GROUNDS FOR REVIEW OF ADMINISTRATIVE ACTION: THE INTERACTION BETWEEN THE CONSTITUTION, THE ACT AND THE COMMON LAW

Elana Hopkins

"Thesis presented in partial fulfillment of the requirements for the degree of Master of Law at the University of Stellenbosch."

Supervisor: Professor André van der Walt

December 2000

Stellenbosch University http://scholar.sun.ac.za

“Declaration

I, the undersigned, hereby declare that the work contained in this thesis is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.

Stellenbosch University http://scholar.sun.ac.za

ABSTRACT

South African administrative law has undergone drastic changes since the inception of the interim Constitution, which elevated 'administrative justice' to a constitutionally entrenched fundamental right in section 24. Although the successor of this section, the '[j]ust administrative action' clause in section 33 FC, did not enter into force on 5 February 1996 with the rest of the Constitution, it required more changes to administrative law in the form of legislation, when read together with item 23 Schedule 6 FC. The two most significant factors that brought about change were the passage of the Promotion of Administrative Justice Act 3 of 2000 in terms of section 33 FC read with item 23 Schedule 6, and the ruling of the Constitutional Court in the *Pharmaceutical Manufacturers* case.

This study shows that in order to give effect to the requirements of the Constitution, the Promotion of Administrative Justice Act and the ruling of the Constitutional Court, administrative law must be reorganised. When this happens, section 33 FC, which gives force to the common law that informs administrative law, becomes the starting point in administrative law matters. Although the Act exists under the Constitution and parallel to the common law, Parliament foresees that the Act and the common law will in time become one system of law. It further provides for the direct application of the Constitution by those who cannot find a remedy in the Act.

The study further shows that, as not all the common law constitutional principles that previously provided the common law grounds for review of administrative action have been taken up by the Constitution, the possibility exists that some of the common law grounds do not continue to be relevant to the review of administrative action. The Act, which articulates the right to 'just administrative action' as viewed by government, contains most of the common law grounds for review. It is therefore argued that, after the Act has entered into force, the continued relevance of those that have been omitted from the Act, needs to be determined before they can be used through the direct application of section 33 FC.

Stellenbosch University http://scholar.sun.ac.za

To test for relevance, the requirements in section 33(1) FC, 'lawfulness', reasonableness' and 'procedural fairness', are therefore interpreted in the study in order to determine which statutory grounds relate to each and which common law grounds have been omitted from the Act. The conclusion reached is that grounds available for the review of administrative action consist of the statutory grounds for review together with the omitted common law grounds that continue to be relevant to the judicial review of administrative action.

Stellenbosch University http://scholar.sun.ac.za

OPSOMMING

Sedert die inwerkingtreding van die interim Grondwet, wat 'administratiewe gerigtigheid' tot 'n grondwetlike reg verhef het in artikel 24, het die Suid-Afrikaanse administratiefreg drastiese veranderinge ondergaan. Al het die reg op 'n 'regverdige administratiewe optrede' in artikel 33 FG nie op 5 Februarie 1996 in werking getree saam met die res van die Grondwet nie, het die klousule nog veranderinge, in die vorm van wetgewing, vereis. Die twee belangrikste faktore wat veranderinge to gevolg gehad het, was die aanneming van die Wet op die Bevordering van Administratiewe Geregtigheid, Wet 3 van 2000, en die beslissing van die Konstitusionele Hof in die *Pharmaceutical Manufacturers*-saak.

Hierdie studie bevind dat die administratiefreg heringedeel sal moet word om effek te gee aan die vereistes van die Grondwet, die Wet op die Bevordering van Administratiewe Geregtigheid en die beslissing van die Konstitusionele Hof. As dit plaasvind, word artikel 33 FG, wat aan die gemenereg krag verleën, die beginpunt in administratiefregtelike aangeleenthede. Al bestaan die Wet onder die Grondwet en parallel tot die gemenereg, voorsien die regering dat die Wet en die gemenereg in die toekoms een stelsel word. Daar word verder voorsiening gemaak vir die direkte toegpassing van artikel 33 deur persone wat nie 'n remedie in die Wet kan vind nie.

Die studie bevind verder dat, omdat al die gemeenregtelike konstitusionele beginsels wat voorheen die gronde van hersiening verskaf het nie in die Grondwet opgeneem is nie, die moontlikheid bestaan dat sekere van die gemeenregtelike gronde nie relevant bly vir die hersiening van administratiewe handelinge nie. Die Wet, wat die reg op 'n '[r]egverdige administratiewe optrede' verwoord soos dit gesien word deur die regering, bevat meeste van die gemeenregtelike gronde van hersiening. Daarom word daar geargumenteer dat die voortgesette relevantheid van die gemeenregtelike gronde van hersiening wat uitgelaat is uit die Wet eers bepaal moet word voordat hulle gebruik kan word deur die direkte toepassing van artikel 33 nadat die Wet in werking getree het.

Stellenbosch University http://scholar.sun.ac.za

Om te toets vir relevantheid, moet die vereistes in artikel 33 FG, 'regmatigheid', 'redelikheid' en 'prosedurele billikheid' geïnterpreteer word om te bepaal watter statutêre gronde onder elk klassifiseer en watter gemmenregtelike gronde uitgelaat is uit die Wet. Die gevolgtrekking is dat die gronde van hersiening beskikbaar vir die hersiening van administratiewe handelinge bestaan uit statutêre gronde van hersiening sowel as die weggelate gemeenregtelike gronde van hersiening wat relevant bly vir die judisiële hersiening van administratiewe handelinge.

Stellenbosch University http://scholar.sun.ac.za

TABLE OF CONTENTS

Abstract……………………………………………………………………………………i

Opsomming………………………………………………………………………………iii

1. Introduction……………………………………………………………………1

2. Lawfulness……………………………………………………………………26

3. Reasonableness………………………………………………………………48

4. Procedural Fairness…………………………………………………………71

5. Remedies and procedures……………………………………………………100

6. Conclusion……………………………………………………………………115

7. Bibliography…………………………………………………………………133

8. Annexure A: Promotion of Administrative Justice Act 3/2000

Stellenbosch University http://scholar.sun.ac.za

CHAPTER 1
INTRODUCTION

1. INTRODUCTION

1.1 Problem area and approach

The problem underlying this study is the confusion in the South African legal society regarding the grounds available at present for the judicial review of administrative action, and more generally, the application of administrative law in terms of the interaction between the Constitution, the Promotion of Administrative Justice Act 3 of 2000 and the common law.

Four interrelated factors gave rise to this problem. First, 'administrative justice' in section 24 of the interim Constitution ('IC')[1] was, and 'just administrative action' in section 33 of the final Constitution ('FC')[2] is elevated to a constitutionally entrenched fundamental right. Second, the mechanism in section 33(3) FC, read together with item 23 Schedule 6 FC, has been inserted in the Constitution to give effect to this right. Third,

---

1 Constitution of the Republic of South Africa, Act 200 of 1993. The Kempton Park negotiations on a right to 'administrative justice' were contested mainly because the right was seen as potentially inhibitory on the transitional government's policy of reconstruction and development. The inclusion of the right itself was uncontroversial but the precise formulation thereof was an issue of much debate.

2 The Constitution of the Republic of South Africa, Act 108 of 1996. Van Wyk submits that the numbering of the Constitution as Act 108 of 1996 is unconstitutional and should therefore be changed to 'Constitution of the Republic of South Africa, 1996'. Acts of Parliament are numbered by year, but the Constitution is not an Act of Parliament and can therefore not be numbered as such. The Constitution was adopted by the Constitutional Assembly, an independent body established with the aim of adopting the final Constitution as the Constitutional Assembly and not as Parliament. Further, the current numbering undermines the authority of the Constitution as a product of the Constitutional Assembly and reduces the importance and status of the Constitution as the supreme law of the country. (See Van Wyk "'n Paar Opmerkings en Vrae Oor die Nuwe Grondwet" (1997) 60 *THRHR* 377 378-379.)

Stellenbosch University http://scholar.sun.ac.za

although the Promotion of Administrative Justice Act ('the Act')[3] was *passed* on time in terms of this mechanism, the Act has not *entered into force* yet. Fourth, the ruling in the *Pharmaceutical Manufacturers* case[4] had a profound effect on the review of the exercise of public power in general and administrative action in particular. All these factors jointly and separately constitute a new administrative law dispensation that derives its force from the Constitution, and further, that involves the Constitution at every level of judicial review of administrative action.

The approach in this study is to determine the relationship between the Constitution, the Act and the common law with reference to the *Pharmaceutical Manufacturers* case. Secondly, the aim is to interpret the requirements of 'lawfulness', 'reasonableness', and 'procedural fairness' in section 33(1) FC with reference to the available material on sections 24 IC and 33 FC, bearing in mind the differences between them. Thirdly, a test is developed, with reference to the *Pharmaceutical Manufacturers* case, for the 'continued relevance' of common law grounds for review that have been omitted from the Act. Fourthly, the statutory grounds for review and common law grounds that have been omitted from the Act relating to the requirements of 'lawfulness', 'reasonableness', and 'procedural fairness' in section 33(1) FC, are discussed. Fifthly, the continued relevance of the common law grounds for review that have been omitted from the Act are determined, with reference to the test for relevance developed in this Chapter. Finally, the influence of the Act on the application of remedies provided and procedures applied in the common law with regard to the judicial review of administrative action in terms of the grounds found to be available is examined.

1.2 Chapter sequence

In Chapter Two the requirement of 'lawfulness' in section 33(1) FC is interpreted, followed by a discussion on the grounds for review relating to the 'lawfulness' requirement. In Chapter Three the requirement of 'reasonableness' in section 33(1) FC is

---

3 Act 3 of 2000.

4 *Pharmaceutical Manufacturers Association In Re: ex parte The President of The Republic of South Africa* 2000 (3) BCLR 241 (CC).

Stellenbosch University http://scholar.sun.ac.za

interpreted, followed by a discussion on the grounds for review relating to the 'reasonableness' requirement. In Chapter Four the final requirement in section 33(1) FC, 'procedural fairness', is interpreted, bearing in mind that 'reasons for administrative action' in section 33(2) FC relates to the requirement of 'procedural fairness'. The grounds for review relating to the 'procedural fairness' requirement are also discussed in that chapter. Chapter Five discusses the statutory procedures and remedies for the review of administrative action while Chapter Six contains the conclusion.

2. SOURCES OF ADMINISTRATIVE LAW

2.1 Introduction

Administrative law is that section of public law that governs the organisation, powers and actions of state administration.[5] The sources of administrative law, that is, the place where legal rules needed to resolve administrative law problems might be found, include the following:

---

5 In the previous dispensation South Africa had a system of parliamentary supremacy. This meant that Parliament was the supreme law-making authority of the Republic and citizens and all organs of state, including the courts, were subordinate to Parliament and its laws. This had very serious and negative consequences for administrative justice, as the government abused administrative law through statutory constructions like ouster clauses (clauses used in empowering legislation to exclude the power of the court to review administrative actions) to exclude persons from administrative justice, and to govern the lives of the majority of South Africans with administrative regulations. These regulations controlled access to housing, education and jobs and prohibited, amongst other things, freedom of movement. This unfortunate situation no longer prevails in the current system of constitutional supremacy. The Constitution is now the supreme law of the Republic and is elevated above other legislation, which is subordinate to the Constitution. (See sec 2 FC, 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid…') Furthermore, the executive authority at all levels derives its power and capacity from the Constitution and is bound by it. (See sec 2 FC, '…the obligations imposed by it (the Constitution) must be fulfilled.') See also Chap 4 FC ('Parliament'), Chap 5 FC ('The President and the National Executive'), Chap 6 FC ('Provinces') and Chap 7 FC ('Local Government'), which impose obligations on government at all levels.

Stellenbosch University http://scholar.sun.ac.za

(a) Legislation

The vast majority of the rules of administrative law are contained in legislation. As a source of administrative law, legislation includes the final Constitution, parliamentary and provincial statutes and administrative (subordinate) legislation.[6]

(b) Case law

Based on the precedent rule,[7] case law forms an extremely important source of administrative law. Over the years, the review powers of the courts has led to the development of an extensive body of substantive administrative law by the courts.[8]

(c) Common law

Although administrative law may be described as predominantly South African, English common law and Roman-Dutch law have both contributed to its development.[9] Insofar as one regards the common law rules relating to estoppel

---

6 Administrative legislation emanates from the executive sphere of government, whereas parliamentary and provincial legislation emanate from the legislative sphere. See fn 2 above for remarks on the Constitution as an Act of Parliament in this regard.

7 The principle of judicial precedent determines that the decision of a court is binding on lower courts until such time as a court of equal or higher status overrules the decision.

8 Burns *Administrative Law Under the 1996 Constitution* (1998) 82-84.

9 For example, the rule that the state should compensate an individual when his property is expropriated has its origin in Roman-Dutch law (see fn 41 Chap 5), and the doctrine of *ultra vires* has its origin in English common law. Before the concept of *ultra vires* can be explained, 'legality' needs explanation. In short, administrative actions need to meet the requirement of *legality* to be *legal* (valid). 'Legality' is therefore the source of all the grounds for review of administrative action (Boulle, Harris & Hoexter *Constitutional and Administrative Law* (1989) 255 and 260). *Ultra vires* is the opposite of *intra vires*. *Ultra* means 'outside' and *vires* 'power'. Literally *ultra vires* therefore means 'outside power' and *intra vires* 'inside power'. *Ultra vires* can be interpreted in a wide or narrow sense. Wiechers *Administratiefreg* (1984) 198-200 prefers the narrow interpretation. Accordingly, *ultra vires* means that the formal grounds afford review for administrative action performed 'outside power'. The formal grounds for review are those that have to do with administrative action exceeding the express limits of power, or failing to comply

Stellenbosch University http://scholar.sun.ac.za

as a source of administrative law, this is also covered by 'common law' as a source.[10]

(d) Administrative practice

Although the recognition of administrative practice as a source of administrative law is the exception rather than the rule, administrative practice, such as internal directives and circulars, can acquire the force of law under certain circumstances.[11]

In terms of these legal rules, actions of state administration (administrative actions)[12] need to adhere to certain requirements to be valid. In other words, courts review the validity of administrative action in terms of the Constitution, legislation and the common

---

with express statutory prerequisites. Baxter *Administrative Law* (1984) 307-312 prefers the wide interpretation. Accordingly, *ultra vires* is a justificatory doctrine for the existence of judicial review. In effect, the wide interpretation means that *legality* and *intra vires* are synonymous and that *illegality* and *ultra vires* are synonymous. The wide interpretation of *ultra vires* therefore relates to all the grounds for review. All reviewable administrative action found invalid were therefore performed 'outside power'. Included in 'grounds for review' are the formal grounds for review and the rules of the common law that postulate the intention of the ideal legislature. Courts have developed these common law rules over time as judges' notion of what an ideal legislature would have stipulated in a statute where there are no stipulations on certain matters in an applicable statute. An example of one of these rules is the principle that where there is doubt as to the meaning of a statute, it should be construed so as to do the least harm to the liberty of the individual. In terms of the rule, if the legislature intends a benefit to be taken away from a person by an administrator without affording the affected person a hearing, it would explicitly have to stipulate this intention in the empowering legislation. See *Staatspresident v United Democratic Front* 1988 (4) SA 830 (A) which has authoritatively restated the law in this respect. (See also fn 24 Chap 2.)

10 Public authorities may acquire authority by way of estoppel in some instances if it is in the 'public interest' (Burns *Administrative Law Under the 1996 Constitution* (1998) 86 fn 22). However, estoppel is one of the possible sources of administrative power (see Baxter *Administrative Law* (1984) 400-404) and not a place where legal rules to resolve administrative law problems might be found.

11 Burns *Administrative Law Under the 1996 Constitution* (1998) 85-86.

12 See 2.5.2 below.

Stellenbosch University http://scholar.sun.ac.za

law grounds for review.[13] The grounds for judicial review of administrative action are in general divided into those relating to administration that exceeds its statutory authority and those relating to irregularities in the exercise of power. Since reasonableness was not regarded as an independent ground for the review of administrative action at common law, administrative action could generally not be reviewed purely for being unreasonable.

2.2 The Constitution and the common law

A right to 'administrative justice' was included in section 24 IC and a right to 'just administrative action' is included in section 33 FC. The purpose of section 33 is (and that of section 24 was) neither to provide an exhaustive statement of the grounds for review of administrative action, nor to create a codification of administrative law.[14] The courts therefore remain empowered to develop administrative law to give effect to the right to 'just administrative action' in section 33 and to bring administrative law in line with the Constitution. However, in the development of administrative law the relationship between the Constitution and the common law becomes problematic.

In the *Container Logistics* case,[15] the question arose whether an administrative decision may still be reviewed purely on common law grounds. Hefer JA responded in the following way:

> 'Judicial review under the Constitution and under the common law are different concepts. In the field of administrative law constitutional review is concerned with constitutional legality of administrative action, the question in each case being whether it is or is not consistent with the Constitution, and the only criterion being the Constitution itself. Judicial review under the common law is essentially also concerned with the legality of administrative action but the

---

[13] See Wiechers *Administratiefreg* (1984) 194 for the relationship between grounds for review and validity requirements of administrative action.

[14] Corder "Administrative Review in South African Law" (1998) 9 *Public Law Review* 89 89-97 and Devenish "The Interim Constitution and Administrative Justice in South Africa" 1996 *TSAR* 458 459.

[15] *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd; Commissioner of Customs and Excise v Rennies Group Ltd t/a Renfreight* 1999 (8) BCLR 833 (SCA).

Stellenbosch University http://scholar.sun.ac.za

> question in each case is whether the action under consideration is in accordance with the behest of the empowering statute and the requirements of natural justice.'[16]

> 'But although it is difficult to conceive a case where the question of *legality* cannot ultimately be reduced to a question of constitutionality, it does not follow that the common law grounds for review have ceased to exist. What is lawful and procedurally fair within the purview of section 24 is for the courts to decide and I have little doubt that, to the extent that there is no inconsistency with the Constitution, the common law grounds for review were intended to remain intact.'[17]

Hefer JA in effect viewed judicial review of administrative action in terms of the Constitution and judicial review of administrative action in terms of common law grounds for review as two systems of law existing parallel to each other. He therefore continued to find the administrative action in question invalid in terms of the common law grounds for review, without considering whether the action infringed section 24 IC.

The implication of this judgment was that the review of administrative action becomes a constitutional matter, with the Constitutional Court having the final jurisdiction, only when the administrative action's consistency with the Constitution is questioned specifically. However, when the consistency of the administrative action with the Constitution is not questioned, the Supreme Court of Appeal ('SCA') has the final jurisdiction in terms of common law grounds for review.

In the *Pharmaceutical Manufacturers* case, Chaskalson P for the Constitutional Court, replied to Hefer JA's statements in the *Container Logistics* case with reference to the relationship between the Constitution and the common law in the judicial review of administrative action in the following manner:

> '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 through the application of common law constitutional principles.'[18]

---

[16] See *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd; Commissioner of Customs and Excise v Rennies Group Ltd t/a Renfreight* 1999 (8) BCLR 833 (SCA) 843 C-E.

[17] See *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd; Commissioner of Customs and Excise v Rennies Group Ltd t/a Renfreight* 1999 (8) BCLR 833 (SCA) 843 H-I.

[18] See *Pharmaceutical Manufacturers Association In Re: ex parte The President of The Republic of South Africa* 2000 (3) BCLR 241 (CC) [33].

Stellenbosch University http://scholar.sun.ac.za

Chaskalson P further held:

> 'I cannot accept the contention that treats the common law as a body of law separate and distinct from the Constitution. There are no two systems of law, each dealing with the same subject matter, each having similar requirements, each 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...[T]hat is not to say the principles of common law have ceased to be material to the development of public law. These well-established principles will continue to inform the content of administrative law and other aspects of public law, and will continue to contribute to their future development.'[19]

Accordingly, in the assessment of the validity of an administrative action, the courts have to determine whether the action in question conflicted with the constitutionally entrenched right to 'just administrative action' in section 33 FC. In order to determine the scope, content and application of this right, the courts have to take recourse to the common law principles of administrative law that inform the content of the right. The courts may therefore still review administrative actions in terms of common law grounds for review, but in doing so, the common law does not constitute a system of law separate from the Constitution. Since the common law derives its force from the Constitution and is subject to constitutional control, there is only one system of law.

2.3 The relationship between section 24 IC and section 33 FC

Section 33(3) FC requires the enactment of national legislation within three years from the date on which the Constitution took effect on 4 February 2000. The legislation must give effect to the right to 'just administrative action' and provide for review of administrative action by a court or, where appropriate, an independent and impartial tribunal. Further, the legislation must impose a duty on the state to give effect to the rights in section 33(1) and (2) FC and promote an efficient administration.[20]

---

19 See *Pharmaceutical Manufacturers Association In Re: ex parte The President of The Republic of South Africa* 2000 (3) BCLR 241 (CC) [44] and [45].

20 The constitutionality of the envisaged legislation, if enacted within the required time frame, will therefore be tested in terms of both the provisions of sec 33(3) FC and sec 36 FC ('limitations

Stellenbosch University http://scholar.sun.ac.za

In terms of item 23(3) Schedule 6, section 33(3) FC would have lapsed if the envisaged legislation had not been enacted within three years from the date on which the new Constitution took effect. If the deadline had not been met, Parliament would still have been entitled to enact national legislation to limit the right to 'just administrative action', although the special circumstances in section 33(3) would have fallen away. This would have left only the provisions of section 36 FC ('limitation of rights') and the rest of the Constitution as a test for the constitutionality of the restrictions in the Act on section 33(1) and (2).[21]

Item 23(2)(b) Schedule 6 FC stipulates that section 33(1) and (2) FC must be read as if it has been phrased like section 24 IC until the national legislation is enacted. The idea behind this was to afford government time to draft legislation in accordance with section 33(3) FC, read together with item 23 Schedule 6.

However, as the envisaged legislation was passed on 3 February 2000, section 33(1) and (2) FC seems to have entered into force and section 24 IC seems to have lapsed on 3 February 2000. In effect, therefore, section 24 was in operation from the inception of the interim Constitution on 27 April 1994 until 3 February 2000 and section 33 FC has been in operation since 3 February 2000.

2.4 The relationship between section 33 FC and Act 3 of 2000

2.4.1 Enactment: mere passage or 'entering into force'?

Section 33 was designed to afford a generous guarantee of 'just administrative action', which was then to be limited and given effect to in legislation.[22] The passage of the envisaged legislation created two problems. Firstly, as the meaning assigned to *enact* is

clause'), the equivalent of sec 33 IC, whereby a right in the Bill of Rights can be limited by a law of general application if the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom (*S v Makwanyane* 1995 (6) BCLR 665 (CC). (See Corder "Administrative Justice in the Final Constitution" (1997) 13 *SAJHR* 28 32 and Govender "Administrative Justice" (1999) 14 *SAPL* 62 65.)

21 Corder (1997) 13 *SAJHR* 28 32.

22 Corder (1997) 13 *SAJHR* 28 31.

Stellenbosch University http://scholar.sun.ac.za

uncertain,[23] it is not clear whether mere passage of the Act was sufficient to fulfill the constitutional obligation to *enact* legislation. Secondly, if passage did indeed amount to enactment, it is uncertain what the effect of the timely *enactment* of the Act was on section 33 FC. The best view seems to be that *enact* has to be interpreted generously, as a narrow interpretation would create the unfortunate situation, in which the Constitutional Court would fetter the discretion of the drafters.[24] Further, as an interpretation which results in validity should be followed in terms of the statutory presumptions of interpretation, *enacted* should be interpreted in such a way that its interpretation results in the validity rather than the invalidity of section 33(3) FC (the section lapsed if legislation had not been enacted on time). In other words, *enacted* should be interpreted generously to include *passage* in order to avoid the lapsing of section 33(3) FC.

---

23 'Enact' seems to refer to the stage when a Bill has been adopted/passed, assented to and signed by the President, in other words when it 'becomes an Act of Parliament' (sec 81 FC). The dictionary meaning of *enact* is 'to enter among the *acta* or public records' or 'to make into an act'. (See Simpson and Werner *The Oxford English Dictionary* (1989) Vol V.) It can therefore not be said with absolute certainty whether *enact* means 'pass' or 'enter into force'. As the concept used in the Afrikaans translation of the Constitution, "verorden", could also mean either 'pass' or 'enter into force', turning to the Afrikaans translation does not provide a solution to the problem either.

24 If government had not enacted legislation on time, (within three years from the date on which the final Constitution took effect), legislation passed after the deadline would have had to comply with every standing judicial interpretation of sec 33(1) and (2), which would have entered into force on 3 February 2000. (See Corder (1997) 13 *SAJHR* 28 32.) Non-compliance with the deadline would therefore have taken the initiative to develop administrative law from the administration and given it to the courts. This unfortunate situation has to be avoided (Govender (1999) 14 *SAPL* 62 65-66). Further, Asimow suggested that an Act was needed to protect the legitimacy of the Constitutional Court, as the public should not see the Constitutional Court judges as policymakers. (See Asimow "Administrative law under South Africa's Final Constitution: The need for an Administrative Justice Act" (1996) 113 *SALJ* 613 626-627.) Klaaren (Klaaren "Constitutional Authority to Enforce Rights of Administrative Justice and Access to Information" (1997) 13 *SAJHR* 549 552) argues that the inclusion of sec 33 in the final Constitution expanded the constitutional authority given to Parliament to legislate in the area of 'just administrative action'. The Constitutional Court should therefore not be put in a situation where it fulfills Parliament's role in this regard.

Stellenbosch University http://scholar.sun.ac.za

The effect of the timely enactment of the Act on section 33(1) and (2) FC requires explanation. The intention of the drafters of the Constitution was clear with regard to the resulting situation if legislation was not enacted on time: section 33(1) and (2) would have become freestanding.[25] However, it is not so clear what the intention of the drafters of the Constitution was with regard to the future of section 33(1) and (2) if legislation was enacted on time. Some authors,[26] relying on the interpretation of 'must give effect to' in section 33(3), suggested the possibility of a permanent constitutional lockout of section 33(1) and (2).[27] According to them 'must give effect to' suspends the direct effect of the right to 'just administrative action' in section 33. However, the Constitutional Court required by implication in the *Certification* case[28] that the fate of section 33(1) and (2) be based on the interpretation of the 'transitional measure' in item

---

25 Item 23(3) Schedule 6 FC stipulates that sec 33(3) FC lapses if the envisaged legislation is not enacted within thee years from the date on which the Constitution took effect. This means that only subsec (1) and (2) would have remained in sec 33 FC, in other words, that sec 33(1) and (2) would have stood free from sec 33(3) and the limitation imposed on sec 33(1) and (2) by it.

26 Davis and Marcus "Information" in Davis, Cheadle and Haysom (eds) *Fundamental Rights in the Constitution* (1997) 154 and Pashke "Open Democracy Bill Some Constitutional Issues" (Unpublished memorandum presented at a workshop on the draft Open Democracy Bill presented by Idasa's Political Information and Monitoring Service, the Human Rights Committee, the Human Rights Commission (Cape Town Office), and the Black Sash, 28 August 1997.) (See Klaaren (1997) 13 *SAJHR* 549 555 ffn 23 and 24.)

27 According to this view, national legislation establishes the machinery for the concrete exercise of the constitutional right in sec 33 FC. Once the legislation passes constitutional muster, by passing the test implicit in sec 33(3) and the limitation analyses in terms of the provisions of sec 36 FC (see page 9 and fn 25 above), it becomes the sole legal avenue for the application of the right to 'just administrative action'. As the Act regulates 'just administrative action', which sec 33(1) and (2) regulated before, it therefore gives effect to sec 33(1) and (2), which is then locked out of the Constitution.

28 In *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) [83] and [85], the Constitutional Court ruled in terms of sec 32 FC ('access to information'), that the 'transitional measure' in item 23(2) Schedule 6 FC is a means of affording Parliament time to provide the necessary legislative framework, in other words, mandates the *suspension* of sec 32 FC until the legislative framework is provided.

Stellenbosch University http://scholar.sun.ac.za

23(2)(b) Schedule 6 FC.[29] Accordingly, section 33(1) and (2) must be read as if it has been phrased like section 24 IC *until* national legislation has been enacted, which implies that section 33(1) and (2) entered into force *after* legislation was enacted. This is the reason why no permanent constitutional lockout of section 33(1) and (2) occurred, which means that the legislation is not the only legal avenue for the application of the right in section 33.

In the *Pharmaceutical Manufacturers* case, the Constitutional Court strengthened both the suggestion that the mere passage of the Act fulfilled the obligation to enact legislation, and the explanation that section 33(1) and (2) FC entered into force after the passage of the Act. As the case was *heard* on 11 November 1999 (before the passage of the Act), but only *decided* on 25 February 2000 (after the publicised[30] passage of the Act), the judges must have been aware of the passage of the Act. However, the decision was based on section 33 FC read as if it were phrased like section 24 IC, which was the law in force at the time the case was *heard*.[31]

---

29 See Klaaren (1997) 13 *SAJHR* 549 556-557 and Corder (1997) 13 *SAJHR* 28 33-34. Corder further argued, with reference to the appearance of the right to 'administrative justice' in the interim Bill of Rights and Constitutional Principle II IC, that sec 33(1) and (2) enters into force after the enactment of the Act. Constitutional Principle II required the final Bill of Rights to be drafted with due consideration to the previous (then current) Bill. If sec 33(3) qualifies the right to 'just administrative action' by making its direct enforcement conditional on whether legislation had been enacted or not, this aspect of the Bill of Rights could have been non-certifiable for taking away a guarantee provided in the interim Constitution. The substantive right in sec 33 ought therefore to be able to be applied directly by a court even after the enactment of the required legislation. National legislation should merely make the implementation of the right to 'just administrative action' in sec 33 easier by providing the procedures and statutory mechanisms to give concrete effect to the right. It should further provide guidance to public administrators in the performance of their tasks. (De Lange Parliament 12 June 2000.)

30 The passage of the Act was afforded media coverage because of its controversial definition of 'administrative action'. (See Bezuidenhout "Staat Kry Reg op Inligting in Konsepwet" *Die Burger* 21 January 2000.)

31 The Act was passed on 3 February 2000. Sec 24 IC was therefore in force on 11 November 1999.

Stellenbosch University http://scholar.sun.ac.za

Chaskalson P for the court held that:

> 'The control of public power by the courts through judicial review is and always has been a Constitutional matter…[S]ince the adoption of the interim Constitution such control has been *regulated by the Constitution* which contains *express provisions* dealing with these matters.'[32]
>
> 'Although the common law remains relevant to this process, judicial review of the exercise of public power is a *constitutional matter that takes place under the Constitution and in accordance with its provisions.*'[33]

The Constitutional Court used the words '*since* the adoption of the interim Constitution', which implies that such control is *still* regulated by the Constitution. Further, the Court's statement that the Constitution 'contains *express provisions* dealing with these matters' (matters of the judicial review of public power) has to refer to, amongst other things, section 33. If the Act caused a permanent constitutional lockout of section 33(1) and (2), the cited passages would have been without force for administrative law in future, as the 'just administrative action' clause would have been locked out of the Constitution on 4 February 2000. As administrative law forms an integral part of the review of the exercise of public power, this cannot be the case.

Further, the Act itself implies that section 33(1) and (2) entered into force when it was enacted. Section 6(2)(i) of the Act affords review for administrative action that is otherwise unconstitutional or unlawful. In other words, section 6(2)(i) affords review on grounds other than statutory grounds. This refers to the suggestion that review of administrative action takes place through the interaction between the Act and section 33 FC.[34] Grounds for review that have been omitted from the Act could therefore continue to be relevant to the review of administrative action through the direct application of section 33 FC.[35]

---

32 My emphasis. See *Pharmaceutical Manufacturers Association In Re: ex parte The President of The Republic of South Africa* 2000 (3) BCLR 241 (CC) [33].

33 My emphasis. See *Pharmaceutical Manufacturers Association In Re: ex parte The President of The Republic of South Africa* 2000 (3) BCLR 241 (CC) [51].

