 (CC) and offered a solution to the problem as follows (at paras 125 and 126):

> A straight-forward reading of these two provisions [s 1 which contains the definition of "administrative action" and s 3(1) which "gives effect to the right entrenched in s 33(1)" (see para 123)] produces the enigma that administrative action is, as defined, not action which affects legitimate expectations, yet s 3(1) suggests that there is administrative action which will affect legitimate expectations and which must accordingly be procedurally fair. In this case a more general provision (the definition) is in conflict with a specific provision (s 3(1)). The specific provision is aimed at giving direct effect to the constitutional right to administrative action that is procedurally fair. The apparent contradiction between the two provisions should be resolved by giving effect to the clear language of s 3(1) which expressly states that administrative action which affects legitimate expectations must be procedurally fair. Thus, the narrow definition of 'administrative action' in s 1 must be read to be impliedly supplemented for the purposes of s 3(1) by the express language of s 3(1). If this were not to be done, the clear legislative intent to afford a remedy to those whose legitimate expectations that are materially and adversely affected would be thwarted.

Not all authors agree with this solution. Moreover, a number of academics offer different solutions to the contradiction highlighted by O'Regan ADCJ. We will not examine these arguments or offer any further comments on the contradiction. Suffice it to say that section 3(1) recognises the doctrine of legitimate expectations.

9.4 THE CONSTITUTIONAL RIGHT TO PROCEDURALLY FAIR ADMINISTRATIVE ACTION: SOME GENERAL OBSERVATIONS

9.4.1 Introductory remarks

Both the interim and 1996 Constitutions expressly guarantee the right to procedurally fair administrative action. We could therefore say that both these provisions "constitutionally entrench the rules of natural justice" so that these rules are no longer only common-law rules, but now have a constitutional basis.

Section 24*(b)* of the interim Constitution stated:

> Every person has the right to procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened.

Section 33(1) of the 1996 Constitution states:

> Everyone has the right to administrative action that is lawful, reasonable and *procedurally fair* [our emphasis] …

Before the commencement of the interim Constitution, the rules of natural justice could be excluded by statute, although our courts were generally reluctant to infer an intention to exclude them in the absence of an express provision to this effect.

Does this mean that the right to procedural fairness may never be limited? No right is absolute, and may be limited, provided the criteria laid down in section 36 of the Constitution (the limitation clause) have been met. However, given the injustices of the past, we may safely say that there will be very few instances that will justify any exclusion or limitation of this right. In other words, legislation may exempt administrative functionaries and institutions from complying with the entrenched rules of natural justice only if these exemptions comply with the limitation clause in the Bill of Rights. Incidentally, PAJA itself also provides for a limitation to the right to procedural fairness, provided certain conditions are met.

9.4.2 The content of the right to procedurally fair administrative action

It is important to note that procedural fairness should not be regarded as a codification of pre-constitutional law or be confined to the principles of natural justice. (To "codify" means that the legal rules have been recorded in a comprehensive code or "law-book" that serves as the primary source of a particular body of legal rules. In essence, such a view will negate the truth that fairness is a flexible concept depending on the circumstances of each case.

In *Van Huyssteen NO v Minister of Environmental Affairs and Tourism* 1995 9 BCLR 1191 (C); 1996 1 SA 283 (C), for example, Farlam J held with reference to section 24*(b)* of the interim Constitution (at 1214B–D)

> … even if section 24*(b)* is to be regarded as merely codifying the previous law on the point, a party entitled to procedural fairness under the paragraph is entitled in appropriate cases to more than just the application of the *audi alteram partem* and *nemo iudex in sua causa* rules. What he is entitled to is, in

> my view, … the principles and procedures … which, in [the] particular situation or set of circumstances, are right and just and fair.

Thus, the constitutional right to procedural fairness (s 24*(b)* of the interim Constitution and s 33(1) of the 1996 Constitution) is more comprehensive than the rules of natural justice and may encompass aspects of fair procedure not yet covered by the common law.

Having said all this, we must point out that in order to determine the content of the constitutionally protected right, we have to look into these common-law rules of natural justice as developed and applied by the courts to give "flesh and meaning" to the constitutional right. In other words, the content of the common-law rules gives a good indication of the content of the constitutional right, with this *proviso*: the constitutional right is not confined to the rules of common law.

9.4.3 The courts' interpretation of the constitutional right to procedural fairness before PAJA

In *Kotzé v Minister of Health* 1996 3 BCLR 417 (T) (for the facts of this case see learning unit 8), the court found that the director-general's consideration of information that did not form part of the application amounted to a denial of procedurally fair administrative action. The applicant should have been given an opportunity to deal with any other information that did not form part of his application and which was taken into account when considering it.

Denying a hearing to a person who is entitled to the benefit of a fair hearing (a fair procedure) is a fatal irregularity, irrespective of the strength of the case against such person. In other words, where a fair procedure has been prescribed, it has to be followed, regardless of its possible effect on the outcome of the decision (De Ville 2005:284). This was illustrated in *Fraser v Children's Court, Pretoria North* 1996 8 BCLR 1085 (T). The applicant was the father of a child born out of wedlock. The mother, who had decided to put the child up for adoption, said her decision was based on the applicant's initial refusal to marry her, her inability to raise the child as a single parent, and her belief that the applicant should not have access rights to the child because he exhibited traits that would render access undesirable. Adoption proceedings were initiated, and the applicant attempted to have the proposed adoption set aside. The applicant sought to have the adoption proceedings stayed and also instituted counter adoption proceedings. The commissioner finally decided the matter without hearing oral evidence and awarded the child to the adoptive parents, holding that it served the interests of the child best to leave him with the adoptive parents.

The applicant then instituted review proceedings aimed at the setting aside of the adoption order. One of the grounds for review was that the applicant, as a parent within the meaning of the Child Care Act 74 of 1983 (now repealed), was entitled to be heard on the issue of adoption. Preiss J stated (at 1100) that

> To sum up, in regard to prayer 3, namely the review of the adoption hearing, I find that the applicant sought to have his claim for adoption decided by viva voce evidence, to which I am satisfied he was entitled. The Commissioner's judgment frustrated the applicant's attempt and in the circumstances amounted to such prejudice as to constitute a gross irregularity. In short, he was not afforded a proper hearing on his claim for the adoption of his own son.

In *Janse van Rensburg NO v Minister of Trade and Industry NO* 2000 11 BCLR 1235 (CC); 2001 1 SA 29 (CC), the constitutionality of two provisions (s 7(3) and 8(5)(a) respectively), of the Consumer Affairs (Unfair Business Practices) Act 71 of 1988 was at issue. Section 7(3) authorises investigation officers appointed by the consumer affairs committee to conduct searches and seizures for the purpose of ensuring that the terms of the Act are being observed, or to obtain information relevant to an investigation launched by the committee. Section 8(5) entitles the Minister of Trade and Industry, on the recommendation of the committee, to take steps to prevent the continuation of business practices that are the subject of an investigation at a stage when the investigation has not yet been completed, and to attach and freeze assets.

The court held that section 8(5) violated the administrative justice guarantee of section 33(1). Section 8(5) was designed to protect the public by giving the minister the power to stay business practices and to attach assets or prohibit their being dealt with. These powers ensured that, during the period of investigation, the persons subject to the investigation would be prevented from continuing the allegedly unfair practices, and hiding or alienating assets in order to defeat prospective claims by members of the public. To achieve its object, the procedure had necessarily to be urgent and incisive.

However, an examination of the powers of the minister shows that they were sweeping and drastic. For example, the minister was empowered to stay a business practice and attach or freeze assets merely by giving notice of the decision to do so. Thus, the actions could be taken without prior warning to persons affected by them. What is more, the legislature did not give sufficient guidance for the exercise of these wide powers. Moreover, irreparable harm might follow upon an exercise of these powers, which harm could not be averted by an appeal to a special court.

These powers had to be weighed against the requirements for administrative justice. The application of procedural fairness had to be considered with regard to the circumstances of each case. The court per Goldstone J, held (para 24) that

> In modern states it has become more and more common to grant far-reaching powers to administrative functionaries. The safeguards provided by the rules of procedural fairness are thus all the more important, and are reflected in the Bill of Rights. Observance of the rules of procedural fairness ensures that an administrative functionary has an open-mind and a complete picture of the facts and circumstances with which the administrative action is to be taken. In that way the functionary is more likely to apply his or her mind to the matter in a fair and regular manner.

Therefore, the court held that a constitutional obligation rests on the legislature to promote, protect and fulfil the entrenched fundamental rights, which means that where a wide discretion is conferred upon a functionary, guidance should be provided as to the manner in which those powers are to be exercised. In this case, the absence of such guidance left the procedure provided for in section 8(5)(a) unfair and a violation of the administrative justice guarantee of section 33(1). The court therefore declared the provision constitutionally invalid.

9.5 THE ORIGIN OF THE RIGHT TO PROCEDURALLY FAIR ADMINISTRATIVE ACTION

To truly understand the meaning and content of the right to procedurally fair administrative action, we need to look at the origin of this right. It is found in the common-law rules of natural justice. But what are these rules?

The "rules of natural justice" is the collective term for a number of common-law provisions applicable to administrative inquiries and hearings. These provisions demand that the administrator follow certain procedural requirements, which include giving the individual an opportunity to present his or her case before the administrator takes a decision, allowing the individual to counter adverse allegations, being impartial and unbiased, and so on.

All these rules are aimed at ensuring that, in exercising public power, the administrator takes decisions in a fair manner and the individual who is subject to this power is treated fairly and justly, in other words, that the administrator applies his or her mind to the matter. We could say that the rules of natural justice represent the age-old fundamental principle that "justice must be done and must be seen to be done". This, in turn, must (and should) inspire public confidence in administrative action (see above what we said about the rationale for procedural fairness).

Baxter (1984:538) calls these rules "principles of good administration", and their enforcement also serves as a lesson for future administrative action (at 538). In his view, these rules serve the following three purposes:

(1) They facilitate accurate and informed decision-making.
(2) They ensure that decisions are made in the public interest.
(3) They preserve important procedural values.

9.6 THE COMMON-LAW RULES OF NATURAL JUSTICE

9.6.1 The *audi alteram partem* rule ("to hear the other side")

9.6.1.1 Introduction

The courts and legal writers generally accept that the common-law rules of natural justice can be condensed into two Latin sayings or maxims. These are

(a) *audi alteram partem* (literally: "to hear the other side")
(b) *nemo iudex in sua propria causa* (literally: "no one shall or should be a judge in his own cause"). In other words, it is a rule against bias (partiality or prejudice).

The *audi alteram partem* rule, as interpreted and developed by our courts, consists of the following:

(1) The individual must be given an opportunity to be heard on the matter (i.e. the opportunity to put his or her case).
(2) The individual must be informed of considerations which count against him or her.
(3) The administrator must provide reasons for any decisions taken.

9.6.1.2 The individual must be given an opportunity to be heard on the matter

The opportunity to be heard or the opportunity to put his or her case is a right that accrues to the individual who may be affected by any administrative action and the manner in which any administrative hearing or enquiry/investigation is conducted. Any individual affected by a decision must therefore be given the chance to be heard – a fair hearing – by the administrator before any decision is made.

The right to put your case is not restricted to formal administrative enquiries, but applies in any situation where rights, privileges, liberties and even "legitimate expectations" are at issue.

Note that although the distinction between different classes of administrative action is no longer relevant, the distinction is nonetheless still useful to assist us in identifying the situations when any individual should be given the opportunity to be heard with reference to his or her case. Thus, whether the administrative action in question is

(a) judicial action, such as the judgment of a judicial administrative body – for example a decision by the Refugees Appeals Board
(b) legislative action, such as the making of a ministerial regulation that affects the rights of the individual
(c) or the true administrative action, such as a disciplinary enquiry or a decision to withdraw a passport, licence or concession. The affected person must be given an opportunity to present his or her side of the story.

We find several "sub-rules" or refinements to the rule concerning the opportunity to be heard. They are:

(i) proper notice of intended action
(ii) reasonable and timely notice
(iii) personal appearance
(iv) legal representation
(v) evidence or cross-examination
(vi) a public hearing or enquiry

We note that all these rules follow the sequence of the process of decision-making logically to ensure that the individual is given a full and proper opportunity to be heard on the administrative action or the administrative matter affecting him or her.

(i) Proper notice of intended action

The individual must be given adequate notice of the forthcoming administrative action, whether this is required by statute or not. This notification must contain all the necessary details to assist the individual in his or her preparation for the hearing. For example, one is notified that the hearing of one's application for a liquor licence will be held on such and such a day.

(ii) Reasonable and timely notice

The person must be given reasonable notice to enable him or her to collect the necessary information to prepare their case. What is reasonable will depend on the circumstances of each case: the more involved the issue, the longer the time required. In *Turner v Jockey Club* 1974 3 SA 633 (A), the disciplinary action by the Jockey Club was set aside, after it was found that the jockey had suddenly been confronted with serious allegations which had not been communicated to him before the hearing.

In *Du Preez v Truth and Reconciliation Commission* 1997 4 BCLR 531 (A); 1997 3 SA 204 (A), Corbett CJ observed (at 544C/233E–F) the following:

> But what does fairness demand in the circumstances of the present case? That is the critical question. Section 30(2) [of the Promotion of National Unity and Reconciliation Act 34 of 1995, the Act through which the Truth and Reconciliation Commission was established] requires that persons detrimentally implicated should be afforded the opportunity subsequently to submit representations to or to give evidence before the Commission. But does that exhaust the requirement of fairness? The appellants say: "no; we require, in the first place, reasonable and timeous notice of the time and place when evidence affecting us detrimentally or prejudicially will be presented to the Committee." King J was of the view that fairness required such notice to be given. I agree.

In *NISEC (Edms) Bpk v Western Cape Provincial Tender Board* 1997 3 BCLR 367 (C), the court found that the right to a hearing does not include a right to complete discovery, that is disclosure of documents. It does require, however, that the aggrieved person be provided with sufficient information to inform him or her of the case against him or her, so that he or she has a meaningful opportunity to prepare to meet that case. In this case, the unsuccessful tenderer sought extensive access to the records of the tender board. The court found that the memorandum, which the board had given to the applicant, set out the basis of the case for the cancellation of the tender in reasonable detail and that this information was sufficient to enable the tenderer to prepare for the hearing.

(iii) Personal appearance

It is not essential for the person to appear personally before the administrative body, unless, of course, a statute makes personal attendance compulsory. What is important, though, is that the person be given a fair opportunity to present his or her case: either by appearing personally or by making written presentations.

(iv) Legal representation

The right to legal representation does not form part of the *audi alteram partem* rule, and can be claimed only where it has been conferred by statute. In other words, there is no general right to demand legal representation at common law. However, Wiechers (1985:211) has always believed that the nature of the hearing should be the deciding factor for legal representation: a purely factual hearing does not require legal representation, but a highly technical matter affecting the individual's status, way of life, reputation, and so on, should entitle him or her to legal representation. The crucial question is whether the affected person has been given a proper opportunity to present his or her case.

(v) Evidence and cross-examination

The right to lead evidence and to cross-examine witnesses does not form an inherent part of the rules of natural justice. In the past, the courts found that an oral hearing does not necessarily include the right to cross-examine, although each case must be decided on its merits. Hearsay and opinion evidence are usually permitted, and the hearing of irrelevant evidence is not necessarily irregular. Again, the criterion is whether, in all the circumstances, the individual has had a proper opportunity to put his or her case.

(vi) Public hearing/enquiry

There is no absolute right to a public hearing. The argument that publicity is an important method of controlling the exercise of any discretionary power is countered by the argument that, in some instances (disciplinary matters or matters dealing with the security of the state, for example), confidentiality may be essential. In these circumstances, fairness demands that the competing interests of openness and confidentiality be weighed against each other. However, when we consider the constitutional demands of openness, transparency and fairness, administrative hearings will generally have to be open to the public.

9.6.1.3 The party must be informed of considerations which count against him or her

Any consideration or fact that may count against a person affected by a decision must be communicated to him or her, to enable him or her to defend the issue. In other words, the essential facts must be given to the person to enable him or her to reply (*Loxton v Kenhardt Liquor Licensing Board* 1942 AD 275). However, in *Down v Malan* 1960 2 SA 734 (A), the court pointed out that if an interested party could reasonably have foreseen that facts prejudicial to him or her would be taken into consideration, he or she should act accordingly, and, if he or she did not, failure would be attributed to his or her own carelessness or negligence.

9.6.1.4 Reasons must be given by the administrator for any decisions taken

This rule requires that the administrator give reasons for his or her decisions. However, in practice, this rule was applied inconsistently in the past. Moreover, it was often excluded in the enabling Act. Administrative functionaries and institutions were traditionally reluctant to provide reasons for the exercise of their discretionary powers, despite the opinion of Baxter (1984:746) that "[t] he good administrator will give reasons even if there is no duty upon him to do so". The courts also, unfortunately, often adopted the approach that an administrative body exercising a discretionary power makes its own decisions and accordingly need not give reasons. However, in some instances (particularly where the statute made provision for recourse such as appeal to a higher body or tribunal), the courts drew adverse inferences, such as the presence of improper motives or even mala fides, where an administrative body refused to furnish reasons (*Sigaba v Minister of Defence and Police* 1980 3 SA 535 (TkSC)).

The refusal to provide reasons often leads to suspicion and distrust of and misgivings about the public administration on the part of the affected person, and he or she may also incur a huge financial expenditure if the matter is taken on review or appeal. In *WC Greyling & Erasmus v Johannesburg Local Transportation Board* 1982 4 SA 427 (A), the court found that "impressive evidence" had been given by the applicants; the respondents had nevertheless refused the application for a permit and had given no reason for the refusal. The court held that the respondents had acted grossly irregularly, and that the fact that the statute did not expressly require that reasons be given, did not dispel the inference that important evidence had been ignored.

ACTIVITY 9.5

Can you find any procedural irregularities that deal with *audi alteram partem* in the following scenario? Note them.

Scenario 21

Mr S Chemer is a citizen from a West African country and has acquired a temporary residence permit in South Africa. The permit is valid for one year and is renewable, but application for renewal must be made annually before the expiry of the permit period. The permit is granted and withdrawn by the Minister of Home Affairs, who has delegated this power to the Director-General of Home Affairs in terms of the relevant legislation. The first application for a residence permit by Mr Chemer was considered by the Director- General, but issued on her instruction by the regional representative of the Department in Johannesburg. Before the expiry of the period, a clerk in the office of the regional representative withdraws the permit and informs Mr Chemer that he is to be deported to his homeland within 24 hours. He refuses to provide Mr Chemer any opportunity to question the action or to give him any reasons for the action.



This is a self-evaluation activity. Use the preceding discussion to guide you.

9.6.2 The *nemo iudex in sua causa* rule ("no one should be judge in his or her own case" – the rule against bias or prejudice)

Over and above the three-legged *audi alteram partem* rule, the rules of natural justice embrace a further rule, namely *nemo iudex in sua causa* (literally: "no one may be a judge in his or her own cause"). In other words, the decision-maker must be, and must be reasonably perceived to be, impartial or unbiased. This is known as the rule against bias.

This common-law rule requires that all administrators – administrative functionaries and institutions – exercise their powers in an impartial or unbiased manner. (Although this rule may also be grouped under the requirements dealing with the capacity of the administrator, it traditionally falls under the rules of natural justice.)

The foundation of the *nemo* principle is rooted in what Cora Hoexter (2012:451) calls two "common-sense rules of good administration": the first is that a decision will more than likely be sound when the decision-maker is unbiased or impartial, and the second that the public will have more faith in the administrative process when "justice is not only done, but *seen* [her emphasis] to be done". Consequently, administrative action "must not be vitiated [to "vitiate" means to make something less effective,

or in a legal sense, to "destroy or reduce the legal validity of something"], tainted or actuated by bias" (*Yates v University of Bophuthatswana* 1994 3 SA 815 (BG) (at 831C)).

The most common examples of bias are the following:

(a) the presence of pecuniary or financial interest
(b) the presence of personal interest

(a) A pecuniary (financial) interest

In *Rose v Johannesburg Local Road Transportation Board* 1947 4 SA 272 (W), the chairman of the board responsible for the granting or refusal of transport licences (the permits) was at the same time the director of three large taxi companies.

One of these companies opposed the application for such permits. It was apparent that the company, a large taxi company in Johannesburg, would benefit from the refusal of applications. Despite this, the chairman refused to stand back and participated in the hearing.

The court found that the reasonable person would realise that the chairman was indeed biased because of his financial or pecuniary interest in the taxi company, and also because that company was one of the objectors.

(b) Personal interest

In *Liebenberg v Brakpan Liquor Licensing Board* 1944 WLD 52, the mayor of the town insisted on being present when liquor licence applications were being heard, despite the fact that one of the applicants was his brother. The licence was granted to the brother, and despite the fact that the other members submitted affidavits to the effect that they had not been influenced by the mayor's presence, the court found that his relationship had led to a suspicion of bias, and set the decision aside.

The court held the following (at 54–55):

> Every person who undertakes to administer justice, whether he is a legal official or is only for the occasion engaged in the work of deciding the rights of others, is disqualified if he has a bias which interferes with his impartiality; or if there are circumstances affecting him that might reasonably create the suspicion that he is not impartial.

The test to determine bias was formulated by the Appellate Division (now the Supreme Court of Appeal (SCA)) in *BTR Industries SA v Metal and Allied Workers Union* 1992 3 SA 673 (A) (at 693I–J) as follows:

> I conclude that in our law the existence of a reasonable suspicion of bias satisfies the test and that an apprehension of the real likelihood that the decision-maker will be biased is not a prerequisite for disqualifying bias.

In *South African Commercial Catering and Allied Workers Union (SACCAWU) v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 1999 7 BCLR 725 (CC); 2000 3 SA 705 (at paras 11–17), the Constitutional Court in dealing with the recusal of a judicial officer on grounds of bias, confirmed the correctness of the test adopted by the Supreme Court of Appeal. However, the Constitutional Court preferred to use the phrase "a reasonable apprehension of bias" rather than "a reasonable *suspicion*

of bias", due to the "inappropriate connotations which might flow from the use of the word 'suspicion' in this context".

It is therefore not required to show that there was in fact no bias or partiality in the process: the criterion is that no reasonable person would have had a perception or suspicion/apprehension of bias. In other words, the affected individual merely has to prove an appearance of bias or partiality rather than the existence of actual bias.

ACTIVITY 9.6

Members of a labour union and a large factory are involved in a bitter dispute. The dispute ends in the industrial (now labour) court. The factory obtained advice from a firm of labour lawyers. The particular firm organises a labour matters seminar and invites the presiding officer of the court to deliver a paper at the seminar.

Do you think bias is in evidence in such a situation? Support your statement.