34 De Lange Parliament 12 June 2000.

35 See 2.4.2 below.

Stellenbosch University http://scholar.sun.ac.za

The conclusion is that the Act exists under section 33 FC. Section 33(1) and (2) therefore provide a safety net for those falling through gaps in the Act.[36] This is strengthened by the suggestions of both Breitenbach[37] and De Lange.[38] As section 33 is still available for those who cannot find a remedy in the Act, Breitenbach suggests that the Act is not sub-standard despite its inadequate regulation and omission of certain aspects of administrative law. De Lange, for the government, suggests that the common law exists parallel to the Act for those persons not finding a remedy in the Act, and further, that the common law system and the statutory system will in time become one.[39]

Until the Act enters into force, the judicial review of administrative action therefore takes place through the direct application of section 33(1) and (2) FC. Accordingly, review takes place in terms of the Constitution, the content of which is informed by the common law that will also contribute to the future development of administrative law.

2.4.2 The continued relevance of the common law grounds for review

Chaskalson P made the following statements in the *Pharmaceutical Manufacturers* case that inform the core of this thesis:

> 'The common law principles that previously provided the grounds for the review of public power have been subsumed under the Constitution, 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.'[40]

---

36 Corder "Administrative Justice: A Cornerstone of South Africa's Democracy" (1998) 14 *SAJHR* 38 52.

37 Breitenbach at the UCT New Legislation Seminars 6 April 2000.

38 De Lange Parliament 12 June 2000.

39 This doesn't mean that the common law exists parallel to the Constitution. Both the Act and the common law with regard to administrative law are constitutional matters even though they exist parallel to each other at this stage. Both therefore obtain their force from the Constitution. See *Pharmaceutical Manufacturers Association In Re: ex parte The President of The Republic of South Africa* 2000 (3) BCLR 241 (CC) [44] and [45].

40 See *Pharmaceutical Manufacturers Association In Re: ex parte The President of The Republic of South Africa* 2000 (3) BCLR 241 (CC) [33].

Stellenbosch University http://scholar.sun.ac.za

Accordingly, the common law grounds for review, previously provided by common law principles, can only 'in so far as they might continue to be relevant' be used for the review of administrative action. The Court further explained:

> 'The most important of these principles were the rule of law, the supremacy of Parliament...[T]he exercise of public power was regulated by the courts through the judicial review of legislative and executive action. This was done by applying constitutional principles of the common law, including the supremacy of Parliament and the rule of law. The latter had a substantive as well as a procedural content that gave rise to what courts referred to as fundamental rights, but because of the countervailing constitutional principle of supremacy of Parliament, the fundamental rights could be, and frequently were, eroded or excluded by legislation.'[41]
>
> This however, has been fundamentally changed by our new constitutional order. We now have a detailed written Constitution. It expressly rejects the doctrine of supremacy of Parliament, but incorporates other common law constitutional principles, and gives them greater substance than they previously had. The rule of law is specifically declared to be one of the foundational values of the constitutional order, fundamental rights are identified and entrenched, and provision is made for the control of public power...'[42]

The 'continued relevance' of common law grounds for review, therefore needs to be determined with reference to the entrenchment of the common law principles that previously provided them. If the principle that previously provided a certain common law ground for review has been entrenched in the Constitution, the ground for review continues to be relevant to the review of the exercise of public power, which includes administrative action. However, if the common law principle that previously provided a certain common law ground for review has not been entrenched in the Constitution, the ground for review does not continue to be relevant to the review of the exercise of public power.

---

41 See *Pharmaceutical Manufacturers Association In Re: ex parte The President of The Republic of South Africa* 2000 (3) BCLR 241 (CC) [35] and [37].

42 See *Pharmaceutical Manufacturers Association In Re: ex parte The President of The Republic of South Africa* 2000 (3) BCLR 241 (CC) [40].

Stellenbosch University http://scholar.sun.ac.za

In addition to the above, the Constitutional Court held:

> 'What is "lawful administrative action", "procedurally fair administrative action" and administrative action that is "justifiable in relation to the reasons given for it" cannot mean one thing under the Constitution, and another thing under the common law.'[43]

Now, under the final Constitution, the common law grounds for review of administrative action, conversely the requirements for valid administrative action should be included under the constitutional categories of 'lawfulness', 'reasonableness' and 'procedural fairness'.[44] The Act, which gives effect to the right in section 33 FC, articulates the content of the right in section 33 FC as viewed by Parliament. It contains most of the common law grounds for review, although some common law grounds have been omitted from the Act. The question raised is therefore whether the common law grounds for review that have been omitted from the Act continue to be relevant to the judicial review of administrative action.

As Corder argues, the Act should merely make the implementation of section 33 FC easier by providing the procedures and statutory mechanisms to give concrete effect to the right.[45] De Lange adds that it provides guidance to public administrators in the performance of their tasks.[46] Section 33 FC, the content of which is informed by the common law, therefore exists above the Act for those not finding a remedy in the Act.[47] However, it needs to be determined whether the common law grounds for review omitted from the Act remain relevant to the review of administrative action, before such actions can be reviewed through the direct application of section 33 FC. A test is accordingly developed in this thesis to determine the continued relevance of common law grounds for review that have been omitted from the Act.

---

43 See *Pharmaceutical Manufacturers Association In Re: ex parte The President of The Republic of South Africa* 2000 (3) BCLR 241 (CC) [50].

44 The case was decided under sec 33 FC read as if it was phrased like sec 24 IC. However, sec 33 has since entered into force.

45 See fn 29 above.

46 De Lange Parliament 12 June 2000.

47 See fn 29 above.

Stellenbosch University http://scholar.sun.ac.za

In determining relevance, the following two questions need to be asked. The first question is whether one or more of the statutory grounds overlap the common law ground that has been omitted from the Act.[48] If this is indeed the case, it continues to be relevant to the review of administrative action through the application of the statutory ground (or grounds) that overlaps it. However, if the first question is answered in the negative, the second question is asked.

The second question is whether the omitted common law ground was previously provided by a common law principle that has now been entrenched in the Constitution. If the answer is in the positive, the common law ground continues to be relevant to the review of administrative action through the direct application of section 33 FC. If not, the common law ground does not continue to be relevant.

2.5 General remarks

2.5.1 Organs of state[49]

In the past, there has been a measure of difficulty in defining 'organ of state'. The concept is important; as one of the parties to an administrative law relationship has to be an administrative organ while the other could either be a private person or another organ of state. In common law, certain tests were applied to determine whether a body or official was an administrative organ, that is, whether the body was instituted by statute, whether it is or has become part of an established administrative hierarchy, whether it performs public duties or functions, or whether it is the bearer of authoritative power.

Both the interim and final Constitutions provide a definition of 'organ of state'. Section 233 IC defined 'organ of state' to include 'any statutory body or functionary', while section 239 FC defines the term as follows:

---

48 There is a presumption of statutory interpretation, which stipulates that the legislature does not include superfluous provisions in a statute.

Stellenbosch University http://scholar.sun.ac.za

"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 judicial officer..."

Section 239 therefore goes a long way in resolving the confusion that surrounded 'organ of state' in the past. Although the section includes state departments of government at all levels, public functionaries and institutions, the emphasis falls on the activities of functionaries and institutions. To qualify as an organ of state, functionary or institution, there must be either constitutional authorisation or other legislative authorisation.

The Act defines 'administrator' in section 1(ii) as 'an organ of state or any natural or juristic person taking administrative action'. In terms of section 1(ix), the Act affords 'organ of state' the meaning assigned to it in section 239 FC and therefore fully adheres to the definition of 'organ of state' in the Constitution.

2.5.2 Administrative action

Administrative action is the conduct of state administration in the exercise of public power in one form or another, which includes conduct of entities that are not formally part of the administration. This includes judicial administrative action (conduct of administrators that approximates the activities of a court of law), legislative administrative action (issuing of delegated legislation) and the powers exercised in the implementation of law (administrative actions which implement policy, legislation or adjudicative decisions).[50]

Defining 'administrative action' has always been problematic in common law. However, as 'administrative action' has become the threshold requirement for the right to 'just

---

49 Burns *Administrative Law Under the 1996 Constitution* (1998) 16, 56-57, 93-95.

50 De Waal et al *The Bill of Rights Handbook* (2000) 456-462.

Stellenbosch University http://scholar.sun.ac.za

administrative action', it has become more problematic since the entrenchment of the interim Constitution and later also the final Constitution. The Constitution does not define 'administrative action' but merely defines 'organ of state'.[51] Since 'organ of state' is so widely defined in the Constitution, defining 'administrative action' in terms of 'organ of state' is problematic.

The Constitutional Court follows a narrow approach with regard to the interpretation of 'administrative action'.[52] Accordingly, legislative actions consisting of resolutions taken by 'an elected, deliberative legislative body established by the Constitution itself', does not constitute administrative action.[53] Further, excluded from 'administrative action' are powers conferred on the President as head of state listed by section 84(2) FC, and powers concerning the assent to and signature of Bills in section 79 FC. Similar powers accorded to provincial executives by sections 121 and 127 FC do not constitute administrative action either. The power conferred on the President to appoint commissions of enquiry is closely related to policy and is not concerned with the implementation of legislation, which is an administrative action.[54] A decision by the President to bring an Act of Parliament into force is not an administrative action either, as it requires a political judgment that lies between the law-making process and the administrative process.[55]

In section 1(i), the Act also defines 'administrative action' narrowly.[56] It lists numerous exclusions to 'administrative action' and stipulates the features that must be present before an action can qualify as 'administrative action'. There must be a 'decision' or a 'failure to take a decision',[57] by an 'organ of state'[58] or 'a natural or juristic person',[59]

---

51 See sec 239 FC p 17 above.

52 See Hoexter "The Future of Judicial Review in South African Administrative Law" (2000) 117 *SALJ* 23-24 (forthcoming).

53 See *Fedsure Life Assurance Ltd and Others v Greater Johannesburgh Transitional Metropolitan Council and Others* 1998 (12) BCLR 1458 (CC) [33] to [45].

54 See *President of the Republic of South Africa and Others v South African Rugby and Football Union and Others* 1999 (10) BCLR 1059 (CC) [132] to [149].

55 *Pharmaceutical Manufacturers Association In Re: ex parte The President of The Republic of South Africa* 2000 (3) BCLR 241 (CC) [79].

56 See Hoexter (2000) 117 *SALJ* 32-34 (forthcoming).

57 'Decision' is defined in sec 1(v) of Act 3 of 2000.

Stellenbosch University http://scholar.sun.ac.za

which 'adversely'[60] 'affects'[61] the 'rights'[62] of any person and which has 'direct external legal effect'.[63]

2.5.3 Access to administrative justice

In terms of section 24 IC, the right to 'administrative justice' was only afforded to certain classes of persons with affected or threatened rights, interests and legitimate expectations.[64] These thresholds were removed from the right to 'just administrative

58 Organ of state is defined in sec 239 FC. (See sec 1(ix) of Act 3 of 2000, which mentions sec 239 FC.)

59 '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...' (See sec 1(i)(b) Act 3 of 2000.) 'Empowering provision' is defined as '...a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which the administrative action is purportedly taken.' (See sec 1(vi) Act 3 of 2000.)

60 '*Adversely*' points to a higher degree of effect than was required in relation with sec 24 IC (and is required in relation with sec 33(1) FC). (See fn 10 Chap 4 for the meaning of 'adversely'.) Sec 3, 4 and 5 of the Act have an even higher threshold, namely, '*adversely* and *materially* affected rights'. (See fn 45 Chap 4 for the meaning of materially.)

61 '*Affects* rights' can be interpreted in a wide or narrow sense, depending on whether the section contains the notion of 'creation of rights' in terms of the determination theory or 'abolishing rights' in terms of the deprivation theory. As rights are created and not abolished in application cases, the wide interpretation in terms of the determination theory is preferred, as all applicants for benefits, advantages, and privileges and applicants for permits, licenses and other concessions will be excluded from the application of the Act if the narrow interpretation is followed. (See fn 44 Chap 4 and Hoexter (2000) 117 *SALJ* 32-33 (forthcoming).)

62 It is suggested that 'rights' should be interpreted widely in order to include all persons with affected or threatened rights, interests and legitimate expectations. (See fn 33 Chap 2.) Further, it is suggested that sec 3(1) of the Act specifically includes the concept of 'legitimate expectations' in order to make sure that persons with legitimate expectations are included in the application of sec 3.

63 '*Direct external legal effect*', from German origin, means that the decision must affect outsiders and should not be a purely internal matter of departmental administration or organisation. (See Hoexter (2000) 117 *SALJ* 32-33 (forthcoming).)

64 See Du Plessis and Corded *Understanding South Africa's Transitional Bill of Rights* (1994) 167.

Stellenbosch University http://scholar.sun.ac.za

action' in section 33 FC, which affords 'just administrative action' to *everyone*.[65] However, section 33(2) FC demands that rights be *adversely* affected for access to 'reasons for administrative action', thereby setting a higher threshold for section 33(2) than section 33(1).[66]

The Act qualifies access to administrative justice by defining 'administrative action', the threshold requirement for the application of the Act, narrowly. Certain sections in the Act contain even higher threshold requirements by requiring '*materially* and adversely affected rights' in addition to 'administrative action' for the application of that particular section.[67]

However, as the Act exists under section 33 FC, those who cannot find a remedy in the Act as a result of the threshold requirement(s), could perhaps find a remedy in section 33 FC if access is afforded to it. In other words, if they are included in 'everyone' for purposes of section 33(1), 'everyone with adversely affected rights' for purposes of section 33(2) and 'administrative action' as interpreted by the Constitutional Court, they could find a remedy in section 33 FC. Further, the common law ground for review those persons attempt to apply through the direct application of section 33 FC, has to 'continue to be relevant' to the judicial review of administrative action.

2.5.4 The Constitution and 'administrative action': the doctrine of constitutional legality

In the *Fedsure* case, the SCA referred two questions to the Constitutional Court. The first was whether administrative action constituted by resolutions made by a local government was consistent with the interim Constitution; and the second, whether or not the interim Constitution preserved for the predecessor of the SCA any residual or concurrent jurisdiction to adjudicate upon an attack on such administrative action on the ground that it fell to be set aside, reviewed or corrected at common law.

65 *Everyone* in sec 33(1) FC therefore includes all persons with 'affected' or 'threatened' 'rights', 'interests' and 'legitimate expectations'.

66 See ffn 4 and 6 Chap 2.

Stellenbosch University http://scholar.sun.ac.za

The Constitutional Court stated that a series of provisions in Chapter 10 FC made it plain that the powers of local governments to act were limited to the powers conferred on them by the Constitution or laws of a competent authority.[68] The Court continued:

> "It is a fundamental principal of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law - to the extent at least that it expresses this principle of legality - is generally understood to be a principle of constitutional law...[T]he principle is also expressly recognised in the 1996 Constitution.'[69]

The Constitutional Court accordingly ruled that:

> 'There is of course no doubt that the common law principles of *ultra vires* remain under the new constitutional order. However, they are underpinned (and supplemented where necessary) by a constitutional principle of legality. In relation to "administrative action" the principle of legality is enshrined in section 24(a). In relation to legislation and to executive acts that do not constitute "administrative action", the principle of legality is necessarily implicit in the Constitution.'[70]

The review of legislative and executive action that does not constitute 'administrative action' for the purpose of section 33 FC, therefore takes place in terms of the doctrine of constitutional legality. As the action reviewed in the *Fedsure* case constituted legislative action rather than 'administrative action', it was decided on the ground of constitutional legality.

In the *SARFU* case, the question arose whether the exercise of power conferred upon the President by section 84(2)(f) FC constituted 'administrative action'. The Court ruled that the focus of an enquiry whether conduct was administrative action or not, was on the nature of the power so exercised. In addition, it stated that some, but not all, of the acts of members of the executive constituted 'administrative action'. Accordingly, it was held

---

67 See sec 3, 4 and 5 Act 3 of 2000.

68 The Court cited sec 174(3) FC as an example. It reads as follows: 'A local government shall be autonomous and, within the limits prescribed by or under law, shall be entitled to regulate affairs.'

69 See *Fedsure Life Assurance Ltd and Others v Greater Johannesburgh Transitional Metropolitan Council and Others* 1998 (12) BCLR 1458 (CC) [56] and [57]. Sec 1 FC reads that: 'The Republic of South Africa is one, sovereign, democratic state founded on the following values...(c) supremacy of the Constitution and the rule of law...'

70 See *Fedsure Life Assurance Ltd and Others v Greater Johannesburgh Transitional Metropolitan Council and Others* 1998 (12) BCLR 1458 (CC) [59].

Stellenbosch University http://scholar.sun.ac.za

that the performing of specifically controlled constitutional responsibilities directly related to the legislative process and the constitutional relationship between the executive, the legislature and the courts, do not constitute administrative action.

As the Court held that the 'special constitutional power' in section 84(2) FC, which permits the President to appoint commissions of inquiry, was closely related to policy and not concerned with the implementation of legislation (which is an administrative action), the appointment of a commission of inquiry by the President was not the exercise of power administrative in character.[71] However, significant constraints on the exercise of the President's power arose from provisions of the Constitution other than the administrative justice clause. Further, the President had to exercise his power in terms of section 84(2) FC in good faith and should not misconstrue his powers. The case was therefore also decided in terms of constitutional legality, but with the added requirement of *bona fides*.

In the *Pharmaceutical Manufacturers* case, the Constitutional Court held that a decision by the President to bring an Act of Parliament into force was not 'administrative action'.[72] The exercise of power to bring a law into force requires a 'political judgment' and lies between the law-making process and the administrative process. However, the action in question still had to comply with the principle of constitutional legality that was implicit in the Constitution. The Court added yet another requirement to the principle of constitutional legality by requiring that the exercise of public power should not be arbitrary or irrational. Rationality was seen as the minimum requirement applicable to the exercise of public power. The test for rationality had to be objective, as irrational decisions exercised in good faith might otherwise pass muster.

As the doctrine is applied in the review of legislative and executive action that does not constitute 'administrative action', constitutional legality is a concept separate from legality sought to be achieved by either section 24 IC or section 33 FC.[73] In effect

---

71 See Hoexter (2000) 117 *SALJ* 22 (forthcoming).

72 *Pharmaceutical Manufacturers Association In Re: ex parte The President of The Republic of South Africa* 2000 (3) BCLR 241 (CC) [79].

73 See page 31 and fn 28 Chap 2.

Stellenbosch University http://scholar.sun.ac.za

therefore, the Constitutional Court narrowed the application of 'administrative action' and, in doing so, the judicial review of administrative action. Legislative and executive action falling outside of 'administrative action', as interpreted by the Constitutional Court, must therefore be reviewed through the application of the doctrine of constitutional legality.[74]

2.5.5 Conclusion

Section 33 of the Constitution, the content of which is informed by the common law, therefore exists above the Act for those persons who cannot find a remedy in the Act. The Act, that articulates the content of the right in section 33 FC as viewed by Parliament, contains most of the common law grounds for review although some common law grounds have been omitted from the Act. However, before section 33 FC can be applied directly by those persons who cannot find a remedy in the Act, the continued relevance of the common law grounds for review that have been omitted from the Act needs to be determined. Further, both the Act and the Constitutional Court

[74] However, Klaaren "Redlight, Greenlight: *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council; Premier Mpumalanga v Executive Committee, Asosiation of state-Aided Schools, Eastern Transvaal*" (1999) 15 *SAJHR* 209 212 (see Hoexter (2000) 117 *SALJ* 23 fn 101 (forthcoming)) observes that the use of constitutional legality constitutes the use of administrative law principles even if by another name. He points out that the principle allows the court to engage in 'an extensive and disputatious examination of whether the resolutions were *intra vires* the relevant legislation'. Further, Hoexter argues that requiring the President to act in good faith, as in *President of the Republic of South Africa and Others v South African Rugby and Football Union and Others* 1999 (10) BCLR 1059 (CC), is also administrative law by another name as 'lawful administrative action' in section 24(a) IC and sec 33(1) FC also implies 'bona fide action'. (See Hoexter (2000) 117 *SALJ* 23 (forthcoming), *Rapholo v State President* 1993 (1) SA 680 (T), Baxter *Administrative Law* (1984) 515-517 and page 38 and fn 58 Chap 2.) Finally, Hoexter (2000) 117 *SALJ* 23 (forthcoming) argues that the concept of 'rationality' as used in *Pharmaceutical Manufacturers Association In Re: ex parte The President of The Republic of South Africa* 2000 (3) BCLR 241 (CC), is widely regarded as a component of reasonableness, a requirement for valid administrative action in sec 33(1) FC. (See page 53-54 Chap 3.)

Stellenbosch University http://scholar.sun.ac.za

qualify access to 'just administrative action' by defining and interpreting 'administrative action', the threshold requirement for access to 'just administrative action', narrowly.

Stellenbosch University http://scholar.sun.ac.za

CHAPTER 2

LAWFULNESS

1. INTRODUCTION

Section 33(1) FC[1] demands administrative action that is *lawful*, reasonable and procedurally fair. In this Chapter the requirement of 'lawfulness' is discussed with reference to interpretations of section 24(a), the section relating to 'lawfulness' in the interim Constitution,[2] and section 33(1) FC. The statutory and common law grounds for review relating to the requirement of 'lawfulness' in section 33(1) FC are then discussed. Finally, the relevance of the common law ground for review that relates to the requirement of 'lawfulness', which has been omitted from the Promotion of Administrative Justice Act ('the Act'),[3] is determined with reference to the test for relevance developed in Chapter One.

2. THE INTERPRETATION OF 'LAWFULNESS'

Section 33(1) and (2)[4] FC entered into force on 3 February 2000 with the passage of the Act.[5] It has therefore been in operation for only a few months, since for all intents and purposes section 24 IC[6] was in force from 27 April 1994 until 3 February 2000.[7] A

---

1 The Constitution of the Republic of South Africa, Act 108 of 1996. See fn 2 Chap 1.

2 The Constitution of the Republic of South Africa, Act 200 of 1993.

3 Act 3 of 2000.

4 "Just administrative action

(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."

5 See fn 24 and page 10 Chap 1.

6 "Administrative Justice

Every person has the right to-

(a) lawful administrative action where any of their rights or interest is affected or threatened;

Stellenbosch University http://scholar.sun.ac.za

reasonable volume of jurisprudence and academic views on section 24 IC arose in this period of five years and nine months. Conversely, very little was produced on section 33 FC by way of academic views and jurisprudence. The discussion on 'lawfulness' in section 33(1) FC is therefore based on the available jurisprudence and academic views on 'lawfulness' in section 24(a) IC, bearing in mind the differences between the two sections.

The two main differences relate to their differing structures.[8] First, section 33 guarantees 'just administrative action', which is wider and more generous on the face of it than the guarantee of 'administrative justice' in section 24.[9] Second, the thresholds that qualified

---

(b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;

(c) be furnished with reasons for administrative action which affects any of their rights or interest unless the reasons for that action have been made public; and

(d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened."

7 Sec 24 IC had been in operation since the entering into force of the interim Constitution on 27 April 1994 until the passage of the Act on 3 February 2000. See Item 23(2)(b) Schedule 6 FC.

8 See fn 4 and 6 above.

9 This wider or more generous guarantee is the result of a compromise reached between conflicting views on whether a right to 'just administrative action' should be included in the final Constitution or not. The debate on the inclusion of the right was dominated by similar issues to the issues raised in the debates on the formulation of the right to 'administrative justice' in the interim Constitution (see fn 1 Chap 1). There were three important issues. The first was the inhibitory effect that such a right could have on government policies for reconstruction and development. Second, as the right allows for the review of all administrative actions, administrators could be discouraged from acting for fear of being reviewed. The passivity of administrators was the biggest concern for a government that wants to promote reconstruction and development programmes (De Lange Parliament 12 June 2000). The third issue, a concern absent from the debates on the formulation of the right to 'administrative justice' in the interim Constitution, was the frequent use of sec 24 IC together with sec 23 IC ('access to information') to gain access to information and reasons for administrative action from the state and government at all levels. A compromise was reached that allowed for the inclusion of a right to 'just administrative action' in sec 33 FC, which affords a wider or more generous guarantee than the guarantee of 'administrative justice' in sec 24 IC. Further, the compromise entailed an agreement to both limit and give effect

Stellenbosch University http://scholar.sun.ac.za

the right to 'administrative justice' in section 24 were removed, which also rendered the guarantee of 'just administrative action' in section 33 wider or more generous.[10]

The second difference between sections 33 and 24 requires further explanation. The concepts of 'rights', 'interests', and 'legitimate expectations', together with the words 'affected' and 'threatened', were used in different combinations to create the thresholds that qualified the components of the right to 'administrative justice' in section 24 IC. As a result of the removal of the above-mentioned concepts and words, 'everyone' in section 33(1) FC now includes all persons with affected or threatened rights, interests and legitimate expectations.

There are important differences between 'lawfulness' in section 24(a) IC and 'lawfulness' in section 33(1) FC. While 'lawfulness' formed part of just one component of the guarantee of 'administrative justice' in section 24(a) IC, it forms part of a more general guarantee of 'just administrative action' in section 33(1) FC. Also, as a threshold qualified the right to 'lawful administrative action' in section 24(a) IC, only persons whose 'rights'[11] and 'interests'[12] were 'affected'[13] or 'threatened'[14] had a right to 'lawful

to the right in national legislation. The operation of the right was suspended until the enactment of the envisaged legislation. Also see ffn 24, 25 and 27 Chap 1 for the effect of non-compliance with the enactment requirement.

10 The various thresholds (see fn 6) that qualified the right to 'administrative justice' in sec 24 IC by affording access to certain classes of persons whose rights, interests or legitimate expectations had been affected or threatened (Du Plessis & Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 167), was done away with in order to cast the right to 'just administrative action' in sec 33 FC wider or more generously. (See fn 9 above for an explanation of 'wider or more generously'.) *Everyone* has the right to 'just administrative action' in sec 33 FC (see fn 4 above). It was therefore no longer necessary to structure the requirements of 'lawfulness', 'reasonableness', and 'procedural fairness' in separate subsections in order to create different thresholds for the different requirements (like in sec 24 IC, see fn 6 above).

11 Sec 24(b) explicitly included the concept of 'legitimate expectations' while the concept was absent from sec 24(a), 24(c), and 24(d). The inference was therefore that persons with 'legitimate expectations' were excluded from the application of sec 24(a). (See fn 6 above.)

12 See fn 46 and 48 Chap 4.

13 According to Currie, the word 'affected' could mean either 'deprived' or 'determined'. The meanings of 'deprived' and 'determined' is illustrated by an example. If a person applies for a

Stellenbosch University http://scholar.sun.ac.za

administrative action', whereas, 'everyone' has the right to 'administrative action that is lawful' in section 33(1) FC, as it is not qualified by a threshold. The interpretations of 'lawfulness' in section 24(a) can therefore only be applied to the discussion on 'lawfulness' in section 33(1), if these differences are borne in mind.

The object of section 24(a) was to prevent ouster clauses, which are clauses used in legislation to exclude powers of the court to review certain administrative actions.[15] In the previous dispensation, the government often obstructed administrative justice through ouster clauses. The main object of section 24(a) was therefore to extend the reach of the guarantee of 'administrative justice' by preventing ouster clauses. The wider or more

---

license for the first time, and the application fails, the refusal of the application will not deprive that person of a right. The decision would however determine the person's rights. Therefore, if 'affected' meant 'deprived', it would have covered a much narrower class of administrative actions than if it meant 'determined'. (See De Waal, Currie, & Erasmus *The Bill Of Rights Handbook* (2000) 462.) According to Mureinik, the meaning of 'affected' differed in each subsection of sec 24 IC. In sec 24(a) and 24(c), 'affected' meant 'determined', as the term 'interests' was used simultaneous with 'affected'. However, in sec 24(b) 'affected' meant 'deprived' as the term 'interests' was absent from the section. Because of policy considerations, Mureinik argued that 'affected' meant 'determined' (therefore had a wide meaning) in sec 24(d). (See Mureinik "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10 *SAJHR* 31 42-43.) Du Plessis and Corder assumed that the 'affecting' of a right constituted a more immediate and real invasion of a right than a mere 'threat' to such a right. This is so particularly in the light of the different parts of the right to 'administrative justice' afforded by sec 24 IC (see fn 6 above). (See Du Plessis & Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 166.)

14 'Threatened' in sec 24(a), (b), and (c) IC might have indicated that the broadest range of administrative actions was contemplated. If afforded that meaning, 'threatened' supplemented the conventional meaning of 'affected' (see fn 13 above) to broaden the range of administrative actions covered by 'affected'. On the other hand, 'threatened' might have been intended to merely extend the ambit of the right to 'administrative justice' to administrative actions consisting of advisory opinions. (See De Waal et al *Bill of Rights Handbook* (2000) 463, and fn 13 above for the view of Du Plessis and Corder.)

15 An example of an ouster clause is a clause that excludes the review of an administrative action performed by an administrator in order to detain a political antagonist without affording him a

Stellenbosch University http://scholar.sun.ac.za

generous guarantee of 'just administrative action' in section 33 FC, compared to the guarantee of 'administrative justice' in section 24 IC, strengthens the tendency to extend administrative justice through the prevention of ouster clauses.[16] However, several authors[17] argue that some ouster clauses could still be valid in terms of section 33 IC, the equivalent of section 36 FC.[18]

Section 24 IC did not enumerate the grounds for review, but left the grounds for review and their further development to the courts through their interpretation of the common law. There are cases that considered section 24 IC to be the equivalent of the common law grounds for review.[19] However, the weight of authority suggests that the impact of section 24 was to widen the grounds for judicial review and, by implication, the grounds relating to the requirement of 'lawfulness'.[20] In the *Farjas* case, Dodson J stated that to

hearing, for an excessive period of time. It therefore purported to exclude jurisdiction of the courts in certain situations.

16 See fn 9 above.

17 Corder "Administrative Review in South African Law" (1998) 9 *Public Law Review* 89 89-97 and Devenish "The Interim Constitution and Administrative Justice in South Africa" 1996 *TSAR* 458 459.

18 The limitation clauses in both Constitutions (interim and final) provide that a right in the Bill of Rights can be limited by a law of general application (including legislation and the clauses in them) if the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. (See *S v Makwanyana* 1995 (6) BCLR 665 (CC).)

19 In *Pennington v The Minister of Justice and Others* 1995 (3) BCLR 270 (C) Steyn AJ mentioned sec 24 IC only to buttress his ruling. He accordingly ruled that where potential prejudice to the accused would jeopardise the fairness of his hearing, although cheaper and more convenient circumstances are created by the potential prejudice, the fairness of the hearing should dominate the outcome of the decision. In deciding that he would not substitute his own discretion for that of the Minister, the test for review remained that which had been set forth in *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) SA 132 (A) 152 A-D (the *locus classicus* for the grounds for review of administrative action in the common law), and no effort was made to interpret sec 24 and develop the common law in solving the problem. The implication from the judgment was therefore that sec 24 enumerated the common law grounds for review.

20 See *Farjas (Pty) Ltd and Another v Regional Land Claims Commissioner, Kwazulu-Natal* 1998 (2) SA 900 (LCC) where the judge refers to the following to illustrate the point that sec 24 widened the common law grounds for review: *Kotze v Minister of Health and Another* 1996 (3)

Stellenbosch University http://scholar.sun.ac.za

hold that section 24 did not widen the common law grounds for review would be to deny the reason for the inclusion of section 24 by the framers of the interim Constitution. This inference, he argued, would be against the presumption that the legislature does not include superfluous provisions in a statute. Another reason why section 24 widened the grounds for review, mentioned by the judge, was that the right to lawful administrative action in section 24(a) elevated the right to *intra vires*[21] administrative action to the status of a fundamental constitutional right. Accordingly, these reasons cast a duty on reviewing courts to be judicious[22] to ensure that public officials confine themselves strictly to the *law* that confers powers on them.[23]

The wider or more generous guarantee for 'just administrative action' in section 33 FC confers an even greater duty on courts to be judicious in the review of administrative action and to further develop the common law grounds for review. Section 33, like section 24 FC, therefore widens the common law grounds for review and, by implication, the grounds for review relating to the requirement of 'lawfulness'.