The facts of the question are loosely based on the above-mentioned BTR Industries *decision. The court ruled that by attending the seminar, the presiding officer had manifestly associated himself with one of the parties to the trial and consequently created the impression of a leaning or inclination on his part towards one of the parties in the dispute.*

In a case where there was such a relationship of animosity between the parties, such behaviour on the part of the presiding officer was bound to create the impression that he was indeed biased.

9.7 AT WHAT STAGE OF THE DECISION-MAKING PROCESS SHOULD PROCEDURAL FAIRNESS BE APPLIED?

Before turning to the next topic, we need to know, finally, **when** the right to procedurally fair administrative action must be observed or applied. In other words, at what stage in the decision-making process must the administrator adhere to the requirement that he or she must act in a procedurally fair manner? Since the purpose of procedural fairness is to promote an objective and informed decision (see our reference to Baxter earlier in the learning unit), the observance of procedural fairness takes place in principle **BEFORE** any decision is taken.

9.8 CONCLUSION

With the discussion of the application of the right to procedural fairness in terms of the common law, we have reached the end of this learning unit dealing with the right to procedurally fair administrative action. You should now be able to answer questions on the right to procedural fairness.

In the next learning unit, we examine the right to written reasons as required by section 5 of PAJA.

LEARNING UNIT 10

The right to be given written reasons

Working your way through this learning unit, should enable you to

- *demonstrate the importance of giving reasons for administrative action*
- *describe the innovation of a right to reasons introduced by section 24(c) of the interim Constitution*
- *reflect on the question who has a right to reasons*
- *describe the provisions of PAJA regarding reasons*
- *reflect on the meaning of "adequate reasons"*

With this learning unit we conclude the discussion of the contents of the right to just administrative action as set out in section 33 of the Constitution: Part 3 of this guide.

The outline of this unit is as follows:

10.1 PAJA and the requirement of reasons

- 10.1.1 The request for reasons
- 10.1.2 The response by the administrator
- 10.1.3 Failure to provide adequate reasons in writing leads to an "adverse inference"
- 10.1.4 Departures from the requirement to furnish written reasons: Reasonable and justifiable refusal to furnish reasons
- 10.1.5 A fair but different procedure in terms of section 5(5)
- 10.1.6 Providing reasons without the need for a request in terms of section 5(1)

10.2 When will reasons be adequate?
10.3 The right to reasons in terms of section 24*(c)* of the interim Constitution and section 33(2) of the 1996 Constitution
10.4 General remarks on the importance of reasons
10.5 Who has a right to reasons?
10.6 Conclusion

10.1 PAJA AND THE REQUIREMENT OF REASONS

10.1.1 The request for reasons

Section 5 provides for the furnishing of reasons as required by section 33(2) of the Constitution. In other words, section 5 gives effect to section 33(2). Section 5(1) requires the provision of written reasons at the request of any person whose rights have been materially and adversely affected by any administrative action and who has not been given reasons for the action. Section 5(1) reads as follows:

> Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action

or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.

10.1.2 The response by the administrator

The administrator (to whom the request is made) is obliged to give that person adequate reasons in writing within 90 days of receiving the request (s 5(2)). In other words, the administrator *must* provide adequate reasons.

10.1.3 Failure to provide adequate reasons in writing leads to an "adverse inference"

Section 5(3) provides for a rebuttable presumption. In other words, in the absence of proof to the contrary in judicial review proceedings, it will be presumed that where no reasons are given, the administrative action was taken without good reason. This means that the onus will lie on the administrator to prove that the failure to provide reasons was in fact based on good reason. Note too that this presumption is also subject to subsection (4), which allows departure from the requirement of providing written reasons if "reasonable and justifiable in the circumstances".

10.1.4 Departures from the requirement to furnish written reasons: Reasonable and justifiable refusal to furnish reasons

Section 5(4) requires that any departure from the requirement that adequate reasons be furnished – a refusal to furnish reasons, in other words – must be reasonable and justifiable in the circumstances. The administrator must inform the person making the request of the departure without delay ("forthwith").

In other words, this subsection, like sections 3(4) and 4(4), represents a limitation on the right (in this case, to be furnished with written reasons). In determining whether a departure is reasonable and justifiable, an administrator must take certain relevant factors into account. These factors are set out in section 5(4)*(b)*. Note that the same observation as to the applicability of section 36 of the Constitution arises here. A limitation on the right to written reasons must therefore not only be in accord with section 5(4)*(a)* and *(b)*, but also with section 36 of the Constitution (the limitation clause).

10.1.5 A fair but different procedure in terms of section 5(5)

This subsection provides for a procedure which is fair but different to that of subsection (2), which requires that the administrator must provide adequate reasons in writing within 90 days of a request. Therefore, if a different Act provides for a different procedure regarding the provision of reasons, that different procedure may be followed, provided it is fair. It will be for a court to determine whether an alternative procedure will meet the constitutional requirement of procedural fairness.

10.1.6 Providing reasons without the need for a request in terms of section 5(1)

In order to promote an efficient administration, the minister may, at the request of the administrator, by notice in the *Gazette,* publish a list specifying any administrative action, or a group or class of administrative actions, in respect of which the administrator will automatically furnish reasons (s 5(6)*(a)*).

Please note:

PAJA also provides that a court has the power to review administrative action if the action itself is not rationally connected to the reasons given for it by the administrator (s 6(2)*(f)(*ii) *(dd)*). We will elaborate on this ground of review in learning unit 12.

Please note further:

We must remember to distinguish between the right to information provided for in section 32 of the Constitution and its accompanying Act – the Promotion of Access to Information Act 2 of 2000, and the provision of written reasons in terms of section 33(2). Cora Hoexter (2012:462) explains that the two rights – the right to written reasons provided for in section 33(2) and the right of access to information provided for in section 32 of the Constitution – have the following different "areas of focus":

> Reasons offer an explanation or a justification for action, whereas information is a far broader concept. Reasons are not reasons until they have been *formulated*, [footnote omitted] while information of any kind is already "information": it does not have to be manipulated into a special form although, in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA), it has to be recorded before it can be requested. The right of access to information is thus much more general and all-embracing than the right to reasons.

10.2 WHEN WILL REASONS BE ADEQUATE?

The standard of reasons for the decision is that of *adequacy.* What will constitute adequate reasons will depend on the circumstances of each and every case, that is, the context within which the decision is taken.

In *Nomala v Permanent Secretary, Department of Welfare* 2001 8 BCLR 844 (E), the termination of a disability grant was at issue. The applicant was informed that she had to reapply for a disability grant. In a "standard form reasons letter" she was informed that her reapplication had been unsuccessful since she was found to be "not disabled". In an application for the review of the refusal of the grant the "sufficiency or otherwise of the reasons contained in this letter" constituted the core of the application (at 848).

The court held that ticking boxes on the "standard form reasons letter" is inadequate since this ticking of boxes "… disclose nothing of the reasoning process or the information upon which it is based" (at 856).

The reasons given did not provide sufficient information for any disappointed applicant to prepare an appeal. Furthermore (at 856)

> … the reasons do not educate the beneficiary concerned about what to address specifically in an appeal or a new application. It does not instil confidence in

> the process, and certainly fails to improve the rational quality of the decisions arrived at.

In *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism v Bato Star Fishing (Pty) Ltd* [2003] 2 All SA 616 (SCA); 2003 6 SA 407 (SCA), quoting Cora Hoexter (at para 40), the SCA held the following:

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

In the same paragraph the court also quoted with approval from the Australian decision *Ansett Transport Industries (Operations) Pty Ltd v Wraith* (1983) 48 ALR 500 at 507. The decision was to the effect that in order to provide adequate reasons it is necessary for the decision-maker:

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

In the pre-PAJA decision in *Moletsane v The Premier of the Free State* 1995 9 BCLR 1285 (O); 1996 2 SA 95 (O), the court found that section 24*(c)* and *(d)* of the interim Constitution should be read together, because they are coupled by the word "and". In other words, the court held that what constituted reasons ought to be understood in the light of the requirements of section 24*(d)* – that administrative action be justifiable in relation to the reasons given for it (at 1288). The court held that

> This in my view connotes a correlation between the action taken and the results furnished: The more drastic the action taken, the more detailed the reasons which are advanced should be. The degree of seriousness of the administrative act should therefore determine the particularity of the reasons furnished.

In this case the administrative action related to the suspension of a teacher. This was a preliminary step taken before the teacher was charged with misconduct. (Remember the story of Thami Educator in scenario 3?) The court found (at 1288) that the action is not as drastic as (for example) the case in which a person is convicted of misconduct and discharged. In such a case, one would expect more detailed reasons to be furnished to enable one to assess whether the administrative action is justifiable in relation to those reasons.

The court accordingly found that the reasons provided were sufficient. (The letter addressed to the applicant stated that she had been suspended from duty without pay,

with immediate effect, pending a departmental investigation into her alleged misconduct.) The court also found that the administrative action taken (the suspension) was justifiable in relation to the reasons advanced, having regard to the applicant's rights that were affected or threatened.

To sum up the requirements of subsections (1) and (2) of section 5 of PAJA for the provision of reasons, note the following:

- Reasons are furnished to persons whose rights have been *materially* and *adversely affected* by administrative action.
- The Act does not provide a right to reasons, it provides the right to *request* reasons.
- Once such a request has been received, the administrator is obliged to (he or she must) furnish the reasons within 90 days.
- The reasons must be *adequate.*
- The reasons must be in writing.

ACTIVITY 10.1

- Suppose Mr Hops applies for a liquor licence to operate in one of the suburbs of Soweto. He is told that his application has been refused and that the licence has been awarded to someone else. When he asks for reasons for the rejection of his application, he is simply told that he was an unsuitable candidate. Advise Mr Hops of his legal rights and the course of action he should adopt.
- Is a refugee status determination officer compelled to furnish reasons for his refusal to grant asylum to Theodor Refugee? Write a short note in which you discuss the question.

These are self-evaluation activities. Use the information in this unit to assist you.

10.3 THE RIGHT TO REASONS IN TERMS OF SECTION 24(C) OF THE INTERIM CONSTITUTION AND SECTION 33(2) OF THE 1996 CONSTITUTION

The interim Constitution changed the common-law situation. Section 24(c) first introduced a right to reasons. It provided as follows:

> Every person has the right to be furnished with reasons in writing for administrative action which affects any of his/her rights or interests (unless the reasons for such action have been made public).

Section 33(2) of the final Constitution provides:

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

The Constitution not only cures the lack of a right to reasons at common law, but is innovative as well. For the first time we find that the administrator has a general duty to give reasons.

Requiring the administrator to give reasons for his decision is a safeguard against any arbitrary or unreasonable administrative decision-making. Look again at what Mokgoro and Sachs JJ wrote about decision-makers being "called upon to explain their decisions" (see above). In essence, this means that the administrator or decision-maker is required to *justify* – provide an explanation for – the administrative action that has been taken, thus safeguarding against any arbitrary or unreasonable administrative decision-making.

The furnishing of reasons also promotes fairness and proper administrative behaviour, since unsound reasons or the absence of reasons may form the subject of review.

Moreover, one of the best methods of ensuring administrative transparency is through the requirement that reasons must be given for administrative action. The giving of reasons also promotes administrative accountability (go back to s 195 of the Constitution to see what it says about the values that should guide the public administration). It may therefore be said that this requirement shows a commitment to openness and transparency in the public administration, and also reflects the constitutional values of an open and democratic society.

10.4 GENERAL REMARKS ON THE IMPORTANCE OF REASONS

You will recall that, theoretically, the need to give reasons is part of the common-law *audi alteram partem* rule, under certain circumstances. But this rule was never strictly adhered to, if at all. Baxter wrote (in the early eighties) that it is not at all clear why the courts "have refused to presume a duty to give reasons" (1984:741).

The importance of the provision of reasons, notwithstanding the initial reluctance to provide reasons, cannot be over-emphasised. Reasons show *how* the administrative body functioned when it took the decision and, in particular, *how* the body performed the action – whether that body acted lawfully or unlawfully, rationally or arbitrarily, reasonably or unreasonably. An individual who wishes to challenge an administrative decision is at a tremendous disadvantage where reasons are not provided, and in some instances the refusal may prove fatal to his or her case. How can such an affected person raise issues such as, for example, failure on the part of the administrator to act lawfully, to act procedurally fairly or reasonably on internal appeal or judicial review, when there is no information or anything concrete on which to base this review or appeal, since reasons for the decision have not been given? After all, how can any of us support or even prove our argument that the administrator failed to fulfil any of the requirements for just administrative action, when we have no concrete reasons for his or her decision?

In their minority judgment in *Bel Porto School Governing Body v Premier, Western Cape* 2002 9 BCLR 891 (CC); 2002 3 SA 265 (CC), Mokgoro J and Sachs J summarised the justification for the provision of reasons as follows (at para 159):

> The duty to give reasons when rights or interests are affected has been stated to constitute an indispensable part of a sound system of judicial review. Unless the person affected can discover the reason behind the decision, he or she may be unable to tell whether it is reviewable or not and so may be deprived of the protection of the law. Yet it goes further than that. The giving of reasons satisfies the individual that his or her matter has been considered and also promotes good administrative functioning because the decision-makers know that they can be called upon to explain their decisions and thus be forced to

evaluate all the relevant considerations correctly and carefully. Moreover, as in the present case, the reasons given can help to crystallize the issues should litigation arise.

10.5 WHO HAS A RIGHT TO REASONS?

The question of who is entitled to written reasons should be asked. In more elegant legal language, the question to be asked is what the "scope" of the right to written reasons is.

For an answer we first need to turn to the Constitution. Upon reading section 33(2), we see that the Constitution insists that only a person whose rights have been *"adversely affected"* [our emphasis] by administrative action has a right to written reasons.

Through this qualification (that only when rights are adversely affected), the drafters of the Constitution have obviously tried to limit the right to written reasons. However, some academics have opted for a broader approach and argue that "the right to lawful, reasonable and procedurally fair administrative action inevitably entitles one to the right to reasons, since the s 33(1) right will always be adversely affected by the failure to give reasons" (Hoexter 2012:470–471). This argument gains credibility when we remind ourselves of the values built into the Constitution – openness and accountability aimed at limiting administrative corruption and maladministration. Due consideration for these values results in regarding the giving of written reasons as essential for their realisation.

Klaaren and Penfold (2008:63–116) take issue with this line of reasoning and submit that the argument in essence "reads out" the adversely affecting rights requirement set by the constitutional drafters. They submit that the more correct approach is to base the right to written reasons on the impact the decision has on a particular person (at 63–116). In this way, effect is given to the internal qualification set by Constitution. (One may add that their view should allay fears expressed in certain quarters that requiring reasons under all circumstances and in all situations would result in a flood of litigation.)

It is difficult to draw a definite conclusion as to who has a right to written reasons, given the qualification that a person has a right to written reasons only if his or her rights have been adversely affected. Perhaps the answer is to be content with the submission by Klaaren and Penfold that the right to written reasons is dependent on the impact a particular decision has on the affected person.

10.6 CONCLUSION

With this discussion of the right to written reasons we have come to the end of the discussion on the requirements for valid administrative action. We are left with the final theme (part 4), consisting of two learning units (learning unit 11 and 12), in which we examine two important matters – that of the control of administrative action (learning unit 11) and the remedies an affected person is entitled to should his or her objection lodged against the administrative action be successful (learning unit 12).

PART 4

CONTROL AND REMEDIES

LEARNING UNIT 11

Internal control of administrative action

Working your way through this learning unit should enable you to

- *explain what is meant when one refers to the "control of administrative action"*
- *explain briefly the difference between the concepts of control of administrative action and remedies for administrative action*
- *identify internal methods of control*
- *explain the importance of domestic control*
- *discuss the PAJA requirements of exhausting internal remedies*
- *explain the exceptions to this rule*

The outline of this learning unit is as follows:

11.1 The distinction between control and remedy
11.2 Control within the administration itself – internal control
  11.2.1 Introductory remarks
  11.2.2 The forms of internal control
  11.2.3 Advantages of internal control
11.3 PAJA and the use of internal control
  11.3.1 Internal remedies must first be exhausted
  11.3.2 Exceptions to this general rule
11.4 Conclusion

11.1 THE DISTINCTION BETWEEN CONTROL AND REMEDY

According to the *Compact Oxford English Dictionary* (2005), the noun "control" has various meanings. For the purposes of our enquiry the following are important:

> … 2 the restriction of something … 3 a means of limiting or regulating something … 4 the place where something is checked or from which an activity is directed …

In its use as a verb, "control" ("controls, controlling, controlled") carries the following meanings according to the dictionary:

> 1 have control of; direct or supervise … 2 limit or regulate something.

To control something is therefore a method of limiting, supervising or regulating something. When we remind ourselves that administrative action quite often may affect a person negatively, the importance of control of such action becomes evident. "Control" would then relate to the "regulation" of or "supervision" of such administrative action. In other words, control comes into the picture when administrative

action is defective. Simply put, to control administrative action is to ensure that administrative action is valid.

According to the dictionary, the noun "remedy" means the following:

> 1 a medicine or treatment for a disease or injury. 2 a way of setting right or improving an undesirable situation. 3 a means of gaining legal amends for a wrong.

In its use as a verb ("remedies, remedying, remedied") it means to:

> set right an undesirable situation.

A remedy is thus anything that serves to cure defects or improve conditions. We could therefore think of a remedy as the medicine that cures a disease or limits its symptoms, or that puts right something that is wrong. In a legal sense, the word "remedy" is the "means of gaining legal amends for a wrong" (see the dictionary meaning 3 above).

Upon looking into the meaning of the two words, it may seem as if there is no real difference between them and that, in essence, they are similar, but a distinction is nonetheless drawn when they are used in a legal context. Baxter (1984:677) explains the difference between "control" and "remedy" as follows when the supervisory functions of courts are at issue:

> What is important, however, is that a clear distinction should be drawn between the two separate functions which the court performs, namely, *reviewing the legality of the action* in question, and *granting an appropriate order* if it finds the action to be unlawful.

Although Baxter made this observation in the early eighties, it is still valid today. De Ville (2005:297) explains the content of this distinction as follows:

> A distinction has to be drawn between the review [read: "control"] of administrative action and the granting of a remedy as a result of a finding that a ground of review is present. Whereas review entails an enquiry into the legality of the administrative action (ie whether a ground of review is present), the specific remedy that is granted usually follows after a finding of illegality and can take a variety of forms depending on the context.

Control, in turn, can take various forms. We find the following two broad categories in administrative law:

(a) internal control (i.e., control within the administration itself)
(b) judicial control.

11.2 CONTROL WITHIN THE ADMINISTRATION ITSELF – INTERNAL CONTROL

11.2.1 Introductory remarks

When we think of control of administrative action we instinctively think in terms of judicial control, that is, control by a court of law. Although judicial control over administrative action catches our eye more often and to a greater extent, we should not forget that internal control of administrative action is a possibility as well. Nor

should we dismiss the importance of internal control. Incidentally, when you page back to learning unit 9 (dealing with procedural fairness), you will find that one of the obligations of an administrator to ensure procedural fairness is to provide a person with adequate notice of the possibility of internal appeal (s 3(2)(iv)). The reference to internal appeal is a reference or internal control by the administration itself.

Internal or extrajudicial control is control exercised within the administration itself. It is a most important and effective means of control, which is exercised by either senior (superior) administrators or specially constituted bodies or institutions, such as the Refugee Appeal Board.

11.2.2 The forms of internal control

The following forms of internal control are found:

(a) control by superior or senior administrators or specially constituted bodies or institutions
(b) parliamentary control
(c) control by public bodies and commissions, such as the public protector and the auditor-general

11.2.2.1 Control by senior or superior administrators or specially constituted bodies or institutions

When we think of the case of John Learner again (scenario 1), we see that his parents should first lodge a complaint with the school's governing body. Suppose the governing body confirms the suspension and the parents are still unhappy about the outcome, they may now appeal to the Head of Department of the Provincial Department of Education (the Head of Department's position is the provincial equivalent of the Director-General of the national Department of Education). If the parents are still not satisfied with the outcome of the hearing, they may appeal finally to the Member of the Executive Council (MEC) for Education of the particular province. In this case, there are therefore three avenues of internal control available.

In the case of the refugee, the Refugees Act provides for a specially constituted body, the Refugee Appeal Board, to hear such appeals from refugees whose applications for asylum have been refused. (See s 13 of the Act for the composition of the board.) It is important to note that the board is not a court of law, but an administrative body within the administration.

What are the powers of the senior administrators?

(1) The senior functionary or institution has the power to reconsider or re-examine – to "review" – the decision and then to confirm it, set it aside or vary the decision. When a decision is varied, the decision is substituted by another.
(2) The senior functionary or institution may consider the validity, desirability or efficacy of the administrative action in question. The controlling body may also take policy into consideration. (As we have learned, these are matters that the court may not enquire into.)
(3) Formal control is also exercised by examining the manner in which the decision was reached.
(4) Internal control, in the form of an internal appeal, does not give rise to a final and binding decision. As a result, the same matter may be raised again within

the same departmental hierarchy (remember our example of John Learner's parents' appeal to the various senior administrators).

11.2.2.2 Parliamentary control

Parliamentary control is another form of internal control over administrative action and is potentially an extremely important form of administrative control, since general administrative policy and matters of public concern may be questioned in Parliament.

Traditionally, every minister or member of the Cabinet is accountable (in other words answerable or responsible) to the democratically elected Parliament for the way in which his or her department is run, administered and managed.

Section 92(2) of the Constitution provides the following:

> Members of the Cabinet are collectively and individually accountable to Parliament for the exercise of their powers and the performance of their functions.

This provision makes Cabinet members (i.e. ministers) accountable for all administrative action. A minister is therefore responsible to Parliament for the way in which his or her department is administered. Parliamentary control takes place by way of the following:

(a) Tabling of reports by ministers
When the particular minister's budget is annually discussed in Parliament, he or she must submit a report of the activities of the particular department to Parliament.

(b) Parliamentary enquiries
Parliamentary enquiries are also known as "question time in Parliament", when members of Parliament, more particularly members of opposition parties, put questions to ministers on any aspect of the exercise of their powers and functions.

11.2.2.3 Public bodies and commissions

It has been said that an important condition/prerequisite for any control of state authority is "an awareness and knowledge among the population of the extent of their rights, and the way these rights may be enforced" (Rautenbach & Malherbe (2009:320). The Constitution has created several extrajudicial bodies or institutions that can assist in the creation of such awareness and knowledge and, therefore, in controlling state authority as well.