It has been suggested that 'lawful' in section 24(a) could be interpreted in a wide or narrow sense according to one's view of the concept of *ultra vires.*[24] However, De

---

BCLR 417 (T), *Tseleng v Chairman, Unemployment Insurance Board, and Another* 1995 (2) BCLR 138 (T), *Standard Bank of Bophuthatswana Ltd v Reynolds NO and Others* 1995 (3) BCLR 305 (B), *Maharaj v Chairman, Liquor Board* 1997 (2) BCLR 248 (N), and *Roman v Williams NO* 1997 (9) BCLR 1267 (C). The judge also referred to *Rudolph and Another v Commissioner for Inland Revenue and Others* 1996 (2) SA 886 (A), where the court considered sec 24 to have impacted on the common law grounds for review, thereby rendering the matter a constitutional matter, and accordingly felt compelled to refer the case to the Constitutional Court.

21 See fn 9 Chap 1.

22 Judicious means 'having or exercising sound judgment', 'wise in adopting means to an end', and 'capable and careful in action'. (See Simpson and Werner *The Oxford English Dictionary* (1989) Vol VIII.)

23 *Farjas (Pty) Ltd and Another v Regional Land Claims Commissioner, Kwazulu-Natal* 1998 (2) SA 900 (LCC) 913 A-D.

24 Carpenter "Administratiewe Geregtigheid: Meer Vrae as Antwoorde" (1994) 57 *THRHR* 467 469. *Ultra vires* can be interpreted in a wide or narrow sense. Wiechers *Administratiefreg* (1984) 198-200 prefers the narrow interpretation. Accordingly, *ultra vires* means that the formal grounds afford review for administrative action performed *ultra vires* ('outside power'). The formal

Stellenbosch University http://scholar.sun.ac.za

Ville[25] submits that the theories relating to the *ultra vires* doctrine have no bearing on the interpretation of 'lawful' in section 24(a) IC, which refers to both the statutory and common law grounds of legality (apart from those guaranteed in sections 24(b), (c) and (d)).[26] In interpreting 'lawful' in terms of the *ultra vires* doctrine, authors favour the narrow interpretation.[27] Accordingly, 'lawful' refers only to the statutory grounds for legality[28] based on the perspective of section 24 IC as a whole.[29] The interpretation by De Ville is therefore preferred as it includes the requirements which relate to the qualifications and attributes of the administrator and the scope and nature of his statutory authority, as well as the statutory and common law requirements which relate to form and

---

grounds for review are those that have to do with administrative action exceeding the express limits of power, or failing to comply with express statutory prerequisites. Baxter *Administrative Law* (1984) 307-312 prefers the wide interpretation. Accordingly, *ultra vires* is a justificatory doctrine for the existence of judicial review. The wide interpretation of *ultra vires* therefore relates to all the grounds for review. Included in the grounds for review are the formal grounds for review and the rules of the common law that postulate the intention of the ideal legislature. See *Staatspresident v United Democratic Front* 1988 (4) SA 830 (A). (See fn 9 Chap 1.)

25 De Ville "The Right to Administrative Justice: An Examination of Section 24 of the Interim Constitution" (1995) 11 *SAJHR* 264 269.

26 See fn 24 above and fn 9 Chap 1. 'Statutory and common law grounds for legality' here are synonymous with 'formal grounds for review' and 'the rules of the common law that postulates the intention of the ideal legislature', or conversely, 'statutory and common law requirements for valid administrative actions'.

27 Carpenter (1994) 57 *THRHR* 467 469, Du Plessis & Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 168, Devenish 1996 *TSAR* 458 464, and Burns "Administrative Justice" (1994) 9 *SAPL* 347 352.

28 See ffn 24 and 26 above. It could not be inferred from the *Farjas* judgment whether there was a preference for the wide or narrow approach to the interpretation of 'lawfulness' in sec 24(a). Both interpretations were possible as *law* in the phrase 'confine themselves strictly to the *law* that confers powers on them' could mean only statutory or both common law and statutory requirements for valid administrative action.

29 Carpenter (1994) 57 *THRHR* 467 468. Burns (1994) 9 *SAPL* 347 352 suggests that if section 24(a) referred to all the grounds for review of administrative action, 'procedural fairness' in section 24(b), 'reasons for administrative action' in section 24(c) and 'justifiability in relation to the reasons given' in section 24(d) would have been rendered nugatory, as the grounds for review referred to by these sections would already have been covered by section 24(a).

Stellenbosch University http://scholar.sun.ac.za

procedure (excluding the rules of natural justice), without creating the situation where the grounds for review relating to 'lawfulness' in section 24(a) overlap with the grounds relating to sections 24(b), (c) and (d).

The argument in favour of the interpretation of 'lawful' as preferred by De Ville, is also relevant to section 33(1) FC. Although 'lawfulness' was only part of one component of the guarantee for 'administrative justice' in section 24 IC, while 'lawfulness' is part of a more general guarantee for 'just administrative action' in section 33 FC, section 33(1) FC still contains the additional requirements of 'reasonableness' and 'procedural fairness'.[30]

From these arguments it can be inferred that it is the structure of section 33 FC that results in a wider or more generous guarantee than that offered by section 24 IC. However, the object of 'lawfulness' in section 33 is still to prevent ouster clauses and, further, to elevate 'lawful administrative action' to a constitutionally entrenched fundamental right. Section 33 equally widens the common law grounds for review and therefore the grounds relating to 'lawfulness'. Finally, 'lawful' refers to both the statutory and common law grounds of legality (apart from those guaranteed by the rest of the requirements in section 33(1) FC).

3. GROUNDS FOR REVIEW RELATING TO THE REQUIREMENT OF 'LAWFULNESS'

3.1 The statutory grounds[31]

Section 6 of the Act is an attempt to codify the common law grounds for review. All the statutory grounds for review, including those relating to the requirement of 'lawfulness', are therefore contained in section 6. The section is qualified by the following words of section 6(1):

> 'Any person may institute proceedings in a court or tribunal for judicial review of *administrative action.*'[32]

---

30 De Ville (1995) 11 *SAJHR* 264.

31 Breitenbach at the UCT New Legislation Seminars 6 April 2000.

Stellenbosch University http://scholar.sun.ac.za

The action concerned therefore has to be an administrative action for statutory grounds for review to apply.

The definition of 'administrative action' in the Act, as in section 33 FC, makes mention only of 'affected rights', as opposed to 'affected rights, interests and legitimate expectations'. However, the Constitutional Court tends to interpret 'right' as widely as possible.[33] It is therefore suggested that 'affected rights, interests and legitimate expectations' be included within the ambit of 'affected rights'.

Section 6(2), which contains the statutory grounds for review, is structured to move from the formal grounds in subsections (2)(a) and (2)(b), which place emphasis on persons authorised to perform the action as opposed to persons not authorised to perform the action, to the rationality of the reasoning process in subsections (2)(d) and (2)(e), and from there to the action itself in (2)(f) and (2)(g), and to the effect of the action in (2)(h). The statutory grounds in section 6 relating to the requirement of 'lawfulness' are also discussed in this order.

3.1.1 Statutory grounds relating to the authorised administrator

Sections 6(2)(a) and 6(2)(b) afford statutory grounds for review relating to the authorised administrator and requirements relating to his personal qualifications. Section 6(2)(a)(i) reads:

---

32 My emphasis. 'Administrative action' is defined in sec 1(i) of Act 3 of 2000. See ffn 57-63 Chap 1.

33 In *Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools, Eastern Transvaal* 1999 (2) BCLR 151 (CC) [31], the Constitutional Court indicated that the term 'right', for the purposes of sec 24 IC should be interpreted wider than the definition of the term at private law. Further, the Court ruled that 'right' should include liabilities incurred by the state through the making of unilateral promises or undertakings. (See De Waal et al *The Bill of Rights Handbook* (2000) 463 fn 53.) See also *SA Metal Machinery Company Ltd v Transnet Ltd* 1999 (1) BCLR 58 (W) 65 H where the judge, while interpreting 'interests' as found in sec 24(a) and 24(c) IC, noted that vested *interests* was sufficiently covered by the protection afforded to *rights* which have been affected.

Stellenbosch University http://scholar.sun.ac.za

> 'A court or tribunal has the power to judicially review an administrative action if the administrator who took it was not authorised to do so by the empowering provision.'[34]

The statutory ground in section 6(2)(a)(i) relates to the common law ground for review that arose in similar circumstances.[35] There are various reasons for the retention of the ground. In some cases, for instance, firm procedures need to be followed to appoint specific administrators validly so that they are permitted to perform certain administrative actions. Further, in some cases the administrative actions that have to be exercised require the expert knowledge of specific administrators. In both instances, specific administrators have to be authorised by empowering provisions, which determine compulsory personal requirements for the performance of administrative actions.[36]

Section 6(2)(a)(ii) reads:

> 'A court or tribunal has the power to judicially review an administrative action if the administrator who took it acted under a delegation of power which was not authorised by the empowering provision.'

This statutory ground relates to the common law ground for review derived from the common law rule *delegatus delegare non potest*.[37] The rule prohibits the delegation of discretionary powers from an authorised administrator to another, unless the delegation is authorised by legislation.[38] The reasons for the retention of the statutory ground in section 6(2)(a)(i) apply here equally.

---

34 In sec 1(vi) of the Act, 'empowering provision' is defined as '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'.

35 See Baxter *Administrative Law* (1984) 426-430.

36 See *S v Lasker* 1991 (1) SA 558 (C).

37 See Baxter *Administrative Law* (1984) 432-434.

38 *G v Superintendent, Groote Schuur Hospital* 1993 (2) SA 255 (C).

Stellenbosch University http://scholar.sun.ac.za

The statutory ground in section 6(2)(b) reads:

> 'A court or tribunal has the power to judicially review administrative action if a mandatory and material procedure or condition prescribed[39] by an empowering provision was not complied with.'

The ground in this section relates to the common law ground affording review of non-compliance with the rules determining the form of specific administrative actions and the procedures to be followed in the performance of each.[40] These forms and procedures are usually clearly defined in legislation. For example, the non-compliance with a stipulated publication requirement for administrative action renders the action reviewable.[41]

3.1.2 Statutory grounds relating to the reasoning process of the administrator

Sections 6(2)(d) and 6(2)(e) encompass statutory grounds for review relating to the reasoning process of the administrator. Section 6(2)(d) reads:

> 'A court or tribunal has the power to judicially review an administrative action if the action was materially influenced by an error of law.'

This statutory ground refers to the common law ground that arose under similar circumstances.[42] This ground for review has recently been restated in *Hira and Another v Booysen and Another*.[43] Accordingly, the non-performance or wrong performance of a

---

39 See sec 1(x) of Act 3 of 2000. 'Prescribed' in this context refers to which is prescribed by the empowering provision concerned.

40 See Baxter *Administrative Law* (1984) 444-452.

41 To determine whether non-compliance with the requirement was reviewable in the common law, the question was usually asked whether the statutory stipulation was cast in a *directory* or *mandatory* form. If it were cast in a mandatory form, non-compliance would lead to invalidity. As all statutory stipulations are mandatory and binding, the correctness of this approach could be questioned. Wiechers *Administratiefreg* (1984) 225 therefore suggested that the question should have been whether the organ had the authority to dispense with the requirement. As the ground in the Act now explicitly states that an action becomes reviewable when a *mandatory or material* condition prescribed by the empowering provision was not complied with, this problem is solved.

42 See Baxter *Administrative Law* (1984) 457-472.

43 1992 (4) SA 69 (A).

Stellenbosch University http://scholar.sun.ac.za

statutory duty or power will entitle persons injured thereby to common law review. The grounds, on which the court may exercise its common law review, are limited to the grounds set out in *Johannesburg Stock Exchange v Witwatersrand Nigel.*[44] Where the complaint is that a tribunal has committed a material error of law, the reviewability of the decision depends on whether the legislature intended the tribunal to have the exclusive authority to decide the question of law. This is a matter of statutory interpretation.[45] Where the tribunal's function is of a purely judicial nature (or where the administrator is required to decide whether the conduct falls within a defined or objectively ascertainable statutory criterion) the court will be slow to conclude that the tribunal has exclusive jurisdiction to decide all questions, or that a misrepresentation of statutory criterion will not render the decision assailable by way of common law review. The question of whether or not an erroneous interpretation of a statutory criterion renders the decision invalid depends upon whether it is material. In cases where the decision of the tribunal is discretionary rather than purely judicial (where it is required to take policy considerations or the general interest into account), the approaches may be somewhat different.[46]

Section 6(2)(e) affords review of administrative action on three grounds. The first statutory ground in section 6(2)(e)(i) reads:

> 'A court or tribunal has the power to judicially review an administrative action if the action itself was taken for a reason not authorised by the empowering provision.'

This statutory ground relates to the common law ground for review applied where administrators exceeded their powers when acting upon the object of the action.[47] The administrator therefore has to stay within the scope of authority bestowed upon him by the empowering provision when acting upon the subject matter of an administrative

44 1988 (3) SA 132 (A) 152 A-E.

45 *Hira v Booysen NO* 1992 (4) SA 69 (A) 93G-I.

46 *Hira v Booysen NO* 1992 (4) SA 69 (A) 93A-94A and Burns *Administrative Law Under the 1996 Constitution* (1998) 204.

47 See Baxter *Administrative Law* (1984) 458-459.

Stellenbosch University http://scholar.sun.ac.za

action.[48] In respect of the subject matter of the administrative action, the scope of authority is defined mainly in legislation, although certain common law rules may also be applicable.[49]

Section 6(2)(e)(ii) reads:

> 'A court or tribunal has the power to judicially review an administrative action if the action was taken for an ulterior purpose or motive.'

The ground in section 6(2)(e)(ii) relates to the common law ground for review that arose when an administrator exercised powers given for a specific purpose, for another or ulterior purpose. There are contrasting views as to whether the motive or subjective state of mind of the administrator could be relevant only to determine whether the exercise of administrative power was for an ulterior purpose, or whether 'ulterior motive' constitutes an independent ground for review in the common law.[50] Baxter submits that the frequent reference in judicial dicta to 'motive' indicates that judges often contemplate that they might go so far as to control the unbecoming action by public authorities, even if such action is notionally within the purpose envisaged by the legislation.[51] The Act follows Baxter's view by using the word 'or' between 'purpose' and 'motive' in section 6(2)(e)(ii) instead of the word 'and'. This means that review is afforded for

---

48 For example, *Moulder v Thom* 1974 (1) SA 336 (T), where the Administration of Transvaal was authorised to declare *roads*, and without the presence of the statutory requirements authorising its declaration, declared a *public* road. The declaration was ruled invalid.

49 Some of the common law rules relating to the subject matter of an administrative action include that an administrator cannot prohibit matters when he is empowered by the empowering provision only to control and regulate them. (See *Vrystaat Ko-operasie Bpk v Minister van Landbou-Ekonomie en Bemarking* 1965 (3) SA 377 (A).) He can however provide limitations. Furthermore, an administrator cannot interfere with the jurisdiction of the courts by ordering sentences for non-compliance with directions imposed by him. (See *Phalaborwa Verhuur v Stadsraad van Phalaborwa* 1979 (3) SA 1260 (A).)

50 See Baxter *Administrative Law* (1984) 507-515 513 and Burns *Administrative Law Under the 1996 Constitution* (1998) 160. An example of an administrative action performed for an ulterior purpose is found in *Hardman NO v Administrator, Natal* 1975 (1) SA 340 (N) where expropriation power, authorised for the purpose of *any main road*, was used to build an *amenity for the road user*.

51 See Baxter *Administrative Law* (1984) 513.

Stellenbosch University http://scholar.sun.ac.za

administrative actions taken for an 'ulterior motive' and administrative actions taken for an 'ulterior purpose'. As 'ulterior motive' is an independent statutory ground for review, it is therefore sufficient to prove an ulterior motive for the invalidation of an administrative action.

The statutory ground in section 6(2)(e)(iii) reads as follows:

> 'A court or tribunal has the power to judicially review an administrative action if the action was taken because irrelevant considerations were taken into account or relevant considerations were not considered.'

This ground relates to the common law ground afforded under similar circumstances.[52] The ground points to the administrator's 'failure to apply his mind to the matter', a sort of catch-all phrase that covers most instances of bad decision-making. Sometimes, fairly detailed statutory guidance as to the factors that have to be taken into account by the administrator in particular is provided. When this is not the case, the view of what constitutes relevant or irrelevant considerations is a highly subjective matter.[53]

The statutory ground in section 6(2)(e)(iv) reads:

> 'A court or tribunal has the power to judicially review an administrative action if the action was taken because of the unauthorised or unwarranted dictates of another person or body.'

The statutory ground in section 6(2)(e)(iv) relates to the common law ground for review, which is implicit in the common law rule *delegatus delegare non potest*,[54] afforded where an administrator allowed a decision to be bound by prescriptions or the advice of a third person.[55] As such a decision was not considered on merit, but taken in accordance with advice or prescriptions, the empowered administrator did not perform the administrative action independently. However, if an administrator gathers advice on his own account and considers the merits of the case in terms of the advice, he acts independently.

---

52 See Baxter *Administrative Law* (1984) 501-507.

53 *Anchor Publishing Co (Pty) Ltd v Publishing Control Board* 1987 (4) SA 708 (N) (see Boulle, Harris & Hoexter *Constitutional and Administrative Law* (1989) 349-350).

54 *G v Superintendent, Groote Schuur Hospital* 1993 (2) SA 255.

Stellenbosch University http://scholar.sun.ac.za

Section 6(2)(e)(v) reads:

> 'A court or tribunal has the power to judicially review an administrative action if the action was taken in bad faith.'

This relates to the common law ground for review that points to the rule requiring an administrator to apply his mind to all the requirements for a valid administrative action when performing the action.[56] There are contrasting views on whether *mala fides* qualified as an independent ground for review of administrative action in the common law.[57] According to the view that *mala fides* was not an independent ground for review, the concept was used to prove that an administrator continued with the administrative action, despite knowledge of the *invalidity*. However, the subjective state of mind of the administrator was irrelevant if the action adhered to all the validity requirements for administrative actions. In other words the *mala fide* exercise of a valid administrative action could not render the action reviewable.[58] The inclusion of the statutory ground in section 6(2)(e)(v) therefore changed the situation that existed in the common law, as the ground explicitly renders the *mala fide* exercise of an otherwise valid administrative action reviewable.

---

55 See Baxter *Administrative Law* (1984) 442-443. Also see *Opperman v Uitvoerende Komitee van die Verteenwoordigende Owerheid* 1991 (1) SA 372 (SWA) and *Government of the Province of KwaZulu Natal v Ngwane* 1996 (4) SA 943 (A).

56 See *Rapholo v State President* 1993 (1) SA 680 (T).

57 See Burns *Administrative Law Under the 1996 Constitution* (1998) 163-165. *Mala fides* is however recognised as an independent ground for review by some authors and case law. Baxter *Administrative Law* (1984) 515-517 for example suggests that *mala fides* may be used in two ways. Accordingly, the concept refers to fraud, dishonesty or corruption (in a strict sense), and in a less pejorative sense, it refers to wrongful use of power even where the official concerned had been perfectly honest.

58 However, according to this view, important consequences flowed from conscious non-compliance with the requirements for validity. For instance, where judicial review was excluded by statute, review was still possible in the case of *mala fides* as a gross form of invalidity. As it caused invalidity *ab initio* (from the very beginning), the exclusion was ineffective because the administrative action was void and not voidable. Courts further ordered the performance of a specific administrative action, and not reconsideration by the administrator, in cases where the absence of another requirement for a valid administrative action was proved by *mala fides*.

Stellenbosch University http://scholar.sun.ac.za

3.1.3 The statutory grounds relating to the action itself

The action itself is the focus of section 6(2)(f)(i), 6(2)(g) and 6(2)(i). Section reads as follows:

> 'A court or tribunal has the power to judicially review an administrative action if the action itself contravenes a law, or is not authorised by the empowering provision.'

This ground relates to the common law ground for review afforded for administrative action that was not authorised by law. In the former dispensation of parliamentary supremacy, there was a common law presumption that statutes do not bind the state.[59] The presumption was applied as a principle of effectiveness to ensure that the state was not unduly hampered in the execution of its governmental functions. As the state is bound by the Constitution and legislation is subordinate to the Constitution, this presumption seems unconstitutional. The statutory ground that affords review of a decision that contravened a law further strengthens this seeming unconstitutionality.[60]

Section 6(2)(g) reads:

> 'A court or tribunal has the power to judicially review an administrative action if the action concerned consists of a failure to take a decision.'

This ground is recognised in the common law and also correlates with the biggest concern raised in relation with the inclusion of a right to 'just administrative action' in

---

[59] Burns *Administrative Law Under the 1996 Constitution* (1998) 256. See also *Administrator, Cape v Raas Röntgen and Vermeulen (Pty) Ltd* 1992 (1) SA 245 (A) and *Somfongo v Government of the Republic of South Africa* 1995 (4) SA 738 (Tk).

[60] However, Burns suggests that the state could rely on the limitation clause (sec 36 FC) in order to prove that the contravention was a reasonable and justifiable limitation of the right to 'just administrative action' in sec 33 FC. For instance, where the police contravened traffic laws while in pursuit of a criminal, it can be argued that the limitation on the right to 'just administrative action' of the criminal, was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. (Burns *Administrative Law Under the 1996 Constitution* (1998) 256.) The suggestion of Burns is incorrect, as a law of general application does not exist in her example. (See Langa J in *Walker v Stadsraad van Pretoria* 1997 (3) BCLR 416 (T).) As the example does therefore not constitute a limitation of a right by a law of general application, it rather illustrates the absence of 'unlawfulness'.

Stellenbosch University http://scholar.sun.ac.za

the Bill of Rights.[61] The concern was that administrators would refrain from performing administrative actions for fear of being reviewed. This would have an inhibitory effect on policies of reconstruction and development. The insertion of the statutory ground therefore compels administrators to act by affording review for a failure to act.

Section 6(3) further defines the ground in section 6(2)(g). Accordingly, where the administrator had a duty to take a decision but no law prescribed the period in which he had to take the decision, and he consequently failed to take the decision, judicial proceedings can be instituted on the ground that there has been an unreasonable delay in taking the decision.[62] Further, where the administrator had a duty to take the decision and a law that prescribes the period in which he had to take the decision did exist, and he failed to take the decision before the expiry of the prescribed period, judicial proceedings can be instituted on the ground that the administrator has a duty to take the decision notwithstanding the expiry of the period.[63]

Section 6(2)(i) reads:

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

The section contemplates review of administrative actions on other grounds than the statutory grounds in section 6. The statutory ground in section 6(2)(i) does not only relate to 'lawfulness' like the rest of the grounds under discussion. Instead, it relates to all the requirements for valid administrative action in section 33(1) FC, that of 'lawfulness', 'reasonableness', and 'procedural fairness'. It also makes the development of new grounds possible that relate to 'lawfulness', 'reasonableness', and 'procedural fairness' in section 33(1), and to other requirements in the final Constitution that could render an administrative action reviewable.[64] Finally, section 6(2)(i) is the statutory mechanism used when a ground for review omitted from the Act, that continues to be

---

61 See Baxter *Administrative Law* (1984) 414 and *Chotabhai v Union Government* 1911 AD 13. Also see fn 9 above.

62 See sec 6(3)(a) Act 3 of 2000.

63 See sec 6(3)(b) Act 3 of 2000.

64 *Pharmaceutical Manufacturers Association In Re: ex parte The President of The Republic of South Africa* 2000 (3) BCLR 241 (CC) [44] and [45].

Stellenbosch University http://scholar.sun.ac.za

relevant to the review of administrative action through the direct application of section 33 FC, is employed in the review of an administrative action.[65]

3.2 The grounds omitted from the Act: adherence to a rigid policy or standards, contractual restrictions and estoppel

At first glance, the common law ground that relates to the adherence to a rigid policy or standards, which has been omitted from the Act, seems to be included in section 6(2)(g) that affords review for a failure to take a decision. However, at closer inspection in terms of section 6(3), it turns out that section 6(2)(g) becomes inapplicable where a decision had been taken, even though a discretion was not exercised because of adherence to a rigid policy or standards.

The reason for the existence of the ground in common law is that adherence to a rigid policy or standards impose an unlawful limitation on the power of the administrator.[66] Policies that merely guide the administrator in the exercise of his decision are allowed. However, as soon as the policy becomes so rigid that the exercise of a discretion is negated, the decision is reviewable on the common law ground relating to adherence to a rigid policy or standards.[67] Policies or standards may accordingly be applied when they do not preclude the exercise of a discretion, when they are compatible with the enabling legislation and when they are disclosed to the person affected by the decision taken in terms of them.[68]

To determine the continued relevance of the common law ground relating to the adherence to a rigid policy or standards, which has been omitted from the Act, the test for

---

[65] De Lange Parliament 12 June 2000. Also see *Pharmaceutical Manufacturers Association In Re: ex parte The President of The Republic of South Africa* 2000 (3) BCLR 241 (CC) [33].

[66] See Baxter *Administrative Law* (1984) 415-419.

[67] See *Mafuya v Mature City Council* 1984 (2) SA 124 (ZCH) where the granting of licenses to the first 300 applicants was rendered invalid as the administrator did not exercise a discretion after considering the merits of all the applicants.

[68] See *Tseleng v Chairman, Unemployment Insurance Board, and Another* 1995 (2) BCLR 138 (T).

Stellenbosch University http://scholar.sun.ac.za

relevance developed in Chapter One is applied. First, the question is whether one or more of the statutory grounds overlap the omitted common law ground.

The statutory ground that affords review of an administrative action taken by an administrator not authorised by an empowering provision in section 6(2)(a)(i), overlaps review of an administrative action taken in terms of a rigid policy or standards. An administrator has to be authorised by an empowering provision to use a rigid policy or standards validly. If the administrator was not authorised by an empowering provision to use a rigid policy or standards in his decision, therefore, and he subsequently used them, his decision can be reviewed through the application of the statutory ground in section 6(2)(a)(i).

Further, the statutory ground in section 6(2)(a)(ii) overlaps the omitted common law ground for review. An administrator not authorised to exercise an administrative action in accordance with a rigid policy or standards cannot delegate an action to another administrator to perform it in accordance with a rigid policy or standards. As the delegate himself had not been empowered to adhere to a rigid policy or standards in the performance of an administrative action, he delegated more power than he himself had. Since the delegation of power had been unauthorised, the administrative action subsequently performed, which adhered to a rigid policy or standards can be reviewed through the application of the statutory ground in section 6(2)(a)(ii).

The statutory ground in section 6(2)(e)(i) also overlap the common law ground for review that relates to adherence to a rigid policy or standards. An administrative action has to be taken for the reason the empowering provision authorised. If the action was taken for reasons of adherence to a rigid policy or standards and not for authorised reasons, the administrative action can be reviewed through the application of the statutory ground in section 6(2)(e)(i).

A decision on whether or not to design new municipal gardens can be used as an example. In terms of the empowering provision, the reasons for not designing new gardens may, for example, only relate to the upkeep of existing gardens. If, in these circumstances, the administrator decides not to design a new municipal garden because he wants to plant 300 trees per annum in a nearby township, he imposed the rigid policy

Stellenbosch University http://scholar.sun.ac.za

or standard. The decision was therefore taken to adhere to a rigid policy or standard and not for the reason authorised by the empowering provision.

The statutory ground in section 6(2)(e)(iii) also overlaps the common law ground for review relating to adherence to a rigid policy or standards. If the aggrieved party can prove that the rigid policy or standards incorporated irrelevant considerations or omitted relevant ones, the decision taken in terms of them can be reviewed in terms of section 6(2)(e)(iii).

Most importantly, the statutory ground in section 6(2)(e)(iv) overlaps the omitted common law ground for review if the rigid policy or standards postulates unauthorised or unwarranted dictates by another person or body. If an unauthorised person or body dictates the decision of an administrator by imposing upon him a rigid policy or standards, the administrative action consequently exercised in adherence to the rigid policy or standards so imposed, can be reviewed through the application of the statutory ground in section 6(2)(e)(iv).

Section 6(2)(f)(i) affords review of an administrative action that was not authorised by an empowering provision. If the administrator performed an administrative action in adherence to a rigid policy or standards, although such an action was not authorised, it becomes reviewable through the application of the statutory ground in section 6(2)(f)(i). This statutory ground therefore also overlaps the omitted common law ground relating to adherence to a rigid policy or standards.

Finally, if the rigid policy or standards renders the action not rationally connected to the purpose for which it was taken, the purpose of the empowering provision, the information before the administrator and the reasons given for it by the administrator, the statutory grounds in section 6(2)(f)(ii)(aa) to (dd) affords review of the administrative action taken in adherence of the rigid policy or standards.[69]

However, adherence to a rigid policy or standards is a separate ground for review and, although difficult to conceive, will under certain circumstances be the only ground for review that is applicable. It is submitted that section 6(2)(i) of the Act is the most

---

69 See 3.2 Chap 3.

Stellenbosch University http://scholar.sun.ac.za

suitable section to deal with the review of administrative actions performed under those circumstances.

Therefore, if in the performance of an administrative action the administrator adhered to a rigid policy or standards, the administrative action can be reviewed through the application of section 6(2)(a)(i) and (ii), section 6(2)(e)(i), (iii) and (iv), sections 6(2)(f)(i) and (ii)(aa) to (dd) and section 6(2)(i).

The first question asked in the test for relevance is therefore answered in the positive. Since one or more of the statutory grounds for review in section 6 of the Act overlap the common law ground for review relating to adherence to a rigid policy or standards and although the omitted common law ground does not afford review for administrative action *per se*, the ground continues to be relevant to the review of administrative action through the application of other statutory grounds for review. Accordingly, it is unnecessary to ask the second question in the test for relevance.

Two further traditional common law grounds for review have been omitted from the Act. They constitute two additional ways in which an administrator can fetter his own discretion. Accordingly, an administrator can also fetter his discretion by way of contractual restrictions.[70] As a general principle, administrators cannot commit themselves in advance against exercising their discretionary powers to act for the public good. However, there is little South African case law on the subject.[71]

Further, where an administrator has a power of decision, he cannot fetter that power by stipulating in advance that he will act in a certain way.[72] In other words, he cannot be held estopped on the basis of his prior representations. The courts are however likely in this regard to reject technical quibbles to the affect that the public authority was not acting within the scope of its powers.[73]

For the same reasons as was the case with the ground for adherence to a rigid policy or standards, section 6(2)(a)(i) and (ii), section 6(2)(e)(i), (iii) and (iv), sections 6(2)(f)(i)

---

70 See Baxter *Administrative Law* (1984) 419-424.

71 See Baxter *Administrative Law* (1984) 419.

72 See Baxter *Administrative Law* (1984) 424-426.

73 *Cf Diedericks v Minister of Lands* 1964 (1) SA 49 (N) 58A-59B.

Stellenbosch University http://scholar.sun.ac.za

and (ii)(aa) to (dd) and section 6(2)(i) overlap the grounds relating to contractual restrictions and estoppel. These grounds therefore continue to be relevant to the review of administrative action through the application of other statutory grounds for review.

3.3 Conclusion

All the common law grounds for review relating to the requirement of 'lawfulness' in section 33(1) FC, with the exception of the grounds relating to adherence to a rigid policy or standards, contractual restrictions and estoppel, have been taken up by the Act. However, although the common law grounds for review relating to adherence to a rigid policy or standards, contractual restrictions and estoppel have been omitted from the Act, they continue to be relevant to the review of administrative action through the application of the statutory grounds that overlap them.

Stellenbosch University http://scholar.sun.ac.za

CHAPTER 3

REASONABLENESS

1. INTRODUCTION

Section 33(1) of the final Constitution[1] demands administrative action that is 'lawful', '*reasonable*', and 'procedurally fair'. In this Chapter, the requirement of reasonableness is discussed with reference to section 24 IC,[2] and section 33 FC. The various grounds for review of administrative action that relate to the requirement of reasonableness are then discussed individually. Finally, the continued relevance of the grounds for review relating to the requirement of reasonableness that have been omitted from the Promotion of Administrative Justice Act ('the Act'),[3] is determined with reference to the test for relevance developed in Chapter One.[4]

2. THE INTERPRETATION OF 'REASONABLENESS'

2.1 Section 24 IC and section 33 FC

The Supreme Court has inherent common law jurisdiction with regard to the judicial review of administrative action. However, a court has to be granted statutory jurisdiction to hear an appeal on the merits of an administrative decision, as it would otherwise usurp the power conferred on administrators by legislation. The distinction between appeal and review becomes important in this regard,[5] since review on the ground of reasonableness

[1] The Constitution of the Republic of South Africa, Act 108 of 1996. See fn 2 Chap 1.