These institutions or bodies are described in the Constitution as "state institutions supporting constitutional democracy". The composition and functions of these bodies are set out in Chapter 9 of the Constitution (ss 181–194) and are therefore often referred to as the "chapter 9 institutions". They are the following:

(a) Public Protector
(b) South African Human Rights Commission
(c) Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities
(d) Commission for Gender Equality
(e) Auditor-General
(f) Electoral Commission

(g) Independent Authority, which regulates broadcasting

Section 181 contains the governing principles, that is, the overarching guiding principles for all these bodies. Among these are the principles that

(1) the bodies are independent and subject only to the Constitution and the law
(2) they are impartial
(3) they must exercise their functions "without fear, favour or prejudice"

Let us briefly examine two of these bodies, which potentially play an important role in the control of administrative action

(a) Public Protector (ss 182 and 183)
(b) Auditor-General (s 188)

The Public Protector

The office of Public Protector has been created to curb administrative excesses. In other countries the Public Protector is known as the "ombud". This office was developed in the Scandinavian countries but has been introduced in a large number of other countries as well. (In England this office is known as the office of the "public commissioner".)

An *ombud* is an administrator or official who investigates citizens' complaints against the public administration and its officials.

The South African Public Protector has the following powers (s 182(1)):

(a) to investigate any conduct in respect of state affairs or in the public administration in any sphere of government that could be improper, or could result in any impropriety;
(b) to report on that conduct; and
(c) to take appropriate remedial action.

The Public Protector may not investigate court decisions (subs (3)). The Public Protector must be accessible to all persons and communities (subs (4)).

The reports of the Public Protector must be open to the public. In exceptional circumstances, which must be defined in national legislation, the reports may be kept confidential (subs (5)).

The Auditor-General

The Auditor-General's control function relates to the auditing of and reporting on the accounts, financial statements and financial management of all national and provincial state departments and administrations and all municipalities. He or she must also report on any institution funded from the National Revenue Fund or any institution that is authorised in terms of any law to receive money for a public purpose (s 188(2)(a) and (b) respectively).

11.2.3 Advantages of internal control

Administrative decisions are thoroughly re-evaluated through internal control. It is also possible to bring inefficient administrators to book. Through internal control, such administrators can be reprimanded or required to explain their decisions.

Internal control is also less expensive, less cumbersome and less time-consuming than judicial control.

ACTIVITY 11.1

(1) List the various forms of internal control that may be used to control administrative action.
(2) Page through this study guide and take careful note of the various scenarios. What would the appropriate form of internal control be in each of the scenarios that illustrate examples of administrative action? Make a note next to each of these scenarios.

This is a self-evaluation activity. However, the purpose is to help you gain an understanding of the importance of internal control of administrative action.

11.3 PAJA AND THE USE OF INTERNAL CONTROL

11.3.1 Internal remedies must first be exhausted

One of the preconditions set before an affected person may take administrative action on judicial review is that he or she must exhaust internal remedies, as required by section 7(2) of PAJA. Internal control is a method of control of administrative action that is found within the administration itself. In an internal appeal, which is usually simple, informal and straightforward, the higher body not only controls the alleged excess of power or irregularity, but also considers the merits of the case (whether the decision taken by the administrator was the right one in the circumstances) and the efficacy of the action (whether the decision is practicable or sensible). It therefore follows logically that judicial review must be seen as the last resort.

The **basic rule is therefore that all internal channels should be exhausted before a court of law is approached**. When we recall John Learner's disciplinary hearing (see scenario 1, learning unit 1) we could say that John's parents or guardian(s) should take the matter to court only after using all the internal remedies – appealing to the chairman of the governing body, then to the Head of Department and finally to the MEC.

Another simple example may illustrate the point as well:

> You are aggrieved by some action of one of the lecturers at Unisa (e.g. you have been denied admission to the examination). Surely you will not take Unisa to court before approaching the Head of the particular Department first, then the Dean of the College and, finally, the Principal?

The requirement that internal remedies must be exhausted before approaching a court of law has been justified as follows:

(a) It is unreasonable for a person to rush to court before his or her internal remedies have been exhausted.
(b) The internal remedies are usually cheaper and more expedient or easier to use.
(c) It helps to prevent the courts being overloaded with cases that may be more efficiently dealt with by the administration itself

The question has been asked whether the requirement that internal remedies must be exhausted before approaching either the High Court or the Constitutional Court still applies. The question is linked to section 34 of the Constitution – the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum. Does section 34 do away with the requirement that internal control must be exhausted?

On the one hand, it may be argued that this fundamental right contained in section 34 empowers the individual to disregard internal control bodies on the basis that they are not handled by independent and impartial forums, and proceed directly to the courts. Although this argument may sound attractive, it does not really convince, since it ignores the impact of the limitation clause (s 36). A limitation in terms of section 36 may legitimately require that internal remedies must first be exhausted (e.g., where the limitation clause requires that the limitation must be reasonable, a notion such as efficacy arises – effective administration requires that internal remedies must be exhausted first). Moreover, it would not be reasonable to overload courts even further than they are already.

In general, the individual should therefore exhaust all internal remedies before approaching the courts. This screening system will ensure that the courts are not swamped by administrative-law cases.

PAJA recognises this precondition. Section 7 deals with "procedure for judicial review". Subsection (2) reads as follows:

> *(a)* Subject to paragraph *(c)*, no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
> *(b)* Subject to paragraph *(c)*, a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph *(a)* has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.
> *(c)* A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.

A court or a tribunal may, **in exceptional circumstances and in the interests of justice**, and *on application* by the affected person, exempt that person from the obligation to exhaust internal remedies first.

The exceptional circumstances to which PAJA refers relate to the exceptions to the general rule that internal remedies must first be exhausted.

11.3.2 Exceptions to the general rule

The recognised exceptions have this in common: they are all examples of situations in which internal control would not be the proper remedy, because

(1) the case has already been prejudged by the administrator
(2) the decision has been made in bad faith (*mala fide*), fraudulently or illegally, or has in effect not been made at all (In *Basson v Hugo and Others* 2018 (3) SA 46 (SCA), the Supreme Court of Appeal held that the appellant was exempted from the duty to exhaust internal remedies since an internal remedy is ineffective and inadequate when the administrator is allegedly biased or reasonably suspected of being biased.)
(3) the aggrieved party has an option whether to use the extrajudicial remedy or to proceed direct to judicial review (*Jockey Club of SA v Feldman* 1942 AD 340)
(4) the administrative authority has come to an unacceptable decision as a result of an error of law (e.g. when the administrator by reason of "mistake of law" presumes that he or she has the authority to take action)
(5) the administrative body concerned has agreed that judicial review proceedings may start immediately
(6) the administrative body concerned has no authority to rectify the particular irregularity complained of
(7) the internal remedy cannot provide the same protection as judicial review (For example, in *Msomi v Abrahams* 1981 (2) SA 256 (N) this was held to be a strong indication that internal remedies need not be exhausted.)

It is important to remember that these exceptions are nothing more than practical solutions to the problems when internal control is not a proper remedy.

In, for instance, *Khan v Minister of Home Affairs and Others* [2014] ZAWCHC 99, the court decided that an immigrant will be entitled to seek immediate relief to prevent deportation, despite the fact that he has not exhausted internal remedies in terms of the Immigration Act 13 of 2002, **on the basis that he was not properly informed of that remedy**. Once urgent relief has been secured, he can still seek to exhaust his internal remedy despite the expiration of the time period for lodging such a ministerial appeal.

Another example is that of *Drift Supersand (Pty) Ltd v Mogale City Local Municipality and Another* [2017] 4 All SA 624 (SCA), where the Supreme Court of Appeal held that the duty to exhaust internal remedies (in terms of section 7(2) of PAJA) should not operate in such a way as to prevent a litigant who had been unfairly excluded from a decision-making process from taking that process on review. The Court held that, since the appellant was excluded from the decision-making process,

> it was not incumbent upon it to attempt to appeal against the decision taken as a result of that process … the appellant cannot be expected to exhaust its internal remedies when it was not afforded any remedies at all (at para 48).

Please note:

The rule that internal remedies must be exhausted is usually applied more strictly to disputes arising with regard to voluntary associations than in matters arising from the public administration as such. In other words, the courts usually accept the principle that in their constitution (e.g. that of the soccer club, the labour union, the church association, and so on) the members of the association have agreed that all domestic remedies should be exhausted before the court may be approached. You

will remember that we explained earlier why the rules of administrative law are applicable to voluntary associations even though they are not administrative bodies: the relationship between the association and its members is similar to that between the individual and the administrative authority – it is an unequal relationship in which the individual member is subordinate.

ACTIVITY 11.2

Read the following scenarios and decide whether internal remedies are proper or not. Write down what you think.

TABLE D

	Scenario	**Internal control the proper remedy?** **Yes/No**
22	Mr Chips told the members of the disciplinary hearing that he has decided to suspend John from school.	
23	A community council is convinced that it is empowered to evict a group of squatters from a piece of land.	
24	A state department did not follow any tender procedure at all and awarded the tender to the company that gave the highest pay-off to administrators in that particular department.	
25	The constitution of the sport club states that no girls will be allowed to be members of the club. Thandi's application is turned down.	
26	Jockey Blinkers and the jockey club agree that since his grievances about the conduct of the jockey club are such, it will serve no purpose for him to approach the jockey club with his grievances.	

TABLE D

Scenario	***Internal control the proper remedy?*** ***Yes/No***
22	*No. Has Mr Chips not prejudged the case?*
23	*No. Have you considered the possibility of a mistake of fact? What about a mistake in law?*
24	*Is there* mala fides *in this case? What is the impact of such bad faith?*
25	*Yes and no. On the one hand, the requirement that internal remedies should be exhausted is more strictly adhered to in the case of voluntary associations. On the other hand, we may argue that internal remedies would be of no use in the light of the constitution of the club.*
26	*No. This is an example of an agreement to proceed immediately to judicial action.*

11.4 CONCLUSION

Having discussed the distinction between control and remedy and explained the concept of internal control, we have come to the end of this learning unit.

In the next (and final) learning unit of this guide – learning unit 12 – we explore some of the many facets of judicial control of administrative action and remedies in proceedings for judicial review.

LEARNING UNIT 12

Judicial control of administrative action and remedies in proceedings for judicial review

Working your way through this learning unit, should enable you to

- *explain the courts' traditional function of controlling administrative action*
- *know what is meant when one refers to the "judicial review of administrative action"*
- *know the grounds upon which an affected person may approach a court or tribunal for the judicial review*
- *describe the provisions of PAJA as regards review of administrative action*
- *know that other judicial avenues are available for the control of administrative action*
- *explain what each of the forms of control requires*
- *explain the difference between appeal and review*

The outline of this learning unit is as follows:

12.1 Preconditions before turning to judicial control
- 12.1.1 Introduction
- 12.1.2 The applicant must have *locus standi* (standing)

12.2 The various forms of judicial control
- 12.2.1 Statutory appeal
- 12.2.2 Judicial review
- 12.2.3 Interdict
- 12.2.4 *Mandamus*
- 12.2.5 Declaratory order
- 12.2.6 Defence in criminal proceedings

12.3 Judicial review: Grounds for review in terms of section 6 of PAJA
- 12.3.1 Introductory remarks
- 12.3.2 The decision-maker (administrator) (s 6(2)(a)(i)–(iii))
- 12.3.3 The manner in which the decision was taken (s 6(2)(b)–(e))
- 12.3.4 The administrative action itself (s 6(2)(f)–(i))

12.4 Procedure for judicial review in terms of PAJA
- 12.4.1 Which court may review administrative action?
- 12.4.2 The procedure prescribed for the review of administrative action

12.5 12.5 The orders made by a court as prescribed by section 8 of PAJA
- 12.5.1 Introduction
- 12.5.2 Section 8

12.6 The "constitutionalisation" of administrative action and judicial review

12.7 The importance of judicial control and the courts' traditional (common-law) function of controlling administrative action through review

12.8 Conclusion

ACTIVITY 12.1

Return to scenario 2 (the story of Theodor Refugee). Suppose the asylum status determining officer refused asylum. What could Theodor do about this decision? What do you think?

We concluded our discussion of the requirements for valid or just administrative action in learning unit 10 with a practical illustration of how such administrative action must be performed in order to conform to the requirements for such action (the course of events in John's disciplinary hearing). We saw that if John and his parents or guardian(s) were unhappy about the way in which the hearing was conducted, they should be informed that an appeal may be lodged through internal education channels and that, if this were unsuccessful, they could institute judicial proceedings in a court of law.

In the same way, Theodor could protest against the refusal of asylum by an internal appeal against the decision to the Refugee Appeal Board (see s 26 of the Act). This is an example of appeal within the administration itself (the internal administrative channels). If Theodor is unsuccessful, that is, if the appeal board confirms the decision of the refugee status determining officer to refuse his application, Theodor may go to court and challenge the decision by the appeal board.

In this final learning unit, we discuss the matter of "going to court". We explore the judicial road Theodor may follow to have the refusal of his asylum "controlled" – reviewed – by a court of law.

12.1 PRECONDITIONS BEFORE TURNING TO JUDICIAL CONTROL

12.1.1 Introduction

The first part of this unit will deal with judicial control in general, and not judicial review in particular. Various procedural requirements must be met before one is to challenge administrative action judicially. For example, the review application must be brought before court within a reasonable period, appeal may be brought only against final decisions of administrative bodies, and so on. One will not be too way off the mark should one call these requirements "preconditions" to be satisfied before approaching the court.

We will be concentrating on only one very important precondition that must be met before judicial control can be used, namely that the affected person must have *locus standi* (standing)

Please note:

Another precondition is that all internal remedies must first be exhausted.

(Remember what we said about the advantages of internal control in the previous learning unit and our discussion of the provisions of s 7(2) of PAJA regarding the exhaustion of internal remedies.)

12.1.2 The applicant must have *locus standi* (standing)

12.1.2.1 What is locus standi*?*

Locus standi or "legal standing" is the capacity of a person to bring a matter to court.

It is a basic rule of all legal systems that a party may take a matter to court only if he or she has an identifiable interest in the outcome, that is, when he or she has sustained loss or damage. Before 1994 and the introduction of the new constitutional order, the requirement was that an applicant for review had to show that he or she had a sufficient personal and direct interest in the case. Financial/pecuniary or material/patrimonial loss was regarded as sufficient to establish legal standing. In *Dawnlawn Beleggings (Edms) Bpk v Johannesburg Stock Exchange* 1983 3 SA 344 (W), the potential for economic gain was accepted as a sufficient interest.

The *actio popularis* of Roman law did not form part of our law. In terms of the *actio popularis*, every member of the public could bring actions to prevent public dangers. The *actio popularis* was action in the public interest. In the administrative-law context, the *actio popularis* means that every person has an interest in the proper execution of administrative functions and every person is able freely to challenge the validity or legality of such administrative action.

In the past, the determination of *locus standi* was also affected by the type of administrative relationship involved – whether it was a general or an individual relationship. When the validity of general legislative administrative measures was disputed, the applicant had to prove that he or she was one of a group or class of persons to whom the particular measures applied, and that if they were to be put into operation, his or her rights, privileges, liberties and so on, would be affected. For example, in the case of *Bamford v Minister of Community Development and State Auxiliary Services* 1981 3 SA 1054 (C), the interest of a private person in a general administrative relationship was recognised – the case dealt with visits to a public park.

12.1.2.2 Locus standi *or legal standing in terms of section 38 of the 1996 Constitution*

The Constitution has broadened the scope or range of *locus standi* of individuals and groups to seek relief in matters involving fundamental rights, including the right to just administrative action. In other words, more people who have identifiable interests in the outcome of a decision may now approach the court.

Section 38 of the Constitution, entitled "enforcement of rights", provides that anyone listed in the particular section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened.

Section 38 reads that

> Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.

The section then proceeds to identify the persons who may approach a court. They are

(a) anyone acting in their own interest
(b) anyone acting on behalf of another person who cannot act in their own name
(c) anyone acting as a member of, or in the interest of, a group or class of persons

(d) anyone acting in the public interest
(e) an association acting in the interest of its members

Please note:

The first four refer to "anyone" and the last one to "an association" representing its members. The following are examples:

(a) Theodor Refugee approaches the court in his own name to attack the refusal of asylum. Theodor is therefore an example of someone "acting in their own interest".
(b) John's parents act on his behalf to complain about his suspension from school. The parents therefore represent "anyone acting on behalf of another person who cannot act in their own name", in this case because he is a minor.
(c) You, as a student, approach the court as a member of the student body, or in the interest of students. You are consequently an example of someone acting as "a member of, or in the interest of, a group or class of persons".
(d) Sibongile, an educator, approaches the court in the public interest of education – the above-mentioned *actio popularis*.
(e) The Wildlife Society acts in the interests of its members, or, the South African Democratic Teachers' Union (SADTU) acts in the interests of the Union. They constitute an example of an "association acting in the interest of its members".

ACTIVITY 12.2

Will the following persons or organisations have *locus standi*?

(1) The river which runs through the village is heavily polluted by waste from the nearby iron factory. The Save-Our-River Society wants to take legal action.
(2) A person approaches the court on behalf of the inhabitants of an informal settlement to compel the municipality to provide them with houses.
(3) The Minister of Health takes legal steps against a sawmill because of the air pollution it creates.
(4) The municipality has started to build a shopping centre in the area reserved as a nature reserve. You are a ratepayer of the suburb in which the nature reserve is situated and are unhappy about the proposed centre.
(5) A soccer player is expelled from his club and no reasons are given.

This is a self-evaluation activity. Use section 38 and its provisions to guide you through the answers.

12.2 THE VARIOUS FORMS OF JUDICIAL CONTROL

It should be noted from the outset that various judicial avenues exist for challenging administrative action or administrative decisions. We will deal with judicial **review, which is only one of them**, in subsequent sections of this unit. The forms of judicial control are the following (once again, we include review to emphasise that it is an avenue for control):

(1) statutory appeal
(2) judicial review
(3) interdict
(4) *mandamus*
(5) declaratory order
(6) defence in criminal proceedings

12.2.1 Statutory appeal

In South Africa, neither the High Court nor the Supreme Court of Appeal has inherent appeal jurisdiction. This means that the courts may hear appeals only where this is provided for by statute or legislation.

Delegated legislators, such as the President or a minister when he or she issues proclamations and/or makes regulations, may not make provision for statutory appeals in their legislation – the proclamations and the regulations, respectively – unless authorised to do so by the enabling Act.

An appeal may be lodged only against a final decision or final order, not against a provisional or interlocutory order (the last-mentioned is a provisional order issued in the course of proceedings).

The provisions governing the power of the courts to examine administrative action on appeal, the requirements for appeal, the time within which the appeal must be noted, and so on, are laid down in the empowering statute. In the scenario about John Learner, the South African Schools Act of 1996 is the empowering legislation. The enabling statute will also determine the nature and extent of the appeal, in other words, whether it is an appeal on the facts, an appeal on questions of law, or whether an appeal may be lodged against both the facts and questions of law.

Please note: THIS IS IMPORTANT!

An appeal is a rehearing of the matter which is restricted to the record of the proceedings. It may examine the merit of the decision, asking whether the administrative decision was right or wrong.

12.2.2 Judicial review

While the courts do not have inherent appeal jurisdiction, they do have (as we have seen) inherent review jurisdiction in terms of common law. This common-law power of review also applies to voluntary associations such as jockey clubs. (Whereas the inherent review power of the courts could previously be excluded by statute expressly or by necessary implication, the practice of excluding the court's jurisdiction by way of an ouster clause will no longer be permitted in the light of s 34 of the 1996 Constitution.) **ALL** administrative decisions are subject to judicial review.

We encounter judicial review – in the sense of reviewing the legality of a decision – in various contexts or settings. For example, in

(1) review of administrative action in terms of the Constitution
(2) review of administrative action in terms of the provisions of section 6 of PAJA
(3) review of the proceedings in or decisions of lower courts in terms of the Supreme Court Act 59 of 1959
(4) review in terms of the provisions of specific statutes

The grounds of review of the legality of administrative action are the following:

(a) the infringement or threatened infringement of a fundamental right listed in the Bill of Rights
(b) any challenge to the validity of administrative action, that is failure to comply with any of the requirements for valid administrative action (as itemised in s 6 of PAJA)

Please note: THIS IS IMPORTANT!

A review scrutinises the legality or validity of the decision – whether it was defective and therefore not conforming to the requirements for validity or legality. In other words, in review, the *manner* in which the decision was reached is examined. Further, a review may go beyond the record to establish whether any irregularities were present, but may **NOT go into the *merits***. A review scrutinises the process of decision-making – whether the correct process or procedure was followed or whether any irregularity or excess of power was present. A review does NOT judge the merits of the decision.

12.2.3 Interdict

If an applicant fears and can prove that an action or impending action by the administrator will affect his or her rights or prejudice him or her, he or she may apply for an interdict restraining the administrator from carrying out its action.

An interdict is aimed at preventing unlawful administrative action or threatened unlawful administrative action. Wiechers (1985:267) explains an interdict as follows:

> It is a decree whereby the administrative organ is ordered to desist from an act or course of conduct which is causing direct prejudice to the applicant and constitutes an encroachment on his rights.

Note that an interdict may be interim or final. An interim interdict is a measure which provisionally decides the rights of parties while legal proceedings are pending. A final interdict may be altered only on appeal.

An application for an interdict must be supported by the following (Wiechers 1985:267–268 and Baxter 1984:685–687):

(1) The applicant has a clear legal interest (right) which is being threatened.
(2) There is no other satisfactory alternative remedy available.
(3) The matter is so urgent that the applicant will suffer irreparable damage or prejudice if the interdict is not granted.

An example of an interdict:

In *Die Vereniging van Advokate v Moskeeplein (Edms) Bpk* 1982 3 SA 159 (T), building operations caused such a noise and disturbance at the advocates' chambers that the group of advocates – the applicants – successfully applied for an interdict prohibiting the builders from continuing with building operations during normal working hours.

12.2.4 *Mandamus*

This remedy is aimed at compelling an administrator to perform some or other statutory duty. However, a *mandamus* cannot stipulate *HOW* the power should be exercised. It merely puts a stop to an administrator "sitting on" a matter instead of dealing with it.

An example of a *mandamus*:

Thuli has applied for a liquor licence, and there is a long delay at the liquor board in hearing the application. She is getting very frustrated, and can't persuade the liquor board to hurry up and make a decision. The applicant (Thuli) may seek to compel the liquor board by way of *mandamus* to exercise its statutory discretionary power or to decide the matter, but ***NOT*** to prescribe to the board how to exercise the discretion – to decide to grant the applicant the licence.

Another example:

PAJA determines failure to take a decision (s 6(2)(g)) as ground for review as well. Suppose a long delay occurs in the application for asylum. Theodor Refugee, the aggrieved person, may approach the court to grant a *mandamus* in the event of such a delay.

And another one from fairly recent case law:

In *Mahambehlala v Member of the Executive Council for Welfare, Eastern Cape Provincial Government* 2003 9 BCLR 899 (SE); 2002 1 SA 342 (SE), a *mandamus* was granted. The applicant had waited for nine months for her disability grant to be approved. The court found that the period taken to process the applicant's grant was unreasonable, taking into account that three months would have been more than sufficient to deal with her application.

The difference between the interdict and the *mandamus* is that the former *prohibits* unauthorised conduct or action, whereas the *mandamus* demands *compliance* with a duty. Wiechers (1985:268) explains as follows:

In reality an interdict and a *mandamus* are the two sides of the same coin; unauthorised action is prevented by means of an interdict and compliance with a statutory duty is enforced by means of a *mandamus*.

Please note:

Do not confuse a *mandamus* with a mandate. A mandate is an instruction from a senior administrator to a junior administrator to implement a decision. A *mandamus* is an instruction from the court to an administrator to take a decision.

12.2.5 Declaratory order

A declaratory order is used where there is a clear legal dispute or legal uncertainty regarding administrative action. It may also be used to determine whether actual or pending administrative action is lawful. It is a simple means of curing illegal activity, even where other remedies, such as review, may also be relied upon (*Coin Operated Systems (Pty) Ltd v Johannesburg City Council* 1973 3 SA 856 (W)).

In a declaratory order, the court gives a definite and authoritative answer to the question of what the legal position is regarding any particular person (or persons) or

a given state of affairs. This is the way an applicant is able to have his or her status in a matter clarified.

12.2.6 Defence in criminal proceedings

At common law, the validity of an administrative action may be challenged by raising its invalidity as a defence in criminal law. If a person is charged with a criminal offence created by legislation (we often see that failure to comply with empowering legislation creates such criminal offences), the person concerned may defend the charge by challenging the validity of the particular administrative decision that is the subject of the dispute.

An early example:

In *R v Abdurahman* 1950 3 SA 136 (A), the appellant had been charged with contravening certain railway regulations by inciting blacks to enter railway coaches reserved for whites. On appeal, his defence that the regulations had been applied unreasonably was upheld and the conviction set aside.

A (possible) recent example:

Although not a defence in a criminal proceeding, it may be argued that the defence raised in *Oudekraal Estates (Pty) Limited v City of Cape Town* 2004 6 SA 222 (SCA) contains certain elements of this form of judicial control. In this case dealing with certain developments on a site rich in cultural heritage, the Supreme Court of Appeal held that where a person or subject is sought to be coerced by a public authority into complying with an unlawful administrative action (at para 32),

> … the subject may be entitled to ignore the unlawful act with impunity and justify his conduct by raising what has come to be known as a "defensive" or a "collateral" challenge to the validity of the administrative act.

The defence may be raised only after the accused has exhausted all the domestic or internal remedies (*S v Brand* 1973 2 SA 469 (RA)).

ACTIVITY 12.3

(1) List the various forms of judicial control of administrative action and briefly explain what is set to be achieved by each of them. Also write down the requirements of each.
(2) Again, page through this study guide and take note of the various scenarios. Now decide, given the story line of the scenario, which of the forms of **judicial control** would be most applicable in each particular case.

This is once again a self-evaluation activity. The purpose is to help you gain an understanding of the various forms of control, the intended outcome of each of them, as well as their requirements. Secondly it will assist you in identifying the various forms of control in different situations.

12.3 JUDICIAL REVIEW: GROUNDS FOR REVIEW IN TERMS OF SECTION 6 OF PAJA

12.3.1 Introductory remarks

The **following sections deal with judicial review, as a form of judicial control, exclusively**. Section 6 of PAJA makes provision for the judicial review of administrative action. Section 6(1) is the general provision and sets the scene for the institution of judicial review. This subsection reads as follows:

> Any person may institute proceedings in a court or a tribunal for the review of an administrative action.

"Any person" means a person whose rights have been directly affected (remember the definition of administrative action discussed earlier in this guide) by an administrative decision.

In section 6(2), the grounds upon which the individual may found his or her objections to an administrative action are set out. Section 6(2) contains the statutory grounds of judicial review.

There are 20 or so separate grounds in total. The legislature further grouped these grounds of review into nine (*(a)* to *(i)*) categories of grounds of review. Broadly speaking, these categories cover the various stages of the decision-making process. If we follow the sequence, we find (again quite broadly speaking) the stages in the decision-making process encapsulated in these nine categories as follows:

(1) the first or initial phase, which starts with the *authorisation of the decision* (in this phase we find the grounds of review as they relate to the *decision-maker - the administrator)* (s 6(2)*(a)*)
(2) the next stage which relates to the *manner in which the decision was taken* (in this phase we find grounds of review as they relate to noncompliance with formal requirements, such as noncompliance with mandatory and material procedures or conditions prescribed by an empowering provision) (s 6(2)*(b)–(e)*)
(3) the final stage, which deals with issues or grounds relating to the *administrative action itself* (e.g. its impact on the affected person) (s 6(2)*(f)-(i)*)

12.3.2 The decision-maker (administrator) (s 6(2)(a)(i)–(iii))

Grounds for judicial review relating to the *administrator* include the following:

(i) Action known as *ultra vires* action at common law. This is when the administrator was not authorised by the empowering provision to take the particular action.

Included under this heading is excess of power by the administrator or lack of authority of the administrator, for example when

(a) the administrator lacked specified qualifications
(b) the administrator exceeded the geographical limits of the powers conferred
(c) the administrator did not act in accordance with provisions relating to time
(d) administrative actions exceeded the objectives or purpose of the empowering provisions

(ii) Unauthorised delegation. This is when the administrator delegated his or her power without any authority to do so.
(iii) *Nemo iudex in sua causa* (the rule against bias). This is when the administrator was biased.

12.3.3 The manner in which the decision was taken (s 6(2)(b)–(e))

The following are grounds relating to the manner in which the decision was taken:

(1) Non-compliance with formal requirements relating to administrative action (s 6(2)***(b)***)
(2) Section 6(2)***(b)*** provides for a ground of review when a mandatory (obligatory or compulsory) and material (substantial or relevant) procedure or condition prescribed by an empowering provision was not complied with.

This ground of review refers to the requirements governing the form and procedure of administrative action. We find an example in the Refugees Act – the procedures set out in the Act for dealing with refugees.

In *Minister of Justice and Correctional Services v Walus* 2017 (2) SACR 473 (SCA) para 16, the Court established the following test to determine whether a procedural irregularity ought to be regarded as material:

> The inevitability of a certain outcome is not a factor to be considered in determining the validity of the decision. Therefore, neither party may argue that the consideration of the victim impact statement by the minister would make no difference. The proper approach is rather to establish, factually, and not through the lens of the final outcome, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA. In this exercise the materiality of any deviance from the legal requirements must be taken into account, where appropriate, by linking the question of compliance to the purpose of the provision before concluding that a review ground under PAJA has been established. So, if the process leading to the decision was compromised, it cannot be known with certainty what the administrator would have finally decided had the procedural requirements been properly observed.

(3) The grounds listed in s 6(2)***(c)-(e)*** expressly relate to the manner in which the action has been taken or has not been taken. For example, was the action taken reasonable? Was it justifiable? Was it a rational decision? Was the decision taken in a procedurally fair manner? Was any action taken at all?

Consequently, grounds for review based on the way the action was taken are present when

(a) the action was procedurally unfair (s 6(2)***(c)***)
(b) the action was materially influenced by an error of law (s 6(2)***(d)***)
(c) the action was taken (s 6(2)***(e)***(i)–(vi))

(i) for unauthorised reasons (reasons not authorised by empowering provisions)
(ii) for unauthorised (ulterior) purposes or ulterior motives
(iii) taking into account irrelevant considerations, or not considering relevant considerations (errors of fact, therefore)

(iv) because of the unauthorised or unwarranted dictates of another person or body
(v) in bad faith
(vi) arbitrarily or capriciously ("capricious" means erratic or unpredictable, in other words "prone to sudden changes of mood or behaviour" as explained in the *Compact Oxford English Dictionary* [2005]).

12.3.4 The administrative action itself (s 6(2)(f)–(i))

The grounds of review relating to the administrative action itself are found in section 6(2) *(f)-(i)*. Grounds of review are present when:

(1) the action itself (s 6(2)*(f)*)

(i) contravenes the law or is unauthorised by the empowering provision; or
(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.

(A word of explanation relating to rationality: The reference to rationality relates to the requirement of the rule of law that the exercise of public power by administrators should not be arbitrary [arbitrary action is action which is apparently not based on any reason or system]. Decisions must be rationally related to the purpose for which the power was given, otherwise the decisions are in effect arbitrary and inconsistent with this requirement. In other words, such actions are examples of irrational decisions. In English law [in both decisions and in writings of academics such as Jeffrey Jowell], irrational decisions are described as decisions unsupported by evidence; decisions in which no connection is found between the evidence and the reasons provided for the decision and decisions in which the reasons themselves are incomprehensible. Note further that although rationality is not defined in PAJA, we find acknowledgment of rationality in the subsection above. Through this four-pronged test [*(aa)-(dd)*], the legislature recognises one of the most important elements of the rule of law, that of the rational exercise of public power. Note too that this rationality test is closely linked to the right to reasonableness recognised by section 33(1) of the Constitution. In essence, rationality supports reasonableness and constitutes proof or evidence of the exercise of public power in a reasonable fashion.)

(2) failure to take a decision (s 6(2)*(g)*)

This is an important provision since, in the past, the individual was often misled or misinformed by administrators who would tell them that the matter was still being investigated or reviewed or being decided.

This particular subsection should be read with section 6(3)*(a)*, which provides that judicial review may be applied for where there has been an *unreasonable delay* in taking the decision. However, a better way for an aggrieved person to deal with the failure to take a decision is to apply to a court for a *mandamus.* A *mandamus* is an order of court compelling an administrative organ to act (but not prescribing how it should act. (See below.)

In *Nazo v Free State Gambling & Liquor Authority and Another; In re: Jacobs v Free State Gambling & Liquor Authority and Another* [2015] ZAFSHC 227, the applicants relied on section 6(2)(g) of PAJA, asking the court to review the Authority's failure to consider their respective applications for liquor licences. The court upheld the applications on the basis of PAJA and mentioned that it could also have forced the functionary to take a decision if met by an application for a mandamus.

(3) unreasonable action (s 6(2)*(h)*)

The constitutional right to justifiable or reasonable administrative action is discussed in learning unit 8. Return to this learning unit if you are uncertain about the meaning of unreasonable action.

(4) action otherwise unconstitutional or unlawful (s 6(2)*(i)*)

This ground for review is a catch-all or safety-net provision to accommodate any ground of review not specifically included in section 6. For example, there is no direct reference to administrative action which is vague and ambiguous. Such action could possibly be covered by the general review power found in this particular subsection.

ACTIVITY 12.4

Page through this study guide and take careful note of the various scenarios. What would the appropriate **ground of review** be in each of the scenarios that are examples of administrative action? Make a note next to each of these scenarios.

This is once again a self-evaluation activity. However, the purpose is to help you gain an understanding of the various grounds of review. *Note, though, that in almost every instance you will not be way off the mark should you write that the administrative action constitutes action that is unconstitutional or unlawful (s 6 2*(i)*). As we explained above, the reason for this is the catch-all nature of this ground of review.*

12.4 PROCEDURE FOR JUDICIAL REVIEW IN TERMS OF PAJA

12.4.1 Which court may review administrative action?

In terms of section 1 of PAJA, the courts that may now review administrative action are (a) the Constitutional Court acting in terms of section 167(6)(a); (this subsection provides for direct access to the Constitutional Court with the permission of the Court and when it is in the interests of justice) and (b) a High Court or another court of similar status. However, more importantly, certain specifically designated magistrates' courts are also now empowered to review administrative action.

Permitting certain designated magistrates' courts to review administrative action is an important departure from our common-law days, when the review of administrative action took place at the level of the High Court only. Section 1 of the Promotion of Administration of Justice Amendment Act 53 of 2002 substituted the definition of "court". A magistrate's court will have jurisdiction

> … either generally or in respect of a specified class of administrative actions, designated by the Minister by notice in the *Gazette* and presided over by a magistrate or an additional magistrate designated in terms of section 9A, [s 9A deals with the "designation and training of presiding officers" and was inserted by s 2 of the 2002 amending Act] within whose area of jurisdiction the administrative action occurred or the administrator has his or her or its principal place of administration or the party whose rights have been affected is domiciled or ordinarily resident or the adverse effect of the administrative action was, is or will be experienced …

Up to now, no magistrate's court or magistrate has been designated as required by section 1 (and read with s 9A) and we will therefore not go into the purpose and content of this section any further or express any opinion about this development. However, it should be noted that the Rules Board for Courts of Law made rules of procedure for judicial review (see below), which are applicable to proceedings for judicial review in the High Court, the Labour Court or the Magistrates' Courts in terms of Rule 1(1). (Rule 1 sets out when and how the rules apply under the heading "application of rules".)

12.4.2 The procedure prescribed for the review of administrative action

The period within which a review may be instituted has been limited to 180 days in terms of section 7(1) of PAJA. Thus, review proceedings are required to be instituted without unreasonable delay and not later than 180 days (6 months) after domestic remedies have been exhausted. The subsection reads as follows:

> Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date –
>
> (a) Subject to subsection 2(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or
> (b) Where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

In *City of Cape Town v Aurecon South Africa (Pty) Ltd* 2017 (4) SA 223 (CC), Mbha J clarified that the 180-day period "starts to run from the date on which the reasons for the administrative action became known (or ought reasonably to have become known)" (at para 41).

In terms of section 9(1)*(b)* ("variation of time"), provision is made for the extension of the period (of 180 days) by agreement between the parties or on application by the person concerned to the court or tribunal. In terms of subsection (2), the court or tribunal may grant an extension "where the interests of justice so require".

The time limit placed on the institution of review proceedings has been the subject of numerous objections. In truth, this subsection has the potential to encourage lawyers to institute legal proceedings as soon as possible and, in this way, weakens the objective of section 7(2) to resolve issues along non-judicial lines. Hoexter (2012:592), for example, refers to the submission presented by the Legal Resources Centre (LRC) to the Portfolio Committee on Justice in Parliament in 1999. Justice

Clive Plasket, then Director of the Grahamstown office of the LRC, told the Committee that the requirement "will undoubtedly work to the detriment of the poor, the illiterate, the marginalized".

A new section 7(3) was inserted by section 27*(a)* of the Judicial Matters Second Amendment Act 55 of 2003 to provide that the Rules Board for Courts of Law established by section 2 of the Rules Board for Courts of Law Act 107 of 1985 *must* make rules of procedure for judicial review "within three years after the commencement of section 10 of this Act" (s 10, which deals with regulations made by the minister, came into operation on 31 July 2002).

The Rules Board made the rules called "The Rules of Procedure for judicial review of administrative action" ("the Rules"). The Rules were duly approved by the Minister and Parliament and were published in the *Government Gazette* No 32622 of 9 September 2009. In terms of the preamble to the Rules, they "provide a procedure to facilitate proceedings for judicial review".

The most important feature of these rules, for our purposes at least, is that they provide that Rule 53 of the Uniform Rules of the High Court and Rule 7A of the Rules for the Conduct of Proceedings in the Labour Court "no longer apply in proceedings for judicial review" (Rule 1(4)*(b)*).

The rules provided for in the Rules deal with (apart from rules on application and definitions) the request for reasons and disclosure in Part B, (Rules 3–7); application for judicial review in Part C, (Rules 8 and 9) and general rules in Part D, (Rules 10–15). These general rules deal with, amongst others, the power of the court to give directions for (a) the "proper conduct of proceedings under these rules"; and (b) "shorten any prescribed period prescribed in the rules … in which the proceedings are instituted" as well as (c) extending the period (Rule 14).

12.5 THE ORDERS MADE BY A COURT AS PRESCRIBED BY SECTION 8 OF PAJA

12.5.1 Introduction

In terms of section 8(1) of PAJA, the court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable.

A court's approach in fashioning such an order was carefully set out in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (4) SA 179 (CC), where the Constitutional Court held that a contract concluded between SASSA and Cash Paymaster was invalid. The Court then had to determine what remedy would follow from that invalidity. Froneman J held that a breach of administrative justice attracts a public-law, rather than a private-law remedy, to correct an improper administrative function. This was phrased as the "**corrective principle"** to allow for the fashioning of remedies that give effect to the rule of law and the principle of legality. The corrective principle is focused on the public interest and operates on two levels: a) what was wrong with a decision must be corrected and b) the harm inflicted on the "public good" should be accounted for. The Court held that even though the contract between the parties had been invalid, it should continue to be in force until such time as SASSA could award a new contract, following a new tender process.

High Courts have the power to make orders in terms of section 6(1) and to order a remedy in terms of section 8(1). Magistrates' courts have similar powers, provided that they have been designated by the Minister, and provided further, that they comply with the provisions of section 170 of the Constitution. This section limits the jurisdiction of magistrates, in that they may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.

If one accepts that the words "any legislation" mean just that, then magistrates' courts do not have jurisdiction to examine the constitutionality of any legislation, be it original or delegated legislation. This means that magistrates' courts cannot examine the constitutionality of delegated legislation such as proclamations, regulations and rules. Magistrates' courts will then have a more limited jurisdiction than the High Courts, in that their jurisdiction is limited to an examination of the validity of administrative action by any organ of state, other than the President, and will also exclude the examination of the validity of primary and delegated legislation.

Getting back to section 8 of PAJA, this section is in line with the constitutional provision (s 172(1)) to the effect that, where the High Court, the Supreme Court of Appeal or the Constitutional Court declares administrative action unconstitutional, such court may make an order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity and an order suspending the declaration of invalidity on certain conditions until such time as the competent authority has corrected the defect.

In *Esorfranki Pipelines (Pty) Ltd and Another v Mopani District Municipality and Others* [2014] 2 All SA 493 (SCA), the Supreme Court of Appeal confirmed that section 8(1) of PAJA enables courts to fashion just and equitable relief, including maintaining a decision that is in fact held to be invalid, in order to deal with practical difficulties that may arise when administrative action is set aside on review.

An important principle was established in *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC), where Cameron J had to decide whether "a decision by a state official, communicated to the subject, and in reliance on which it acts, [may] be set aside by a court even when government has not applied (or counter-applied) for the court to do so." The Court found in the negative since such an allowance would be unfair to the affected private party (Kirland) who benefitted from an invalid administrative decision. **If a public authority intends to set aside an invalid administrative decision, it would have to do so by way of judicial review.**

The Court also held that PAJA requires that a litigant bring an application to set aside administrative action; judicial review proceedings must be instituted without unreasonable delay; and if the court finds that the administrative action is unlawful, it must grant a just and equitable remedy.

12.5.2 Section 8

Section 8(1)*(a)*

In terms of section 8(1)*(a)* the court may direct the administrator:

(i) to give reasons, or
(ii) to act in a required manner

This order will no doubt assume the form of a *mandamus* or a mandatory interdict.

Section 8(1)*(b)*

In terms of section 8(1)*(b)*, the court may make an order prohibiting the administrator from acting in a particular manner. This paragraph thus makes provision for a prohibitory interdict.

Section 8(1)*(c)*

In terms of paragraph *(c)*, the court may grant orders setting aside decisions of the administrator. At common law, the courts do not lightly substitute their decision for that of the administrative body. In general, the policy is to refer the matter back to the administrator for his or her reconsideration. However, one does encounter decisions in which the court has indeed substituted its own decision for that of an administrative body. For example, in *Nel v SA Geneeskundige en Tandheelkundige Raad* ["SA Medical and Dental Council"] 1996 4 SA 112 (T), the court found that the legislature had appointed the Council as the final arbiter of what constituted improper or disgraceful conduct for practitioners, and that the members of the Council had the necessary expertise to know what could be regarded as disgraceful and improper. A court would thus not lightly interfere with the Council's decision or itself impose a sentence. The applicant had been *bona fide,* but had been negligent in applying the applicable tariffs. The court found that the sentence which had been imposed was shockingly inappropriate (her name was removed from the register of dentists), to the extent that the Council had either not fully accepted the facts placed before it, or had used inside information which had not been made known to the applicant, and which she had not been able to address. Although a court should not substitute its judgment with regard to sentencing for that of the Council, unless compelling reasons existed for it to do so, the circumstances of the case forced the court to impose a lighter sentence.

In the main, however, the court would set aside a decision by the administrator under the circumstances laid down in section 8(1)*(c)* and send it back to the original decision-maker.

Section 8(1)*(c)* reads as follows:

> The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders –
>
> . . .
>
> (a) setting aside the administrative action and –
>
> (i) remitting the matter for reconsideration by the administrator, with or without directions; or
>
> (ii) in exceptional cases –
>
> *(aa)* substituting or varying the administrative action or correcting a defect resulting from the administrative action, or
>
> *(bb)* directing the administrator or any other party to the proceedings to pay compensation;

This subsection clearly empowers a court or tribunal to set aside administrative action in certain exceptional circumstances.

In terms of section 8(1)*(d)*, the court is empowered to declare the rights of the parties. (The purpose is to ensure that the rights of the affected person and the admin-

istrator are clearly set out.) Section 8(1)*(e)* provides for the granting of a temporary interdict or other temporary relief. In terms of section 8(1)*(f)*, a court may make an order as to costs.

Section 8(2) relates to orders when an administrator failed to make a decision.

ACTIVITY 12.5

Page through this study guide again and take careful note of the various scenarios. What would the appropriate *remedy* be in each of the scenarios that are examples of administrative action? Make a note next to each of these scenarios. In other words, suppose you were the aggrieved person's legal advisor and you were to approach a court of law, what *order* would you ask the court to grant?

This is a self-evaluation activity. However, the purpose is to help you gain an understanding of the various remedies or orders a court may grant. Note, though, that it is not sufficient to write that you would ask for an order that is just and equitable. You must be more exact and provide a reason.

12.6 THE "CONSTITUTIONALISATION" OF ADMINISTRATIVE ACTION AND JUDICIAL REVIEW

The common-law rules of administrative law have now been entrenched in section 33 of the Constitution (and earlier in s 24 of the interim Constitution). In other words, the fundamental principles of administrative law as we encounter them in a summarised or encapsulated format in the right to just administrative action are now recognised and guaranteed by the Constitution. Hoexter "Just administrative action" in Currie and De Waal (2013:647) explains the position as follows:

> The constitutional right to just administrative action entrenches fundamental principles of administrative law that were developed by the courts in the exercise of their common-law review powers.

But what has happened to the inherent power of high courts to review administrative action? This is a difficult question to answer, since it is possible to argue from various points of view, and various theories may be advanced.

For our purposes, it will suffice to say that this difficult question was answered by the Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa: In re ex Parte President of the Republic of South Africa* 2000 3 BCLR 241 (CC); 2000 2 SA 674 (CC). The argument was that the common-law grounds of review can be relied upon by a litigant (a party to a lawsuit), and if this is done, the matter must be treated as a common-law matter and not a constitutional matter. Chaskalson P (at para 33) found that

> The control of public power by the courts through judicial review is and always has been a constitutional matter. Prior to the adoption of the interim Constitution this control was exercised by the courts through the application of common law constitutional principles. Since the adoption of the interim

> Constitution such control has been regulated by the Constitution which contains express provisions dealing with these matters. The common law principles that previously provided the grounds for judicial review of public power have been subsumed, and in so far as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts.