[2] The Constitution of the Republic of South Africa, Act 200 of 1993.

[3] Act 3 of 2000.

[4] See 2.4.2 Chap 1.

[5] It is sometimes very difficult to distinguish between appeal and review. Important differences between the two are, first, that a court in review proceedings cannot substitute the decision of an administrator with that of its own, but has to set the decision aside or prevent implementation thereof. The opposite is true in the case of an appeal. Furthermore, in review proceedings the court is not confined to the record of the administrative process, as the *validity* of the decision is at stake. In appeal proceedings, however, the appellate body is confined to the record of the

Stellenbosch University http://scholar.sun.ac.za

could seem like, or come close to, an appeal on the merits of a decision. Because of this, courts were reluctant to invalidate administrative action on the ground of unreasonableness before the adoption of the interim Constitution.[6] However, courts did start to take the first tentative steps towards treating unreasonableness as an independent ground for review.[7]

There were conflicting views on whether reasonableness should have been included in the right to 'administrative justice' in the interim Constitution, and specifically on whether reasonableness should have been included as a ground for judicial review of administrative action in the transitional period.[8] However, the opposing parties reached a

---

administrative process as the *correctness* of the decision is at stake. Finally, in appeal proceedings the *merits* of decisions are assessed in order to determine the correctness of decisions, while the *validity* of decisions is considered in review proceedings. (See Baxter *Administrative Law* (1984) 258-259.)

6 The courts followed the view that unreasonableness did not constitute an independent ground for review unless it indicated that another requirement for the valid exercise of administrative action, such as performing an administrative action independently and not in accordance with a rigid policy, was absent. *Gross unreasonableness* was regarded as a ground for review, as it indicated *mala fides,* an ulterior purpose or that the administrator did not apply his mind to the matter. (See *National Transport Commission v Chetty's Motor Transport (Pty) Ltd* 1972 (3) SA 726 (A).) This was called *symptomatic unreasonableness*. (See *Union Government v Union Steel Corporation Ltd* 1928 AD 319.) However, Hoexter "The Future of Judicial Review in South African Administrative Law" (2000) 117 *SALJ* 26 (forthcoming) submits that even though judges hid behind notions such as 'gross' or the search for irregularities such as 'the failure to apply the mind', they inevitably entered into the merits of administrators' decisions and reviewed them on the ground of unreasonableness.

7 In *Theron v Ring van Wellington van NG Sending Kerk in Suid Afrika* 1976 (2) SA 1 (A) the Appellate Division adopted the "extended formal yardstick" for cases involving *judicial administrative actions*, based on the common law presumption of English law that the legislature intends power to be exercised reasonably. The adoption of this approach was based on the view that the courts had been applying the presumption unconsciously in South African law.

8 The conflicting views on 'reasonableness' related to other conflicting views on how to formulate the actual grounds for review of administrative action in the interim Bill of Rights. Some argued for a formulation that refers generally to grounds (such as 'the duty to act fairly'), as this would allow courts room to develop the actual content of the right. However, it was further argued,

Stellenbosch University http://scholar.sun.ac.za

compromise that allowed for the adoption of the requirement of 'justifiability in relation to the reasons given' in section 24(d) IC.[9] The concept of reasonableness was finally included in the right to 'just administrative action' in section 33 FC.

As section 33 FC has been in force only since 3 February 2000,[10] a small volume by way of academic views and jurisprudence is available on the requirement of reasonableness in section 33(1) FC. Conversely, there is a reasonable volume of academic views and jurisprudence on 'justifiability in relation to the reasons given' in section 24(d) IC. The interpretations and jurisprudence on section 24(d) IC are therefore used in the discussion on the requirement of reasonableness in section 33(1) FC. However, the general and structural differences between section 24 IC and section 33 FC should be borne in mind.[11] The most important of these differences is the fact that 'justifiability in relation to the reasons given' in section 24(d) was only part of one component of the guarantee for 'administrative justice' in section 24 IC, while 'reasonableness' in section 33(1) FC is part of a more general guarantee for 'just administrative action'. Furthermore, thresholds qualified the application of 'justifiable in relation to the reasons given' in section 24(d) IC, while no such qualification exists for 'reasonable' in section 33(1) FC. Consequently, only persons whose 'rights'[12] were 'affected'[13] or 'threatened'[14] had a right to

---

specifically with the ground for unreasonableness in mind, that the inherently conservative courts should be encouraged to move in a certain direction in their development of the content of the right to 'administrative justice'. Others argued that it was necessary to spell out the grounds for review clearly but narrowly in the right to 'administrative justice', as this would protect the decisions and intentions of the democratically elected Parliament and its executive from frustration by an undemocratic body such as the courts. Further, in the light of the volatile situation Parliament would be faced with during the transitional period, it was argued that review on the ground of unreasonableness should be suspended during this period. (See Corder "Administrative Review in South African Law" (1998) 9 *Public Law Review* 89-97.)

9 Mureinik developed the concept of 'justifiability in relation to the reasons given' in sec 24(d) IC. It required some degree of reasonableness but was qualified by 'in relation to reasons given for it'. (Du Plessis & Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 169.)

10 Sec 24 IC had been in operation since the entering into force of the interim Constitution on 27 April 1994 until the passage of the Act on 3 February 2000. See Item 23(2)(b) Schedule 6 FC.

11 See ffn 9 and 10 Chap 2.

12 See fn 46 Chap 4.

Stellenbosch University http://scholar.sun.ac.za

'administrative action that is justifiable in relation to the reasons given for it' in section 24(d), while 'everyone' has the right to 'administrative action that is reasonable' in section 33(1).[15]

Apart from the general and structural differences between the two sections, there are more specific differences between 'reasonableness' in section 33(1) FC and 'justifiability in relation to the reasons given' in section 24(d) IC. The first specific difference is terminology: 'reasonable' obviously means something other than 'justifiable in relation to the reasons given'. Some authors suggested that 'justifiable' is narrower than 'reasonable', as it related only to the reasons supplied for the decision, while 'reasonable' extends also to the effects of the decision.[16] Others suggested that the two concepts are synonymous.[17]

---

13 See fn 13 Chap 2.

14 See fn 14 Chap 2.

15 'Everyone' in section 33(1) FC now includes all persons with affected or threatened rights, interests and legitimate expectations. See sec 2 Chap 2.

16 Burns "Administrative Justice" (1994) 9 *SAPL* 347 357, Corder (1998) 9 *Public Law Review* 89 89-97 and Carpenter "Administratiewe Geregtigheid: Meer Vrae as Antwoorde" (1994) 57 *THRHR* 467 472.

17 Mureinik, who constructed 'justifiability in relation to the reasons given', is included in this group. (Du Plessis & Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 169 fn 156 and De Waal, Currie & Erasmus *The Bill of Rights Handbook* (2000) 473.) Hoexter (2000) 117 *SALJ* 28 (forthcoming) further suggests that it seems as if Froneman DJP in *Carephone (Pty) Ltd v Marcus NO* 1998 (11) BLLR (LAC) supported this view. The judge points out that the dictionary meaning of 'justifiable' defines the word as 'able to be legally or morally justified, able to be shown to be just, reasonable, or correct; defensible'. It does not, he says, mean 'just', 'justified' or 'correct'.

Stellenbosch University http://scholar.sun.ac.za

2.2 The interpretation of 'justifiability in relation to the reasons given' in section 24(d) IC

Mureinik[18] endorsed the view that 'justifiable in relation to the reasons given' in section 24(d) IC guaranteed a rational decision-making process that would give a reasonable result.[19] He accordingly formulated the following test:

> 'A good starting point would be to recognise that the justifiability of an administrative decision is a matter not of second-guessing the policy choices that it entails, which is the prerogative of the decisionmaker, but rather the *soundness of the process of deciding* which went into its making. It is suggested that an administrative decision cannot be taken to be justified unless (a) the decisionmaker has *considered all serious objections* to the decision taken and has answers which plausibly meet them; (b) the decisionmaker has *considered all the serious alternatives* to the decision taken, and has discarded them for plausible reasons, and (c) there is a *rational connection between premises and conclusions* - between the information (evidence and argument) before the decisionmaker and the decision taken.'[20]

According to Mureinik, a rational decision-making process therefore requires a rational link between the information before the administrator and the decision taken in terms of it. Seen like that, section 24(d) removed the need for a test based on symptomatic unreasonableness,[21] as it expressly permitted a court to inquire into the justification of an

---

18 See Du Plessis & Corder *Understanding South Africa's Transitional Bill of Rights* 169 and Burns (1994) 9 *SAPL* 359.

19 Mureinik further endorsed the view that sec 24(c) and sec 24(d) should not be read together as it would place too great a burden on officials who would then be obliged to supply reasons for their administrative conduct in terms of sec 24(c). (See De Waal et al *The Bill of Rights Handbook* (2000) 474, Devenish "The Interim Constitution and Administrative Justice in South Africa" 1996 *TSAR* 458 466 fn 72 and Du Plessis & Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 169).

20 My emphasis. Mureinik "A bridge to where? Introduction to the interim Bill of Rights" (1994) 10 *SAJHR* 31 41.

21 In *Standard Bank of Bophuthatswana Ltd v Reynolds NO and Others* 1995 (3) SA 74 (BG) it was ruled in relation with 'justifiability in relation to the reasons given', that the test of 'gross unreasonableness' had to be rejected for being too stringent. It was accordingly out of step with the modern approach to judicial review in a constitutional dispensation entrenching fundamental human rights binding on legislative and executive organs. The judge as a result replaced the test for 'gross unreasonableness' with a test for 'reasonableness'. Currie (see De Waal et al *The Bill of*

Stellenbosch University http://scholar.sun.ac.za

administrative action.[22] However, saying that symptomatic unreasonableness was replaced by a more general reasonableness review could lead to disregarding the appeal-review distinction. Some authors and judges therefore suggested that 'justifiable in relation to the reasons given' in section 24(d) gave the courts power to assess the merits of a decision in order to determine whether the decision was right or wrong.[23] In other words, they suggested that section 24(d) erased the line between appeal and review.[24] However, the preferred view amongst authors and judges was that 'justifiable in relation to the reasons given' in section 24(d) did not erased the line between appeal and review.[25] This was strengthened by *Carephone (Pty) Ltd v Marcus NO and Others* in which the view was endorsed that the appeal-review distinction remained intact. The judge ruled that, in determining whether an administrative action was 'justifiable in relation to the reasons given',

---

Rights Handbook (2000) 473) with reference to the *Reynolds* case suggested that although unreasonableness review of delegated legislation, the drafting of which is an administrative action, is available at common law (see *Kruse v Johnson* 1898 (2) (QB) 91), unreasonableness is now also a ground for review of other administrative actions.

22 Devenish 1996 *TSAR* 458 467.

23 Basson *South Africa's Interim Constitution: Text and Notes* 1ed (1994) 35 fn 1. (See De Ville "The Right to Administrative Justice: An Examination of Section 24 of the Interim Constitution" (1995) 11 *SAJHR* 264 272.

24 De Ville (1995) 11 *SAJHR* 264 265 fn 1 and 273 fn 61. Further, in *Kotzé v Minister of Health and Another* 1996 (3) BCLR 417 (T), Spoelstra J ruled that the difference between appeal and review might have been eroded by the inclusion of sec 24(d) IC. De Ville submitted that the viability of this view depended on the adequacy of 'reasons' furnished by the administrator in terms of sec 24(d). Should the reasons not include a reference to the evidence or other materials upon which the findings were based, it would be impossible to ascertain from them whether requirements (a) to (c) laid down by Mureinik (page 49 above), needed for a decision to be 'justified in relation to the reasons given', had been complied with. (De Ville (1995) 11 *SAJHR* 264 273.)

25 *Roman v Williams NO* 1997 (9) BCLR 1267 (C). Further, Govender "Administrative Justice" (1999) 14 *SAPL* 62 89-90 submits that it does appear cavalier to conclude on the basis of one word, 'justifiable', in the Bill of Rights, that the review-appeal distinction had been largely eroded. He cannot reconcile that approach with the continued commitment to the doctrine of the separation of powers, especially as the carefully constructed sec 24 IC was designed to give limited overseeing powers to the judiciary. Also see Hoexter (2000) 117 *SALJ* 27 (forthcoming).

Stellenbosch University http://scholar.sun.ac.za

> '...value judgments will have to be made which will, almost inevitably, involve the consideration of the "merits" of the matter in some way or another. As long as the judge determining this issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order.'[26]

In *Roman v Williams NO*, decided before the *Carephone* case, the judge ruled that review powers no longer entailed scrutiny only of the way in which decisions were made,[27] and therefore required an objective test for 'justifiability in relation to the reasons given' in section 24(d).[28] The rational-objective-basis test was formulated as follows in the *Carephone* case:

> '... [I]s there a *rational objective basis* justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at?'[29]

A decision that is 'justifiable in relation to the reasons given' therefore had to have a rational objective basis.

De Ville[30] submitted that proportionality[31] fitted into the context of the Constitution as a whole and therefore that section 24(d) required proportionality for legality in

---

26 See *Carephone (Pty) Ltd v Marcus NO* 1998 (11) BLLR (LAC) 1337 D and *Deacon v Controller of Customs and Excise* 1999 (6) BCLR 637 (SE).

27 See *Carephone (Pty) Ltd v Marcus NO* 1998 (11) BLLR (LAC) and Hoexter (2000) 117 *SALJ* 27 (forthcoming).

28 See *Roman v Williams NO* 1997 (9) BCLR 1267 (C), *Deacon v Controller of Customs and Excise* 1999 (6) BCLR 637 (SE) and *Kotzé v Minister of Health and Another* 1996 (3) BCLR 417 (T).

29 My emphasis. See *Carephone (Pty) Ltd v Marcus NO* 1998 (11) BLLR (LAC) 1337 F-G.

30 See De Ville "Proportionality as a Requirement for Legality in Administrative Law in Terms of the New Constitution" (1994) 9 *SAPL* 360 360 and *Roman v Williams NO* 1997 (9) BCLR 1267 (C) 1275 F. Burns strengthens this by stating that the courts would be faced with the distinction between terms such as 'rationality', 'reasonableness', 'justifiability', and 'proportionality' in their interpretation of the phrase 'justifiable in relation to the reasons given'. (Burns (1994) 9 *SAPL* 347 355.)

31 See Govender (1999) 14 *SAPL* 62 79 fn 54 where he cites the definition of proportionality with reference to Halsbury *Halsbury's Laws of England* vol 1 (1989) as: 'the court will quash exercise of discretionary powers in which there is not a reasonable relationship between the objective that

Stellenbosch University http://scholar.sun.ac.za

administrative law.[32] In terms of the requirement of proportionality, the measure which least infringes upon fundamental rights must be adopted where there is more than one suitable measure for attaining a statutory purpose.[33] In other words, proportionality requires administrative decisions that are 'suitable' and 'necessary', in other words, that certain broad but specifically determined issues be considered.

No certainty existed as to whether section 24(d) required proportionality for administrative actions. This is illustrated by the different tests for 'justifiability in relation to the reasons given' suggested by Van Deventer J and Froneman DJP. In the *Roman v Wiliams NO,* Van Deventer J, with reference to De Ville, required that decisions objectively meet the requirements of 'suitability', 'necessity', and 'proportionality'.[34] In the *Carephone* case, Froneman DJP required, without substituting the concept of substantive rationality with formulations such as 'proportionality' and the like, that decisions have a rational objective basis in order to meet the requirement in section 24(d).[35]

2.3 The interpretation of 'reasonableness' in section 33(1) FC

Hoexter[36] uses ordinary dictionary meanings in order to define 'reasonableness' in section 33(1): 'reasonableness' requires decision-making 'in accordance with reason' or 'within the limit of reason'. 'Within the limit of reason' suggests 'a space within which various reasonable choices may be made'. It therefore excludes capricious decision-making, but does not include the substitution of the administrator's decision for that of

---

is sought to be achieved and the means used to that end, or where punishment imposed by administrative bodies or inferior courts are wholly out of proportion to the relevant misconduct...'

32 Baxter *Administrative Law* (1984) 528-529 viewed proportionality as a facet of unreasonableness that was compatible with South African law as long as judges confine themselves to the review of action that had been of such an excessive degree that no reasonable man would consider it to be appropriate.

33 Burns *Administrative Law Under the 1996 Constitution* (1998) 194.

34 See *Roman v Williams NO* 1997 (9) BCLR 1267 (C) 1276 C.

35 See *Carephone (Pty) Ltd v Marcus NO* 1998 (11) BLLR (LAC) 1337 E.

36 Hoexter (2000) 117 *SALJ* 27 (forthcoming).

Stellenbosch University http://scholar.sun.ac.za

the court. Consequently, 'within the limit of reason' captures exactly the right standard. Review for reasonableness does therefore entail scrutiny of the merits of administrative decisions,[37] as it is impossible to judge whether the decision was 'within the limit of reason' without looking carefully at aspects such as the information before the administrator, the weight given to the various factors and the purpose sought to be achieved by the action.[38]

The question arises what the elements of 'reasonableness' are and whether they are different form the concept of 'rationality'.[39] Currie, with reference to 'reasonableness' in section 33(1), submits that the Constitution ushers in full-blown rationality review, which was restricted by the courts in the system of parliamentary supremacy.[40] The question therefore has to be answered by establishing what 'rationality' means within the context of the Constitution and, further, how 'reasonableness' in section 33(1) FC relates to the concept of 'rationality'.

Govender suggests that the test for the rationality of the exercise of public power requires a rational connection between the decision taken and a legitimate governmental purpose.[41] Further, with reference to the *Makwanyane* case, the author submits that the purpose of the rationality test is to ensure that government in a constitutional state does not act arbitrarily or capriciously.[42] This is strengthened by the *Pharmaceutical*

---

37 See *Carephone (Pty) Ltd v Marcus NO* 1998 (11) BLLR (LAC) 1337 D and *Deacon v Controller of Customs and Excise* 1999 (6) BCLR 637 (SE).

38 Hoexter (2000) 117 *SALJ* 27 and 28 (forthcoming). (See also the passage cited on page 49 above.)

39 Hoexter (2000) 117 *SALJ* 27 (forthcoming).

40 De Waal et al *The Bill of Rights Handbook* (2000) 473.

41 Govender (1999) 14 *SAPL* 62 78.

42 See Govender (1999) 14 *SAPL* 62 79. In *S v Makwanyane* 1995 (6) BCLR 665 (CC) [156], Ackermann J characterised the new constitutional order as one in which state action must be such that it is capable of being analysed and justified rationally. He further stated that a constitutional State presupposes a system whose operation can be rationally tested against or in terms of law. Ackermann J therefore viewed arbitrariness as being dissonant with the perception of the new constitutional order. See also Yacoob J in *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) BCLR 139 (CC).

Stellenbosch University http://scholar.sun.ac.za

Manufacturers case,[43] in which the President, acting in good faith, prematurely brought an Act of Parliament into operation. Although the action did not constitute administrative action for the purposes of section 33 FC, the Constitutional Court held that the bringing into force of the Act by the President constituted the exercise of public power[44] and therefore had to be consistent with the Constitution.[45] The Court also ruled that in the exercise of public power, decisions have to be rationally connected to the purpose for which the power was given. Such a 'rational connection' is the minimum requirement in terms of the standards demanded by our Constitution. As irrational decisions might otherwise pass muster simply because they were taken in good faith, the question of whether the decision rationally related to the purpose for which it was taken calls for an objective enquiry.[46]

Administrative action is a component of the exercise of public power in the operation of a constitutional state. It is governed by section 33 FC. 'Rationality' is therefore part of section 33 and is consequently included in the requirement of reasonableness in section 33(1).[47] 'Rationality' is therefore part of 'reasonableness' in section 33(1) FC. The suggestion of Hoexter that, as the dictionary meaning of 'rational' entails 'rejecting what

43 *Pharmaceutical Manufacturers Association In Re: ex parte The President of The Republic of South Africa* 2000 (3) BCLR 241 (CC).

44 The action required a political judgment as to when the Act should enter into force, a decision that is necessarily antecedent to the legislative process. In substance the decision was therefore closer to the legislative process than the administrative process. (See *Pharmaceutical Manufacturers Association In Re: ex parte The President of The Republic of South Africa* 2000 (3) BCLR 241 (CC) [79], and page 23 Chap 1.)

45 See *Fedsure Life Assurance Ltd and Others v Greater Johannesburgh Transitional Metropolitan Council and Others* 1998 (12) BCLR 1458 (CC) [33] to [45], *President of the Republic of South Africa and Others v South African Rugby and Football Union and Others* 1999 (10) BCLR 1059 (CC) [132] to [149], and 2.5.4 Chap 1 for the doctrine of constitutional legality.

46 See *Pharmaceutical Manufacturers Association In Re: ex parte The President of The Republic of South Africa* 2000 (3) BCLR 241 (CC) [85] and [86].

47 This notion correlates with the way in which the review of administrative action for 'justifiability in relation to the reasons given' in section 24(d) had been conducted. See *Carephone (Pty) Ltd v Marcus NO* 1998 (11) BLLR (LAC) 1337 F-G.

Stellenbosch University http://scholar.sun.ac.za

is unreasonable' 'rational' has either a lesser meaning or is synonymous with 'reasonable', strengthens the fact that 'rationality' is a part of 'reasonableness'.[48]

Delegated legislation, the drafting of which constitutes administrative action, in most instances involve issues of high policy. Govender discusses the role of 'rationality' in policy decisions with reference to the *Soobramoney* case.[49] In this case, the provincial health authorities of KwaZulu-Natal advanced a policy that afforded dialysis treatment only to patients with reversible renal failure. The applicant, a patient with irreversible renal failure, argued that he had a right in terms of section 27(3) FC[50] to be admitted to the dialysis programme at a state hospital. The Constitutional Court stated that a court would be slow to interfere with rational decisions taken in good faith by the political organs and authorities whose responsibility it is to deal with certain matters. Govender therefore submits that the implication of this judgment is that policy decisions, including the drafting of delegated legislation,[51] should be rational to avoid judicial interference.[52] The drafting of delegated legislation should therefore also be exercised 'rationally' in order to adhere to the requirement of reasonableness in section 33(1) FC.

The uncertainty regarding whether both rationality and proportionality were elements of 'justifiable in relation to the reasons given' continues for 'reasonableness' in section 33(1) FC. Hoexter submits, with reference to 'reasonableness' in section 33(1) FC, that while reasonableness requires rationality, it is not confined to rationality as reasonable decisions also reveal proportionality between means and end, benefits and detriments.[53] However, Govender submits, with reference to review of delegated legislation in terms of section 33 FC,[54] that 'reasonableness' in section 33(1) simply requires 'rationality'.[55] He

---

48 Hoexter (2000) 117 *SALJ* 27-28 (forthcoming).

49 *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 (12) BCLR 1696 (CC) [29].

50 "Health care, food, water and social security

(3) No one may be refused emergency medical treatment..."

51 The drafting of delegated legislation is an administrative action that includes a significant measure of policy.

52 See Govender (1999) 14 *SAPL* 62 78-79. See also *Jooste v Score Supermarket Trading (Pty) Ltd* 1999(2) BCLR 139 (CC) in this regard.

53 Hoexter (2000) 117 *SALJ* 27 (forthcoming).

54 See fn 51 above and Govender (1999) 14 *SAPL* 62 78-79.

Stellenbosch University http://scholar.sun.ac.za

bases his submission firstly on *Prinsloo v Van Der Linde and Another*,[56] in which the applicants argued that the section which they were seeking to impugn lacked rationality because it did not use the least onerous means of achieving its objectives. Sachs J dismissed the argument, stating that:

> 'The question whether the legislation could have been tailored in a different and more exactable way is relevant to the issue of justification, but irrelevant to the question of whether there is a sufficient relationship between the means chosen and the end sought, for purposes of the present enquiry.'[57]

Consequently the test for rationality, applied in the above manner, would leave no room for the application of the proportionality test in the first phase of a constitutional case. Secondly, Govender argues that 'proportionality' requires a balancing process between means and end, as adopted in *S v Makwanyane*,[58] only after a constitutional right had been infringed. This balancing process is therefore applied during the second phase of a constitutional case in terms of the limitations clause (section 36 FC) as justification for courts to look closely at legislative and executive choices.[59] The following paragraph by O'Reagan J in the *Dawood* case indicates that the Constitutional Court is still applying this approach:

> 'Section 36(1) of the Constitution provides that a limitation of a constitutional right may be justified. It will be justified only if the Court concludes that the limitation of the right, considering the nature and importance of the right and the extent of its limitation on the one hand, is justified in relation to the purpose, importance and effect of the provision causing the limitation, taking into account the availability of less restrictive means to achieve the purpose of the provision, on the other.'[60]

---

55 See Govender (1999) 14 *SAPL* 62 78-79.

56 *Prinsloo v Van Der Linde and Another* 1997 (11) BCLR 1498 (CC).

57 See *Prinsloo v Van Der Linde and Another* 1997 (11) BCLR 1498 (CC) [35]. See also fn 31 above for Govender's definition of 'proportionality'. (See Govender (1999) 14 *SAPL* 62 79 fn 54.) See also *Jooste v Score Supermarket Trading (Pty) LTD* 1999 (2) BCLR 139 (CC) in this regard.

58 1995 (6) BCLR 665 (CC).

59 Govender (1999) 14 *SAPL* 62 79.

60 *Dawood, Shalabi and Thomas v The Minister of Home Affairs and Others* (CC) 07/06/2000 Caes no. CCT 35/99 [40].

Stellenbosch University http://scholar.sun.ac.za

Accordingly, it seems as if 'rationality' constitutes the only element of 'reasonableness' in section 33(1) FC. '[P]roportionality' plays a role only in the limitation analysis that follows after a finding that the right to 'just administrative action' in section 33 FC had been infringed.[61] Furthermore, as politicians were not impressed with the idea of proportionality,[62] the formulations of the statutory grounds for review of unreasonable administrative action in sections 6(2)(e)(vi), (f)(ii)(aa) to (dd) and (h) of the Act do not include proportionality. This contrasts with the statutory ground for 'unreasonableness' proposed by the law commission, which did include proportionality.[63]

In section 24(d) IC, a threshold qualified the right to 'administrative action that is justifiable in relation to the reasons given for it'. Accordingly, the right was only afforded where a person's 'rights'[64] were 'affected'[65] or 'threatened'.[66] Conversely, the right to 'administrative action that is reasonable' is afforded to 'everyone' in section 33(1) FC. The ambit of the guarantee afforded by section 33(1) therefore depends on the interpretation of 'everyone'. As thresholds were done away with in order to afford a wider or more generous guarantee in section 33, 'everyone' in section 33(1) includes all persons with affected or threatened rights, interests and legitimate expectations.[67]

---

61 This approach of the Constitutional Court, based upon Canadian authority (*R v Big M Drug Mart* (1985) 18 DLR (4th) 321 and *R v Oaks* (1986) 26 DLR (4th) 200) stipulates that 'proportionality' only features in the limitation analysis (the second phase of a constitutional case) once it has been established that a right in the Bill of Rights had been infringed upon (the first phase of a constitutional case).

62 Breitenbach at the UCT New Legislation seminars Thursday 6 April 2000.

63 See the South African Law Commission's Discussion Paper 81 project 115 annexure E section 4(1)(f)(iv)(cc). According to Hoexter (2000) 117 *SALJ* 34 (forthcoming), the formulation proposed by the law commission prevented the conflation between rationality and proportionality.

64 Sec 24(b) IC explicitly included persons with 'legitimate expectations' within the ambit of the right to 'procedurally fair administrative action' while all the other subsections in sec 24 IC did not mention it. The inference could therefore have been that persons with 'legitimate expectations' were excluded from sec 24(a), (c), and (d) IC.

65 See fn 13 Chap 2.

66 See ffn 13 and 14 Chap 2.

67 See sec 2 Chap 2.

Stellenbosch University http://scholar.sun.ac.za

Section 33 FC, of which 'reasonableness' is a part, affords a wider or more generous guarantee of 'just administrative action' than the guarantee of 'administrative justice' in section 24 IC.[68] As it related only to the reasons supplied for the decision, while 'reasonable' extends also to the effects of the decision, 'justifiable' in section 24(d) IC is either narrower than 'reasonable' in section 33(1) FC or synonymous with 'reasonable' in section 33(1) FC.[69] Accordingly, 'reasonableness' also does away with symptomatic unreasonableness in terms of both interpretations of 'justifiable', but even more so if 'justifiable' was narrower than 'reasonable'. Requiring 'reasonableness' in section 33(1), in other words, affording review for unreasonableness and not only for 'gross' or any other form of unreasonableness, strengthens this.

As 'symptomatic unreasonableness' falls away and 'reasonableness' might also extend to the effects of and not merely the reasons for a decision, the appeal-review distinction is questioned. However, Govender[70] submits that the appeal-review distinction is important in our law as it recognises that the role of the courts are to ensure legality and constitutionality and not to act as second deliberator in respect of every administrative decision. This is consistent with the separation of powers principle, which is central to our constitutional democracy. Further, the right to 'just administrative action' focuses on judicial review of, and not appeals against, administrative actions.[71] The view preferred for 'justifiability', namely that the appeal-review distinction remains intact, and that the merits of a decision are scrutinised only to determine whether the decision (and perhaps, its effects) is rationally justifiable, is therefore applicable to the interpretation of 'reasonableness' in section 33(1). Finally, in terms of both the *Pharmaceutical Manufacturers* case and the interpretation of section 24(d) IC, the rationality of a decision

---

68 See fn 9 Chap 2.

69 See fn 16 and 17 above.

70 Govender (1999) 14 *SAPL* 62 88.

71 See sec 33(3)(a) FC that reads: 'National legislation must be enacted to give effect to these rights, and must- (a) provide for the *review of administrative actions*...' (My emphasis.)

Stellenbosch University http://scholar.sun.ac.za

is determined by applying a rational-objective-basis test, which is therefore also applicable for 'reasonableness' in section 33(1).[72]

3. GROUNDS FOR REVIEW RELATING TO 'REASONABLENESS'

3.1 Section 6(2)(e)(vi): action taken arbitrarily or capriciously

Section 6(2)(e)(vi) reads:

> 'A court or tribunal has the power to judicially review an administrative action if the action was taken arbitrarily or capriciously.'[73]

A decision may be said to be arbitrary and capricious when it is irrational or senseless, without foundation or apparent purpose.[74] The Constitutional Court perceives arbitrariness as being dissonant with rational state action.[75] Section 6(2)(e)(iv) therefore also refers to 'rationality' as a requirement for 'reasonableness' in section 33(1). Accordingly, administrative action that is 'arbitrary and capricious' is contrary to the reasonableness requirement and amounts to irrational administrative action.[76]

---

72 See *Carephone (Pty) Ltd v Marcus NO* 1998 (11) BLLR (LAC) 1337 F-G and *Pharmaceutical Manufacturers Association In Re: ex parte The President of The Republic of South Africa* 2000 (3) BCLR 241 (CC) [85] and [86].

73 Arbitrary means 'to be decided by one's own liking', 'dependent upon will or pleasure' or 'at the discretion or option of anyone', while capricious means 'guided by whim or fancy rather than by judgment or settled purpose'. (See Simpson & Werener *The Oxford English Dictionary* (1989) Vol I.) Baxter (see Baxter *Administrative Law* (1984) 521-522) views this as the ultimate form of unreasonableness as it is implicit in the concept of discretion that the decision-maker should base his decisions on rational principles and standards.

74 See Boulle, Harris & Hoexter *Constitutional and Administrative Law* (1989) 350 fn 176. In the common law, a decision that was arbitrary and capricious amounted to a failure by the administrator to apply his mind to the matter (*Northwest Townships (Pty) Ltd v Administrator, Transvaal* 1975 (4) SA 1 (T)). See fn 6 above.

75 See *S v Makwanyane* 1995 (6) BCLR 665 (CC) [156].

76 Hoexter (2000) 117 *SALJ* 29 (forthcoming).

Stellenbosch University http://scholar.sun.ac.za

3.2 Section 6(2)(f)(ii): rationality

Section 6(2)(f)(ii) confirms that 'rationality' is an element of 'reasonableness' in section 33(1). The section affords review of administrative action that is not rationally connected to the purpose for which it was taken, or to the purpose of the empowering provision, or to the information before the administrator, or to the reasons given for it by the administrator. Review for irrationality therefore encompasses four statutory grounds for review. The grounds are independent from each other and can be used jointly and independently in the review of administrative action.[77] Further, an objective test has to be used for the determination of 'rationality' of administrative action in terms of the four grounds.[78]

Section 6(2)(f)(ii)(aa) reads as follows:

> 'A court or tribunal has the power to judicially review an administrative action if the action itself is not rationally connected to the purpose for which it was taken.'

The section therefore confirms the requirement of 'rationality' for the exercise of public power in terms of the Constitution.[79] Accordingly, the purpose for which the administrative action was taken has to be a legitimate governmental purpose in terms of law.[80]

Section 6(2)(f)(ii)(bb) reads as follows:

> 'A court or tribunal has the power to judicially review an administrative action if the action itself is not rationally connected to the purpose of the empowering provision.'

If the administrative action is not rationally connected to the empowering provision, the power was not exercised in terms of the empowering provision, even if the specific action was authorised. Section 6(2)(f)(ii)(bb) therefore relates to the statutory ground in section 6(2)(e)(i) that is discussed in Chapter Two, which affords review of administrative action

---

77 Section 6(f)(ii)(aa)-(dd) is divided by the word 'or' and not 'and' that would have had the opposite effect.

78 See *Carephone (Pty) Ltd v Marcus NO* 1998 (11) BLLR (LAC) 1337 E.

79 See *S v Makwanyane* 1995 (6) BCLR 665 (CC) [156] and Govender (1999) 14 *SAPL* 62 79.

80 See *Pharmaceutical Manufacturers Association In Re: ex parte The President of The Republic of South Africa* 2000 (3) BCLR 241 (CC) [85] and [86].

Stellenbosch University http://scholar.sun.ac.za

taken for reasons not authorised by the empowering provision.[81] For example, where an administrator decides to use municipality workers to paint the town hall a week before her daughter's wedding, the action is not rationally connected to the empowering provision, although she is empowered by an empowering provision to maintain the town hall.

Section 6(2)(f)(ii)(cc) reads:

> 'A court or tribunal has the power to judicially review an administrative action if the action itself is not rationally connected to the information before the administrator.'

Further, section 6(2)(f)(ii)(dd) reads:

> 'A court or tribunal has the power to judicially review an administrative action if the action itself is not rationally connected to the reasons given for it by the administrator.'

Sections 6(2)(f)(ii)(cc) and (dd) therefore require a rational decision-making process for 'justifiable in relation to the reasons given' in section 24(d) IC, as suggested by Mureinik.[82] In addition, the decision-maker is required to consider all serious objections to the decision taken and to provide answers that plausibly meet them.[83]

3.3 Section 6(2)(h): gross unreasonableness

Section 6(2)(h) reads as follows:

> 'A court or tribunal has the power to judicially review an administrative action if 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 so have exercised the power or performed the function...'[84]

---

81 This statutory ground relates to the common law ground for review applied where administrators exceeded their powers when acting upon the object of the action. (See Baxter *Administrative Law* (1984) 458-459, *Moulder v Thom* 1974 (1) SA 336 (T) and page 39 and fn 49 Chap 2.)

82 See Du Plessis & Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 169 and Burns (1994) 9 *SAPL* 347 359.

83 Mureinik (1994) 10 *SAJHR* 31 41.

84 Breitenbach suggested that the formulation is circular, since an unreasonable administrative action is axiomatically something that no reasonable person would perform. (Breitenbach at the UCT

Stellenbosch University http://scholar.sun.ac.za

The section therefore has the merit of dealing with gross unreasonableness head-on and not as a symptom of some other defect.[85] Although the formulation of the statutory ground in section 6(2)(h) seems to confirm the gross unreasonableness test,[86] it is only one component of a greater test for reasonableness that consists of all the statutory grounds for review relating to 'reasonableness' in section 33(1) FC.

Section 6(2)(h) does therefore not seem to qualify the right to 'administrative action that is reasonable' in section 33(1) FC to such an extent that it merits the direct application of section 33 FC for the review of administrative action that was unreasonable. The reason is that review of unreasonable administrative action can take place in terms of five statutory grounds for review, which specifically confirms that 'rationality' is the only element of 'reasonableness' in section 33(1), and further, in terms of the statutory ground in section 6(2)(h). It is difficult to imagine an unreasonable administrative action that cannot be reviewed by applying either one of these statutory grounds for review.

New Legislation Seminars Thursday 6 April 2000.) Hoexter "The Future of Judicial Review in South African Administrative Law" (2000) 117 *SALJ* 34-35 (forthcoming) criticises the formulation 'so unreasonable that no reasonable person could so have exercised the power or performed the function' for closely resembling the *Wednesbury* test (see *Associated Provincial Picture Houses v Wednesbury Corpotaion* 1948 1 KB 223) that requires a decision to be 'so unreasonable that no reasonable authority could ever come to it' before affording review. She argues that courts will therefore conclude that the statutory ground in sec 6(2)(h) requires the same sort of egregiousness as the *Wednesbury* test. Further, as Jansen JA in *Theron v Ring van Wellington van NG Sending Kerk in Suid Afrika* 1976 (2) SA 1 (A) noted that judicial self-restraint (as illustrated by the *Wedensbury* test) was being loosened in England (Baxter *Administrative Law* (1984) 480 fn 19), Hoexter critisises the formulation of sec 6(2)(h) as the test in the *Wednesbury* case is questioned in its home country.

85 Hoexter (2000) 117 *SALJ* 34 (forthcoming).

86 However, De Lange (Parliament Monday 12 June 2000) suggests that the ground constitutes the *via media* between a ground for gross unreasonableness and the abrogation of the distinction between appeal and review.

Stellenbosch University http://scholar.sun.ac.za

3.4 The common law ground for review omitted from the Act: vague and uncertain administrative action

The common law ground that affords review of vague or uncertain administrative action was omitted from the Act, although it was incorporated in the 1999 Draft Administrative Justice Bill.[87] In common law, the ground is afforded for the review of an administrative action that was vague, confusing or embarrassing. In other words, administrative actions are required to be clear and comprehensible. It is unreasonable to expect individuals to comply with directives if they are unable to make sense of them.[88]

The ground for vagueness or uncertainty is primarily used in the realm of the drafting of delegated legislation but is applicable to all administrative actions. The test for invalidity is 'whether a reasonably precise meaning is ascertainable'[89] and is therefore objective. However, the determination of certainty differs according to the circumstances of each case. Where delegated legislation is for example addressed to a specialised audience, the court will judge the clarity of the words according to the understanding of the audience.

In the *Dawood* case, decided in terms of section 10 FC ('human dignity'), the Constitutional Court ruled that direct guidance was necessary for officials untrained at law to exercise their discretion in a manner consistent with the Bill of Rights. Further, those affected by a discretionary power that contains no express constraints would not know what is relevant to the exercise of those power, or in which circumstances they are entitled to seek relief from an adverse decision, if no guidance is given to officials for the exercise of their discretion. The Court brought the drafting of delegated legislation (and by implication administrative action)[90] within the realm of the judgment with the following statement:

---

87 See the South African Law Commission's Discussion Paper 81 project 115 annexure E section 4(1)(f)(ii).

88 For example, a regulation concerning the presence of an overly broad group of people in a vaguely demarcated area is unreasonable for being vague or uncertain, as anybody could be arrested for being present in the area, including those that has to be there for business purposes: *S v Lasker* 1991 (1) SA 558 (C).

89 *R v Jopp* 1949 (4) SA 11 (N) 14.

90 See fn 51 above.

Stellenbosch University http://scholar.sun.ac.za

> 'Guidance will often be required to ensure the Constitution takes root in the daily practice of governance. Where necessary, such guidance must be given. Guidance could be provided either in the legislation itself, or where appropriate, by a legislative requirement that delegated legislation be properly enacted by a competent authority.'[91]

In the *Dawood* case, the Constitutional Court therefore, by implication, referred to the importance of clear administrative actions.

The continued relevance of the common law ground for review relating to vague and uncertain administrative action, which was omitted from the Act, therefore needs to be determined.[92] In determining relevance, two questions are asked. The first question is whether one or more of the statutory grounds overlap the common law ground that has been omitted from the Act.[93] The second is whether the constitutional common law principles that previously provided the common law ground for review have been taken up by the Constitution.

The statutory ground in section 6(2)(vi), the ground relating to administrative action taken arbitrarily or capriciously, can in certain circumstances overlap vague or uncertain administrative action. The following serves as an example: the drafting of delegated legislation that empowers a town clerk to terminate hawking activities that influences formal markets. The administrative action is arbitrary firstly for being senseless, as the majority of hawking activities influences formal markets. Secondly, the administrative action is arbitrary for not having any apparent purpose. The purpose of the action cannot be to protect formal markets, as more stringent measures would be needed for such an undertaking and, further, the purpose of the action cannot be to prohibit hawking activities as such, as only an uncertain class of hawking activities is affected.

The statutory grounds in section 6(2)(f)(ii), the grounds relating to rationality, can overlap vague or uncertain administrative action in certain circumstances. The following set of facts can serve as an example: if 'harbour' had been vaguely demarcated as 'Table Bay' in delegated legislation that empowers a policeman to order any member of the

---

91 See *Dawood, Shalabi and Thomas v The Minister of Home Affairs and Others Dawood* (CC) 07/06/2000 Case no. CCT 35/99 [54].

92 See 2.4.2 Chap 1.

93 See fn 48 Chap 1.

Stellenbosch University http://scholar.sun.ac.za

public to leave the 'harbour', and therefore includes the Cape Town Harbour, Greenpoint, the area around the Castle and Robben Island, the drafting of the delegated legislation amounts to a vague or uncertain administrative action.[94] In terms of section 6(2)(f)(ii)(aa), the administrative action in question is not rationally connected to the purpose for which it was taken, that is, to keep unwelcome persons like prostitutes out of the 'harbour'. The area covers a far greater area than merely the 'harbour' and the administrative action therefore seems to have been taken to empower policemen to order any member of the public to leave any part of the area included in Cape Town Harbour, Greenpoint, the area around the Castle and Robben Island, if the policeman feels that the person is 'unwelcome'. In other words, the purpose of the action seems to be to make policing in this greater area easier.

Further, in terms of section 6(2)(f)(ii)(bb), the administrative action in question is not rationally connected to the purpose of the empowering provision objectively. The purpose of the empowering provision in terms of which the legislation was drafted is to keep unwelcome persons, like prostitutes, out of the 'harbour area' in order for them not to obstruct the daily activities in the 'harbour' and further, for their own safety. The regulations consequently drafted in terms of this empowering provision, are not rationally connected to the provision, as they usurp more power than empowering provision afforded them.

In terms of section 6(2)(f)(ii)(cc), the administrative action in question is also not rationally connected to the information before the administrator objectively. 'Harbour', under normal circumstances, includes the fenced in area around the docks. However, the administrator used the word 'harbour' to include an area that has nothing to do with the daily activities taking place in a 'harbour', but that has to do with an area in which normal daily activities take place.

Finally, in terms of section 6(2)(f)(ii)(dd), the administrative action in question is not rationally connected to the reasons given for it by the administrator objectively. Keeping prostitutes out of the 'harbour area' in order for them not to obstruct the daily activities in

---

[94] *S v Lasker* 1991 (1) SA 558 (C).

Stellenbosch University http://scholar.sun.ac.za

the 'harbour' and for their own safety is no reason for arresting a prostitute on Robben Island.

The example can be used to demonstrate that the statutory ground in section 6(2)(h) also overlaps vague or uncertain administrative action. The administrative action affects not only prostitutes, but could also affect a businessman that is 'unwelcome' in the eyes of a certain policeman. Ordering such a businessman, who needs access to the area in order to earn his livelihood, to leave the area for being unwelcome, 'is so unreasonable that no reasonable person could so have exercised the action or performed the function'. In other words, the administrative action in question seems to be grossly unreasonable.

However, vagueness is a separate ground for review and will under certain circumstances be the only ground for review that is applicable. Section 6(2)(i) is then the most suitable section to deal with administrative action that was performed vaguely.

More than one of the statutory grounds for review in the Act therefore overlap the common law ground for review relating to vague or uncertain administrative action that has been omitted from the Act. The statutory grounds that could overlap a vague or uncertain administrative action are the statutory grounds in sections 6(2)(e)(vi), 6(2)(f)(ii)(aa) to (dd), 6(2)(h) and 6(2)(i). The common law ground for review relating to vague or uncertain administrative action that has been omitted from the Act, therefore continues to be relevant to the review of administrative action through the application of the statutory grounds that overlap it. It is therefore unnecessary to answer the second question in the test for continued relevance.

3.5 Conclusion

Both sections 6(2)(e)(vi) and 6(2)(f)(ii) confirms that 'rationality' is the main element of 'reasonableness' in section 33(1). Section 6(2)(f)(ii) contains four statutory grounds for review, which are independent from each other and can be used jointly and independently in the review of administrative action. The formulation of the statutory ground in section 6(2)(h) seems to confirm the gross unreasonableness test. However, as it is only one component of a greater test for reasonableness, which consists of all the statutory grounds

Stellenbosch University http://scholar.sun.ac.za

for review relating to 'reasonableness' in section 33(1) FC, it is difficult to imagine an unreasonable administrative action that cannot be reviewed by applying either one of these grounds. Although the common law ground that affords review of vague or uncertain administrative action was omitted from the Act, it continues to be relevant to the review of administrative action through the application of the statutory grounds in sections 6(2)(e)(vi), 6(2)(f)(ii)(aa) to (dd), 6(2)(h) and 6(2)(i) that overlap it.

Stellenbosch University http://scholar.sun.ac.za

CHAPTER 4

PROCEDURAL FAIRNESS

1. INTRODUCTION

Section 33(1) FC[1] demands administrative action that is 'lawful', 'reasonable' and '*procedurally fair*'. This Chapter concerns the requirement of 'procedural fairness'. As the requirement of 'reasons for administrative action' in section 33(2) FC relates to the requirement of 'procedural fairness',[2] 'procedural fairness' is discussed with reference to both sections 24(b) and 24(c) IC,[3] and both sections 33(1) and 33(2) FC. Finally, the grounds for review relating to the requirement of 'procedural fairness' are discussed.

2. THE INTERPRETATION OF 'PROCEDURAL FAIRNESS'

2.1 Section 24(c) and (d) IC and section 33(1) and (2) FC

Section 24 IC was in operation for five years and nine months.[4] A reasonable volume of academic views and jurisprudence on 'procedural fairness' in section 24(b) and 'reasons for administrative action' in section 24(c) arose in this period. Section 33 FC only entered into force on 3 February 2000. Consequently there is very little by way of academic views and jurisprudence on section 33(1) and (2). Academic views and

---

[1] Constitution of the Republic of South Africa, Act 108 of 1996. See fn 2 Chap 1.

[2] Baxter *Administrative Law* (1984) 567 the fact that an unreasoned decision is arbitrary and unfair is the strongest argument for natural justice (see fn 14 below) implying a right to reasons. Further, Boulle, Harris & Hoexter *Constitutional and Administrative Law* (1989) 328 fn 30 noted before the inception of a right to 'reasons for administrative action' into our law (see sec 2.1 below) that although the giving of reasons was not yet recognised as a component of natural justice, a failure to give reasons in certain circumstances can lead to (or strengthen) an inference of unfairness. Wiechers *Administratiefreg* (1984) 240 stated that the rule that an administrator should give reasons for administrative actions points to the third requirement of the *audi alterem partem* principle. (See fn 15 and 35 below.)

[3] Constitution of the Republic of South Africa, Act 200 of 1993.

[4] See 2.4 Chap 1.

Stellenbosch University http://scholar.sun.ac.za

jurisprudence on section 24(b) and (c) are therefore used in the discussion on the requirement of 'procedural fairness' in section 33(1). However, the differences between sections 24 and 33 need to be kept in mind when referring to academic views and jurisprudence on section 24.[5]

Although 'procedural fairness' appears in both sections 24 IC and 33 FC, there are important differences between 'procedural fairness' in section 24(b) and 'procedural fairness' in section 33(1). 'Procedural fairness' in section 24(b) was only part of one component of the guarantee of 'administrative justice', while 'procedural fairness' in section 33(1) is part of a more general guarantee of 'just administrative action'. However, the most important difference relates to the qualification of the right to 'procedurally fair administrative action' by thresholds. A threshold qualified the guarantee of 'procedurally fair administrative action' in section 24(b) by affording it only to those with affected[6] or threatened[7] rights[8] and *legitimate expectations*.[9] However, the guarantee of 'administrative action that is procedurally fair' in section 33(1) is unqualified and afforded to *everyone*.

---

5 See ffn 9 and 10 Chap 2.

6 See fn 13 Chap 2.

7 See fn 14 Chap 2.

8 See fn 33 Chap 2.

9 Sec 24(b) was the only subsection in sec 24 IC that explicitly included those with 'legitimate expectations'. In *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A) 758 D-E Corbet CJ defined the doctrine of legitimate expectations as follows: '[T]he legitimate expectation doctrine is sometimes expressed in terms of some substantive benefit, advantage or privilege which the person concerned could reasonably expect to acquire or retain and which it would be unfair to deny such person without prior consultation or a prior hearing; and at other times in terms of a legitimate expectation to be accorded a hearing before a decision adverse to the interests of the person concerned is taken'. There is no definition for 'legitimate expectation' in the interim or final Constitutions. However, the court has indicated that a definition was unnecessary since the doctrine of legitimate expectation has already become part of the common law encompassed by sec 24(b) (*Jenkins v Government of the Republic of South Africa* 1996 (8) BCLR 1059 (Tk)). See Burns *Administrative Law Under the 1996 Constitution* (1998) 177-178, and *Van Huysteen NO v Minister of Environmental Affairs and Tourism* 1995 (9) BCLR 1191 (C).

Stellenbosch University http://scholar.sun.ac.za

Finally, the 'reasons for administrative action' component of the guarantee of 'procedurally fair administrative action' was afforded to persons with *affected rights* or *interests* in section 24(c), while the 'reasons for administrative action' component of the guarantee for 'administrative action that is procedurally fair', is afforded to *everyone* whose rights have been *adversely*[10] affected in section 33(2).[11] Further, a specific qualification was included in 'reasons for administrative action' in section 24(c), as no reasons could be requested if they had already been made public. There is no such qualification of 'reasons for administrative action' in section 33(2).

The academic views and jurisprudence on sections 24(b) and 24(c) can therefore be applied to the discussion on 'procedural fairness' in section 33(1) and 'reasons for administrative action' in section 33(2) if the differences are kept in mind.

2.2 The interpretation of 'procedural fairness'

'Procedural fairness' relates to the application of certain common law rules. These rules were designed to afford an affected individual[12] a fair procedure before an administrator

---

[10] *Adversely* means 'antagonistic', 'actively hostile', 'acting against or in opposition to', 'opposing' or 'contrary'. (See Simpson & Werner *The Oxford English Dictionary* (1989) Vol I.)

[11] The reason for the qualification of the right to 'reasons for administrative action' in sec 33(2) relates to a concern about the effect of including a right to 'just administrative action' in the final Constitution. The concern was raised by the frequent use of the right to 'reasons for administrative action' in sec 24 IC, together with the right to 'access to information' in sec 23 IC in the interim period to gain access to information and reasons for administrative action from the state and government at all levels. (See fn 9 Chap 2.) The qualification of the right to 'reasons for administrative action' by affording it only to those whose rights had been adversely affected was inserted to address that concern. Further, the Promotion of Access to Information Act 2 of 2000 was put in place to regulate access to information.

[12] If an administrative action impacted generally on a community or class of individuals, procedural fairness did not require a hearing at common law. Prior to *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A), the courts applied the distinction between 'legislative' and 'non-legislative' acts as a mechanism to restrict the reach of natural justice. The application of the rules of natural justice was confined to non-legislative acts. In the *Roads Board* case the Appellate Division replaced this distinction with a distinction between (a) statutory

Stellenbosch University http://scholar.sun.ac.za

performs an administrative action.[13] These common law rules, referred to as the rules of natural justice,[14] have traditionally been classified under the headings of *audi alterem partem* (persons affected by a decision should be given a fair hearing by the decision-maker prior to the making of the decision, hereafter 'the *audi* principle')[15] and *nemo*

---

powers which, when exercised, affect members of the community at large equally and (b) those which, while possibly also having general impact, are calculated to cause particular prejudice to an individual or particular group of individuals. Only the exercise of powers in type (b) attracted the requirements of natural justice. It was further ruled that less onerous procedures than a hearing (not specified in the case) would suffice for procedural fairness in this regard. (See De Waal, Currie and Erasmus *The Bill of Rights Handbook* (2000) 460 fn 35 and 470 fn 80.)

13 In *Du Preez v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) 231 the Appellate Division ruled that the duty to act fairly is concerned only with the *manner* in which a decision is taken and not whether the *decision itself* is fair or not.

14 Wiechers *Administratiefreg* (1984) 208 believes that the rules of natural justice encompass more than mere rules of procedure. In essence the rules represent a fundamental or primeval justice by guaranteeing simple justice between man and man. (Burns *Administrative Law Under the 1996 Constitution* (1998) 166 fn 145.) According to Baxter *Administrative Law* (1984) 538-540 the rules of natural justice can be equated with a duty to act fairly. (Burns *Administrative Law Under the 1996 Constitution* (1998) 166 fn 144.)

15 According to Baxter, the *audi* principle requires that the administrator should afford the affected individual a fair hearing. (Burns *Administrative Law Under the 1996 Constitution* (1998) 166 fn 144.) Fairness includes two fundamental requirements namely notice of the intended action and a proper opportunity to be heard. However, Wiechers (Wiechers *Administratiefreg* (1984) 240) states that 'reasons for administrative action' constitutes the third requirement for the *audi* principle. (See fn 2 above.) The notice of the intended action needs to specify the factors motivating the proposed action together with the time and place where an opportunity to be heard will be afforded. A fair opportunity to be heard means an opportunity to present evidence, and to contradict and challenge evidence presented against you. This involves disclosing of information and reasons for the looming decision that is in the possession of the decision-making authority adequately (*Loxton v Kenhardt Liquor Licensing Board* 1942 AD 275). Finally, reasonable time has to be given to prepare for representations. 'Reasonable' depends on the circumstances of each case (*Turner v Jockey Club* 1974 (3) SA 633 (A)).

Stellenbosch University http://scholar.sun.ac.za

iudex in propria causa (the decision maker must be, and must be reasonably perceived to be, impartial).[16]

The right to 'procedurally fair administrative action' in section 24(b) IC was not restricted to the application of the rules of natural justice. In the *Van Huysteen* case[17] Farlam J stated that although natural justice and procedural fairness are similar in scope, content and application, the constitutional right to 'procedural fairness' should not be regarded as a codification of the principles of natural justice. The interpretation of

16 According to the *nemo iudex in propria causa* principle, an administrator must be free from bias and unprejudiced when performing an administrative action. The test for bias is whether the administrator accused of bias, had associated himself with one of the opposing views in such a way that it appeared to a reasonable man that he was going to be biased or that there was a real likelihood of bias. (See *City and Suburban Transport (Pty) Ltd v Local Board Road Transportation, Johannesburg* 1932 WLD 100 and *Sculte v Van den Berg and Others NNO* 1991 (3) SA 717 (C).) Therefore, even if no bias is proved, invalidation can result if bias was apparent. The circumstances under which bias can arise include firstly, situations where the administrator has a pecuniary interest in the outcome of an administrative action. The pecuniary interest can be direct, like bribery for instance, or indirect, like a long-term financial benefit for a private business (see *Rose v Johannesburg Local Road Transportation Board* 1947 (4) SA 272 (W)). However, there are different degrees of indirect pecuniary interest and the courts will draw a line where the interest is so remote that it does not satisfy the test for bias. Secondly, bias can arise where the administrator has a personal interest in the outcome of the administrative action. It can for example arise where the administrator has a personal relationship with one of the parties affected by his decision (see *Liebenberg v Brakpan Liquor Licencing Board* 1944 WLD 52). Other examples of personal interests that might cause bias are relationships of family, business, social or otherwise. Thirdly, real or apparent prejudgment of the issue to be decided by the administrator give rise to disqualification on the grounds of bias, for example, past relationships with the aggrieved party that is expressed by a previous attitude towards him. Fourthly, current external commitments or past activities of the decision-maker might indicate that he so identifies himself with a particular view relevant to the administrative action, that there is a reasonable apprehension that he cannot remain impartial. Finally, the manner of conduct of the administrator during the decision-making process could create the appearance of prejudice (see *Schoeman v Administrateur OVS* 1961 (4) SA 856 (O)).

17 *Van Huysteen NO v Minister of Environmental Affairs and Tourism* 1995 (9) BCLR 1191 (C) 1212.

Stellenbosch University http://scholar.sun.ac.za

section 24(b) IC had to be a generous one[18] in order to give individuals the full measure of the guarantee in the section. This in effect meant that section 24(b) IC encompassed aspects of a fair procedure not yet addressed in the common law. The courts accordingly developed the common law to include new aspects of a fair procedure within the ambit of 'procedurally fair' in section 24(b) IC.

'Procedural fairness' was only part of one component of the guarantee of 'administrative justice' in section 24 IC, while 'procedural fairness' is part of a more general guarantee of 'just administrative action' in section 33 FC. However, that does not preclude consideration of the interpretation of 'procedural fairness' in section 24(b) after considering the interpretation of 'procedural fairness' in section 33(1). As the development of the common law with regard to 'procedural fairness' through the application of section 24(b) illustrates the tendency to afford a wide or generous guarantee for 'procedural fairness',[19] it could rather strengthen such a consideration of section 24(b) IC.

While the right to 'procedurally fair administrative action' in section 24(b) is qualified by a threshold, the right to 'administrative action that is procedurally fair' in section 33(1) is afforded to *everyone*.[20] This could strengthen the consideration of the interpretation of 'procedural fairness' in section 24(b) in the consideration of 'procedural fairness' in section 33(1). The unqualified right to 'procedural fairness' in section 33(1), like the development of the common law with regard to 'procedural fairness' through the application of section 24(b), both point to a wide or generous guarantee of 'procedural fairness'.

The first development of the common law with regard to 'procedural fairness' in section 24(b) IC, related to the obligation that commissions of enquiry have to comply with the *audi* principle. In this regard De Ville suggested that, as section 24(b) applied when a

---

18 Also see *Jenkins v Government of the Republic of South Africa and Another* 1996 (8) BCLR 1059 (Tk).

19 *Van Huysteen NO v Minister of Environmental Affairs and Tourism* 1995 (9) BCLR 1191 (C).

20 As a result of doing away with thresholds, *everyone* in sec 33 means all persons with affected or threatened rights, interests and legitimate expectations. (See fn 10 Chap 2.)

Stellenbosch University http://scholar.sun.ac.za

person's rights or legitimate expectations were affected or *threatened*, it might also obligate commissions of enquiry to comply with the *audi* principle.[21] In *Transkei Public Servants Association v Government of the Republic of South Africa*,[22] it was accordingly ruled that the question whether 'procedural fairness' should be applied in a preliminary investigation (like an investigation conducted by a commission of enquiry), depended on the circumstances of each case. According to Burns, 'circumstances' include the proximity between the initial investigation and the final decision, the terms of the enabling provision, the importance of the subject matter to the individual, and the need for administrative efficiency.[23]

The court consequently applied section 24(b) IC to a preliminary investigation in *Du Preez v Truth and Reconciliation Commission*[24] in which it was ruled that the appropriate committee of the Truth and Reconciliation Commission had to comply with the rules of natural justice. The reason for this was that the envisaged process was potentially prejudicial to the parties involved as it could result in criminal or civil proceedings against them.

The next issue in which the *audi* principle could find application, that had been raised since the implementation of section 24(b) IC, was the issue of persons being subpoenaed to give evidence before a legally constituted tribunal.[25] In the *Podlas* case,[26] the master of the Supreme Court decided to hold an enquiry and issue notices for an urgent interrogation in terms of section 152 of the Insolvency Act. In the event of seeking an interim interdict to stop the interrogation, it was ruled that no liberties, property or other existing rights were prejudicially affected. The application of the *audi* principle was therefore not required and the application for the interim interdict was set aside.

---

21 De Ville "The Right to Administrative Justice: An Examination of Section 24 of the Interim Constitution" (1995) 11 *SAJHR* 264 270.

22 1995 (9) BCLR 1235 (Tk).

23 See Burns *Administrative Law Under the 1996 Constitution* (1998) 179-180.

24 See *Du Preez v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) 233 E.

25 Burns *Administrative Law Under the 1996 Constitution* (1998) 180.

26 *Podlas v Cohen and Brydon* 1994 (3) BCLR 137 (T).

Stellenbosch University http://scholar.sun.ac.za

It is suggested with reference to the *Podlas* case and the precedents on commissions of enquiry[27] that the rules of natural justice should apply. This should be done where persons have been subpoenaed to give evidence before a legally constituted tribunal in cases in which the process followed by the tribunal is potentially prejudicial to the parties involved. The potential prejudice has to be real or apparent, like prejudice that could result in criminal or civil proceedings against the affected party and like prejudice that affects liberties, property or other existing rights.

However, the following statement by the Constitutional Court in the *Premier, Province of Mpumalanga* case should be kept in mind by the courts when developing the common law with regard to 'procedural fairness':

> '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. 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. On the other hand, to permit the implementation of retroactive decisions without, for example, affording parties an effective opportunity to make representations would flout another important principle, that of procedural fairness…'[28]

Therefore, in developing the common law with regard to 'procedural fairness', a proper balance needs to be struck between this guarantee and the importance to ensure that government has the ability to make and implement policy effectively. This is strengthened by *Gardener v East London Transitional Local Council*,[29] which warned, prior to the *Mpumalanga* case, against affording a guarantee of 'procedural fairness' that is too wide. The motivation was that a guarantee that is too wide would hamper legislative and adjudicative functions of administrators that need to be expeditious and inexpensive at this stage of South Africa's history.

---

[27] See *Du Preez v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) 233 E, *Podlas v Cohen and Brydon* 1994 (3) BCLR 137 (T) and *Transkei Public Servants Association v Government of the Republic of South Africa*1995 (9) BCLR 1235 (Tk).

[28] *Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools, Eastern Transvaal* 1999 (2) BCLR 151 (CC) [41].

[29] 1996 (3) SA 99 (E) 116 E.

Stellenbosch University http://scholar.sun.ac.za

Further, the Constitutional Court appeared to countenance the departure in the *Mpumalanga* case from the standard required in *Administrator, Transvaal v Traub*.[30] In the *Traub* case the court interpreted fairness in the context of a 'legitimate expectation' as requiring the decision-maker to afford the affected party a *hearing* prior to the making of the decision. However, the Constitutional Court held that a *hearing* would not be required to achieve 'procedural fairness' in all cases where there are legitimate expectations.[31] Based on the *Mpumalanga* case, Govender[32] suggests with reference to 'procedural fairness' in section 33(1), that the objective of 'procedural fairness' is to achieve *procedural fairness* and not to afford a *hearing*. In some circumstances, for example, a balancing of interests might suggest that government need provide only a rudimentary procedure before it acts and perhaps a more satisfactory procedure later.[33]

---

30 1989 (4) SA 731 (A).

31 In the *Mpumalanga* case, benefits to schoolchildren, given in the form of bursaries, were withdrawn without granting them a prior hearing. The same type of situation arose in the *Oranje Vrystaatse Vereniging vir Staatsondersteunde Skole en 'n Ander v Premier van die Provinsie Vrystaat en Andere* 1996 (2) BCLR 248 (O). There a decision to suspend the payment of subsidies to state-aided schools without granting the aggrieved parties a *prior hearing*, was set aside for being procedurally unfair in terms of sec 24(b) IC. In the *Mpumalanga* case, O'Reagan J accepted that it might be procedurally fair to withdraw benefits simply by giving *adequate notice* of such intention. However, a number of factors such as the nature of the benefit, the impact of the withdrawal, the benefits of the withdrawal to the state and society and the cost of affording a hearing to the aggrieved party need to be taken into account. A measure of safeguard is therefore required before a hearing could be refused.