He did not accept the appellants' contention that the common law is a body of law separate and distinct from the Constitution and held as follows (at para 44):

> There are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.

What does this mean? It means that the court was saying that the inherent review powers of the court with regard to administrative action have now been subsumed (to "subsume" means to incorporate something or to include something in a larger group or category) by constitutional review in so far as they applied to the exercise of public power. Hoexter "Just administrative action" in Currie and De Waal (2013:647) explained the post-1994 position (and before the commencement of PAJA) as follows:

> … any … challenge to the validity of administrative action was (in principle, if not always in fact) based on an allegation that one or more of the constitutional rights to lawful, procedurally fair and reasonable administrative action had been violated.

As we said, this is a difficult topic and what we have briefly explained will suffice.

12.7 THE IMPORTANCE OF JUDICIAL CONTROL AND THE COURTS' TRADITIONAL (COMMON-LAW) FUNCTION OF CONTROLLING ADMINISTRATIVE ACTION THROUGH REVIEW

We indicated in the previous learning unit that judicial control is another form of control of administrative action.

You will learn (or hopefully have already) about the principle of checks and balances, which is an important aspect of the principle of separation of powers. This principle ensures that each branch of government is subject to some influence and control by the others, which is very important in any democratic state to prevent abuse of power.

The Constitution also provides for a number of additional checks and balances (we have already referred you to, for example, the state institutions supporting constitutional democracy). By far the most important is judicial control by the courts through the power of judicial review. This power of judicial review allows the validity of legislation and/or administrative action to be challenged in a court. The judiciary, which acts as a watchdog over the legislature and the executive, must ensure that all state actions comply with the Constitution (both the procedural and substantive requirements). This is why judicial control is universally regarded as the cornerstone of the control of administrative action in a democratic state; so much so that some writers view the judicial review of administrative action as the most important aspect of administrative law.

Please note:

Matters such as the legitimacy of the judiciary (i.e. the acceptance of the legal system by the citizens of a country) and the importance of true independence of the judiciary (i.e. it must be free from interference by the other branches of government) are dealt with in the Constitutional-law module. Note that the 1996 Constitution specifically provides that no person or organ of state may interfere with the functioning of the courts (s 165(3)). Organs of state must, by legislative and other means, assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness (s 165(4)).

Even before 1994 (under the old Westminster dispensation characterised by parliamentary supremacy), under the common law, the various divisions of the Supreme Court (now called the "High Courts") have always had an *inherent (inbuilt) power* of judicial review of administrative action. In *Johannesburg Consolidated Investment Company Ltd v Johannesburg Town Council* 1903 TS 111, Innes CJ described the common-law power of review as follows (at 115):

> Whenever a public body has a duty imposed on it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the proceedings complained of and set aside or correct them. This is no special machinery created by the Legislature; it is a right inherent in the Court …

In order to succeed in a claim for judicial review in terms of the common law, the applicant will have to prove the illegality, irregularity or invalidity of the administrative action in question. To do so, he or she will rely on any of the recognised common-law grounds of invalidity, such as failure to comply with the rules of natural justice or failure to comply with the correct procedure, and so on.

Over the years, the South African courts (the above-mentioned various divisions of the High Court) have built up a substantial volume of case law in which the most important and most authoritative legal principles relating to administrative organisation, powers and actions, as well as the control of these administrative powers and actions, are found. Common-law review has therefore had a considerable impact on the development of administrative law.

12.8 CONCLUSION

We have come to the end of our study of the general principles of administrative law. We have limited the discussion of orders that a court can make to a brief overview to give you an idea of the possibilities provided for in section 8. We hope you have found this module instructive and informative.

ANNEXURE A

Promotion of Administrative Justice Act No. 3 of 2000

(Available from http://www.saflii.org (accessed on 2010/07/13))

[ASSENTED TO 3 FEBRUARY, 2000]

[DATE OF COMMENCEMENT: 30 NOVEMBER, 2000] (Unless otherwise indicated)

(English text signed by the President)

This Act has been updated to *Government Gazette* 31908 dated 17 February, 2009.

as amended by

Judicial Matters Amendment Act, No. 42 of 2001
[with effect from 7 December, 2001, unless otherwise indicated]

Promotion of Administrative Justice Amendment Act, No. 53 of 2002
Judicial Matters Second Amendment Act, No. 55 of 2003

Judicial Matters Amendment Act, No. 22 of 2005
[with effect from 11 January, 2006, unless otherwise indicated]

Public Service Amendment Act, No. 30 of 2007 [with effect from 1 April, 2008]
Judicial Matters Amendment Act, No. 66 of 2008 [with effect from 17 February, 2009]

proposed amendment by
Public Service Amendment Act, No. 30 of 2007
(provisions not yet proclaimed)

ACT

To give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action as contemplated in section 33 of the Constitution of the Republic of South Africa, 1996; and to provide for matters incidental thereto.

Preamble – WHEREAS section 33(1) and (2) of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair and that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons;

AND WHEREAS section 33 (3) of the Constitution requires national legislation to be enacted to give effect to those rights, and to –

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

- impose a duty on the state to give effect to those rights; and
- promote an efficient administration;

AND WHEREAS item 23 of Schedule 6 to the Constitution provides that the national legislation envisaged in section 33(3) must be enacted within three years of the date on which the Constitution took effect;

AND IN ORDER TO –

- promote an efficient administration and good governance; and
- create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function, by giving effect to the right to just administrative action,

ARRANGEMENT OF SECTIONS

1. Definitions
2. Application of Act
3. Procedurally fair administrative action affecting any person
4. Administrative action affecting public
5. Reasons for administrative action
6. Judicial review of administrative action
7. Procedure for judicial review
8. Remedies in proceedings for judicial review
9. Variation of time
9A. Designation and training of presiding officers
10. Regulations
10A. Liability
11. Short title and commencement

1. Definitions. –

In this Act, unless the context indicates otherwise –

"administrative action" means any decision taken, or any failure to take a decision, by –

(a) an organ of state, when –

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) 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 provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include –

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

(bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121(1) and (2), 125(2)(d), (e) and (f), 126, 127(2), 132(2), 133(3)(b), 137, 138, 139 and of the Constitution;

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

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

(ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;

(ff) a decision to institute or continue a prosecution;

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

[Para. (gg) substituted by s. 26 of Act No. 55 of 2003.]

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

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

"administrator" means an organ of state or any natural or juristic person taking administrative action;

"Constitution" means the Constitution of the Republic of South Africa, 1996;

"court" means –

(a) the Constitutional Court acting in terms of section 167(6)(a) of the Constitution; or

(b)

(i) a High Court or another court of similar status; or

(ii) a Magistrate's Court, either generally or in respect of a specified class of administrative actions, designated by the Minister by notice in the Gazette and presided over by a magistrate or an additional magistrate designated in terms of section 9A, within whose area of jurisdiction the administrative action occurred or the administrator has his or her or its principal place of administration or the party whose rights have been affected is domiciled or ordinarily resident or the adverse effect of the administrative action was, is or will be experienced;

[Definition of "court" substituted by s. 1 of Act No. 53 of 2002.]

"decision" means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to –

(a) making, suspending, revoking or refusing to make an order, award or determination;
(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
(c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
(d) imposing a condition or restriction;
(e) making a declaration, demand or requirement;
(f) retaining, or refusing to deliver up, an article; or
(g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly;

"empowering provision" means a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken;
"failure", in relation to the taking of a decision, includes a refusal to take the decision;
"Minister" means the Cabinet member responsible for the administration of justice;
"organ of state" bears the meaning assigned to it in section 239 of the Constitution;
"prescribed" means prescribed by regulation made under section 10;
"public", for the purposes of section 4, includes any group or class of the public;
"this Act" includes the regulations; and
"tribunal" means any independent and impartial tribunal established by national legislation for the purpose of judicially reviewing an administrative action in terms of this Act.

Wording of Sections	x
def: administrative action par (gg) of Act 3 of 2000 prior to amendment by Act 55 of 2003	
Wording of Sections	x
def: court of Act 3 of 2000 prior to amendment by Act 53 of 2002	

2. Application of Act –

(1) The Minister may, by notice in the *Gazette* –

(a) if it is reasonable and justifiable in the circumstances, exempt an administrative action or a group or class of administrative actions from the application of any of the provisions of section 3, 4 or 5; or
(b) in order to promote an efficient administration and if it is reasonable and justifiable in the circumstances, permit an administrator to vary any of the requirements referred to in section 3 (2), 4 (1)(a) to (e), (2) and (3) or 5 (2), in a manner specified in the notice.

(2) Any exemption or permission granted in terms of subsection (1) must, before publication in the *Gazette*, be approved by Parliament.

3. Procedurally fair administrative action affecting any person –

(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2) (a) A fair administrative procedure depends on the circumstances of each case.

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1) –

(i) adequate notice of the nature and purpose of the proposed administrative action;
(ii) a reasonable opportunity to make representations;
(iii) a clear statement of the administrative action;
(iv) adequate notice of any right of review or internal appeal, where applicable; and
(v) adequate notice of the right to request reasons in terms of section 5.

[Para. (b) amended by s. 46 of Act No. 42 of 2001.]

(3) In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person referred to in subsection (1) an opportunity to –

(a) obtain assistance and, in serious or complex cases, legal representation;
(b) present and dispute information and arguments; and
(c) appear in person.

(4) (a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).

(b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including –

(i) the objects of the empowering provision;
(ii) the nature and purpose of, and the need to take, the administrative action;
(iii) the likely effect of the administrative action;
(iv) the urgency of taking the administrative action or the urgency of the matter; and
(v) the need to promote an efficient administration and good governance.

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

Wording of Sections	x
s 3(2)(b) of Act 3 of 2000 prior to amendment by Act 42 of 2001	

4. Administrative action affecting public –

(1) In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether –

(a) to hold a public inquiry in terms of subsection (2);

(b) to follow a notice and comment procedure in terms of subsection (3);
(c) to follow the procedures in both subsections (2) and (3);
(d) where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure; or
(e) to follow another appropriate procedure which gives effect to section 3.

(2) If an administrator decides to hold a public inquiry –

(a) the administrator must conduct the public inquiry or appoint a suitably qualified person or panel of persons to do so; and
(b) the administrator or the person or panel referred to in paragraph (a) must –

(i) determine the procedure for the public inquiry, which must –

(aa) include a public hearing; and
(bb) comply with the procedures to be followed in connection with public inquiries, as prescribed;

(ii) conduct the inquiry in accordance with that procedure;
(iii) compile a written report on the inquiry and give reasons for any administrative action taken or recommended; and
(iv) as soon as possible thereafter –

(aa) publish in English and in at least one of the other official languages in the *Gazette* or relevant provincial *Gazette* a notice containing a concise summary of any report and the particulars of the places and times at which the report may be inspected and copied; and
(bb) convey by such other means of communication which the administrator considers effective, the information referred to in item (aa) to the public concerned.

(3) If an administrator decides to follow a notice and comment procedure, the administrator must –

(a) take appropriate steps to communicate the administrative action to those likely to be materially and adversely affected by it and call for comments from them;
(b) consider any comments received;
(c) decide whether or not to take the administrative action, with or without changes; and
(d) comply with the procedures to be followed in connection with notice and comment procedures, as prescribed.

(4) (a) If it is reasonable and justifiable in the circumstances, an administrator may depart from the requirements referred to in subsections (1)(a) to (e), (2) and (3).
(b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including –

(i) the objects of the empowering provision;
(ii) the nature and purpose of, and the need to take, the administrative action;
(iii) the likely effect of the administrative action;

(iv) the urgency of taking the administrative action or the urgency of the matter; and

(v) the need to promote an efficient administration and good governance.

(Date of commencement of s. 4: 31 July, 2002.)

5. Reasons for administrative action –

(1) Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.

(2) The administrator to whom the request is made must, within 90 days after receiving the request, give that person adequate reasons in writing for the administrative action.

(3) If an administrator fails to furnish adequate reasons for an administrative action it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason.

(4) (a) An administrator may depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances, and must forthwith inform the person making the request of such departure.

(b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including –

(i) the objects of the empowering provision;

(ii) the nature, purpose and likely effect of the administrative action concerned;

(iii) the nature and the extent of the departure;

(iv) the relation between the departure and its purpose;

(v) the importance of the purpose of the departure; and

(vi) the need to promote an efficient administration and good governance.

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

(6) (a) In order to promote an efficient administration, the Minister may, at the request of an administrator, by notice in the *Gazette* publish a list specifying any administrative action or a group or class of administrative actions in respect of which the administrator concerned will automatically furnish reasons to a person whose rights are adversely affected by such actions, without such person having to request reasons in terms of this section.

(b) The Minister must, within 14 days after the receipt of a request referred to in paragraph (a) and at the cost of the relevant administrator, publish such list, as contemplated in that paragraph.

6. Judicial review of administrative action –

(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

(2) A court or tribunal has the power to judicially review an administrative action if –

(a) the administrator who took it –

(i) was not authorised to do so by the empowering provision;
(ii) acted under a delegation of power which was not authorised by the empowering provision; or
(iii) was biased or reasonably suspected of bias;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
(c) the action was procedurally unfair;
(d) the action was materially influenced by an error of law;
(e) the action was taken –

(i) for a reason not authorised by the empowering provision;
(ii) for an ulterior purpose or motive;
(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
(iv) because of the unauthorised or unwarranted dictates of another person or body;
(v) in bad faith; or
(vi) arbitrarily or capriciously;

(f) the action itself –

(i) contravenes a law or is not authorised by the empowering provision; or
(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; or
(dd) the reasons given for it by the administrator;

(g) the action concerned consists of a failure to take a decision;
(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

(i) the action is otherwise unconstitutional or unlawful.

(3) If any person relies on the ground of review referred to in subsection (2)(g), he or she may in respect of a failure to take a decision, where –

(a) (i) an administrator has a duty to take a decision;
(ii) there is no law that prescribes a period within which the administrator is required to take that decision; and
(iii) the administrator has failed to take that decision, institute proceedings in a court or tribunal for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the decision; or
(b) (i) an administrator has a duty to take a decision;
(ii) a law prescribes a period within which the administrator is required to take that decision; and

(iii) the administrator has failed to take that decision before the expiration of that period, institute proceedings in a court or tribunal for judicial review of the failure to take the decision within that period on the ground that the administrator has a duty to take the decision notwithstanding the expiration of that period.

7. Procedure for judicial review –

(1) Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date –

(a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or

(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

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

(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.

(3) The Rules Board for Courts of Law established by section 2 of the Rules Board for Courts of Law Act, 1985 (Act 107 of 1985), must, before 28 February 2009, subject to the approval of the Minister, make rules of procedure for judicial review.

[Sub-s. (3) substituted by s. 27 (a) of Act No. 55 of 2003 and by s. 29 of Act No. 66 of 2008.]

(4) Until the rules of procedure referred to in subsection (3) come into operation, all proceedings for judicial review under this Act must be instituted in a High Court or another court having jurisdiction.

[Sub-s. (4) substituted by s. 27 (b) of Act No. 55 of 2003.]

(5) Any rule made under subsection (3) must, before publication in the *Gazette*, be approved by Parliament.

Wording of Sections	x
s 7(3) of Act 3 of 2000 prior to amendment by Act 55 of 2003 s 7(3) of Act 3 of 2000 prior to amendment by Act 66 of 2008	
Wording of Sections	x
s 7(4) of Act 3 of 2000 prior to amendment by Act 55 of 2003	

8. Remedies in proceedings for judicial review –

(1) The court or tribunal, in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable, including orders –

(a) directing the administrator –

(i) to give reasons; or
(ii) to act in the manner the court or tribunal requires;

(b) prohibiting the administrator from acting in a particular manner;
(c) setting aside the administrative action and –

(i) remitting the matter for reconsideration by the administrator, with or without directions; or
(ii) in exceptional cases –

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or
(bb) directing the administrator or any other party to the proceedings to pay compensation;

(d) declaring the rights of the parties in respect of any matter to which the administrative action relates;
(e) granting a temporary interdict or other temporary relief; or
(f) as to costs.

(2) The court or tribunal, in proceedings for judicial review in terms of section 6 (3), may grant any order that is just and equitable, including orders –

(a) directing the taking of the decision;
(b) declaring the rights of the parties in relation to the taking of the decision;
(c) directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or
(d) as to costs.

9. Variation of time –

(1) The period of –

(a) 90 days referred to in section 5 may be reduced; or
(b) 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period, by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.

(2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require.

9A. Designation and training of presiding officers.–

(1) (a) The head of an administrative region defined in section 1 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), must, subject to subsection (2), designate in writing any magistrate or additional magistrate as a presiding officer of the Magistrate's Court designated by the Minister in terms of section 1 of this Act.

(b) A presiding officer must perform the functions and duties and exercise the powers assigned to or conferred on him or her under this Act or any other law.

(2) Only a magistrate or additional magistrate who has completed a training course –

(a) before the date of commencement of this section; or

(b) as contemplated in subsection (5), and whose name has been included on the list contemplated in subsection (4)(a), may be designated in terms of subsection (1).

(3) The heads of administrative regions must –

(a) take all reasonable steps within available resources to designate at least one presiding officer for each magistrate's court within his or her area of jurisdiction which has been designated by the Minister in terms of section 1; and

(b) without delay, inform the Director-General: Justice and Constitutional Development of any magistrate or additional magistrate who has completed a training course as contemplated in subsections (5) and (6) or who has been designated in terms of subsection (1).

(4) The Director-General: Justice and Constitutional Development must compile and keep a list of every magistrate or additional magistrate who has –

(a) completed a training course as contemplated in subsections (5) and (6); or

(b) been designated as a presiding officer of a magistrate's court contemplated in subsection (1).

(5) The Chief Justice must, in consultation with the Judicial Service Commission and the Magistrates Commission, develop the content of training courses with the view to building a dedicated and experienced pool of trained and specialised presiding officers for purposes of presiding in court proceedings as contemplated in this Act.

(6) The Chief Justice must, in consultation with the Judicial Service Commission, the Magistrates Commission and the Minister, implement the training courses contemplated in subsection (5).

(7) The Minister must table a report in Parliament, as prescribed, relating to the content and implementation of the training courses referred to in subsections (5) and (6).

[S. 9A inserted by s. 2 of Act No. 53 of 2002.]

10. Regulations and code of good administrative conduct –

(1) The Minister must make regulations relating to –

(a) the procedures to be followed by designated administrators or in relation to classes of administrative action in order to promote the right to procedural fairness;
(b) the procedures to be followed in connection with public inquiries;
(c) the procedures to be followed in connection with notice and comment procedures; and
(d) the procedures to be followed in connection with requests for reasons.

(2) The Minister may make regulations relating to –

(a) the establishment, duties and powers of an advisory council to monitor the application of this Act and to advise the Minister on –

(i) the appropriateness of publishing uniform rules and standards which must be complied with in the taking of administrative actions, including the compilation and maintenance of registers containing the text of rules and standards used by organs of state;
(ii) any improvements that might be made in respect of internal complaints procedures, internal administrative appeals and the judicial review by courts or tribunals of administrative action;
(iii) the appropriateness of establishing independent and impartial tribunals, in addition to the courts, to review administrative action and of specialised administrative tribunals, including a tribunal with general jurisdiction over all organs of state or a number of organs of state, to hear and determine appeals against administrative action;
(iv) the appropriateness of requiring administrators, from time to time, to consider the continuance of standards administered by them and of prescribing measures for the automatic lapsing of rules and standards;
(v) programmes for educating the public and the members and employees of administrators regarding the contents of this Act and the provisions of the Constitution relating to administrative action;
(vi) any other improvements aimed at ensuring that administrative action conforms with the right to administrative justice;
(vii) any steps which may lead to the achievement of the objects of this Act; and
(viii) any other matter in respect of which the Minister requests advice;

(b) the compilation and publication of protocols for the drafting of rules and standards;
(c) the initiation, conducting and co-ordination of programmes for educating the public and the members and employees of administrators regarding the contents of this Act and the provisions of the Constitution relating to administrative action;
(d) matters required or permitted by this Act to be prescribed; and
(e) matters necessary or convenient to be prescribed in order to –

(i) achieve the objects of this Act; or
(ii) subject to subsection (3), give effect to any advice or recommendations by the advisory council referred to in paragraph (a).

(3) This section may not be construed as empowering the Minister to make regulations, without prior consultation with the Minister for the Public Service and Administration, regarding any matter which affects the public service.

[Sub-s. (3) substituted by s. 43 of Act No. 30 of 2007.]

(4) Any regulation –

(a) made under subsections (1)(a), (b), (c) and (d) and (2)(c), (d) and (e) must, before publication in the *Gazette*, be submitted to Parliament; and
(b) made under subsection (2)(a) and (b) must, before publication in the *Gazette*, be approved by Parliament.

[S. 10 substituted by s. 15 of Act No. 22 of 2005.]

(5) Any regulation made under subsections (1) and (2) or any provision of the code of good administrative conduct made under subsection (5A) which may result in financial expenditure for the State must be made in consultation with the Minister of Finance.

(5A) The Minister must, by notice in the *Gazette*, publish a code of good administrative conduct in order to provide administrators with practical guidelines and information aimed at the promotion of an efficient administration and the achievement of the objects of this Act.

(6) The code of good administrative conduct referred to in subsection 5A must, before publication in the *Gazette*, be approved by Cabinet and Parliament and must be made before 28 February 2009.

[S. 10 substituted by s. 15 of Act No. 22 of 2005. Sub-s. (6) substituted by s. 30 of Act No. 66 of 2008.]

Wording of Sections	x
s 10(3) of Act 3 of 2000 prior to amendment by Act 30 of 2007	
Wording of Sections	x
s 10 of Act 3 of 2000 prior to amendment by Act 22 of 2005	

Wording of Sections	x
10 of Act 3 of 2000 prior to amendment by Act 22 of 2005 s 10(6) of Act 3 of 2000 prior to amendment by Act 66 of 2008	

10A. Liability – No person is criminally or civilly liable for anything done in good faith in the exercise or performance or purported exercise or performance of any power or duty in terms of this Act or the rules made under section 7(3).

[S. 10A inserted by s. 31 of Act No. 66 of 2008.]

11. Short title and commencement. – This Act is called the Promotion of Administrative Justice Act, 2000, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

ANNEXURE B

Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and Another 2005 (3) SA 156 (C) 2005 (3) SA 156 (C)

(Available at http://www.saflii.org (accessed on 2010/07/13)

Case Information

Application for review and setting aside of the Director-General's decision under s 22(3) of the Environment Conservation Act 73 of 1989 to authorise the construction of a nuclear reactor. The facts appear from the reasons for judgment.