32 Govender "Administrative Justice" (1999) 14 *SAPL* 62 87.

33 Under pre-constitutional law, natural justice did not apply with regard to the termination of benefits. The situation changed since the inception of the interim Constitution. Where benefits are withdrawn, the affected party is afforded a hearing, as there is a reasonable basis for a 'legitimate expectation' that the benefits would continue. (See *Jenkins v Republic of South Africa* 1996 (8) BCLR 1059 (Tk).) Because of the government's policy of reconstruction and development, benefactory programmes of all sorts will become fixtures in South Africa and will be seen as conferring 'rights' and 'legitimate expectations'. Consequently every reduction, termination or denial of admission to a programme of this kind, will trigger a requirement that 'procedural fairness' needs to be complied with. As it is apparent that it is impossible to grant hearings in all of these cases, narrowing is essential. (See Asimow "Administrative Law Under

Stellenbosch University http://scholar.sun.ac.za

The idea behind section 33 was to afford a wider or more generous guarantee for 'just administrative action' and then to limit and give effect to the right in legislation. One of the concerns that gave rise to this idea was the inhibitory effect of a guarantee for 'just administrative action' on government policies of reconstruction and development.[34] As the *Mpumalanga* case seems to address this concern, raised in the negotiations of section 33 FC, the interpretation of section 24(b) IC applies equally to 'procedural fairness' in section 33(1) FC.

It can therefore be said that the differences between 'procedural fairness' in section 24(b) IC and section 33(1) FC can be ascribed to the differing structures of section 24 IC and 33 FC. 'Procedural fairness' encompasses the common law rules of natural justice, but is not confined to it. Accordingly, the courts have developed 'procedural fairness' to include aspects not yet addressed in common law. However, a balance needs to be struck between the necessity of 'procedural fairness' and the importance to ensure that government has the ability to make and implement policy effectively. Finally, affording a hearing, which depends on the circumstances of each case, is not synonymous with 'procedural fairness'.

2.3 The interpretation of 'reasons for administrative action'

The guarantee in section 24(c) IC afforded a remedy that had been unavailable for administrative law in the common law. As the guarantee entailed 'the giving of reasons in writing for decisions that affected rights or interests', it extended the reach of administrative justice. Requiring an administrator to give reasons for his decision therefore provides a safeguard against arbitrary or unreasonable administrative action.[35]

South Africa's Final Constitution: The need for an Administrative Justice Act" (1996) 113 *SALJ* 613 617 and 619.)

34 See fn 9 Chap 2.

35 See De Waal et al *The Bill of Rights Handbook* (2000) 471. Wiechers argued that the refusal to give reasons for administrative actions implied that the decision was arbitrary and unfair. (See Wiechers *Administratiefreg* (1984) 241.) According to him, the notion in the common law that

Stellenbosch University http://scholar.sun.ac.za

Section 24(c) IC included and section 33(2) FC includes 'reasons for administrative action'. Further, both sections 24(c) IC and 33(2) FC afford 'reasons for administrative action' its own subsection although it is a component of 'procedural fairness'. These measures were and are taken to specifically guide the courts in their development of the common law in relation with 'procedural fairness', as a ground for review relating to 'reasons for administrative action' did not exist in the common law. This shows the importance attached to 'reasons for administrative action' as a component of 'procedural fairness' by the drafters of both the interim and the final Constitutions.[36] Another reason for affording the right to 'reasons for administrative action' its own subsection in section 33(2) FC, is that it contains a threshold that qualifies the right to 'reasons for administrative action' by affording it to *everyone* with *adversely* affected rights while 'procedural fairness' in section 33(1) FC is afforded to *everyone*.

Section 24(c) did not explicitly say whether reasons should be furnished as a matter of course or on request. However, some authors[37] have suggested that reasons needed to be furnished only on request, because it would be a waste of time and money and would hamper administrative efficiency if the opposite were true. The same seems to be true of 'reasons for administrative action' in section 33(2) FC.

Further, section 24(c) IC did not stipulate the kind of detail that was required or how informative reasons should be. Currie[38] submits that reasons are not reasons unless they provide proper information. With reference to *Moletsane v Premier of the Free State*,[39] he suggests that the degree of severity of the administrative action should determine the detail required for reasons. The more drastic the action taken, the more detailed the

---

reasons weren't required where decisions involved a discretion, led to discretions being abused as methods of secretive decision-making.

36 See fn 35 above.

37 See De Ville (1995) 11 *SAJHR* 264 271 and De Waal et al *The Bill of Rights Handbook* (2000) 474.

38 De Waal et al *The Bill of Rights Handbook* (2000) 472.

39 1996 (2) SA 95 (O). The judge came to his conclusion by seeing sec 24(c) in the light of sec 24(d) and therefore holding that there was a correlation between the action and the reasons required for it.

Stellenbosch University http://scholar.sun.ac.za

reasons advanced should be.[40] The degree of *particularity* therefore differs according to the circumstances. As the judge required a degree of *particularity* for 'reasons for administrative action' in section 24(c), the ruling in the *Rèan* case reinforces this submission.[41] Although it was not expected from the administrator to produce reasons with such a degree of particularity that it equated the draft judgment of a court, the administrator had to produce reasons that were intelligible and comprehensible when considered against the background circumstances.

Since it affords 'reasons for administrative action' to *everyone* whose rights have been *adversely*[42] affected, the 'reasons for administrative action' component of the right to 'administrative action that is procedurally fair' in section 33(2) FC is qualified by a higher threshold than the right to 'reasons for administrative action' in section 24(c) IC. A higher degree of effect is therefore required before 'reasons for administrative action' are afforded in adherence to the guarantee of 'just administrative action' in section 33 FC than was the case in the guarantee of 'administrative justice' in section 24 IC. However, as the interpretation considers mainly the quality of and time when reasons should be furnished, as opposed to the class of persons that should be furnished with reasons, this interpretation does not influence the application of 'reasons for administrative action' in section 24(c) IC to section 33(2) FC.

Once again, the differences between 'reasons for administrative action' in section 24(c) IC and section 33(2) FC can be ascribed to the differing structures of sections 24 IC and 33 FC. Further, reasons need to be furnished only on request and the required degree of particularity of reasons differs according to the circumstances of each case. Finally, 'reasons for administrative action' are afforded to everyone with *adversely* affected rights in section 33(2) FC.

---

40 See De Waal et al *The Bill of Rights Handbook* (2000) 473.

41 *Rèan International Supply Company (Pty) Ltd and Others v Mpumalanga Gaming Board* 1999 (8) BCLR 918 (T).

42 See fn 10 above.

Stellenbosch University http://scholar.sun.ac.za

3. GROUNDS FOR REVIEW RELATING TO THE REQUIREMENT OF 'PROCEDURAL FAIRNESS'

3.1 Section 3 of the Act

The following thresholds in section 3(1) qualify section 3 of the Act:

> '*Administrative actions* which *materially and adversely* affect the *rights and legitimate expectations* of any person must be procedurally fair.' (My emphasis)

The cited subsection contains three thresholds. The first threshold, 'administrative actions', refers to the definition of 'administrative action' in section 1(i) of the Act.[43] As 'rights' and 'legitimate expectations' are included and 'interests' omitted from section 3(1), the omission of 'interests' could point to a second threshold.[44] The final threshold qualifies 'rights and legitimate expectations' by requiring them to be '*materially* and *adversely* affected'.[45]

As *interests* are not mentioned in any threshold in the Act, the absence of the concept of interests from section 3(1) of the Act does not mean that section 3 is not afforded to those with 'interests'. Further, as authors and the courts tended to interpret 'rights' for

43 See 2.5.2 Chap 1.

44 Hoexter (Hoexter "The Future of Judicial Revie in South African Administrative Law" (2000) 117 *SALJ* 32-34 (forthcoming)) argues, with reference to section 24(b) IC, that the class of persons with 'interests' has been omitted from the application of sec 3 of the Act. The concept of 'interests' was omitted from sec 24(b) IC that afforded the guarantee of 'procedural fairness' to persons with affected or threatened rights or legitimate expectations. All applicants (applicants for licenses, permissions or concessions and benefits, advantages or privileges, see Hoexter (2000) 117 *SALJ* 32 (forthcoming)), at least, have *interests* in the outcome of their applications. Conflicting views existed on whether sec 24(b) did afford the guarantee of 'procedural fairness' to persons with 'interests' or not. (See Burns *Administrative Law Under the 1996 Constitution* (1998) 179.)

45 Materially means 'important' or 'of serious or substantial import of much consequence'. (See Simpson and Werner *The Oxford English Dictionary* (1998) Vol IX.) See fn 10 above for the meaning of 'adversely'. The inference from the fact that 'materially' has been used together with 'adversely' (that is used in isolation in sec 1 of the Act, see sec 1(i)(b)) is that a higher degree of effect on rights (interests) and legitimate expectations by administrative action is required than for other sections in the Act that do not include 'materially'.

Stellenbosch University http://scholar.sun.ac.za

purposes of section 24 widely,[46] and as *everyone* in section 33(1) and (2) is afforded a wide interpretation and includes all persons with 'affected' or 'threatened' 'rights', 'interests' and 'legitimate expectations',[47] it is submitted that 'rights' in section 1 of the Act should also be afforded a wide interpretation in order to include the concepts of 'legitimate expectations' and 'interest'.[48] It can therefore be said that section 3(1) of the Act explicitly includes persons with 'legitimate expectations' in order to strengthen the importance of section 3 for those with legitimate expectations.[49]

Section 3(2)(b) of the Act '...give[s] effect to the right to procedurally fair administrative action'. The section therefore refers to the right to 'administrative action that is procedurally fair' in section 33(1) FC. Section 3(2)(a) further provides that '...a fair administrative procedure depends on the circumstances of each case'. Accordingly,

---

46 De Ville (De Ville (1995) 11 *SAJHR* 264 270) suggested that 'rights' in section 24(b) should be interpreted widely to include within its ambit 'property' and 'liberty', as well as other fundamental rights in the Constitution. It was further suggested that 'rights' included common law and statutory rights excluded from the Constitution. According to Currie, the Constitutional Court strengthened a wide interpretation of 'rights', for the purpose of sec 24, in the *Mpumalanga* case. (Further see Pretorius "The Outsider and Natural Justice: A Re-examination of the Scope of the Application of the Audi Alterem Partem Principle" (2000) 63 *THRHR* 93 97-105, *Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools, Eastern Transvaal* 1999 (2) BCLR 151 (CC) [31], *SA Metal Machinery Company Ltd v Transnet Ltd* 1999 (1) BCLR 58 (W) 65 H and De Waal et al *The Bill of Rights Handbook* (2000) 463 fn 53.)

47 See page 27 Chap 2.

48 De Lange noted in this regard that, as it hampers the notion of a 'culture of rights' in South Africa, government in general wants to refrain from using the concept of 'interests'. It creates the idea that some have *rights* and some merely have lower scaled *interests* in matters, thereby causing an unwanted situation where some people are viewed as more important than others. (De Lange Parliament 12 June 2000) One could infer from the discussion with De Lange that 'interests' are included in 'rights' as the reason given by him for not using the concept of 'interests' differs from the one proposed by Hoexter, namely, that all applicants are excluded from the ambit of sec 3(1) of the Act. (See fn 44 above.)

49 See fn 62 Chap 1.

Stellenbosch University http://scholar.sun.ac.za

section 3(2)(a) qualifies section 3(2)(b) and by implication section 33(1) FC, as it renders a fair procedure dependent on the circumstances of each case.[50]

Section 3(2) of the Act refers to the rules of natural justice relating to the *audi* principle, and sets out the procedure to be followed when an administrative action materially and adversely affects the rights (and interests) or legitimate expectations of any person.[51] The *audi* principle encompasses two fundamental requirements, namely notice of the intended action and a proper opportunity to be heard. Sections 3(2)(b)(a) and 3(2)(b)(b) accordingly require:

> '...adequate notice of the nature and purpose of the proposed administrative action;[52] and a reasonable opportunity to make representations...'

In terms of the common law, administrators had to make an adequate disclosure of *information* and *reasons* that was in their possession for the awaited decisions.[53] However, section 3(2)(b)(c) requires:

> '...administrator must give a person referred to in subsection (1) a clear statement of the *administrative action.*'

This informs the party involved of the administrative action to be taken and allows him an opportunity to decide whether to take steps or not. The clear statement of the administrative action further affords him the knowledge of what type of information and reasons he requires for the presentation of his case. The situation might call for

---

50 This correlates with *Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools, Eastern Transvaal* 1999 (2) BCLR 151 (CC) where O'Regan J held that a hearing would not be required in all cases where there is a legitimate expectation, as the court should be slow to impose inhibitory obligations on government. In other words, what constitutes a 'fair procedure' depends on the facts of each case.

51 See ffn 15 and 48 above.

52 In *Du Preez v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) it was held that reasonable and timeous notice depends on the circumstances of each case. *In casu* a notice received on the Saturday that evidence was to be given as from the Monday, possibly on the Monday, was under the circumstances not reasonable and timeous. It is suggested that *adequate* notice means *reasonable and timeous* notice and should accordingly be afforded the meaning given to it in the *Du Preez* case.

53 See *Du Preez v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) and fn 15 above.

Stellenbosch University http://scholar.sun.ac.za

information or reasons in the possession of the state, or for information in his personal possession, or that of a third party, which would assist the state and improve his chances of a favourable decision.

The reason for requiring a clear statement of the *administrative action* to be taken instead of the disclosure of *information* that was in the possession of the administrator, is the fact that any decision taken or failure to take a decision in terms of any provision of the Promotion of Access to Information Act[54] has been omitted from the application of the Promotion of Administrative Justice Act.[55] If the party involved therefore requires a disclosure of information, the Promotion of Access to Information Act regulates the disclosure of information that was in the possession of the administrator before performing an administrative action.

The reason for requiring a statement of the administrative action instead of a disclosure of *reasons*, is the fact that section 5 of the Act regulates 'reasons for administrative action'. If the party involved requires reasons for the administrative action, the statutory grounds in section 5 must be employed. Accordingly section 3(2)(b)(c) cannot be employed to acquire 'reasons for administrative action'. However, section 3(2)(b)(e) requires administrators to:

> 'give a person referred to in subsection (1) adequate notice of the right to request reasons in terms of section 5.'

Further, in terms of a requirement in section 3(2)(b)(d), an administrator has to give adequate notice of any right of review or internal appeal where applicable.

Section 3(4)(a), which qualifies section 3(2)(b)(a) to (e), 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).'

The factors that *must* be taken into account to determine whether the departure was 'reasonable and justifiable' are all the relevant factors (section 3(4)(b)) as well as specific

---

54 Act 2 of 2000.

55 Sec 1(i)(hh) Act 3 of 2000.

Stellenbosch University http://scholar.sun.ac.za

factors that are named in section 3(4)(b)(i) to (v).[56] This reinforces the submission by De Lange that the drafters of the Act attempted to make it comprehensible and clear so that administrators could use it in their efforts to act lawfully, reasonably and procedurally fair.

Section 3(5), which qualifies section 3(2)(b)(a) to (e), reads:

> 'Where an administrator is empowered by an empowering provision to follow a procedure which is fair but different from the provision of subsection (2), the administrator may act in accordance with that different procedure.'[57]

Both sections 3(4)(a) and 3(5) therefore relate to and further define the phrase, '...a fair procedure depends on the circumstances of each case', in section 3(2).

Finally, section 3(2) is qualified by section 2(1)(a) and (b) of the Act. In terms of section 2(1)(a) the Minister may, in a notice in the *Gazette,* exempt an administrative action or group or class of administrative actions from the application of any of the provisions in sections 3,[58] if it is reasonable and justifiable in the circumstances. In terms of section 2(1)(b), the Minister may also, 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 in section 3(2).[59] Where such an exemption or permission has been provided in terms of section 2(1)(a) and (b), Parliament has to grant approval before publication in the *Gazette* in terms of section 2(2).

---

56 "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 effects 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."

57 The empowering provision can, amongst others, refer to a notice published in the *Gazette* by the Minister in terms of section 2(1)(a) and (b). See fn 58 and 59 below.

58 This section is also applicable for sec 4 and 5 of the Act, see sec 2(1)(a) Act 3 of 2000.

59 This section is also applicable for sec 4(1)(a) to (e), (2) and (3) or 5(2) of the Act, see Act 3 of 2000.

Stellenbosch University http://scholar.sun.ac.za

Like section 3(2), section 3(3) gives effect to the right to procedurally fair administrative action in section 33(1) FC. Section 3(3) reads:

> 'In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her 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.'

Section 3(3) therefore contemplates a hearing in correlation with the *Mpumalanga* case.[60] According to O'Regan J, a measure of safeguard has to be present before a hearing can be refused. As a result, certain factors need to be taken into account by administrators when exercising their discretion in terms of section 3(3) on whether to grant a hearing or not. Therefore, in terms of both the *Mpumalanga* case and section 3(3), *hearing* and its elements are flexible concepts dependent on the discretion of the administrator. Furthermore, the fact that section 3(3) is qualified by section 2(1)(a) causes flexibility dependent only on the discretion of the Minister.[61]

In conclusion, it can be said that any person whose rights, interests and legitimate expectations have been materially and adversely affected can apply section 3 of the Act. Section 3(2) of the Act refers to the rules of natural justice relating to the *audi* principle, but requires a clear statement of the *administrative action* to be taken and an opportunity to make representations. Further, an administrator has to give adequate notice of any right of review or internal appeal, where applicable, and the right to request reasons. In contrast, sections 3(4), 3(5) and 2(1)(a) and (b) allow for departures from the requirements in section 3(2).

Section 3(3) contemplates a hearing in certain circumstances and sets out its elements. The application of section 3(3) is subject to the discretion of the administrator and to notices published by the Minister in terms of section 2(1)(a). Accordingly, both sections 3(2) and 3(3) can be applied differently in different circumstances in adherence to the

---

60 See *Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools, Eastern Transvaal* 1999 (2) BCLR 151 (CC).

61 See fn 58 above.

Stellenbosch University http://scholar.sun.ac.za

Mpumalanga case, which requires flexibility for 'procedural fairness' in section 33(1) FC.

Section 3 articulates the way in which government views the *audi* principle as a component of the requirement of 'procedural fairness' in section 33(1) FC. Further, the Act seems to adhere to the way in which the courts, and the Constitutional Court in particular, view 'procedural fairness' in section 33(1) FC[62] and specifically the way in which they view the requirements and prerequisites for affording a *hearing*.[63] As no common law grounds for review relating to the *audi* principle have been omitted from the Act, or for that matter, the Act read with the Promotion of Access to Information Act, it is difficult to imagine a situation where a person who cannot find a remedy in the Act, would find a remedy in the common law. Review of administrative actions in terms of the *audi* principle, would therefore probably be governed by section 3 of the Act in future. However, as the statutory mechanism in section 6(2)(i) can be applied,[64] the courts can still develop the common law with regard to the *audi* principle.[65]

3.2 Section 4 of the Act

Section 4 of the Act introduces grounds for review of administrative action which materially and adversely affected the rights of the public. 'Procedural fairness' for administrative actions with general impact, like subordinate legislation (in comparison with 'procedural fairness' for administrative actions that affect individuals), is thereby incorporated into the South African administrative law.[66]

---

62 See especially *Du Preez v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) in this regard.

63 See *Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools, Eastern Transvaal* 1999 (2) BCLR 151 (CC).

64 De Lange Parliament 12 June 2000. Also see *Pharmaceutical Manufacturers Association In Re: ex parte The President of The Republic of South Africa* 2000 (3) BCLR 241 (CC) [33].

65 See *Van Huysteen NO v Minister of Environmental Affairs and Tourism* 1995 (9) BCLR 1191 (C) and ffn 20 and 22 Chap 2.

66 See fn 12 above. In the past, a significant volume of delegated legislation was promulgated without opportunity for public comment and participation. A number of procedures were

Stellenbosch University http://scholar.sun.ac.za

Section 4 is introduced by section 4(1), which 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…' (My emphasis.)

Like in section 3, three thresholds in section 4(1) qualify access to section 4, namely, 'administrative action', 'materially and adversely', and the concept of 'affected rights'. 'Administrative action' refers to the definition of 'administrative action' in section 1(i) of the Act,[67] while 'materially and adversely' points to a higher degree of effect for the application of section 4 than for the other sections in the Act.[68] As suggested earlier, 'rights' should be interpreted widely to include all persons with affected or threatened rights, interests and legitimate expectations.[69] 'Affected rights' in section 4(1) therefore contemplates the same class of persons.[70] Further, although section 4(1) omits the concept of 'legitimate expectations', as opposed to section 3(1), the absence of

---

suggested for the achievement of public participation in the drafting of delegated legislation. (See Govender (1999) 14 *SAPL* 62 73-75.) With reference to the federal Administrative Procedure Act 1946, Govender analysed four ways in which to achieve public participation. First, notice and comment rule-making was analysed. Second, formal rule-making, where oral hearings allow representations, evidence, and cross examination of witnesses by interested parties was analysed. Third, Govender analysed negotiated rule-making, where negotiations are conducted amongst all parties interested in the formulation of the rule. Fourth, hybrid rule-making, where public hearings are conducted whilst developing the rule was analysed. The procedure preferred by a number of authors was the notice and comment procedure (see Burns *Administrative Law Under the 1996 Constitution* (1998) 212, Govender (1999) 14 *SAPL* 62 75, Asimow (1996) 113 *SALJ* 613 621, and De Waal et al *The Bill of Rights Handbook* (2000) 470), whereby the public authority is required to publish its proposed legislation together with a reasoned explanation of its purpose. The notice invites public comment in written or oral form, whereupon the comments are analysed and the proposed legislation adopted. (Burns *Administrative Law Under the 1996 Constitution* (1998) 181 fn 212) The reason for the preference of the procedure is that it achieves efficiency and accountability with the input of minimum time and costs.

67 See 2.5.2 Chap 1.

68 See fn 10 and 45 above.

69 See fn 46 and 48 above.

70 Here, in the context of the public, in other words where the public as a class of persons has affected or threatened rights, interests or legitimate expectations.

Stellenbosch University http://scholar.sun.ac.za

'legitimate expectations' from the threshold in section 4(1) does not mean that the section cannot be afforded to those with legitimate expectations. Section 3 explicitly includes persons with 'legitimate expectations' to strengthen the importance of the concept for the application of the section.[71]

In cases where the decision of the administrator will materially and adversely affect the rights of the public, section 4(1)(a) to (e) lists different procedures that could be followed prior to taking a decision in order to comply with the requirement of 'procedural fairness' in section 33(1) FC. This listing of the different procedures that could be followed by administrators in section 4(1)(a) to (e), and the setting out of the two most important of these procedures in sections 4(2) and 4(3), reinforces the views of De Lange that the Act was intended to be used as a guideline by administrators.[72]

In terms of section 4(1)(a), the administrator could hold a public inquiry, the substance of which is set out in section 4(2). Accordingly, the administrator may conduct the inquiry or appoint a suitably qualified person or panel of persons to do so.[73] The administrator, the person or the panel of persons must determine the procedure of the public inquiry, which includes a public hearing,[74] and must comply with the rest of the prescribed procedures in connection with public inquiries.[75] The inquiry must therefore be

---

71 See fn 62 Chap 1.

72 De Lange suggests that that the drafters of the Act attempted to make it understandable and clear so that administrators could use it in their efforts to act lawfully, reasonably and procedurally fair. (De Lange Parliament 12 June 2000.)

73 See sec 4(2)(a) Act 3 of 2000.

74 See sec 4(2)(b)(i)(aa) Act 3 of 2000. This is one of the procedures proposed by Govender. (See Govender (1999) 14 *SAPL* 62 73-75 and fn 66 above.) Sec 4(2), which sets out the procedure to be followed in the case of a public inquiry, demands a public hearing in sec 4(2)(b)(i)(aa) although a departure from this requirement is possible in terms of sec 4(4)(a). The word *inquiry* was therefore used instead of *hearing* (as used by Govender), as a hearing is not always required.

75 Sec 4(2)(b)(i)(bb) Act 3 of 2000. (See also sec 10(b).) Sec 10 requires that regulations must be drafted within two years from the commencement of the Act (sec 10(6)). This is the reason why the Act has not entered into force yet. A wide variety of aspects are covered by sec 10 (see fn 39 Chap 2) but the notion does exist that the Act can enter into force without the regulations being drawn up first. (De Lange Parliament 12 June 2000) As administrative law remains static for as long as the Act is not in force, it is hoped that the Act will enter into force shortly even though

Stellenbosch University http://scholar.sun.ac.za

conducted in terms of the procedure,[76] which consists jointly of the prescribed and the administrator's procedure.

Further, a written report must be compiled on the inquiry and reasons must be given for the administrative action taken or recommended.[77] The public must be afforded the information on the inquiry by publishing it in the *Gazette* or the relevant provincial *Gazette*.[78] Finally, the administrator must communicate the information regarding the public hearing to the public concerned in a way that she considers effective.[79]

Section 4(1)(b) allows the administrator to follow a notice and comment procedure, the substance of which is set out in section 4(3). Section 4(3) requires the administrator to communicate the administrative action to those likely to be materially and adversely affected by it and to call for comments from them.[80] She must then consider the comments received before she decides whether or not to take the administrative action with or without changes.[81] Again the administrator must comply with prescribed procedures not yet drafted in terms of section 10(1)(c) (here, the procedures in terms of notice and comment procedures).[82]

In terms of section 4(1)(c) an administrator may decide to follow both procedures in sections 4(2) and 4(3). Further, the administrator can follow a procedure that is fair but different from those in sections 4(2) and 4(3) if she is empowered to do so by an

---

regulations haven't been drawn up yet. The Act contains enough detail, as seen in this thesis, to function without regulations for a while even though such regulations are needed to provide administrators with the necessary guidance (like the rest of the Act).

76 See sec 4(2)(b)(ii) Act 3 of 2000.

77 See sec 4(2)(b)(iii) Act 3 of 2000. The administrator is therefore compelled to give reasons even before the party involved requests them. This correlates with the qualification of sec 5 by sec 5(1) that reads: '...and who has not been given reasons for administrative action may...' Accordingly, sec 5 does not apply in situations where reasons had been furnished in terms of sec 4(2).

78 See sec 4(2)(b)(iv)(aa) Act 3 of 2000.

79 See sec 4(2)(b)(iv)(bb) Act 3 of 2000.

80 See sec 4(3)(a) Act 3 of 2000.

81 See sec 4(3)(b) and (c) Act 3 of 2000.

82 Sec 4(3)(d) Act 3 of 2000. See fn 75 above.

Stellenbosch University http://scholar.sun.ac.za

empowering provision, in terms of section 4(1)(d).[83] Finally, an administrator can follow another appropriate procedure that gives effect to section 3 of the Act, 'procedurally fair administrative action affecting any person' in terms of section 4(1)(e). In this instance, every affected member of the public has to be afforded 'procedural fairness' individually.

Where administrative action materially and adversely affects the rights of the public, section 4(1)(a) to (e) therefore affords administrators a choice of at least five procedures, each of which is also flexible.

Section 4(4)(a) authorises an administrator to depart from the requirements in sections 4(1)(a) to (e), 4(2) and 4(3) if the departure is reasonable and justifiable under the circumstances. Section 4(4)(b) is a replica of section 3(4)(b). Accordingly, all relevant specific factors named in section 4(4)(b)(i) to (v) must be taken into account when determining 'reasonable and justifiable in the circumstances'.[84] Further, the Minister may, by notice in the *Gazette*, exempt an administrative action or any class of administrative actions from the application of the provisions of section 4 if the exemption is reasonable and justifiable in the circumstances.[85] He may also permit an administrator to vary any of the requirements referred to in section 4(1)(a) to (e), (2) or (3) in order to promote an efficient administration if such permission is reasonable and justifiable in the circumstances.[86] In both instances, Parliament has to grant permission before publication in the *Gazette*.[87]

To conclude: in cases where the decision of the administrator will materially and adversely affect or threaten the rights, interest and legitimate expectations of the public, section 4(1)(a) to (e) lists different procedures that she could follow to adhere to the requirement of procedural fairness. The administrator could hold a public inquiry or follow a notice and comment procedure. Further, an administrator may decide to follow both these procedures or follow a procedure that is fair but different if she is empowered

---

[83] This refers to, amongst others, an empowering provision published in terms of sec 2(1)(a) and (b) of Act 3 of 2000.

[84] See fn 56 above.

[85] See sec 2(1)(a) Act 3 of 2000.

[86] See sec 2(1)(b) Act 3 of 2000.

[87] See sec 2(2) Act 3 of 2000.

Stellenbosch University http://scholar.sun.ac.za

to do so. An administrator can also follow other appropriate procedures that give effect to section 3 of the Act. An administrator may depart from the requirements in sections 4(1)(a) to (e), 4(2) and 4(3), but must take general and specific factors into account before undertaking such departures. Finally, the Minister may exempt an administrative action or any class of administrative actions from the application of the provisions of section 4 or permit an administrator to vary any of the requirements referred to in section 4(1)(a) to (e), (2) or (3). Section 4, in adherence to the *Mpumalanga* case,[88] therefore affords flexibility to administrators in their quest to be 'procedurally fair' in terms of section 33 (1) FC, where the public is involved.

As there are no common law grounds for review relating to the *audi* principle where the rights, interests or legitimate expectations of the public is concerned, those who cannot find a remedy in the Act cannot resort to the common law either. However, the courts remain empowered to develop the common law in this regard through the application of section 6(2)(i).[89]

3.3 Section 5 of the Act

Section 5 of the Act contains grounds for review relating to the part of the guarantee for 'procedural fairness' that requires 'reasons for administrative action' in section 33(2) FC. A threshold qualifies the guarantee of 'reasons for administrative action' in section 33(2), as everyone with *adversely* affected rights is afforded the guarantee. The threshold in section 5(1) requires:

> '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

88 *Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools, Eastern Transvaal* 1999 (2) BCLR 151 (CC).

89 See *Van Huysteen NO v Minister of Environmental Affairs and Tourism* 1995 (9) BCLR 1191 (C), De Lange Parliament 12 June 2000, *Pharmaceutical Manufacturers Association In Re: ex parte The President of The Republic of South Africa* 2000 (3) BCLR 241 (CC) [33] and ffn 20 and 22 Chap 2.

Stellenbosch University http://scholar.sun.ac.za

> aware of the action, request that the administrator concerned furnish written reasons for the action.' (My emphasis)

As a higher degree of effect is required before section 5 of the Act can be resorted to, the Act went even further in qualifying the right in section 33(2) FC. Accordingly, rights have to be *materially* and *adversely* affected before section 5 becomes applicable.[90]

As it explicitly states that only those who had not been given reasons for the administrative action in question may request reasons in accordance with section 5, section 5(1) can be used only once to request reasons for administrative action. For the same reason, section 5 does not apply in situations where reasons have been furnished in terms of section 4(2) of the Act.[91]

A procedure in section 5(2) qualifies the automatic furnishing, in writing, of adequate reasons for administrative actions. In terms of section 5(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.'[92]

It is suggested that, like *adequate* notice, *adequate* reasons are 'reasonable and timeous' reasons and, further, that what is 'reasonable and timeous' depends on the circumstances of each case.[93] Accordingly, a time period of shorter than 90 days might be *adequate* in certain circumstances. This is strengthened by '*within* 90 days' in section 5(2). Further, in section 9 of the Act, 'variation of time' affords parties the opportunity to extend or reduce the period of 90 days in terms of an agreement. Failing such an agreement, a court or tribunal may extend or reduce the period of 90 days on application by the person

---

90 See fn 10 and 45 above for the meanings of *materially* and *adversely*.

91 See fn 77 above.

92 The party has to request reasons within 90 days from the date on which he became aware of the action or was reasonably expected to become aware of it. See sec 5(1) Act 3 of 2000. See also fn 23 Chap 5 with regard to the constitutionality of this section.

93 See fn 52 above and *Du Preez v Truth and Reconciliation Commission* 1997 (3) SA 204 (A). In terms of a common law rule of statutory interpretation, the same words in the same statute bears the same meaning throughout the statute.

Stellenbosch University http://scholar.sun.ac.za

or administrator concerned.[94] Section 5(2) therefore affords administrators flexibility with regard to the period within which reasons requested can be furnished.

Further, in terms of section 2(1)(a), the Minister may, by notice in the *Gazette,* exempt an administrative action or a class of administrative actions from the application of the provisions in section 5 (therefore also section 5(2)), if this is reasonable and justifiable in the circumstances. He may also, in order to promote an efficient administration, permit an administrator to vary any of the requirements in section 5(2) in terms of section 2(1)(b), if this is reasonable and justifiable in the circumstances.[95]

Section 5(3) raises a presumption in cases where an administrator fails to furnish adequate reasons for an administrative action. The presumption reads:

> 'If an administrator fails to furnish reasons for an administrative action, it must, subject to section (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 reasons.'

This encourages administrators to give reasons for administrative actions.

However, section 5(3) is qualified by both section 2(1)(a)[96] and section 5(4)(a). The latter reads:

> '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 a departure.'

The same type of construction used in sections 3 and 4, although slightly more stringent, is therefore used in section 5 to assist administrators in determining what is reasonable and justifiable.[97] Accordingly, an administrator must take all relevant factors into

---

94 Note that the court or tribunal may grant the application in terms of sec 9(1) if the interests of justice so requires. (See sec 9(2) of the Act.) See *Mohlomi v Minister of Defence* 1996 (12) BCLR 1559 (CC).

95 'Any exemption or permission granted in terms of subsection (1) must, before publication in the *Gazette*, be approved by Parliament.' (See sec 2(2) Act 3 of 2000.)

96 See fn 58 above.

97 See fn 56 above.

Stellenbosch University http://scholar.sun.ac.za

account as well as certain specified factors laid down by section 5(4)(b)(i) to (vi).[98] Section 5(5) allows an administrator to act in accordance with a procedure which is fair but different from the provisions in section 5(2), provided that she is authorised to do so by an empowering provision.[99] Further, section 5(6) allows the Minister to compel administrators, by notice in the government *Gazette*, to automatically furnish reasons for a certain group or class of administrative actions without persons having to request reasons in terms of section 5. This procedure adheres fully to section 33(2) FC and will presumably be used where key administrative decisions are taken.

It could be argued that section 5(4)(a) of the Act is unconstitutional in terms of section 33(2) FC. The section empowers administrators to depart from the requirement to afford reasons for administrative action, while the right to 'reasons for administrative action' is specifically included in the Constitution.[100] However, it is difficult to conceive a situation where a departure from the obligation to furnish reasons in terms of the factors in section 5(4)(b)(i) to (vi), would not pass the test implicit in the provisions of the limitations clause (section 36 FC) or the provisions of section 33(3) FC.[101] Although it

---

98 "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 effects of the administrative action concerned;
(iii) the nature and extend 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."

99 Administrators can therefore furnish oral reasons if empowered to do so. The reason for this is the fact that many South African citizens, especially those from disadvantaged communities, are illiterate. By implication, reasons therefore have to be conveyed to the illiterate *via* some other way of communication in order to afford them the same measure of protection. (Breitenbach at the UCT New Legislation Seminars 6 April 2000.) It is therefore doubtful whether a constitutional challenge on sec 5 for not affording written reasons (as required by section 33(2) FC) in all circumstances, would succeed. Finally, 'empowering provision' refers to, amongst others, notices published in terms of sec 2(1) of Act 3 of 2000.

100 See fn 4 Chap 2.

101 See fn 20 Chap 1.

Stellenbosch University http://scholar.sun.ac.za

seems as if there is no reason for those who cannot find a remedy in the Act to turn to the common law, the courts can still develop the common law[102] with regard to 'reasons for administrative actions' through the application of section 6(2)(i) of the Act.[103]

In conclusion therefore, section 5 of the Act contains grounds for review relating to the part of the guarantee for 'procedural fairness' that requires 'reasons for administrative action' in section 33(2) FC. However, a procedure in section 5(2) qualifies the automatic furnishing of adequate reasons in writing for administrative actions. As section 5(3) raises a presumption in cases where an administrator failed to furnish adequate reasons, it therefore encourages administrators to furnish reasons. Further, section 5(4), 5(5) and 5(6), and 2(1)(a) and (b) afford administrators flexibility in furnishing reasons for administrative action and therefore encourages procedural fairness, as required by the *Mpumalanga* case.[104]

3.4 Section 6(2)(a)(iii)

Section 6(2)(a)(iii) reads:

> 'A court or tribunal has the power to judicially review administrative action if the administrator who took it was biased or reasonably suspected of bias.'

This refers to the *nemo iudex in propria causa* principle.[105] The statutory ground in section 6(2)(a)(iii) fully adheres to the common law ground that afforded review for actual or apparent bias,[106] as the statutory ground equally affords review for administrative actions taken by an administrator who was biased or reasonably suspected

---

102 'Reasons for administrative action' has been part of the common law since the inception of the interim Constitution (and section 24(c)) on 27 April 1994.

103 See *Van Huysteen NO v Minister of Environmental Affairs and Tourism* 1995 (9) BCLR 1191 (C), De Lange Parliament 12 June 2000, *Pharmaceutical Manufacturers Association In Re: ex parte The President of The Republic of South Africa* 2000 (3) BCLR 241 (CC) [33] and ffn 20 and 22 Chap 2.

104 *Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools, Eastern Transvaal* 1999 (2) BCLR 151 (CC).

105 See fn 16 above.

106 See Baxter *Administrative Law* (1984) 557-568.

Stellenbosch University http://scholar.sun.ac.za

of bias.[107] Therefore even if bias is not proved, invalidation can result if bias is reasonably suspected.

In contrast with all the other statutory grounds for review relating to the requirement of 'procedural fairness' in section 33(1), the statutory ground in section 6(2)(a)(iii) is not qualified by requiring an *adverse* and *material* effect for its application.[108] The ground is accordingly afforded to *any person* whose rights had been *adversely* affected by administrative action, subject to section 38 FC.[109] This illustrates the importance attached to the function of this statutory ground for review.[110]

3.5 Conclusion

No grounds for review relating to the requirement of 'procedural fairness' in section 33(1) FC have been omitted from the Act. It needs to be mentioned again that the Act articulates the way in which government views the right to 'just administrative action' in section 33 FC. Once those sections in the Act pass constitutional muster, 'procedural fairness' will probably be applied in accordance with the Act. As the Act regulates procedural fairness thoroughly, situations in which a person would want to or could resort to the common law would seldom arise. However, the courts remain empowered through the application of section 6(2)(i) of the Act to develop the common law with regard to the requirement of 'procedural fairness' in section 33(1) FC.[111]

---

107 See *Sculte v Van den Berg and Others NNO* 1991 (3) SA 717 (C).

108 Sec 6(2)(a)(iii) is afforded to those whose 'rights' had been adversely affected. (See fn 48 above and fn 62 Chap 1.) 'Rights' include 'interests' and 'legitimate expectations'. (See fn 46 above.)

109 See ffn 5 and 7 Chap 5.

110 Allegations of corruption and nepotism in the ANC government are often made. A qualified ground for review of administrative actions taken by administrators that was biased or reasonably suspected of bias would have conveyed a very negative message.

111 See *Van Huysteen NO v Minister of Environmental Affairs and Tourism* 1995 (9) BCLR 1191 (C), De Lange Parliament 12 June 2000, *Pharmaceutical Manufacturers Association In Re: ex parte The President of The Republic of South Africa* 2000 (3) BCLR 241 (CC) [33] and ffn 20 and 22 Chap 2.

Stellenbosch University http://scholar.sun.ac.za

CHAPTER 5

PROCEDURES AND REMEDIES

1. INTRODUCTION

Judicial review of administrative action in terms of statutory and common law grounds for review that continues to be relevant, must be conducted with reference to certain procedures, and applicants can be granted certain remedies in these proceedings. The Promotion of Administrative Justice Act ('the Act')[1] attempts to codify administrative law in general, and therefore also remedies and procedures for judicial review of administrative action. Section 8 provides for the parallel existence of the Act and the common law with regard to remedies in proceedings for the judicial review of administrative action.[2] However, no such provision is made with regard to procedures to be followed in the judicial review of administrative action in section 7.[3] This Chapter discusses section 7 of the Act, 'procedure for judicial review', with reference to the common law it attempts to codify, and section 8, 'remedies in proceedings for judicial review' of the Act, with reference to its parallel existence with the common law.

2. SECTION 7: 'PROCEDURE FOR JUDICIAL REVIEW'

2.1 Section 7(1)

Section 7(1) reads:

---

1 Act 3 of 2000.

2 Provision is made in Act 3 of 2000 for the parallel application of the Act and the common law with regard to grounds for review (compare section 8(1) and sec 6(2)(i) Act 3 of 2000). No such provision is made with regard to procedures for judicial review, although provision is made for the utilisation of existing procedures until new statutory procedures are drawn up in terms of the Act. (See ffn 11 and 12 below and De Lange Parliament 12 June 2000. Also see *Pharmaceutical Manufacturers Association In Re: ex parte The President of The Republic of South Africa* 2000 (3) BCLR 241 (CC) [33].)

3 Compare section 7(1), 8(1) and 6(2)(i) of Act 3 of 2000.

Stellenbosch University http://scholar.sun.ac.za

> '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-' (My emphasis.)

Section 7 ('procedures for judicial review') accordingly applies to judicial review in terms of section 6(1), which reads:

> '*Any person*[4] may institute proceedings in a court or tribunal for the judicial review of administrative action.' (My emphasis.)

In this section, *any person* is subject to section 38 FC, the *locus standi* clause of the Bill of Rights.[5] This is so, as the Act and therefore also section 6 'gives effect to'[6] section 33 FC, the right to 'just administrative action' in the Bill of Rights, which is subject to section 38 FC. '*Any person*' in section 6(1) is therefore equally subject to section 38 FC, which reads as follows:

> "Enforcement of rights"
>
> '...The persons who may approach the court[7] are-
>
> (a) anyone acting in their own interest;
>
> (b) anyone acting on behalf of another person who cannot act in their own name;

---

4 In the common law, a person had to establish that he had a sufficient legally protected interest (a personal or direct interest) in the administrative matter in order to acquire the necessary *locus standi* for the judicial review of the administrative action. (See *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 294 (A).) This was so as the *actio popularis* of Roman law did not form part of the South African administrative law. In terms of the *actio popularis*, every member of the public had an interest in the proper performance of administrative functions. Any person could therefore freely challenge the validity of administrative actions even if the person did not have a personal interest in the matter.

5 The common law, with regard to *locus standi* in administrative review matters, was duly changed when the interim Constitution was promulgated. Sec 38 FC, like its predecessor in the interim Constitution, extends the *locus standi* of persons in matters involving the Bill of Rights. Further, as persons referred to in sec 38 are afforded legal standing as a constitutional right; any limitation to the right must therefore be in accordance with sec 36 FC ('the limitations clause').

6 See the introduction of Act 3 of 2000.

7 In terms of sec 38(d) FC, anyone acting in the public interest has *locus standi* to approach the *court*. However, sec 34 FC affords everyone 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 an independent and impartial *tribunal* or forum. Sec 6(1) of the Act is therefore equally subject to sec 38 FC when a tribunal, in terms of sec 7, performs judicial review of administrative action.

Stellenbosch University http://scholar.sun.ac.za

(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; and

(e) an association acting in the interest of its members.'

'Judicial review of administrative action' in section 6(1) refers to the judicial review of administrative action through the statutory grounds for review afforded by section 6. Section 6(2)(c) reads:

> 'A court or tribunal has the power to judicially review an administrative action if the action was procedurally unfair.'

As section 6(2)(c)[8] represents the statutory grounds in sections 3, 4 and 5, which contain all the statutory grounds for review relating to the requirement of 'procedural fairness' in section 33(1) FC, those grounds are also included in 'judicial review in terms of *section 6(1)*' in section 7(1). The same is true for the common law grounds for review that have been omitted from the Act, which continue to be relevant to the judicial review of administrative action,[9] and which are employed through the application of section 6(2)(i). All the statutory grounds for review, in other words all the statutory grounds relating to the requirements of 'lawfulness', 'reasonableness', and 'procedural fairness' in section 33(1) FC as well as the common law grounds for review that continue to be relevant, are therefore either represented or present in section 6. Section 7(1) therefore refers to judicial review in terms of all the statutory grounds for review in the Act, therefore those in sections 3, 4, 5 and 6, and the common law grounds that continue to be relevant and that are employed through the application of section 6(2)(i).[10]

Proceedings for judicial review must be instituted before a court or tribunal. In section 1(iv) of the Act, 'court' is defined as:

> '(a) the Constitutional Court acting in terms of section 167(6)(a) of the Constitution;[11] or

---

8 Sec 6(2)(c) of Act 3 of 2000.
"A court or tribunal has the power to judicially review an administrative action if the action was procedurally unfair."

9 See 2.4.2 Chap 1.

10 De Lange Parliament 12 June 2000. Also see *Pharmaceutical Manufacturers Association In Re: ex parte The President of The Republic of South Africa* 2000 (3) BCLR 241 (CC) [33].

11 "Constitutional Court

Stellenbosch University http://scholar.sun.ac.za

(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...'

In terms of the common law, the Supreme Court has an inherent jurisdiction to hear all matters, including the review of administrative action, except for those matters removed from its jurisdiction by statute. In the common law, Supreme Court Rule 53 governs review of administrative actions by the Supreme Court.[12] Since lower courts, therefore also magistrate's courts, are creatures of statute, they have no jurisdiction other than that conferred on them by statute. In the common law, a magistrate's court could only scrutinise the validity of an administrative action if it had a bearing on a specific judgment, unless the court was prevented from doing so by statute. As the Act includes magistrate's courts in the definition of 'court', magistrate's courts now also have the jurisdiction to judicially review administrative actions together with the Constitutional Court, a High court or a court of similar status.

Section 33(3)(a) FC states that the envisaged legislation must provide for review of administrative action, where appropriate, by an independent and impartial tribunal. Apart from courts, no other forum currently exists that has jurisdiction to review administrative action in general.[13] However, the Act provides for the possibility of establishing tribunals for the review of administrative action by mentioning 'tribunal' together with 'court' throughout the Act. Further, section 10, ('regulations'), grants the Minister the power to:

---

(6) National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court-

(a) to bring a matter directly to the Constitutional Court..."

12 The rule governs applications for review of decisions of inferior courts, tribunals, boards and officers performing judicial, quasi-judicial or administrative functions.

13 South Africa has no separate system of administrative courts. Further, there is no general legislation that governs jurisdiction of tribunals to judicially review administrative action in general. Sometimes, tribunals are simply court substitutes; specialised versions of the ordinary courts, for example, the special income tax courts. However, some of these have superior court status while others are subject to supervision by the Supreme Courts. (See Baxter *Administrative Law* (1984) 180 and 244.)

Stellenbosch University http://scholar.sun.ac.za

> '...make regulations relating to the appropriateness of establishing independent and impartial tribunals, in addition to 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'.[14]

In terms of section 7(1)(a), proceedings for judicial review must be instituted without unreasonable delay. What is unreasonable will depend on the circumstances of each case.[15] However, proceedings have to be instituted within 180 days after the date on which any proceedings instituted in terms of internal remedies as contemplated by section 7(2)(a) have been concluded.[16] Where no such remedies are available, proceedings for judicial review have to be instituted within 180 days after the date on which the person affected was informed of the administrative action, or became aware of the administrative action and reasons for it, or are expected to have become aware of the action and the reasons.[17]

Burns submits, with reference to the regulation or exclusion of state liability in the previous dispensation, that legislation that prescribes conditions for state liability will face a challenge on the basis of its possible unconstitutionality.[18] If so, the state must prove that the limitation on state responsibility is reasonable and justifiable in terms of the limitation clause (section 36 FC).

In *Mohlomi v Minister of Defence*,[19] the Constitutional Court found that section 113(1) of the Defence Act[20] was inconsistent with the interim Constitution's right of access to court. The section permitted actions against the Minister of Defence to be instituted within six moths after the cause of action arose and, if notice of the action had been given to the Minister, one month before the commencement of the action. The Court further found that the infringement of the right was not justifiable in terms of the limitation

---

[14] Sec 10(2)(a)(iii) Act 3 of 2000.

[15] See ffn 52 and 93 Chap 4.

[16] Sec 7(1)(a) Act 3 of 2000.

[17] Section 7(1)(b) Act 3 of 2000. See also sec 5(2) of the Act for a condition relating to the period in which reasons have to be requested for administrative action.

[18] Burns *Administrative Law Under the 1996 Constitution* (1998) 257.

[19] 1996 (12) BCLR 1559 (CC).

[20] Act 44 of 1957.

Stellenbosch University http://scholar.sun.ac.za

clause after comparing the provisions of the Defence Act with similar limitations in the Prescription Act[21] and the Police Service Act.[22] There, the court was allowed to condone non-compliance with time provisions similar to the one under discussion in the Defence Act. According to the Court, the provisions in those Acts were less stringent and less detrimental to the interests of claimants. Less stringent procedure could accordingly be used with regard to the Defence Act.

Accordingly, if section 7(1) of the Act causes a regulation or exclusion of state liability which is stringent and detrimental to the interests of the claimant, without providing an opportunity for the courts to condone non-compliance with the requirements in section 7(1), the section could infringe on the right to just administrative action in section 33 and therefore face a challenge on the basis of its possible unconstitutionality.[23] Section 9(1)(b) of the Promotion of Administrative Justice Act does allow parties to extend the 180 day period in section 7(1) by agreement, or the court to extend the period on application by the person or the administrator concerned failing such an agreement, provided the application was in the interest of justice (section 9(2)).[24]

It therefore seems as if the drafters of the Act kept the judgment of the Constitutional Court in the *Mohlomi* case in mind when drafting section 7(1) in terms of section 9, as it gives the courts a wide discretion with regard to condoning non-compliance with the time period.[25] Accordingly, it seems as if a constitutional challenge on section 7(1) for prescribing conditions for state liability and thereby infringing on the right to 'just administrative action' in section 33 FC, would not succeed.

---

21 Act 68 of 1969.

22 Act 68 of 1995.

23 For example, if an administrative action causes a situation that hampers the instituting of proceedings within 180 days, like sending a representative oversees for 3 months to attend a management course without the authority to do so. The representative returns after 182 days and finds himself dismissed from his previous position for not being allowed to be absent without leave for more than two days without permission by a person so authorised.

24 The same construction is used for a time period with regard to 'reasons for administrative action' in sec 5 of the Act. See page 92-93 and fn 94 Chap 4.

Stellenbosch University http://scholar.sun.ac.za

To summarise: section 7(1) refers to judicial review in terms of all the statutory grounds for review in the Act and the common law grounds that continue to be relevant and that are employed through the application of section 6(2)(i). Further, although magistrate's courts does not have the jurisdiction to judicially review administrative actions in the common law, they will have such jurisdiction together with the Constitutional Court, a High court or a court of similar status once rules drafted in terms of the Act enters into force. Further, the Act provides for the possibility of establishing tribunals for the review of administrative action, although there are no tribunals with general jurisdiction to review administrative action in the common law. Finally, as the drafters of the Act kept the *Mohlomi* case in mind when drafting section 7(1) in terms of section 9, it seems as if a constitutional challenge on section 7(1) would not succeed.

2.2 Section 7(2)

In terms of section 7(2)(a), no court or tribunal shall review an administrative action in terms of the Act unless any internal remedy provided for in any other law has been exhausted.[26] Further, in terms of section 7(2)(b), the court or tribunal must be satisfied that the internal remedy has been exhausted. If this has not happened, the court or tribunal must direct the person concerned to exhaust the internal remedy before instituting proceedings for judicial review in terms of the Act. However, in terms of section 7(2)(c), a court or tribunal may exempt a person from the obligation to exhaust

---

25 SA Law Commission Discussion Paper 81 Project 115: *Administrative Law* January 1999 Chapter 5 10.

26 This requirement originates from the common law rule that suspended the right to judicial review until internal remedies created by legislation had been exhausted. However, the rule was not automatic. The intention of the legislature that recourse to the courts had been excluded until internal remedies had been exhausted had to be clear. If the intention of the legislature was not clear, two main factors were taken into account by the court before review was afforded. The first factor was whether the internal remedy was capable of providing effective redress in respect of the application, and the second, whether the alleged unlawfulness undermined the internal remedy. (See Baxter *Administrative Law* (1984) 720-723.)

Stellenbosch University http://scholar.sun.ac.za

internal remedies in exceptional circumstances and if the court or tribunal deems it in the interest of justice.

Burns suggests that generally speaking, internal remedies should be exhausted before courts are approached. This prevents the flooding of courts with judicial review for administrative action by providing a sifting process. However, she submits that a person should be able to rely directly on section 34 FC ('access to courts') without first exhausting internal remedies where the affected party has evidence of bad faith or an ulterior purpose by the administrator.[27]

Like in the common law, internal remedies should therefore be exhausted before courts are approached.

2.3 Section 7(3), 7(4) and 7(5)

Section 7(3) compels the Rules Board for Courts of Law to make and implement rules of procedure for judicial review within one year of the 'commencement' of the Act. 'Commencement' can mean either 'entering into force' or 'passage'. 'Commencement' was used instead of 'entering into force' or 'passage' to afford section 7(3) a flexible meaning, as it was not necessary to compel the Rules Board for Courts of Law to draft and implement rules for procedure for judicial review within a specified period while nobody knew (nobody knows) when the Act will enter into force.[28]

While the rules of procedure are drafted and before they are implemented, proceedings for judicial review can be instituted in the High Court[29] or the Constitutional Court,[30] as

[27] Burns *Administrative Law Under the 1996 Constitution* (1998) 220-222.

[28] However, because of the flexible meaning, the Rules Board for Courts of Law can be compelled to draft and implement rules within two different periods. First, within one year of the passage of the Act (this could allow the drafting and implementation of rules of procedure for magistrate's courts before the Act enters into force), second, within one year from the date the Act enters into force (which is possible because of section 7(4), see fn 11 and 12 above).

[29] This can be done in terms of Supreme Court Rule 53. (See fn 12 above.)

[30] See Sec 1(iv)(a) of the Act. The Constitutional Court acts in terms of sec 167(6)(a) FC, which allows direct access to the Constitutional Court when it is in the interest of justice.

Stellenbosch University http://scholar.sun.ac.za

rules for procedure governing administrative law matters are already available in these two courts. Further, section 7(4) explicitly affords the institution of proceedings for judicial review in these two courts while rules for procedure are being drafted and before they are implemented. Finally, any rule made has to be approved by Parliament before publication it the *Gazette* in terms of section 7(5).

No provision is made for the parallel application of the common law and the Act once rules drafted by the Rules Board for Courts of Law, with regard to procedures for judicial review in terms of section 7, enters into force. The Act contains most of the grounds for review and those not present in section 6 are represented by sections 6(2)(c) and 6(2)(i) respectively.[31] Both review proceedings conducted in terms of the Act and of the common law, in other words, judicial review by means of the application of both statutory and common law grounds for review that continue to be relevant,[32] will therefore be performed in terms of procedures contained in the Act.

3. SECTION 8: REMEDIES IN PROCEEDINGS FOR JUDICIAL REVIEW

3.1 Section 8(1)

Section 8(1) specifies that:

> 'The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable...'

Accordingly, this section provides for the parallel application of the Act and the common law with regard to remedies in proceedings for judicial review. Any order can therefore be granted for judicial review in terms of all the grounds for review represented or present in section 6 of the Act,[33] to *any person* subsequent to section 38 FC.[34]

---

31 De Lange Parliament 12 June 2000. Also see *Pharmaceutical Manufacturers Association In Re: ex parte The President of The Republic of South Africa* 2000 (3) BCLR 241 (CC) [33].

32 See 2.4.2 Chap 1.

33 Sec 6(2)(c) and 6(2)(i) of Act 3 of 2000 and De Lange Parliament 12 June 2000. Also see *Pharmaceutical Manufacturers Association In Re: ex parte The President of The Republic of South Africa* 2000 (3) BCLR 241 (CC) [33].

34 See the introduction of Act 3 of 2000 and fn 5 above.

Stellenbosch University http://scholar.sun.ac.za

Section 8(1)(a) to 8(1)(f) specifies certain orders.[35] The first order so specified, is the order directing administrators to give reasons[36] and to act in a manner the court or tribunal requires.[37] This order comes close to the *mandamus* of the common law.[38] However, it is broader than the common law remedy. First, it can be used to compel an administrator to perform administrative actions in terms of duties other than statutory duties (for example, in the manner the court or tribunal requires). Further, it provides 'reasons for administrative action', which has been a ground for review in the common law only since the inception of the interim Constitution. A court or tribunal can further grant an order prohibiting an administrator from acting in a certain way in terms of section 8(1)(b). Administrative law has always afforded this remedy for aggrieved parties.[39]

In terms of section 8(1)(c), courts or tribunals can set aside an administrative action, and remit the matter for reconsideration, with or without directions. 'Directions' means *guidelines* in this context, as section 8(1)(a)(ii) deals with orders that include

---

35 De Lange (Parliament 12 June 2000) noted that one of the ideas behind the Act was to encourage administrators to act by informing them of the procedures to be followed and the consequences if they are not followed. Specifying two of the orders that could be given in the judicial review of administrative action does this.

36 This read together with the presumption in sec 5(3), that if an administrator fails to furnish adequate reasons for administrative action, it must be presumed in the absence of proof to the contrary that the administrator acted without good reason, is a stringent order. (Note however, that the presumption is subject to sec 5(4) that allows the administrator to depart from the requirement to furnish reasons if it is reasonable and justifiable in the circumstances.)

37 The court or tribunal does not substitute the *decision* of the administrator with his or her own, but orders him to *perform* the action again and in a certain way.

38 A *mandamus* is an order in the common law that requires an administrator to comply with a statutory duty or to act in the remedying of a state of affairs brought about by his own unlawful action. It cannot be used to compel an administrative organ to perform an administrative action or remedy a state of affairs in terms of any other duty than a statutory duty. It is therefore limited in its application.

39 In the common law, a peremptory interdict can be granted to prohibit an administrator from performing an administrative action. (See *Vereniging van Advokate v Moskeeplein (Edms) Bpk* 1982 (3) SA 159 (T).)

Stellenbosch University http://scholar.sun.ac.za

requirements on how an administrator should act. In exceptional cases, the court or tribunal can in addition to setting the action aside, substitute or vary the administrative action, or correct a defect resulting from the administrative action.[40]

In exceptional cases, a court or tribunal can set an administrative action aside and direct the administrator or any other party to the proceedings to pay compensation in terms of section 8(1)(c)(ii)(aa).[41] There is a strong presumption that the legislature does not intend to infringe rights (like expropriating property) without making provision for compensation.[42] Compensation can therefore be ordered by the court or tribunal in terms of section 8(1)(c)(ii)(aa) in cases where administrators do not have a statutory duty to pay compensation when infringing rights.

Administrators are, in terms of the common law, contractually liable for damages when they breach their contractual obligations, and delictually liable for damages caused during performance of their statutory duties. Delictual liability is confined to cases where the actor is at fault and did not have a substantial degree of discretion, as the presence of discretion limits the justiciability of a delict. However, administrators could escape liability for damages if their actions were justified by statute.[43] As administrative law

---

40 Sec 8(1)(c)(i) Act 3 of 2000. The situation is the same in the common law, where the Supreme Court in certain circumstances can correct administrative action. Examples of exceptional circumstances warranting substitution, varying or correcting of a defect caused, include the following: cases involving administrative action influenced by *mala fides*, where the end result is a foregone conclusion and reconsideration would merely be a waste of time; cases where the delay can cause prejudice to the applicant (see *Local Road Transport Board v Durban City Council* 1965 (1) SA 586 (A) 598-599); and cases where the court is in as good a position as the administrator to make the decision.

41 In the common law, there is a difference between an order for damages in respect of unlawful acts and an order for payment of compensation as a precondition for acting lawfully. However, both serve the purpose of indemnification. (See Baxter *Administrative Law* (1984) 636 fn 253.) For example, where a statute explicitly requires that compensation have to be paid in cases of expropriation or town planning, administrators have to pay compensation as a precondition for acting lawfully.

42 See Baxter *Administrative Law* (1984) 636 fn 254.

43 Unfortunately, courts distinguish between prescription and statutory expiry terms with regard to delictual actions for damages against the state. The courts accordingly rule that the cause of action

Stellenbosch University http://scholar.sun.ac.za

falls outside the law of delict, administrators do not have a delictual duty of care not to act *ultra vires*.[44] An action for damages can therefore not be instituted against *ultra vires* actions of administrators.

Like in the common law, a court or tribunal can declare the rights of the parties in respect of any matter to which the administrative action relates in terms of section 8(1)(d). A party can therefore apply for a declaration of rights where a clear legal dispute or legal uncertainty regarding an administrative action exists. Although the remedy has no direct effect of its own, it is remarkably effective as it determines how a legal issue will be resolved. However, the court or tribunal will not concern itself with academic disputes in such a declaration of rights.[45]

The court or tribunal may grant a temporary interdict or other temporary relief in terms of section 8(1)(e). An interim or temporary interdict can serve to prevent harm that might be caused if the action is performed before the final order in a dispute between parties. Finally, the court or tribunal can make orders as to cost in terms of section 8(1)(f).

Section 8(1) therefore mainly codifies the remedies afforded in proceedings of the judicial review of administrative action as applied in the common law. No common law remedies have been omitted from the Act and the only development with regard to remedies provided in the common law is found in section 8(1)(a), which affords the equivalent of the common law *mandamus*. As it can be used to compel an administrator to perform administrative actions in terms of duties other than statutory duties, it is broader than the common law remedy.[46] Section 8(1) therefore provides for the parallel

---

expires when the statutory term for instituting the action lapses, and that the exceptions of the Prescription Act do not apply. Wiechers *Administratiefreg* (1984) 370 argues that the approach is wrong. It should be that the expiry of the term only influences the justiciability of the action, and not that it erases the cause of action.

44 Breitenbach at the UCT New Legislation Seminars 6 April 2000.

45 See *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC) and *Reinecke v Incorporated General Insurance Ltd* 1974 (2) SA 84 (A).

46 See fn 38 above.

Stellenbosch University http://scholar.sun.ac.za

existence of the Act and the common law with regard to remedies for judicial review,[47] although the common law and the Act will in future become one system of law.[48]

3.2 Section 8(2)

Section 8(2) governs orders of review in terms of the statutory ground in section 6(2)(g), the ground relating to an action consisting of a failure to take a decision. As the remedies afforded by section 8(2) relate to a ground for review, which is introduced for the first time in South African administrative law by the Act,[49] the remedies provided for review in terms of this ground are also introduced for the first time. Accordingly, a court or tribunal may grant any order that is just and equitable, including the specified orders in section 8(2)(a) to (d).[50] In terms of section 8(2)(a), a court may grant an order directing the administrator to perform the administrative action. Section 8(2)(a) is therefore not a duplication of the common law remedy in section 8(1)(a), that affords an order directing administrators to give reasons and to act in the manner the court or tribunal requires, as the order directs an unwilling administrator to perform the administrative action and not to act as required.

In terms of section 8(2)(b), a court or tribunal may declare the rights of the parties in relation to the taking of the decision. Although an administrator is not directed to act by this order, it is effective as it determines how a legal issue, resulting from the subsequent failure to act, will be resolved.[51]

---

47 '...*any order* that is just and equitable...'

48 De Lange Parliament 12 June 2000, with reference to grounds for review, but it could by implied that he referred to the Act and the common law in general.

49 See 3.1.3 Chap 2.

50 This refers to the parallel existence of the Act with the common law. Compare sec 8(1) and 6(2)(c) Act 3 of 2000, see fn 48 above.

51 This remedy correlates with the common law remedy of a declaration of rights that was used with regard to the *performance* of an administrative action, as opposed to a *failure to act*. Further, the court or tribunal will not concern itself with academic disputes in such a declaration of rights. (See *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC) and *Reinecke v Incorporated General Insurance Ltd* 1974 (2) SA 84 (A).)

Stellenbosch University http://scholar.sun.ac.za

Section 8(2)(c) reads as follows:

> 'A court or tribunal may direct any of the parties to do, or refrain from doing, any act or thing the doing, or refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties…'

In other words, a court or tribunal may grant a directory or peremptory interdict where the action under review consists of a failure to take a decision.[52] The court or tribunal can accordingly direct any of the parties to act, or to refrain from acting in terms of a directory interdict. (Bear in mind that the act consists of a failure to act.) Further, the court or tribunal can prohibit any of the parties to act or to refrain from acting, in terms of a peremptory interdict. (Bear in mind that the act consists of a failure to act.)