W H Trengove SC (with A M Stewart and P Naidu) for the applicant.

R C Hiemstra SC (with N Bawa) for the first respondent.

P M Kennedy SC (with L H Barnes) for the second respondent. Cur adv vult.

Postea (January 26).

1] **IN THE HIGH COURT OF SOUTH AFRICA**

2] **(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

3] Case No 7653/03

4] In the matter between:

5] **EARTHLIFE AFRICA (CAPE TOWN)** Applicant

6] and

7] **DIRECTOR-GENERAL: DEPARTMENT OF ENVIRONMENTAL AFFAIRS & TOURISM** First Respondent

8] **ESKOM HOLDINGS LIMITED** Second Respondent

9] _____

10] **JUDGMENT: DELIVERED 26 JANUARY 2005**

11] _____

12] **Griesel J:**

13] ***Introduction***

14] The second respondent (Eskom) wishes to construct a demonstration model 110 MegaWatt class pebble bed modular reactor (PBMR) at the site of its Koeberg Nuclear Power Station near Cape Town. On 25 June 2003, the first respondent, the Director-General of the Department of Environmental Affairs and Tourism (the DG), granted Eskom the requisite authorisation in terms of s 22(3) of the Environment

Conservation Act 73 of 1989 (ECA), subject to certain conditions which are not material for present purposes. This application is brought by the applicant to review and set aside that decision by the DG.

15] The applicant is Earthlife Africa (Cape Town), a non-governmental, non-profit, voluntary association of environmental and social activists in Cape Town. Its professed aims are to campaign against perceived 'environmental injustices' in the Cape Town area and to participate in environmental decision-making processes with a view to promoting and lobbying for good governance and informed decision-making. It is an autonomous branch of Earthlife Africa, which has several branches throughout South Africa. The applicant brings this application on its own behalf, on behalf of the residents of Cape Town who may be exposed to potential risks posed by the PBMR, and in the public interest.

16] ***Applicable legislation***

17] Although the decision under review was made primarily in terms of s 22(3) of ECA, there is a closely interwoven framework of related legislation impacting on the present matter: it includes the National Environmental Management Act 107 of 1998 (NEMA); the Nuclear Energy Act 46 of 1999 (the NE Act); the National Nuclear Regulator Act 47 of 1999 (the NNR Act); as well as a number of regulations, treaties and policies that fall under the jurisdiction of different government departments, all containing their own unique processes and requirements. For present purposes, however, the enquiry can be confined to ECA and its regulations.

18] The starting point for purposes of this application is s 21(1), read with s 22(1), of ECA. In terms of these provisions, the national Minister of Environmental Affairs and Tourism (the Minister) may identify 'activities which in his opinion may have a substantial detrimental effect on the environment'. Having identified such activities, nobody may then undertake any of them without authorisation in terms of s 22. One of the activities that has been identified by the Minister in terms of the Act is the 'construction, erection or upgrading' of, inter alia, nuclear reactors, including the PBMR. It is also common cause that the Minister designated the DG to perform the function of determining Eskom's application in terms of s 22(3).

19] In terms of s 22(2), read with the applicable regulations, the DG was required first to consider environmental impact reports (EIRs), which reports were to be compiled and submitted by such persons and in such manner as might be prescribed, dealing with the impact of the proposed activity on the environment.

20] Section 22(3) authorises the Minister or 'competent authority' (in casu, the DG) 'at his or its discretion (to) refuse or grant the authorisation for the proposed activity … on such conditions, if any, as he or it may deem necessary'.

21] Section 35(3) of ECA provides for appeals to the Minister by any person who feels aggrieved by a decision. Such person 'may appeal against such decision to the Minister … in the prescribed manner, within the prescribed period'. Regulation 11(1) of the applicable regulations provides that such an appeal must be lodged within thirty days from the date on which the record of decision was issued.

22] Section 36(1) of ECA goes on to provide that, '(n)otwithstanding the provisions of s 35', any interested party may request reasons for a decision within 30 days after becoming aware of it, while s 36(2) permits such interested party to apply to the High Court for review of the decision within 30 days after being furnished with the reasons or after expiry of the period within which they had to be given.

23] Regulations promulgated in terms of the Act (the EIA Regulations)[1] prescribe the procedures for the preparation, submission and consideration of EIRs for purposes of applications for authorisation in terms of s 22. It is not necessary for present purposes to summarise the EIA Regulations in detail, save to point out, first, that an applicant for authorisation is required, in terms of reg 3(1)(a), to appoint an independent consultant to comply with the regulations on its behalf; and second, one of the responsibilities of an applicant for authorisation in terms of reg 3(1)(f) is 'to ensure that all interested parties … are given the opportunity to participate in all the relevant procedures contemplated in these regulations'.

24] ***Factual background***

25] In an application dated 26 June 2000, Eskom applied to the DG for the necessary authorisation in terms of s 22 of ECA for 'the construction, commissioning, operation/ maintenance and decommissioning' of a PBMR. The purpose of the proposed plant, according to Eskom, was to assess the techno-economic viability of the technology for South African and international application for electricity generation and other commercial applications. The application was prepared by a consortium of consultants, appointed by Eskom pursuant to the provisions of reg 3(1)(a).

26] The consultants duly undertook an environmental impact assessment, accompanied by an extensive process of public participation. During the period from the beginning of 2001 to March 2002, they completed the steps contemplated by regs 5, 6 and 7 of the E EIA Regulations, comprising the preparation, submission and acceptance of a plan of study for scoping, a scoping report and a plan of study for the EIA. On 3 June 2002, they submitted a draft EIR to the department and to interested parties, including the applicant, for comment.

27] Prior to filing its submissions, and during the period from June to September 2002, the Legal Resources Centre (the LRC) made various efforts on behalf of the applicant to obtain access to further information and documents relating to the draft EIR from the department, Eskom, the consultants and others. Their efforts were, however, largely unsuccessful. This aspect forms the basis of one of the applicant's complaints in the present review, as will appear below.

28] On 4 September 2002, being the extended deadline for the submission of comments, the applicant submitted detailed written submissions on the draft EIR to the department. According to the applicant, its submissions were 'a serious study of complex technology and its implications', which took 'many hundreds of hours' to prepare and involved input from lawyers, scientists and social activists. It was intended as 'a serious contribution to the process'. In its covering letter, the LRC requested an opportunity to make further submissions to the relevant departmental chief on behalf of the applicant regarding its input.

29] The consultants subsequently produced their final EIR, which they submitted to the department on 28 October 2002. The final EIR was later published and distributed to interested parties. It was also made available on the internet and in certain public libraries.

30] During the period from October to May 2003, the LRC made various efforts on behalf of the applicant to be afforded a 'hearing' by the DG on the final EIR and on his decision whether to grant or refuse the authorisation sought by Eskom. The applicant, however, was persistently rebuffed and was not afforded the opportunity it sought. As will emerge later, this aspect forms the applicant's main ground of review.

1 GN R1183 GG 18261 OF 4 September 1997, as amended.

31] On 21 May 2003, the applicant launched an urgent application against the DG and Eskom in the Pretoria High Court, seeking access to all the information that Eskom had placed before the DG in support of its application for authorisation, and a reasonable opportunity to make representations to the DG on his decision whether to grant or refuse Eskom's application for authorisation. Both the DG and Eskom opposed the application, which ultimately failed because the Court held 'that the applicant has failed to establish that this is an urgent application and it is accordingly struck off the roll of this Court'.

32] Early in the whole process, during 2001, the DG appointed a panel of experts to advise him on Eskom's application. On 28 March 2003, and having studied the final EIR, the panel reported to the DG, recommending that the application be granted.

33] On 25 June 2003, the Deputy DG of the department, Mr Wynand Fourie, submitted a memorandum to the DG in which he recommended that Eskom's application for authorisation be granted. The memorandum did not address or even mention the applicant's submissions on the draft EIR. On the same day, the DG formally approved Eskom's application for authorisation and issued his record of decision accordingly.

34] On 24 July 2003, ie within 30 days after the decision, the applicant lodged an appeal to the Minister against the DG's decision, as required by s 35(3) of ECA, read with reg 11(1) of the EIA Regulations. That appeal has not yet been finalised.

35] The present application for review, which is being brought in terms of s 36 of ECA, read with s 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), was thereupon launched on 15 September 2003 and is being opposed by both the DG and Eskom.

36] ***Internal remedies***

37] Before considering the individual review grounds, it is necessary first to consider two preliminary points. One of the grounds of opposition raised by Eskom – though not by the DG – was that the decision of the DG does not constitute 'administrative action' as defined by PAJA, on the basis that the decision does not have 'a direct external legal effect', as I contemplated by the definition of 'administrative action' in s 1 of that Act. This aspect was raised for the first time in Eskom's written heads of argument and was not specifically relied on as a substantive defence in its answering affidavit. During oral argument before us, however, counsel – without expressly abandoning the point – did not address any submissions to us in support thereof. In the circumstances, I do not deem it necessary to devote any attention to it, save to state that, in my opinion, there is no substance in the point.

38] The second, more substantial, point raised on behalf of both respondents is that it was incumbent upon the applicant, prior to launching the present application for review, first to have exhausted its internal remedies in terms of ECA. They rely in this regard on the provisions of s 7(2)(a) and (b) of PAJA, read with s 35(3) of ECA.

39] Section 7(2)(a) of PAJA provides that 'no court … shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted'. Paragraph (b) requires a court or tribunal, if it is not satisfied that any internal remedy referred to in para (a) has been exhausted, to direct that the person concerned must first exhaust such remedy before instituting proceedings for judicial review in a court or tribunal in terms of this Act.

40] As shown above, s 35(3) of ECA provides for appeals to the Minister by any person who feels aggrieved by a decision. This procedure, however, is not peremptory inasmuch as s 36 of the same Act makes provision for judicial review by the High Court 'notwithstanding the provisions of s 35'.

41] It is common cause that an appeal to the Minister in terms of s 35(3) of ECA does constitute an 'internal remedy', as contemplated by s 7(2) of PAJA. It is further common cause that the applicant in this case has indeed lodged such an appeal and that it has also launched the present review application without awaiting the outcome of the appeal. The question is whether the present application should in these circumstances be barred until disposal of the appeal.

42] During argument before us, much of the debate revolved around the apparent contradiction between s 7(2)(a) of PAJA, on the one hand, and s 36 of ECA, on the other. The applicant relied squarely on the provisions of s 36 of ECA and attempted to reconcile those provisions with the aforesaid provisions in PAJA. The respondents, on the other hand, contended for a narrow, literal interpretation of s 7(2)(a) and (b) of PAJA. Relying on Sasol Oil (Pty) Ltd and Another v Metcalfe NO[2], they argued, inter alia, that '(t) o the extent that earlier legislation is inconsistent with PAJA, PAJA must prevail'.

43] In the view that I take of the matter, it is not necessary to resolve this hermeneutic dispute. Even if it were to be held in favour of the respondents that the present application is indeed prima facie barred in terms of the provisions of s 7(2)(a) of PAJA by reason of the applicant's failure to exhaust its internal appeal remedies in terms of s 35(3) of ECA, that would not be the end of the matter. Section 7(2)(c) of PAJA gives the Court a discretion to exempt the applicant from the obligation to exhaust its internal remedy in terms of ECA. In the present case, the applicant did apply for exemption in terms of the said provision in response to the contention in the respondents' answering affidavits that this application was barred by reason of s 7(2)(a) of PAJA. It is to this enquiry that I now turn.

44] Application for exemption B

45] Section 7(2)(c) of PAJA provides as follows:

46] *'A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.' [Emphasis added.]*

47] Currie and Klaaren note that 'by imposing a strict duty to exhaust domestic remedies [PAJA] has considerably reformed the common law'.[3] They point out, furthermore, that the exception to the requirement to exhaust internal remedies is a narrow one: s 7(2)(c) refers to 'exceptional circumstances … in the interests of justice', rather than 'good cause'.[4]

48] *Exceptional circumstances*

49] The applicant argued that it has met both requirements for exemption. As far as the first requirement is concerned, it is, of course, not possible to give a comprehensive definition of the concept. As Sir John Donaldson MR succinctly put it:

2 2004 (5) SA 161 (W) para 7 at 166C–D.
3 *The Promotion of Administrative Justice Act Benchbook 182.*
4 *Ibid.*

50] '*By definition, exceptional circumstances defy definition, but, where Parliament provides an appeal procedure, judicial review will have no place unless the applicant can distinguish his case from the type of case for which the appeal procedure was provided.*[5]

51] This dictum highlights the first 'exceptional circumstance' in this case: the same statutory enactment that provides for the internal remedy (s 35(3) of ECA) also provides for the possibility of simultaneous judicial review (s 36 of ECA). To that extent, the present applicant can distinguish its case from the type of case for which only an appeal procedure is statutorily provided: ordinarily there will be an intention by the Legislature, either express or implied, that the internal remedy is first to be exhausted. Such intention is absent in ECA.

52] In my view, there are further factors, tending cumulatively to constitute exceptional circumstances:

- The present application concerns the very sensitive and controversial issue of nuclear power, which potentially affects the safety and environmental rights of vast numbers of people. In the result, Eskom's application for the construction of a PBMR has generated considerable local and national interest. It would be a most unsatisfactory result if a matter of this magnitude and importance had to be decided on a 'technicality', only to be resumed at a later stage on the 'merits'.
- Had the respondents felt as strongly about this legal argument as they want the Court to believe, they could have raised it as a preliminary legal point in *initio litis,* in terms of Rule 6(5)*(d)*(iii) of the Uniform Rules, thereby obviating the need to file bulky answering affidavits on the merits – not to mention a voluminous review record in excess of 4 000 pages in terms of Rule 53(1)(b). They did not do so. Instead, substantive and substantial answering affidavits were filed, traversing in great detail all the factual and legal points raised by the applicant.
- Presently, some 70 appeals in terms of s 35 of ECA are pending with the Minister against the decision of the DG. Should this application for review be allowed to proceed and be successful, then those 70 appeals would all fall away, because the decision against which they had been directed would have been overturned. The hearing and determination of these appeals is likely to be a long, drawn-out and complicated affair, raising as they do 'a myriad of complicated issues on the merits', in the words of counsel for the applicant. This application for review on the other hand, is confined to fairly crisp, identified procedural issues. If it succeeds, the costs and delay occasioned by the other appeals will be avoided. This course of action would best serve, not only the applicant's interests, but also the interests of the State and the public interest as it will avoid unnecessary cost and delay.
- This case is different from the ordinary one contemplated by s 7(2)*(a)* of PAJA, where a balance has to be struck between a single applicant's internal remedy, on the one hand, and judicial review, on the other. The balance that has to be struck in this case is between a single applicant's limited review, on the one hand, and more than 70 complicated appeals. It is, in other words, an exceptional case in which the interests of justice dictate that the Court should allow the review to proceed.

5 *R v Secretary of State for the Home Department, ex parti Swati* [1986] 1 All ER 717 (CA) at *724a–b.*

53] According to the respondents, the fact that there are a large number of appeals pending before the Minister cuts both ways. It is conceivable that the Minister may set aside the DG's decision on any one or more of the grounds raised by any of the appellants (not necessarily the applicant), or he may amend the decision. This would have the effect that this 'premature application' would be rendered academic. Moreover, as it is clear from the decision that Eskom cannot commence construction of the PBMR unless and until it obtains the necessary authorisations in terms of the NNR Act and the NE Act, there was manifestly no urgency in bringing this review application. Eskom may not succeed in obtaining the necessary authorisations required under the NNR Act or the NE Act. This would preclude the construction of the PBMR and would again render this review application academic. There is no sufficient reason, according to the respondents, why the applicant should not await the outcome of these various processes (both the appeal process under ECA and the processes under the NNR Act and the NE Act). Only if they confirm the authorisation of the PBMR would it be appropriate for the applicants to approach the Court by way of a review application.

54] I do not agree with this argument. The fact that the DG's approval is but the first step in a multi-stage process does not mean that the audi rule is inapplicable, nor does it mean that an aggrieved party must await the *final* step before it can take legal action for review.[6]

55] A similar argument to the one advanced before us on behalf of the respondents was considered – and rejected – by the Supreme Court of Appeal in *Director, Mineral Development, Gauteng Region, and Another v Save the Vaal Environment and Others,*[7] where it was held, inter alia:

56] *'It is settled law that a mere preliminary decision can have serious consequences in particular cases, inter alia where it lays "… the necessary foundation for a possible decision …" which may have grave results. In such a case the audi rule applies to the consideration of the preliminary decision.'*

57] In my view, similar considerations apply to the present situation. Granting of the necessary authorisation by the DG in terms of ECA is a necessary prerequisite to the further steps in the process. It is, at the same time, a final step as far as ECA is concerned. It follows that any procedural unfairness affecting a decision in terms of s 22 of ECA may render such decision susceptible of review.

58] *Interest of justice*

59] When considering the second requirement, the question may be posed as to when an aggrieved person would choose to pursue a review, as opposed to an appeal. At common law, appeal and review are 'distinct and dissimilar remedies':

60] *'They are also irreconcilable remedies in the sense that, where both are available, the review must be disposed of first as, if the correctness of the judgment appealed against is confirmed, a review of the proceedings is ordinarily not available.'*[8]

6 Hoexter *The New Constitutional & Administrative Law Vol 2* (2002) 222.
7 1999 (2) SA 709 (SCA) para 17 at 718D–E (other case reference omitted). See also *Van Wyk NO v Van der Merwe* 1957 (1) SA 181 (A) at 188B–189A; De Ville *Judicial Review of Administrative Action in South Africa* 240–241.
8 *Liberty Life Association of Afroca v Kachelhoffer NO and Others* 2001 (3) SA 1094 (C) AT 1108F–G; 1110J–1111C.

61] In the instant matter, where both appeal and review are available in terms of ECA, it would be in the interest of justice to apply the above-mentioned ordinary rule by disposing of the review first, provided that the Court heeds the caution expressed by O'Regan J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*:[9]

62] *'… (A) court minded to grant permission to a litigant to pursue the review of a decision before exhausting internal remedies should consider whether the litigant should be permitted simultaneously to pursue those internal remedies. In considering this question, a court needs to ensure that the possibility of duplicate or contradictory relief is avoided.'*

63] At common law, the question was whether the internal remedy was an effective one, or whether it was tainted by the irregularity on which the review is based. In the latter case, the Court would be less likely to insist on exhaustion of the internal remedy:

64] *'… (A)n appeal, unaccompanied by a review, to us appears to presuppose the regularity and validity of the proceedings in which the decision that is being assailed was given.'*[10]

In the present instance, ECA indeed recognises a distinction between an appeal de novo in terms of s 35(3) and a review brought on the basis of preceding irregularity in terms of s 36. As will appear more fully from the next section of this judgment, one of the principal complaints raised by the applicant in the present instance is that it did not have an adequate opportunity to place its case before the decision-maker. Should the applicant, therefore, be compelled to pursue its 'internal remedy' in terms of ECA by way of an appeal to the Minister, it may have to do so on the basis of a record that, from its perspective, will be deficient. To that extent, it would be in the interest of justice, in my view, to afford the applicant an opportunity of supplementing the record before being obliged to prosecute its appeal to the Minister.

65] A further factor to take into account in this context, as pointed out above, is the fact that voluminous papers have been filed on behalf of all parties in the present application. The papers, including the record on review, cover more than 5 000 pages. Furthermore, the merits of the matter have been argued fully before a Full Court of three Judges over a period of two court days. It involved considerable input by more than ten highly qualified lawyers. Should the present application be dismissed on this narrow, technical ground, it would mean that all this time and effort will have been wasted and the parties will be no closer to a resolution of their differences. It cannot be in the interest of justice to countenance such a state of affairs.

66] Even if it were to be held that the applicant erred in bringing this application for review in accordance with s 36 of ECA, it was argued that it was reasonable and understandable for the applicant to have assumed that this review had to be brought within the time periods prescribed by s 36 of ECA. It was, at best, 'a very difficult and complicated judgment call to make', as it was put in the heads of argument on behalf of the applicant. If the applicant had waited for its appeal under s 35 of ECA to be finalised before it launched this application for review, it might have faced the opposite contention today, namely, that its application for review was time-barred under s 36. In my view, it would be contrary to the interests of justice to say to the applicant, at this stage, that it should have waited with its review until its appeal had been finalised at the risk of forfeiting its right of review by so doing.

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9 2002 (2) SA 490 (CC) para 17 at 503B–D.

10 *Liberty Life Association of Africa v Kachelhoffer NO and Others* footnote above at 1111C. See also Devenish, Govender & Hulme *Administrative Law and Justice in South Africa* (2001) 427.

67] Finally, all other things being equal, and in case of doubt in relation to either of the two criteria laid down by s 7(2)(c) of PAJA, the Court should, in my view, incline to an interpretation of the facts and the law that promotes, rather than hampers, access to the courts.[11]

68] To sum up as far as this aspect is concerned, I am satisfied that exceptional circumstances are indeed present in this case and that the interests of justice require that the applicant be exempted in terms of s 7(2)(c) of PAJA from the obligation of having to exhaust its internal remedies before approaching this court on review.

69] ***Review grounds***

70] This brings me to the merits of the application for review. The applicant's principal ground of review is based on an allegation that its right to procedurally fair administrative action has been infringed, contrary to s 33(1) of the Constitution, read with s 6(2)(c) of PAJA.

71] The first and obvious point to make in this regard is that procedural fairness depends on the circumstances of each particular case. This principle has been applied by the courts in innumerable cases pre-PAJA,[12] and is now enshrined in s 3(2)(a) of that Act.[13]

72] The second important point to bear in mind is that the administrative action in question affects the rights not only of individual persons but of the public in general. It follows, therefore, that such administrative action should comply with both ss 3 and 4 of PAJA unless, of course, either of the exceptions in terms of ss 3(5) or 4(4) is found to apply.

73] In the context of the present case, the parties were ad idem that the applicant was entitled, as part of its right to procedural fairness, to a fair hearing before a decision was made by the DG. It was further common cause that the right to a hearing did not extend to an oral hearing, but that 'a reasonable opportunity to make (written) representations', as contemplated by s 3(2)(b)(ii) of PAJA, sufficed. Where the parties differed was on the question whether or not, on the facts of this case, the applicant did indeed enjoy a fair hearing: the respondents maintained that the applicant had been afforded an adequate opportunity to make written representations, both during the public process that preceded the submission of the final EIR to the department, and thereafter.

74] The applicant, while conceding that it did participate in the public process that led up to the submission of the final EIR, maintained nevertheless that the hearing afforded to it was flawed or deficient in the following respects:

(a) The applicant did not have access to crucial information and documents that were required to enable it to make full and proper representations;
(b) the applicant was not afforded an opportunity of making submissions on the consultants' *final* EIR, but was confined to submissions on the draft EIR; and
(c) the applicant was confined to making submissions to Eskom's consultants, and not to the DG himself, who was the decision-maker.

75] I shall address these three issues separately in what follows.

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11 Section 34 of the Constitution. See also *Zondi v MEC for Traditional and Local Government Affairs and Others* (CCT 73/03, 15 October 2004, as yet unreported) para 102 and the authorities cited in footnote 105. Available at http://www.concourt.gopv.za/files/7303/zondi.pdf.

12 See the authorities cited by De Ville *op cit* 246 n 253.

13 Section 3(2)*(a):* 'A fair administrative procedure depends on the circumstances of each case'.

76] *Access to material information*

77] Fairness ordinarily requires that an interested party be given access to relevant material and information in order to make meaningful representations. De Smith Woolf & Jowell[14] summarise the principle as follows:

78] *'If relevant evidential material is not disclosed at all to a party who is potentially prejudiced by it, there is prima facie unfairness, irrespective of whether the material in question arose before, during or after the hearing.'*

79] On the other hand, however, it has been emphasised repeatedly that an interested party's right to disclosure of 'relevant evidential material' is not equivalent to a right to complete discovery, as this could 'over-judicialise' the administrative process.[15] 'The right to know is not to be equated to the right to be given *"chapter and verse".*'[16] What is required in order to give effect to the right to a fair hearing is that the interested party must be placed in a position to present and controvert evidence in a meaningful way. In order to do so, the aggrieved party should know the 'gist' or substance of the case that it has to meet.[17]

80] In the present instance, it was conceded on behalf of the DG that a substantial number of documents and other information were annexed to the final EIR that were not previously made available to the applicant or any of the other objectors, notwithstanding efforts on the part of the applicant to obtain access to such documents and information. In the result, so it was claimed on behalf of the applicant, the final EIR was based on and incorporated various documents which the applicant never had an opportunity to consider and comment upon.

81] While the applicant's complaint is not without substance, I find it unnecessary to decide whether the failure to make the documents available to the applicant is, in itself, sufficient to vitiate the DG's decision. The reason is that such failure was largely cured by the inclusion of some (if not all) of the documents in question in the final EIR. The first complaint thereby became subsumed in the applicant's next complaint, viz that it was not afforded an opportunity of commenting on the final EIR.

82] *Submissions on Draft EIR*

83] The applicant claimed that it was confined to submissions on an earlier draft version of the EIR, notwithstanding its requests to the DG to be afforded a further 'hearing' on the final EIR.

84] The respondents countered this complaint by claiming, first, that what the applicant was seeking from the DG was an oral hearing, to which it was not entitled. It is true, as pointed out by counsel for the applicant, that at no stage did the applicant expressly demand an oral hearing. However, the term 'hearing' was repeatedly used in the correspondence on its behalf by the LRC and that word is usually understood

14 *Judicial Review of Administrative Action* (5ed, 1995) 9–019. Compare also *Van Huyssteen v Minister of Enivronmental Affairs and Tourism* 1996 (1) SA 283 (C) at 299D–300F; *Masamba v Chairperson, Western Cape Regional Committee, Immigrants Selection Boards and Others* 2001 (12) BCLR 1239 (C) at 1255A.

15 Cf Lawrence Baxter *Administrative Law* 550 and authorities referred to herein; Hoexter op cit 199.

16 *Nisec (Pty) Ltd v Western Cape Provincial Tender Board* 1998 (3) SA 228 (C) at 235B and authorities cited herin.

17 *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) at 232C–D; *Chairman, Board on Tariffs and Trade and Ors v Brenco Inc & Ors* 2001 (4) SA 511 (SCA) para 42 at 532G–H. Cf also *Heatherdale Farms v Deputy Minister of Agriculture* 1980 (3) SA 476 (T) at 486D–G; Nisec (Pty) *Ltd v Western Cape Provincial Tender Board* footnote above at 235C.

to refer to a hearing at which oral submissions and/or evidence can be tendered.[18] Be that as it may, this is not necessarily fatal to the applicant's case. The more fundamental enquiry is whether or not the applicant was entitled to make further written submissions in respect of the final EIR before a decision was made by the DG.

85] In this regard, the respondents argued that the applicant did not enjoy a right of reply on the contents of the final EIR. If it were otherwise, so they contended, the process would become 'long, tedious, costly and repetitive'; in fact, it would be 'never-ending'. The DG's attitude appears, inter alia, from the following:

- In a letter addressed to the applicant's attorneys, dated 23 December 2002, the DG recorded that the Review Panel that had been appointed to advise the department felt that Eskom's consultants 'had adequately dealt with the majority of the issues raised by the interested and affected parties'; that all reports were available from the consultants (except for parts 'that contain commercially sensitive detail that should not have an influence on the environmental impact'); and that the nuclear safety issues are not his department's mandate, but rather fall under the mandate of the national nuclear regulator. He concluded as follows:

86] '*Once a decision has been taken and the record of decision published, you will of course have the right to express your opinion about such record of decision. The law further provides for a process of appeal if required.'*

- On 16 January 2003, the applicant's attorneys addressed a further letter to the Minister, with copies to the DG as well as other officials, reiterating that an interested party has a right to lawful and procedurally fair administrative action 'by each of the decision-makers'. They reiterated their earlier request for a 'hearing' prior to any decision being taken.

- On 10 March 2003, the DG responded, stating his view that 'the EIA process makes no provision for public and private hearings at this stage of the prescribed process … Sufficient opportunity existed previously and will be provided during the following appeal period for the public to raise relevant issues on this matter.'

- On 12 May 2003, the applicant's attorneys addressed an urgent letter to the DG, recording that they had been informed that a decision on Eskom's application was 'imminent'. They, accordingly, sought an assurance that the DG would 'afford our client a hearing prior to making this decision'.

- When the required assurance was not forthcoming, the applicant eventually launched the aforementioned application in the Pretoria High Court, seeking an order declaring that the applicant has 'a right to a reasonable opportunity to make representations to the (DG)', together with an order directing the DG 'to afford the applicant a reasonable opportunity to make representations to him prior to making his decision'. In an answering affidavit, filed on his behalf in opposition to that application, the DG's attitude was spelt out in unambiguous terms:

87] *'Applicant cannot comment on the final EIR as they had an opportunity previously to comment on the draft.'*

18 See eg De Smith Woolf & Jowell *op cit* 9–012.

- The attitude adopted by the DG in these proceedings was similar: he submitted that 'the process prescribed by the ECA does not provide for further comment on the final EIR prior to the decision being taken by the competent authority'.

88] In defence of this attitude, the respondents submitted that an opportunity to make representations to the consultants sufficed. They rely, in this regard, on the provisions of the EIA Regulations. These regulations, so the argument went, prescribe the manner in which EIRs are to be compiled and submitted. As such, they provide for a procedure which is 'fair but different' from the provisions of PAJA, which procedure has been faithfully complied with by the consultants on behalf of Eskom. The respondents' approach implies that full public participation in the process was required, but only up to submission of the final EIR. Thereafter, according to their argument, public participation is only revived to the limited extent that interested parties have a right of appeal to the Minister against the decision.

89] I find this approach to be fundamentally unsound. The regulations provide for full public participation in 'all the relevant procedures contemplated in these regulations'.[19] The respondents seek to limit such participation to the 'investigation phase' of the process (as contemplated by regs 5, 6 and 7). After submission of the EIR, however, the 'adjudicative phase' of the process commences, involving the DG's consideration and evaluation, not only of the EIR, but also – more broadly – of all other facts and circumstances that may be relevant to his decision. There is nothing in the Act (ECA) or the regulations that expressly excludes public participation or application of the audi rule during this 'second stage' of the process. In line with settled authority,[20] therefore, it follows that procedural fairness demands application of the audi rule also at this stage.

90] A further reason why I find the respondents' approach to be unsound is because it overlooks the fact that, on the DG's own version (though not Eskom's), the final EIR was 'substantially different' from the draft EIR. The final EIR made material changes and incorporated substantially more documentation than the draft EIR. The question for decision can therefore be narrowed down to an enquiry whether it was procedurally fair to take administrative action based on 'substantially different' new matter on which interested parties have not had an opportunity to comment.

91] By analogy with the approach adopted in motion proceedings where new matter is raised in reply, I am of the view that, if such new matter is to be considered by the decision-maker, fairness requires that an interested party ought to be afforded an opportunity first to comment on such new matter before a decision is made.[21] Support for this attitude is to be found in the following dictum of Van den Heever JA in *Huisman v Minister of Local Government, Housing and Works (House of Assembly) and Another*:[22]

92] '*Were new **facts** to be placed before the "administrator" which could be prejudicial to an appellant, it would be only fair that the latter be given an opportunity to counter them if he were able to do so, more particularly were the matter one in which the extant rights of an appellant could be detrimentally affected.'*

19 Reg 3(1)*(f)*.
20 See eg *Attorney-General, Eastern Cape v Blom* 1988 (4) SA 645 (A) at 662G–I.
21 Cf Herbstein & Van Winsen *The Civil Practice of the Supreme Court of South Africa* 4 ed (1997) 359–361.
22 1996 (1) SA 836 (A) at 845F–G. See also *Hayes v Minister of Housing, Planning and Administration, Western Cape* 1999 (4) SA 1229 (C) at 1248B–C; Devenish *et al op cit* 288, 304–305.

93] Similar sentiments are expressed by De Ville:[23]

94] *'Where the final decision-maker is not permitted to take account of new evidence or required to hold an enquiry him/herself, but simply has to take a decision on the evidence (and recommendations) presented to him/her after a full enquiry (complying with the requirements of procedural fairness), a hearing will not be required before the taking of a final decision.'*

95] In the present case, where the draft EIR was substantially overtaken by the final EIR, it is clear to my mind that new facts had indeed been placed before the decision-maker on behalf of Eskom. In these circumstances, I am of the view that the applicant, as an interested party, was entitled, as part of its right to procedural fairness, to a reasonable opportunity to make representations to the DG on the new aspects not previously addressed in its submissions in relation to the draft EIR.

96] In an alternative argument, the respondents submitted that, in any event, the applicant had had ample opportunity, after the submission of the final EIR until the DG's decision was made, to submit written comments on the final EIR – either to the consultants or to the DG. They point out that the applicant received the final EIR together with all the documentation on which it was based more than six months before the decision was made. Furthermore, the report was also made available, as noted above, on the internet and in certain public libraries.

97] However, as appears from the above brief extracts from the record,[24] the DG had consistently adopted the attitude that the applicant and other interested parties had no right to comment on the final EIR prior to the decision being taken. It is, accordingly, clear that the DG and other officials in his department had closed their minds to further submissions from interested parties. Given this background, it is opportunistic, in my view, for the DG to suggest that, in any event, the applicant had had an adequate opportunity to comment on the final EIR but failed to do so. Faced with the above-mentioned attitude on the part of the decision-maker, it would have been an exercise in futility for the applicant – at great expense and effort – to have prepared and submitted comments to the DG (or the consultants) on the contents of the final EIR. I accordingly agree with the submission on behalf of the applicant that, in the circumstances, the notional opportunity enjoyed by the applicant to comment on the final EIR was 'meaningless'.

98] Finally, in considering the requirements of procedural fairness in the present scenario, I bear in mind that the general approach should be 'a generous rather than a legalistic one'.[25] At the same time, the Court should be alive to the following caution expressed by the Constitutional Court:

99] *'In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognised in our common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly.'*[26]

23 *Op cit* 244.
24 Para above.
25 V*an Huyssteen v Minister of Environmental Affairs and Tourism* 1996 (1) SA 283 (C) at 305I.
26 *Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 (2) SA 91 (CC) para 41 at 109H–110A.

100] Be that as it may, I do not think that it would be placing an undue burden on the department if it were required to consider further submissions from interested parties regarding the contents of the final EIR, especially in view of the fact that the department went to the trouble of making the report widely available to interested parties.

101] On the facts of this case, I am satisfied that interested parties – including the applicant – were entitled to a reasonable opportunity to make further submissions on the final EIR prepared by the consultants. As a fact, the applicant was not afforded such an opportunity, contrary to s 3(4)(b)(ii) of PAJA.

102] *Representations to the DG*

103] Having come to the foregoing conclusion, it follows that the DG's decision was fatally flawed and falls to be set aside. It is therefore not strictly necessary to consider the applicant's final review ground. However, seeing that great stress was laid on this aspect (it was described by the applicant as its 'main complaint'), and because it may have a bearing on the future conduct of the matter, I deem it necessary briefly to state my views on this aspect.

104] The applicant's complaint was that the DG, who was the decision-maker in this case, did not afford it a hearing at all. As pointed out above, although the applicant repeatedly asserted a right to make representations to the DG, the DG consistently refused to afford the applicant a hearing. Even an application to the Pretoria High Court to enforce this right proved fruitless. Instead, the applicant had to content itself with written submissions addressed to Eskom's consultants during the first phase of the process. The applicant submitted that this was manifestly not sufficient and that it was entitled to make representations to the decision-maker himself.

105] In support of its argument, the applicant submitted that the very purpose of the audi rule is to give an interested party an opportunity to influence the way in which the decision-maker – in this case the DG – exercises his discretionary power. To deny interested parties an opportunity of making representations to him and to confine them instead to representations made to someone else did not serve the purpose of the audi rule at all and was particularly invidious in the circumstances of the present case. This is so because, although Eskom's consultants were notionally 'independent', in the sense that they were not institutionally part of Eskom, they were employed by Eskom to act as its agent and the purpose of their engagement was to obtain the authorisation Eskom sought. Eskom employed them, both to prepare the application for authorisation and to perform the functions of its consultants under the EIA Regulations. The consultants were, in other words, clearly aligned on Eskom's side and were not independent consultants employed by the decision-maker to assist him in making his decision. It meant that the only 'hearing' afforded to the applicant was an opportunity to make submissions to the consultants for 'the other side', as it was put. Moreover, it meant that the consultants were allowed an opportunity to adjust the final EIR and to comment on and rebut the applicant's submissions without giving the applicant a corresponding opportunity.

106] It is not quite clear from the papers whether the applicant claimed a right to a hearing by the DG personally. Support for such a stance is to be found in the following remarks by Denning LJ in *R v Minister of Agriculture and Fisheries, Ex parte Graham; R v Agricultural Land Tribunal (South Western Province), Ex parte Benney*:[27]

27 [1995] 2 All ER 129 (CA) at 134F–G, quoted with approval in this Division in *Campus Bay Ratepayers and Residents Association and Others v Minister of Planning, Culture and Administration, Western Cape, and Others* 2001 (4) SA 294 (C) at 320A–C and *Hayes v Minister of Finance and Development Planning, Western Cape 2003* (4) SA 598 (C) at 616G–H. See also *Hayes v Minister of Housing, Planning and Administration, Western Cape 1999* (4) SA 1229 (C) at 1248H.

107] *'The ordinary principles of fair dealing require that a farmer should be able to put his case in his own words before the very man who is to take action against him, rather than that he should have to put it before an intermediary, who in passing it on may miss out something in his favour or give undue emphasis to things that are against him. This is so manifestly just and reasonable that the Minister would, I think, in all cases have been bound to hear the representations himself, unless the Act authorised him to appoint someone else.'*

108] However, it does not follow from the foregoing authorities that an interested party is invariably entitled to be heard by the decision-maker personally. The weight of authority appears to indicate that some other person or body may, in suitable circumstances, be appointed to 'hear' the interested party – whether orally or by receiving written representations. This procedure may be permissible where the enabling statute authorises it and it may be a convenient course to follow, eg where the credibility of witnesses is not involved.[28]

109] In the present case, the DG pointed out that it would not only be 'physically impossible for (him) to read each and every page submitted, but it would also be senseless'. According to the DG, some of the documents submitted to the department deal with 'highly complex matters of a scientific and technical nature' and, unless he were to rely on expert advice in that regard, he would not be able honestly and effectively to apply his mind to those issues. It was specifically for this purpose that a panel of experts was appointed to advise the DG with regard to Eskom's application herein.

110] I am satisfied that the present case is an appropriate one where the DG would be entitled to rely on the assistance and expert advice of others in coming to his decision. Nevertheless, it is an essential requirement that, before making his or her decision, the decision-maker should be fully informed of the submissions made on behalf of interested parties and he or she should properly consider them. As pointed out by the Privy Council in *Jeffs v New Zealand Dairy Production and Marketing Board and Others*,[29] in some circumstances, it may suffice for the decision-maker to have before it and to consider 'an accurate summary of the relevant evidence and submissions if the summary adequately discloses the evidence and submissions to the (decision-maker)'. What is required, as a minimum, is that the summary will contain 'a fair synopsis of all the points raised by the parties so that the repository of the power can consider them in order to come to a decision'.[30]

111] This is not what happened in this case. The applicant's submissions to Eskom's consultants on their draft EIR were incorporated in an annexure to the final EIR. But the DG did not read those submissions or even a summary thereof. The DG does say that he read the executive summary of the final EIR and that he 'considered' the report of the panel of experts. But it is clear from the report itself that it is a brief and rather perfunctory one that does not even mention the applicant's submissions. Thus, as a fact, the DG took his decision without any regard to the applicant's submissions and indeed without knowing what they were.

112] *Conclusion*

28 Cf eg *Jeffs v New Zealand Dairy Production and Marketing Board and Others* [1966] 3 All ER 863 (PC) at 870F–G; De Smith Woolf & Jowell op cit 6–113.

29 Footnote above at 870G–H.

30 *Ohlthaver & List Finance and Trading Corporation Ltd and Others v Minister of Regional and Local Government and Housing and Others* 1996 NR 213 (SC) 234G.

113] Taking a step back and considering the evidence as a whole, the picture that emerges is one where the requirements of procedural fairness were, by and large, recognised and observed on behalf of the department, up to and including the submission by Eskom's consultants of their final EIR. Subsequent thereto, however, no further submissions from interested parties were entertained or even invited by the DG, notwithstanding the fact that the final EIR differed materially from the earlier report on which the applicant did comment. Furthermore, the DG made his decision without having heard the applicant and without even being aware of the nature and substance of the applicant's submissions. In these circumstances, I am driven to the conclusion that the process that underlay the decision of the DG was procedurally unfair and falls to be set aside.

114] In the light of the conclusion I have reached, it is not necessary to deal with the two subsidiary review grounds, namely, that the DG failed properly to address the problems posed by nuclear waste at the proposed PBMR; and that the DG abdicated his responsibility properly to consider safety issues by deferring to the National Nuclear Regulator.

115] As for the appropriate remedy in these circumstances, s 8(1)(c)(i) of PAJA authorises the Court to 'grant any order that is just and equitable', including orders setting aside the administrative action and 'remitting the matter for reconsideration by the administrator, with or without directions'. It is clear from the evidence on record that the DG's decision was preceded by a protracted process, involving public participation on a wide scale. By and large, the process was conducted in a manner that was thorough and fair. The fact that the final step, viz the DG's decision, is to be set aside as flawed should not result in the whole process having to commence afresh. I would, accordingly, regard it as just and equitable, in setting aside the DG's decision, to issue directions to provide for the reconsideration by the DG of the matter after the applicant – and other interested parties – have been afforded an opportunity to address further written submissions to the DG on the final EIR, as well as any other relevant considerations that may affect the decision.

116] Finally, in view of the public interest generated by this matter, it needs to be emphasised that our decision does not express any opinion as to the merits or demerits of the proposed PBMR, in particular, nor of nuclear power in general. These were not matters that we were called upon to consider. Our decision deals solely with the procedural fairness of the DG's decision from an administrative law perspective and, in that regard, we have found, for the reasons set out herein, that the decision was flawed and has to be set aside.

117] *Order C*

118] For the reasons set out above, it is ordered as follows:

1. The first respondent's decision, made on 25 June 2003 in terms of s 22(3) of the Environment Conservatiion Act 73 of 1989, authorising the second respondent's constructiion of a pebble bed modular reactor at Koeberg, is reviewed and set aside.

2. The matter is remitted to the first respondent with directions to afford the appllicant and other interested parties an opportunity of addressing further written submissions to him allong the lines as set out in this judgment and within such period as he may determine and to consider such submissions before making a decision anew on the second respondent's appllication.

3. The respondents are ordered jointly and severally to pay the applicant's costs, including the costs off two counsel.

119]

120] _____

121] BM GRIESEL

DAVIS J: I agree.

122] _____

123] DM DAVIIS

MOOSA J: I agree.

124] _____

125] E MOOSA

ANNEXURE C

The Refugees Act, 130 of 1998

(Available at http://www.saflii.org (accessed on 2010/07/13)).

OFFICE OF THE PRESIDENT

No. 1558 2 December 1998

It is hereby notified that the President has assented to the following Act which is hereby published for general information: –

NO. 130 OF 1998: REFUGEES ACT, 1998.
(English text signed by the President.)
(Assented to 20 November 1998.)

ACT

To give effect within the Republic of South Africa to the relevant international legal instruments, principles and standards relating to refugees; to provide for the reception into South Africa of asylum seekers; to regulate applications for and recognition of refugee status; to provide for the rights and obligations flowing from such status; and to provide for matters connected therewith.

PREAMBLE

WHEREAS the Republic of South Africa has acceded to the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa as well as other human rights instruments, and has in so doing, assumed certain obligations to receive and treat in its territory refugees in accordance with the standards and principles established in international law,

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows: –

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CHAPTER 1
INTERPRETATION, APPLICATION AND ADMINISTRATION OF ACT

Definitions

1. In this Act, unless the context shows that another meaning is intended –

    (i) "abusive application for asylum" means an application for asylum made –

        (a) with the purpose of defeating or evading criminal or civil proceedings or the consequences thereof; or

        (b) after the refusal of one or more prior applications without any substantial change having occurred in the applicant's personal circumstances or in the situation in his or her country of origin; (xiv)

(ii) “Aliens Control Act, 1991,” means the Aliens Control Act, l991 (Act No. 96 of 1991); (xxiv)

(iii) “Appeal Board” means the Refugee Appeal Board, established by section 12; (ii)

(iv) “asylum” means refugee status recognised in terms of this Act; (iii)

(v) “asylum seeker” means a person who is seeking recognition as a refugee in the Republic; (iv)

(vi) “asylum seeker permit” means a permit contemplated in section 22; (v)

(vii) “child” means any person under the age of 18 years; (x)

(viii) “Department” means the Department of Home Affairs; (vii)

(ix) “dependant”, in relation to an asylum seeker or a refugee, includes the spouse, any unmarried dependant child or any destitute, aged or infirm member of the family of such asylum seeker or refugee; (i)

(x) “Director-General” means the Director-General of the Department; (viii)

(xi) “fraudulent application for asylum” means an application for asylum based without reasonable cause on facts, information, documents or representations which the applicant knows to be false and which facts, information, documents or representations are intended to materially affect the outcome of the application; (vi)

(xii) “manifestly unfounded application” means an application for asylum made on grounds other than those on which such an application may be made under this Act; (xi)

(xiii) “Minister” means the Minister of Home Affairs; (xiii)

(xiv) “prescribed” means prescribed by regulation; (xxiii)

(xv) “refugee” means any person who has been granted asylum in terms of this Act; (xviii)

(xvi) “Refugee Reception Office” means a Refugee Reception Office established under section 8(1); (xx)

(xvii) “Refugee Reception Officer” means a Refugee Reception Officer referred to in section 8(2); (xix)

(xviii) “Refugee Status Determination Officer” means a Refugee Status Determination Officer referred to in section 8(2); (xxi)

(xix) “regulation” means any regulation made under this Act; (xvi)

(xx) “rules” means the rules made by the Appeal Board under section 14(2); (xv)

(xxi) “social group” includes, among others, a group of persons of particular gender, sexual orientation, disability, class or caste; (xii)

(xxii) "Standing Committee" means the Standing Committee for Refugee Affairs, established by section 9; (xvii)

(xxiii) "this Act" includes the regulations; (ix)

(xxiv) "UNHCR" means the United Nations High Commissioner for Refugees. (xxii)

General prohibition of refusal of entry, expulsion, extradition or return to other country in certain circumstances

2. Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where –

(a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or

(b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country.

Refugee status

3. Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person –

(a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or

(b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or

(c) is a dependant of a person contemplated in paragraph (a) or (b).

Exclusion from refugee status

4. (1) A person does not qualify for refugee status for the purposes of this Act if there is reason to believe that he or she –

(a) has committed a crime against peace, a war crime or a crime against humanity, as defined in any international legal instrument dealing with any such crimes; or

(b) has committed a crime which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment; or

(c) has been guilty of acts contrary to the objects and principles of the United Nations Organisation or the Organisation of African Unity; or

(d) enjoys the protection of any other country in which he or she has taken residence.

(2) For the purposes of subsection (1)(c), no exercise of a human right recognised under international law may be regarded as being contrary to the objects and principles of the United Nations Organisation or the Organisation of African Unity.

Cessation of refugee status

5. (1) A person ceases to qualify for refugee status for the purposes of this Act if –

(a) he or she voluntarily re-avails himself or herself of the protection of the country of his or her nationality; or

(b) having lost his or her nationality, he or she by some voluntary and formal act reacquires it; or

(c) he or she becomes a citizen of the Republic or acquires the nationality of some other country and enjoys the protection of the country of his or her new nationality; or

(d) he or she voluntarily re-establishes himself or herself in the country which he or she left; or

(e) he or she can no longer continue to refuse to avail himself or herself of the protection of the country of his or her nationality because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist and no other circumstances have arisen which justify his or her continued recognition as a refugee.

(2) Subsection (1)(e) does not apply to a refugee who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself or herself of the protection of the country of nationality.

(3) The refugee status of a person who ceases to qualify for it in terms of subsection (1) may be withdrawn in terms of section 36.

Interpretation, application and administration of Act

6. (1) This Act must be interpreted and applied with due regard to –

(a) the Convention Relating to the Status of Refugees (UN, 1951);

(b) the Protocol Relating to the Status of Refugees (UN, 1967);

(c) the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU, 1969);

(d) the Universal Declaration of Human Rights (UN, 1948); and

(e) any other relevant convention or international agreement to which the Republic is or becomes a party.

(2) The Minister is responsible for the administration of this Act.

Delegation of powers and duties

7. (1) The Minister may delegate any power granted to, or duty imposed upon, him or her in terms of this Act, except the duty referred to in section 6(2), to an officer in the Department.

(2) A power or duty so delegated must be exercised or performed in accordance with the directions of the Minister, who may at any time withdraw such delegation.

(3) A delegation under subsection (1) does not prevent the Minister from exercising the power or performing the duty in question himself or herself.

CHAPTER 2

REFUGEE RECEPTION OFFICES, STANDING COMMITTEE FOR REFUGEE AFFAIRS AND REFUGEE APPEAL BOARD

Refugee Reception Office

8. (1) The Director-General may establish as many Refugee Reception Offices in the Republic as he or she, after consultation with the Standing Committee, regards as necessary for the purposes of this Act.

(2) Each Refugee Reception Office must consist of at least one Refugee Reception Officer and one Refugee Status Determination Officer who must –

(a) be officers of the Department, designated by the Director-General for a term of office determined by the Director-General; and

(b) have such qualifications, experience and knowledge of refugee matters as makes them capable of performing their functions.

(3) The Director-General must, with the approval of the Standing Committee, ensure that each officer appointed under this section receives the additional training necessary to enable such officer to perform his or her functions properly.

Standing Committee for Refugee Affairs

9. (1) There is hereby established a Standing Committee for Refugee Affairs.

(2) The Standing Committee must function without any bias and must be independant.

(3) The headquarters of the Standing Committee must be determined by the Minister.

Composition of Standing Committee

10. (1) The Standing Committee must consist of –

(a) a chairperson; and

(b) such number of other members as the Minister may determine, having regard to the likely volume of work to be performed by the Committee.

(2) The chairperson and other members of the Standing Committee must be appointed by the Minister with due regard to their experience, qualifications and expertise, as well as their ability to perform the functions of their office properly.

(3) A person may not be appointed as a member of the Standing Committee if he or she –

(a) is not a South African citizen;

(b) has been sentenced to imprisonment without the option of a fine during the preceding four years.

(4) At least one of the members of the Standing Committee must be legally qualified.

Powers and duties of Standing Committee

11. The Standing Committee –

(a) may formulate and implement procedures for the granting of asylum;

(b) may regulate and supervise the work of the Refugee Reception Offices;

(c) may liaise with representatives of the UNHCR or any nongovernmental organisation;

(d) must advise the Minister or Director-General on any matter referred to it by the Minister or Director-General;

(e) must review decisions by Refugee Status Determination Officers in respect of manifestly unfounded applications;

(f) must decide any matter of law referred to it by a Refugee Status Determination Officer;

(g) must monitor the decisions of the Refugee Status Determination Officers; and

(h) must determine the conditions relating to study or work in the Republic under which an asylum seeker permit may be issued.

Establishment of Refugee Appeal Board

12. (1) There is hereby established a Refugee Appeal Board.

(2) The headquarters of the Appeal Board must be determined by the Minister.

(3) The Appeal Board must function without any bias and must be independent.

Composition of Appeal Board

13. (1) The Appeal Board must consist of a chairperson and at least two other members, appointed by the Minister with due regard to a person's suitability to serve as a member by virtue of his or her experience, qualifications and expertise and his or her capability to perform the functions of the Appeal Board properly.

(2) At least one of the members of the Appeal Board must be legally qualified.

(3) A person may not be appointed as a member of the Appeal Board if he or she –

(a) is not a South African citizen;

(b) has been sentenced to imprisonment without the option of a fine during the preceding four years.

Powers and duties of Appeal Board

14. (1) The Appeal Board must –

(a) hear and determine any question of law referred to it in terms of this Act;

(b) hear and determine any appeal lodged in terms of this Act;

(c) advise the Minister or Standing Committee regarding any matter which the Minister or Standing Committee refers to the Appeal Board.

(2) The Appeal Board may determine its own practice and make its own rules.

(3) Rules made under subsection (2) must be published in the *Gazette*.

Meetings of Standing Committee and Appeal Board

15. In the case of both the Standing Committee and the Appeal Board –

(a) meetings must be convened by the chairperson;

(b) the majority of members constitutes a quorum;

(c) decisions must be taken by a majority of votes, and in the case of an equality of votes, the chairperson has a casting vote.

Periods of office of members of Standing Committee and Appeal Board

16. In the case of both the Standing Committee and the Appeal Board –

(a) a member is appointed for five years;

(b) any member is eligible for reappointment upon expiry of his or her term of office;

(c) any member may resign by tendering a written notice of resignation to the Minister.

Removal from office of member of Standing Committee or Appeal Board

17. (1) Any member of the Standing Committee or Appeal Board may be removed from office by the Minister on account of misconduct or inability to perform the functions of his or her office properly.

(2) The Minister may only act in terms of subsection (1) if the member concerned and the relevant chairperson have been given an opportunity to make representations or comments on the matter and the Minister has taken any such representations and comments into consideration.

Filling of vacancies in Standing Committee or Appeal Board

18. The Minister may appoint a suitable person in a vacancy arising from the death, resignation or removal from office of a member of the Standing Committee or Appeal Board, for the remainder of the term of office of the member in respect of whom the vacancy has occurred.

Remuneration of members of Standing Committee and Appeal Board

19. The members of the Standing Committee and the Appeal Board must receive such remuneration, allowances and other benefits as may be determined by the Minister with the approval of the Minister of Finance.

Administrative staff of Standing Committee and Appeal Board

20. The administrative work connected with the performance of the functions of the Standing Committee and the Appeal Board, must be performed by officers of the Department, designated by the Director-General for that purpose.

CHAPTER 3

APPLICATION FOR ASYLUM

Application for asylum

21. (1) An application for asylum must be made in person in accordance with the prescribed procedures to a Refugee Reception Officer at any Refugee Reception Office.

(2) The Refugee Reception Officer concerned –

(a) must accept the application form from the applicant;

(b) must see to it that the application form is properly completed, and, where necessary, must assist the applicant in this regard;

(c) may conduct such enquiry as he or she deems necessary in order to verify the information furnished in the application; and

(d) must submit any application received by him or her, together with any information relating to the applicant which he or she may have obtained, to a Refugee Status Determination Officer, to deal with it in terms of section 24.

(3) When making an application for asylum, every applicant must have his or her fingerprints or other prints taken in the prescribed manner and every applicant who is 16 years old or older must furnish two recent photographs of himself or herself of such dimensions as may be prescribed.

(4) Notwithstanding any law to the contrary, no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic if –

(a) such person has applied for asylum in terms of subsection (1), until a decision has been made on the application and, where applicable, such person has had an opportunity to exhaust his or her rights of review or appeal in terms of Chapter 4; or

(b) such person has been granted asylum.

(5) The confidentiality of asylum applications and the information contained therein must be ensured at all times.

Asylum seeker permit

22. (1) The Refugee Reception Officer must, pending the outcome of an application in terms of section 21(1), issue to the applicant an asylum seeker permit in the prescribed form allowing the applicant to sojourn in the Republic temporarily, subject to any conditions, determined by the Standing Committee, which are not in conflict with the Constitution or international law and are endorsed by the Refugee Reception Officer on the permit.

(2) Upon the issue of a permit in terms of subsection (1), any permit issued to the applicant in terms of the Aliens Control Act, 1991, becomes null and void, and must forthwith be returned to the Director-General for cancellation.

(3) A Refugee Reception Officer may from time to time extend the period for which a permit has been issued in terms of subsection (1), or amend the conditions subject to which a permit has been so issued.

(4) The permit referred to in subsection (1) must contain a recent photograph and the fingerprints or other prints of the holder thereof as prescribed.

(5) A permit issued to any person in terms of subsection (1) lapses if the holder departs from the Republic without the consent of the Minister.

(6) The Minister may at any time withdraw an asylum seeker permit if –

(a) the applicant contravenes any conditions endorsed on that permit; or

(b) the application for asylum has been found to be manifestly unfounded, abusive or fraudulent; or

(c) the application for asylum has been rejected; or

(d) the applicant is or becomes ineligible for asylum in terms of section 4 or 5.

(7) Any person who fails to return a permit in accordance with subsection (2), or to comply with any condition set out in a permit issued in terms of this section, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years, or to both a fine and such imprisonment.

Detention of asylum seeker

23. If the Minister has withdrawn an asylum seeker permit in terms of section 22(6), he or she may, subject to section 29, cause the holder to be arrested and detained pending the finalisation of the application for asylum, in the manner and place determined by him or her with due regard to human dignity.

Decision regarding application for asylum

24. (1) Upon receipt of an application for asylum the Refugee Status Determination Officer –

(a) in order to make a decision, may request any information or clarification he or she deems necessary from an applicant or Refugee Reception Officer;

(b) where necessary, may consult with and invite a UNHCR representative to furnish information on specified matters; and

(c) may, with the permission of the asylum seeker, provide the UNHCR representative with such information as may be requested.

(2) When considering an application the Refugee Status Determination Officer must have due regard for the rights set out in section 33 of the Constitution, and in particular, ensure that the applicant fully understands the procedures, his or her rights and responsibilities and the evidence presented.

(3) The Refugee Status Determination Officer must at the conclusion of the hearing –

(a) grant asylum; or

(b) reject the application as manifestly unfounded, abusive or fraudulent; or

(c) reject the application as unfounded; or

(d) refer any question of law to the Standing Committee.

(4) If an application is rejected in terms of subsection (3)(b) –

(a) written reasons must be furnished to the applicant within five working days after the date of the rejection or referral;

(b) the record of proceedings and a copy of the reasons referred to in paragraph (a) must be submitted to the Standing Committee within 10 working days after the date of the rejection or referral.

CHAPTER 4

REVIEWS AND APPEALS

Review by Standing Committee

25. (1) The Standing Committee must review any decision taken by a Refugee Status Determination Officer in terms of section 24(3)(b).

(2) Before reaching a decision, the Standing Committee may –

(a) invite the UNHCR representative to make oral or written representations;

(b) request the attendance of any person who is in a position to provide it with information relevant to the matter being dealt with;

(c) on its own accord make such further enquiry and investigation into the matter being dealt with as it may deem appropriate; and

(d) request the applicant to appear before it and to provide such other information as it may deem necessary.

(3) The Standing Committee –

(a) may confirm or set aside a decision made in terms of section 24(3)(b); and

(b) must decide on a question of law referred to it in terms of section 24(3)(d).

(4) The Standing Committee must inform the Refugee Status Determination Officer concerned of its decision in the prescribed manner and within the prescribed time.

(5) After the Standing Committee has decided a question of law referred to it in terms of section 24(3)(d), the Standing Committee must refer the application back to the Refugee Status Determination Officer with such directives as are necessary and the Refugee Status Determination Officer must decide the application in terms of the directives.

Appeals to Appeal Board

26. (1) Any asylum seeker may lodge an appeal with the Appeal Board in the manner and within the period provided for in the rules if the Refugee Status Determination Officer has rejected the application in terms of section 24(3)(c).

(2) The Appeal Board may after hearing an appeal confirm, set aside or substitute any decision taken by a Refugee Status Determination Officer in terms of section 24(3).

(3) Before reaching a decision, the Appeal Board may –

(a) invite the UNHCR representative to make oral or written representations;

(b) refer the matter back to the Standing Committee for further inquiry and investigation;

(c) request the attendance of any person who, in its opinion, is in a position to provide the Appeal Board with relevant information;

(d) of its own accord make further inquiry or investigation;

(e) request the applicant to appear before it and to provide any such other information as it may deem necessary.

(4) The Appeal Board must allow legal representation upon the request of the applicant.

CHAPTER 5

RIGHTS AND OBLIGATIONS OF REFUGEES

Protection and general rights of refugees

27. A refugee –

(a) is entitled to a formal written recognition of refugee status in the prescribed form;

(b) enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution and the right to remain in the Republic in accordance with the provisions of this Act;

(c) is entitled to apply for an immigration permit in terms of the Aliens Control Act, 1991, after five years' continuous residence in the Republic from the date on which he or she was granted asylum, if the Standing Committee certifies that he or she will remain a refugee indefinitely;

(d) is entitled to an identity document referred to in section 30;

(e) is entitled to a South African travel document on application as contemplated in section 31;

(f) is entitled to seek employment; and

(g) is entitled to the same basic health services and basic primary education which the inhabitants of the Republic receive from time to time.

Rights of refugees in respect of removal from Republic

28. (1) Subject to section 2, a refugee may be removed from the Republic on grounds of national security or public order.

(2) A removal under subsection (1) may only be ordered by the Minister with due regard for the rights set out in section 33 of the Constitution and the rights of the refugee in terms of international law.

(3) If an order is made under this section for the removal from the Republic of a refugee, any dependant of such refugee who has not been granted asylum, may be included in such an order and removed from the Republic if such dependant has been afforded a reasonable opportunity to apply for asylum but has failed to do so or if his or her application for asylum has been rejected.

(4) Any refugee ordered to be removed under this section may be detained pending his or her removal from the Republic.

(5) Any order made under this section must afford reasonable time to the refugee concerned to obtain approval from any country of his or her own choice, for his or her removal to that country.

Restriction of detention

29. (1) No person may be detained in terms of this Act for a longer period than is reasonable and justifiable and any detention exceeding 30 days must be reviewed immediately by a judge of the High Court of the provincial division in whose area of jurisdiction the person is detained, designated by the Judge President of that division for that purpose and such detention must be reviewed in this manner immediately after the expiry of every subsequent period of 30 days.

(2) The detention of a child must be used only as a measure of last resort and for the shortest appropriate period of time.

Identity document to refugee

30. (1) A refugee must be issued with an identity document which must contain –

(a) an identity number of the holder compiled in the prescribed manner;

(b) the holder's surname, full forenames, gender, date of birth and the place or country where he or she was born;

(c) the country of which the holder is a citizen, if any; (d) a recent photograph of the holder; and

(d) the holder's fingerprints or other prints, taken and displayed in the prescribed manner.

(2) An identity document referred to in subsection (1) must be in the prescribed form.

Travel document to refugee

31. A refugee may apply for a travel document in the prescribed manner.

Unaccompanied child and mentally disabled person

32. (1) Any child who appears to qualify for refugee status in terms of section 3, and who is found under circumstances which clearly indicate that he or she is a child in need of care as contemplated in the Child Care Act, 1983 (Act No. 74 of 1983), must forthwith be brought before the Children's Court for the district in which he or she was found.

(2) The Children's Court may order that a child contemplated in subsection (1) be assisted in applying for asylum in terms of this Act.

(3) Any mentally disabled person who appears to qualify for refugee status in terms of section 3 must be assisted in applying for asylum in terms of this Act.

Dependants of refugee

33. (1) A person who qualifies for refugee status in terms of section 3(a) or (b) and who would like one or more of his or her dependants who have accompanied him or her to the Republic to receive asylum must, when applying for asylum, also assist every such dependant to apply for asylum in terms of this Act or apply on behalf of any such dependant who is not able to apply by himself or herself.

(2) Where a dependant of a recognised refugee is within the Republic in accordance with an asylum seeker permit or has been granted asylum in terms of this Act and ceases to be a dependant by reason of his or her marriage, his or her attaining the age of majority or the cessation of his or her dependence upon the recognised refugee, as the case may be, he or she may be permitted to continue to remain within the Republic in accordance with the provisions of this Act.

(3) Upon the death of a recognised refugee or upon his or her divorce, every person who, immediately before such death or divorce was within the Republic in terms of this Act as a dependant of such recognised refugee, may be permitted to continue to remain within the Republic in accordance with the provisions of this Act.

(4) Nothing contained in this Act may prevent a dependant of a recognised refugee or a person who has, in terms of subsection (2) or (3), been permitted to continue to remain in the Republic from applying for recognition as a refugee in accordance with the provisions of this Act.

Obligations of refugees

34. A refugee must abide by the laws of the Republic.

CHAPTER 6

SUPPLEMENTARY AND GENERAL PROVISIONS

Reception and accommodation of asylum seekers in event of mass influx

35. (1) The Minister may, if he or she considers that any group or category of persons qualify for refugee status as is contemplated in section 3, by notice in the *Gazette*, declare such group or category of persons to be refugees either unconditionally or subject to such conditions as the Minister may impose in conformity with the Constitution and international law and may revoke any such declaration by notice in the *Gazette*.

(2) The Minister may, after consultation with the UNHCR representative and the Premier of the province concerned, designate areas, centres or places for the temporary reception and accommodation of asylum seekers or refugees or any specific category or group of asylum seekers or refugees who entered the Republic on a large scale, pending the regularisation of their status in the Republic.

(3) The Minister may appoint any person as a manager of an area, centre or place designated under subsection (2).

(4) The Minister may at any time withdraw the designation of an area, centre or place contemplated in subsection (2).

Withdrawal of refugee status

36. (1) If a person has been recognised as a refugee erroneously on an application which contains any materially incorrect or false information, or was so recognised due to fraud, forgery, a false or misleading representation of a material or substantial nature in relation to the application or if such person ceases to qualify for refugee status in terms of section 5 –

(a) the Standing Committee must inform such person of its intention of withdrawing his or her classification as refugee and the reasons therefor; and

(b) such person may, within the prescribed period, make a written submission with regard thereto.

(2) After consideration of all material facts and with due regard for the rights set out in section 33 of the Constitution, the Standing Committee may withdraw such recognition and such person may be dealt with as a prohibited person under the Aliens Control Act, 1991.

(3) Any refugee whose recognition as such is withdrawn in terms of subsection (1) may be arrested and detained pending being dealt with in terms of the Aliens Control Act, 1991.

Offences and penalties

37. Any person who –

(a) for the purpose of entering, or remaining in, the Republic or of facilitating or assisting the entry into or residence in the Republic of himself or herself or any other person, commits any fraudulent act or makes any false representation by conduct, statement or otherwise; or

(b) fails to comply with or contravenes the conditions subject to which any permit has been issued to him or her under this Act; or

(c) without just cause refuses or fails to comply with a requirement of this Act; or

(d) contravenes or fails to comply with any provision of this Act, if such contravention or failure is not elsewhere declared an offence, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years, or to both a fine and such imprisonment.

Regulations

38. (1) The Minister may make regulations relating to –

(a) a large-scale influx of asylum seekers into the Republic;

(b) the manner in which and period within which a matter must be referred to the Standing Committee;

(c) the forms to be used under certain circumstances and the permit to be issued pending the outcome of an application for asylum;

(d) the manner and the period in which applications for asylum which are manifestly unfounded, fraudulent or abusive, must be dealt with;

(e) the conditions of sojourn in the Republic of an asylum seeker, while his or her application is under consideration;

(f) the provision of interpreters at all levels of the determination process; and

(g) any other matter which is necessary or expedient to prescribe in order that the objects of this Act may be achieved.

(2) A regulation under subsection (1)(a) may only be made in consultation with the Premier of any province into which the influx takes place.

Training of staff

39. The Director-General must, in consultation with the Standing Committee, take such steps as to ensure the appropriate training of any person –

(a) to whom powers are delegated in terms of this Act; or

(b) who is appointed in any capacity in terms of this Act.

Transitional arrangements

40. Any person who, immediately before the commencement of this Act, was in the process of applying for asylum or was a recognised refugee must be regarded as having applied for asylum or as having been recognised as a refugee in terms of this Act, and the provisions of this Act apply in all respects to such applicant and his or her application and such refugee, as the case may be.

Short title and commencement

41. This is the Refugee Act, 1998, which comes into operation on a date determined by the President by proclamation in the *Gazette*.