Finally, a court or tribunal may grant an order as to costs where the action under review consists of a failure to act in terms of section 8(2)(e).

Therefore, in the case of remedies afforded in proceedings for the judicial review of administrative action in terms of the statutory ground in section 6(2)(g), no codification of existing common law remedies took place, as no such ground for review existed in the common law. As the Act, and therefore the grounds for review introduced by it for the first time, has not entered into force yet, review for a failure to act and remedies provided in terms of review of a failure to act are not currently available in South African administrative law. Further, remedies provided in section 8(2) for a failure to act, will be governed only by section 8(2) once the Act enters into force, as there are no common law remedies in this regard. However, the court can develop the common law in this regard in terms of section 8(2) that allows for granting of *any* order that is just and equitable.

3.3 Conclusion

Section 8(1) therefore provides for the parallel existence of the Act and the common law with regard to remedies for judicial review. Section 8(2) affords remedies proceedings

---

52 This remedy, like the one in fn 51 above, correlates with the common law remedy of a peremptory or directory interdict that was used with regard to the *performance* of an administrative action, as opposed to a *failure to act*.

Stellenbosch University http://scholar.sun.ac.za

for the judicial review of administrative action in terms of the statutory ground in section 6(2)(g). No codification of existing common law remedies therefore took place and as the Act has not entered into force yet, review for a failure to act and remedies provided in terms of the judicial review of a failure to act are not currently available in South African administrative law. However, the common law could be developed in this regard.

Stellenbosch University http://scholar.sun.ac.za

CHAPTER 6
CONCLUSION

1. INTRODUCTION

The aim of this study was to resolve the question about the current and future grounds for the judicial review of administrative action. To achieve this aim, the effect of the *Pharmaceutical Manufacturers* case on the interaction between the Constitution and the common law in the judicial review of administrative action was analysed. It was also necessary to study the effect of the *promulgation* of the Promotion of Administrative Justice Act ('the Act')[1] in terms of section 33(3) FC read with item 23 Schedule 6 FC, on section 33 FC and the common law that informs the right contained in the section. A further aim was to interpret the requirements of 'lawfulness', 'reasonableness' and 'procedural fairness' in section 33(1) FC and analyse the grounds for review that relate to each. For the sake of completeness, the remedies and procedures contained by the Act for judicial review of administrative action in terms of the available grounds were examined to determine their relationship with the common law.

2. THE CONSTITUTION AND THE COMMON LAW

With regard to the relationship between the Constitution and common law, it was found that Section 24 IC, which was in force until 3 February 2000,[2] afforded a constitutionally entrenched right to 'administrative justice'. However, on 3 February 2000, the right to 'just administrative action', which is afforded by section 33 FC, entered into force.[3] As in section 24 IC, the purpose of section 33 FC is neither to provide an exhaustive statement of the grounds for review of administrative action, nor to create a codification

1 Act 3 of 2000.

2 See 2.4.1 Chap 1.

3 See 2.4.1 Chap 1

Stellenbosch University http://scholar.sun.ac.za

of administrative law.[4] The courts therefore remain empowered to develop administrative law to give effect to the right to 'just administrative action' and to bring administrative law in line with the Constitution.

In the assessment of the validity of an administrative action, it was found that the courts have to determine whether the action in question conflicted with the constitutionally entrenched right to 'just administrative action' in section 33 FC. In order to determine the scope, content and application of this right, the courts have to take recourse to the common law principles of administrative law that inform the content of the right. Since the common law derives its force from the Constitution and is subject to constitutional control, there is only one system of law.[5]

However, the common law grounds for review can only be used in the judicial review of administrative action in so far as they continue to be relevant.[6] Continued relevance is determined with reference to entrenchment in the Constitution of a common law constitutional principle that previously provided a certain common law ground for review. If such a principle is entrenched in the Constitution, the common law ground continues to be relevant. If not, the common law ground becomes irrelevant.[7]

3. THE PASSAGE OF ACT 3 OF 2000

The study revealed that national legislation, which had to be enacted within three years from the date on which the Constitution took effect, was *passed* only one day before the

---

[4] Corder "Administrative Review in South African Law" (1998) 9 *Public Law Review* 89 89-97 and Devenish "The Interim Constitution and Administrative Justice in South Africa" 1996 *TSAR* 458 459.

[5] See *Pharmaceutical Manufacturers Association In Re: ex parte The President of The Republic of South Africa* 2000 (3) BCLR 241 (CC) [44] and [45]. Although the case was decided in terms of sec 24 IC, the Constitutional Court contemplated the entering into force of sec 33(1) and (2) FC. See ffn 30 and 31 and page 12-13 Chap 1.

[6] See *Pharmaceutical Manufacturers Association In Re: ex parte The President of The Republic of South Africa* 2000 (3) BCLR 241 (CC) [33].

[7] See *Pharmaceutical Manufacturers Association In Re: ex parte The President of The Republic of South Africa* 2000 (3) BCLR 241 (CC) [35], [37] and [40].

Stellenbosch University http://scholar.sun.ac.za

deadline date on 3 February 2000.[8] Although the Act has not entered into force yet, the best view seems to be that the mere *passage* of the Act was sufficient to fulfill the obligation to *enact* legislation,[9] and further, that section 24 IC lapsed on 3 February 2000 when sections 33(1) and 33(2) FC entered into force.[10]

At present the Act articulates the way in which government views the content of the right to 'just administrative action' in section 33 FC. It contains most of the common law grounds for review, although some have been omitted from the Act. The Act exists parallel to the common law, but under the Constitution, as does common law. Those who cannot find a remedy in the Act can therefore resort to section 33 FC,[11] which is informed by the common law. However, before a common law ground for review that has been omitted from the Act can be employed in the judicial review of administrative action through the direct application of section 33 FC, the continued relevance of the ground must be determined.

In Chapter One a test was developed for the continued relevance of the common law grounds for review that have been omitted from the Act. Two questions must be answered. The first is whether one or more statutory ground(s) overlaps the omitted common law ground. If the answer is 'yes', the common law ground continues to be relevant through the application of the statutory ground(s) that overlaps it. If not, the second question must be asked, that is, whether the omitted common law ground was previously provided by a common law constitutional principle that has now been entrenched in the Constitution. If the answer is 'yes', the ground continues to be relevant to the judicial review of administrative action through the direct application of section 33 (FC). If the answer is 'no', the common law ground does not continue to be relevant.[12]

---

8 See sec 33(3) FC read with item 23 Schedule 6 FC, which further required that sec 33 FC had to be read as if it had been phrased like sec 24 IC *until* the enactment of the envisaged legislation.

9 See the discussion on page 10 fn 24 Chap 1.

10 See 2.3 Chap 1.

11 Corder "Administrative Justice: A Cornerstone of South Africa's Democracy" (1998) 14 *SAJHR* 38 52, Breitenbach at the UCT New Legislation Seminars 6 April 2000 and De Lange Parliament 12 June 2000.

12 See 2.4.2 Chap 1.

Stellenbosch University http://scholar.sun.ac.za

The study has also shown that:

> 'What is "lawful administrative action", "procedurally fair administrative action" and administrative action that is "justifiable in relation to the reasons given for it" cannot mean one thing under the Constitution, and another thing under the common law'.[13]

Now under the final Constitution,[14] the grounds for review of administrative action are divided into the requirements of 'lawfulness', 'reasonableness' and 'procedural fairness'. Therefore, until the Act enters into force, the judicial review of administrative action takes place in terms of the constitutional right to 'just administrative action' in section 33 FC as informed by the common law. In other words, the judicial review of administrative action currently takes place through the direct application of section 33 FC in terms of common law grounds for review that continue to be relevant, relating to the requirements of 'lawfulness', 'reasonableness' and 'procedural fairness' in section 33(1) FC. However, once the Act enters into force, administrative action, as defined in section 1(i) of the Act,[15] will be reviewed through the application of the statutory grounds for review contained by the Act and the common law grounds for review that have been omitted from the Act, which continue to be relevant to the judicial review of administrative action.

3. GROUNDS FOR REVIEW OF ADMINISTRATIVE ACTION

3.1 Grounds for review relating to the requirement of 'lawfulness' in section 33(1) FC[16]

As section 33 FC has been in operation only since 3 February 2000, while section 24 IC had been in operation since 27 April 1994 until 3 February 2000, there is little by way of academic views and jurisprudence on section 33 FC. However, the academic views and jurisprudence on 'lawfulness' in section 24(a) IC can be applied to the consideration of

---

13 See *Pharmaceutical Manufacturers Association In Re: ex parte The President of The Republic of South Africa* 2000 (3) BCLR 241 (CC) [50].

14 See fn 5 above and page 12-13 Chap 1.

15 See ffn 58-63 Chap 1.

16 See sec 2 and 3 Chap 2.

Stellenbosch University http://scholar.sun.ac.za

'lawfulness' in section 33(1) although the general differences between section 33 and 24, as well as the specific differences between 'lawfulness' in section 24(a) IC and section 33(1) FC, must be born in mind.

The first difference found in the study is that the guarantee of 'just administrative action' in section 33 is wider or more generous on the face of it than the guarantee for 'administrative justice' in section 24.[17] Further, the thresholds that qualified access to the right to 'administrative justice' in section 24 was done away with in order to afford the wider or more generous guarantee in section 33.[18] Accordingly, the guarantee of 'just administrative action' in section 33 is afforded to *everyone* with affected or threatened rights, interests and legitimate expectations.

The second difference concerns lawfulness. 'Lawfulness' in section 33(1) FC is part of the more general guarantee of 'just administrative action', while 'lawfulness' in section 24(a) IC is only part of one component of the guarantee of 'administrative justice'. Further, as a threshold qualified the right to 'lawful administrative action' in section 24(a) IC, only persons whose 'rights' and 'interests' were 'affected' or 'threatened' had a right to 'lawful administrative action', whereas, 'everyone' has the right to 'administrative action that is lawful' in section 33(1) FC, which it is not qualified by a threshold.

In the light of the differences described above, the object of the inclusion of 'lawfulness' in section 33(1) FC is to prevent ouster clauses. As government previously obstructed administrative justice through ouster clauses, the main object of section 33(1) is to extend the reach of the guarantee of 'justice administrative action' by preventing ouster clauses.

The theories relating to the *ultra vires* doctrine have no bearing on the interpretation of 'lawful'.[19] Accordingly, 'lawfulness' includes the grounds for review relating to the

---

17 See fn 9 Chap 2.

18 See fn 10 Chap 2.

19 De Ville "The Right to Administrative Justice: An Examination of Section 24 of the Interim Constitution" (1995) 11 *SAJHR* 264 269. Also see Carpenter "Administratiewe Geregtigheid: Meer Vrae as Antwoorde" (1994) 57 *THRHR* 467 469, Du Plessis & Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 168, Devenish 1996 *TSAR* 458 464, and Burns "Administrative Justice" (1994) 9 *SAPL* 347 352.

Stellenbosch University http://scholar.sun.ac.za

qualifications and attributes of the administrator and the scope and nature of his statutory authority, as well as the statutory and common law requirements relating to form and procedure (excluding the rules of natural justice), but does not overlap with the grounds for review relating to the remaining requirements in section 33(1) FC.[20]

The study further shows that 'lawfulness' does not enumerate the common law grounds for review relating to it, but imposes a duty on courts to further develop the common law grounds for review by way of interpreting the common law.[21] Accordingly, a duty is cast on reviewing courts to be judicious[22] to ensure that public officials confine themselves strictly to the law that confers powers on them.

With regard to grounds for review, all the common law grounds relating to the requirement of 'lawfulness' as interpreted by the courts and academic writers have been included in the Act, except for the common law grounds for review relating to adherence to a rigid policy or standards, contractual restrictions and estoppel.[23] Statutory grounds for review, relating to the authorised administrator, for example, are afforded by sections 6(2)(a)(i) and (ii), and 6(2)(b), while those that relate to the reasoning process of the administrator are afforded by sections 6(2)(d) and 6(2)(e)(i) to (v). The action itself is the focus of the statutory ground for review afforded by section 6(2)(f)(i) and of two statutory grounds introduced for the first time in the South African administrative law in sections 6(2)(g) and 6(2)(i) respectively. These are review for a failure to take the administrative action concerned as afforded by section 6(2)(g), which is further defined in section 6(3), and review for administrative action that is otherwise unconstitutional or unlawful, therefore contemplating review of administrative action through the direct application of section 33 FC afforded by sections 6(2)(i).[24] This latter ground will be

20 See fn 8 Chap 1 and fn 26 Chap 2.

21 See *Farjas (Pty) Ltd and Another v Regional Land Claims Commissioner, Kwazulu-Natal* 1998 (2) SA 900 (LCC).

22 See fn 22 Chap 2.

23 See 3.2 Chap 2.

24 De Lange Parliament 12 June 2000.

Stellenbosch University http://scholar.sun.ac.za

used by courts in their development of the common law with reference to the *Farjas* case.[25]

The common law grounds that were omitted from the Act concern adherence to a rigid policy or standards in the performance of an administrative action, contractual restrictions on the exercise of a discretion and estoppel. However, these actions can be reviewed through the application of section 6(2)(a)(i) and (ii), section 6(2)(e)(i), (iii) and (iv), section 6(2)(f)(i) and (ii), and section 6(2)(i). One or more of the statutory grounds for review in section 6 therefore overlap the common law grounds for review relating to adherence to a rigid policy or standards, contractual restrictions and estoppel that have been omitted from the Act. The omitted common law grounds therefore continue to be relevant to the review of administrative action, through the application of the statutory grounds that overlap them.

3.2 Grounds for review relating to the requirement of 'reasonableness' in section 33(1) FC[26]

The study showed that the interpretation of 'justifiable in relation to the reasons given' in section 24(d) IC, as is the case with 'lawfulness', applies to the consideration of the requirement of 'reasonableness' in section 33(1) FC. However, in doing this, the general and structural differences between section 24 IC and section 33 FC should be borne in mind.[27] The most important of these differences is the fact that 'justifiability in relation to the reasons given' in section 24(d) was only part of one component of the guarantee for 'administrative justice' in section 24 IC, while 'reasonableness' in section 33(1) FC is part of a more general guarantee for 'just administrative action'. Furthermore, thresholds qualified the application of 'justifiable in relation to the reasons given' in section 24(d) IC, while there is no such qualification for 'reasonable' in section 33(1) FC. Consequently, only persons whose 'rights' were 'affected' or 'threatened' had a right to 'administrative action that is justifiable in relation to the reasons given for it' in section

25 De Lange Parliament 12 June 2000.

26 See sec 2 and 3 Chap 3.

27 See ffn 9 and 10 Chap 2.

Stellenbosch University http://scholar.sun.ac.za

24(d), while 'everyone' has the right to 'administrative action that is reasonable' in section 33(1).

However, there are some specific differences between 'reasonableness' in section 33(1) FC and 'justifiability in relation to the reasons given' in section 24(d) IC. The first of these concerns terminology: 'reasonable' obviously means something other than 'justifiable in relation to the reasons given'. Some authors suggest that 'justifiable' is narrower than 'reasonable', as it related only to the reasons supplied for the decision, while 'reasonable' extends also to the effects of the decision.[28] Others suggest that the two concepts are synonymous.[29]

In the light of these differences, the inclusion of 'reasonableness' in section 33(1) does away with symptomatic unreasonableness.[30] Saying that symptomatic unreasonableness was done away with could lead to disregarding the appeal-review distinction.[31] However, 'reasonableness' does not extinguish the line between appeal and review. It means only that a judge can enter the merits of a decision, not in order to substitute his or her own opinion on the correctness of the decision, but to determine whether the outcome is rationally justifiable.[32] The test for 'reasonableness' is therefore the rational-objective-basis test.[33]

---

28 Burns (1994) 9 *SAPL* 347 357, Corder (1998) 9 *Public Law Review* 89 89-97 and Carpenter (1994) 57 *THRHR* 467 472.

29 Mureinik, who constructed 'justifiability in relation to the reasons given', is included in this group. (See Du Plessis & Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 169 fn 156, De Waal, Currie & Erasmus *The Bill of Rights Handbook* (2000) 473 and Hoexter "The Future of Judicial Review in South African Administrative Law" (2000) 117 *SALJ* 28 (forthcoming).)

30 *Standard Bank of Bophuthatswana Ltd v Reynolds NO and Others* 1995 (3) SA 74 (BG).

31 See fn 21 Chap 3.

32 *Carephone (Pty) Ltd v Marcus NO and Others* 1998 (10) BCLR 1326 (LAC) 1337 D.

33 See *Carephone (Pty) Ltd v Marcus NO and Others* 1998 (10) BCLR 1326 (LAC) 1337 F-G.

Stellenbosch University http://scholar.sun.ac.za

With regard to proportionality, it has been found that the increasing attention to the concept as an element of 'reasonableness' is ill-founded.[34] The correct view seems to be that 'proportionality' becomes applicable as part of the limitation analysis in accordance with section 36 FC only after a constitutional right had been infringed.[35] If this reasoning is correct, proportionality is not an element of 'reasonableness'. However, once it has been established that the right to 'just administrative action' in section 33 had been infringed upon by an unreasonable administrative action, proportionality comes into play to determine whether the limitation of the right was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[36]

With regard to the rationality being an element of 'reasonableness', in the exercise of public power, a rational connection between the decision taken and a legitimate governmental purpose is required.[37] Administrative action is a component of the exercise of public power in the operation of a constitutional state. It is governed by section 33 FC. 'Rationality' is therefore part of section 33 and is consequently included in the requirement of 'reasonableness' in section 33(1). 'Rationality' is therefore indeed the main element of 'reasonableness' in section 33(1) FC. As such, it is also required for administrative action involving policy considerations, for example, the drafting of delegated legislation.[38]

Concerning the grounds for review afforded by sections 6(2)(f)(ii) and 6(2)(e)(vi) of the Act, it is confirmed that 'rationality' is an element of 'reasonableness' in section 33(1) FC.[39] Four statutory grounds for review, which specifically refer to rationality, are

---

34 De Ville "Proportionality as a Requirement for Legality in Administrative Law in Terms of the New Constitution" (1994) 9 *SAPL* 360 360 and *Roman v Williams NO* 1997 (9) BCLR 1267 (C) 1275 F.

35 Govender "Administrative Justice" (1999) 14 *SAPL* 62 79, *S v Makwanyane* 1995 (6) BCLR 665 (CC), *Dawood, Shalabi and Thomas v The Minister of Home Affairs and Others* Case CC 07/06/2000 Case no. CCT 35/99 [40], *R v Big M Drug Mart* (1985) 18 DLR (4th) 321 and *R v Oaks* (1986) 26 DLR (4th) 200.

36 *S v Makwanyane* 1995 (6) BCLR 665 (CC).

37 Govender (1999) 14 *SAPL* 62 78.

38 See Govender (1999) 14 *SAPL* 62 78-79.

39 See 3.1 and 3.2 Chap 3.

Stellenbosch University http://scholar.sun.ac.za

afforded by section 6(2)(f)(ii). Further, the statutory ground in section 6(2)(e)(vi) affords review for administrative action taken arbitrarily or capriciously, which some consider the ultimate form of unreasonableness. As no mention is made of proportionality, the Act confirms that proportionality is not an element of 'reasonableness' in section 33(1) FC.[40]

Although the formulation of the statutory ground in section 6(2)(h) seems to confirm the gross unreasonableness test, it is only one component of a greater test for reasonableness that consists of all the statutory grounds for review relating to 'reasonableness'.[41] As it is difficult to imagine an unreasonable administrative action that cannot be reviewed by applying any of the statutory grounds for review that relates to the requirement of reasonableness, section 6(2)(h) does not seem to qualify the right to 'administrative action that is reasonable' to such an extent that it merits the direct application of section 33 FC for the review of administrative action that was unreasonable.[42]

The common law ground for review relating to vague or uncertain administrative action that has been omitted from the Act, continues to be relevant to the review of administrative action through the application of those statutory grounds that overlap it (sections 6(2)(e)(vi), 6(2)(f)(ii)(aa) to (dd), 6(2)(h) and 6(2)(i)).[43]

3.3 Grounds for review relating to the requirement of 'procedural fairness' in section 33(1) FC[44]

As mentioned above, the academic views and jurisprudence on section 24 have to be considered in this study in the interpretation of 'procedural fairness' in section 33(1). However, the differences between sections 24 and 33,[45] as well as differences between the concepts of 'procedural fairness' in the two sections, need to be kept in mind. In section 24(b) it was only part of one component of the guarantee of 'administrative

---

40 See fn 63 Chap 3.

41 See 3.3 Chap 3.

42 See 3.3 Chap 3.

43 See 3.4 Chap 3.

44 See sec 2 and 3 Chap 4.

45 See ffn 9 and 10 Chap 2.

Stellenbosch University http://scholar.sun.ac.za

justice', while in section 33(1) it is part of a more general guarantee. Another difference is that a threshold qualified the guarantee in section 24(b) by affording it only to those with affected or threatened rights and *legitimate expectations*, while the guarantee in section 33(1) is unqualified and afforded to *everyone*.

Accordingly, 'procedural fairness' relates to the application of certain common law rules referred to as the rules of natural justice, which have traditionally been classified under the headings of *audi alterem partem* and *nemo iudex in propria causa*.[46] However, as explained in Chapter Four, the application of the right to administrative action that is 'procedurally fair' in section 33(1) FC is not restricted to the application of the rules of natural justice.[47] This means that the common law has to be developed in this regard. In accordance with such a development of the common law, preliminary investigations now have to adhere to the requirement of 'procedural fairness' in section 33(1) FC.[48]

Despite the obligation to develop the common law with regard to 'procedural fairness', a proper balance needs to be struck between the guarantee of 'procedural fairness' and the importance of refraining from inhibiting government and its ability to make and implement policy effectively.[49] Finally, the objective of 'procedural fairness' is to achieve *procedural fairness* and not to afford a *hearing*. In some circumstances, for example, a balancing of interests might suggest that government need provide only a rudimentary procedure before it acts and perhaps a more satisfactory procedure later.

The requirement of 'reasons for administrative action', a component of 'procedural fairness', is afforded its own subsection in section 33(2) FC. The reason for this is that a threshold qualifies the right while no threshold qualifies the right to 'procedural fairness' in section 33(1).[50]

---

46 See ffn 15 and 16 Chap 4.

47 *Van Huysteen NO v Minister of Environmental Affairs and Tourism* 1995 (9) BCLR 1191 (C) 1212.

48 See *Du Preez v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) 233 E.

49 *Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools, Eastern Transvaal* 1999 (2) BCLR 151 (CC) [41].

50 This ground for review has been part of the South African administrative law since the entrenchment of the interim Constitution that specifically included the ground.

Stellenbosch University http://scholar.sun.ac.za

The study also revealed differences between 'reasons for administrative action' in section 24(c) IC and 'reasons for administrative action' in section 33(2) FC. The 'reasons for administrative action' component of the guarantee of 'procedurally fair administrative action' was afforded to persons with *affected rights* or *interests* in section 24(c), while the 'reasons for administrative action' component of the guarantee for 'administrative action that is procedurally fair', is afforded to *everyone* whose rights have been *adversely* affected in section 33(2). Further, a specific qualification was included in 'reasons for administrative action' in section 24(c), as no reasons could be requested if they had already been made public. There is no such qualification of 'reasons for administrative action' in section 33(2).

In this light, an administrator is required to give reasons for his decision, which provides a safeguard against arbitrary or unreasonable administrative action.[51] Reasons should be furnished only on request as the automatic furnishing of reasons is a waste of time and money, and hampers administrative efficiency.[52] As more drastic actions require more detailed reasons, the degree of *particularity* of the reasons required differs according to the circumstances.[53]

3.3.1 Section 3 Act 3 of 2000

With regard to statutory grounds for review that relate to the *audi* principle, section 3 of the Act contains grounds for any person whose rights (interests)[54] and legitimate expectations have been *materially* and *adversely* affected. Accordingly, section 3(2) requires a clear statement of the *administrative action* to be taken (as opposed to

---

[51] See fn 35 Chap 4.

[52] See De Ville "The Right to Administrative Justice: An Examination of Section 24 of the Interim Constitution" (1995) 11 *SAJHR* 264 271 and De Waal et al *The Bill of Rights Handbook* (2000) 474.

[53] See De Waal et al *The Bill of Rights Handbook* (2000) 473 and *Rèan International Supply Company (Pty) Ltd and Others v Mpumalanga Gaming Board* 1999 (8) BCLR 918 (T).

[54] See ffn 46 and 48 Chap 4.

Stellenbosch University http://scholar.sun.ac.za

information and *reasons*),[55] and an opportunity to make representations. Further, an administrator has to give adequate notice of any right of review or internal appeal, where applicable, and the right to request reasons. Departures from the requirements in section 3(2) are allowed for in sections 3(4), 3(5) and 2(1)(a) and (b).

Section 3(3) sets out the elements of a hearing. It contemplates a hearing in correlation with the *Mpumalanga* case,[56] which requires a measure of safeguard to be present before a hearing can be refused. Accordingly, certain factors need to be taken into account by administrators when exercising their discretion in terms of section 3(3) on whether to grant a hearing or not. As the application of section 3(3) is also subject to the discretion of the administrator and to notices published by the Minister in terms of section 2(1)(a), both sections 3(2) and 3(3) provide for flexibility.

As the Act articulates the way in which government views section 33, and as no common law grounds for review relating to the *audi* principle have been omitted from the Act, it is difficult to imagine a situation where a person who cannot find a remedy in the Act, would find a remedy in the common law. Review of administrative actions in terms of the *audi* principle, would therefore probably be governed by section 3 of the Act in future. However, as the statutory mechanism in section 6(2)(i) can be applied,[57] the courts can still develop the common law with regard to the *audi* principle.[58]

3.3.2 Section 4 Act 3 of 2000

With regard to the application of the *audi* principle for the public in general, section 4 contains statutory grounds for review relating to administrative decisions that materially

---

55 'Reasons for administrative action' is governed by sec 5 of the Act, while the Promotion of Access to Information Act 2 of 2000 governs information in possession of the state.

56 *Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools, Eastern Transvaal* 1999 (2) BCLR 151 (CC).

57 De Lange Parliament 12 June 2000. Also see *Pharmaceutical Manufacturers Association In Re: ex parte The President of The Republic of South Africa* 2000 (3) BCLR 241 (CC) [33].

58 See *Van Huysteen NO v Minister of Environmental Affairs and Tourism* 1995 (9) BCLR 1191 (C) and ffn 20 and 22 Chap 2.

Stellenbosch University http://scholar.sun.ac.za

and adversely affect or threaten the rights (interest)[59] and legitimate expectations of the public. Section 4(1)(a) to (e) lists different procedures an administrator could follow to adhere to the requirement of procedural fairness. She could hold a public inquiry, or follow a notice and comment procedure, or follow both these procedures, or follow a procedure that is fair but different if she is empowered to do so. An administrator can also follow other appropriate procedures that give effect to section 3 of the Act.

An administrator may depart from the requirements in sections 4(1)(a) to (e), 4(2) and 4(3), taking general and specific factors into account. The Minister may exempt an administrative action or any class of administrative actions from the application of the provisions of section 4 or permit an administrator to vary any of the requirements referred to in section 4(1)(a) to (e), (2) or (3). Section 4 therefore affords flexibility to administrators in their quest to be 'procedurally fair' in terms of section 33 (1) FC in adherence to the *Mpumalanga* case[60] where the public is involved.

As there are no common law grounds for review relating to the *audi* principle where the rights, interests or legitimate expectations of the public is concerned, those who cannot find a remedy in the Act cannot resort to the common law either. However, the courts remain empowered to develop the common law in this regard through the application of section 6(2)(i).[61]

3.3.3 Section 5 and 6 Act 3 of 2000

Concerning 'reasons for administrative action', section 5 of the Act contains grounds for review relating to 'reasons for administrative action' in section 33(2) FC. However, a procedure in section 5(2) qualifies the automatic furnishing of adequate reasons in

59 See ffn 46 and 48 Chap 4.

60 *Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools, Eastern Transvaal* 1999 (2) BCLR 151 (CC).

61 See *Van Huysteen NO v Minister of Environmental Affairs and Tourism* 1995 (9) BCLR 1191 (C), De Lange Parliament 12 June 2000, *Pharmaceutical Manufacturers Association In Re: ex parte The President of The Republic of South Africa* 2000 (3) BCLR 241 (CC) [33] and ffn 20 and 22 Chap 2.

Stellenbosch University http://scholar.sun.ac.za

writing for administrative actions. As section 5(3) raises a presumption in cases where an administrator failed to furnish adequate reasons, it therefore encourages administrators to furnish reasons. Further, section 5(4), 5(5) and 5(6), and 2(1)(a) and (b) afford administrators flexibility in furnishing reasons for administrative action as required by the *Mpumalanga* case.

It could be argued that section 5(4)(a) of the Act is unconstitutional in terms of section 33(2) FC. Although the section empowers administrators to depart from the requirement in section 33(2) FC to afford reasons for administrative action, it is difficult to conceive a situation where such a departure in terms of the factors in section 5(4)(b)(i) to (vi), would not pass the test implicit in the provisions of the limitations clause (section 36 FC) or the provisions of section 33(3) FC.[62]

As shown in Chapter Four, the Act articulates the way in which government views the requirement to furnish reasons for administrative action in section 33(2) FC. Although it seems as if there is no reason to turn to the common law, the courts can still develop the common law[63] with regard to 'reasons for administrative actions' through the application of section 6(2)(i) of the Act.[64]

With regard to bias, an unqualified statutory ground in section 6(2)(a)(iii) affords review for administrative actions taken by administrators that was biased or reasonably suspected of bias, in terms of the *nemo iudex in propria causa* principle.[65] The fact that the ground is unqualified, illustrates the importance attached to the function of this statutory ground for review.

---

62 See fn 20 Chap 1.

63 'Reasons for administrative action' has been part of the common law since the inception of the interim Constitution (and sec 24(c)) on 27 April 1994.

64 See *Van Huysteen NO v Minister of Environmental Affairs and Tourism* 1995 (9) BCLR 1191 (C), De Lange Parliament 12 June 2000, *Pharmaceutical Manufacturers Association In Re: ex parte The President of The Republic of South Africa* 2000 (3) BCLR 241 (CC) [33] and ffn 20 and 22 Chap 2.

65 See fn 16 Chap 4.

Stellenbosch University http://scholar.sun.ac.za

4. REMEDIES AND PROCEDURES

Section 7 of the Act contains procedures and obligations to draft procedures for the judicial review of administrative action in terms of all the statutory grounds as well as the common law grounds for review that continues to be relevant.[66]

A time limit ('*within* 180 days'), qualifies the period within which proceedings for the judicial review of administrative action have to be instituted. However, it seems as if the drafters of the Act kept the judgment of the Constitutional Court in the *Mohlomi* case[67] in mind when drafting section 7(1) in terms of section 9, as it gives the courts a wide discretion to condone non-compliance with this time period.[68] Accordingly, a constitutional challenge on section 7(1) for prescribing conditions for state liability and thereby infringing on the right to 'just administrative action' in section 33 FC would probably not succeed.

The Act affords jurisdiction to judicially review administrative action not only to the Constitutional Court, a High court and a court of similar status, but also to a magistrate's court and independent and impartial tribunals.[69] Section 7(3) compels the Rules Board for Courts of Law to make and implement rules of procedure for judicial review. While the rules of procedure are drafted and before they are implemented, proceedings for judicial review in terms of the Act can be instituted in the High Court[70] or the Constitutional Court,[71] as rules for procedure governing administrative law matters already exist in these two courts.

No provision is made for the parallel application of the common law and the Act once rules drafted by the Rules Board for Courts of Law, with regard to procedures for judicial review in terms of section 7, enter into force. Review proceedings conducted by means

66 See sec 6(2)(c) and sec 6(2)(i) Act 3 of 2000.

67 *Mohlomi v Minister of Defence* 1996 (12) BCLR 1559 (CC).

68 SA Law Commission Discussion Paper 81 Project 115: *Administrative Law*, January 1999 Chapter 5 10.

69 See sec 1(iv) Act 3 of 2000.

70 This can be done in terms of Supreme Court Rule 53.

71 See sec 1(iv)(a) of the Act. The Constitutional Court acts in terms of section 167(6)(a), that allows direct access to the Constitutional Court when it is in the interest of justice.

Stellenbosch University http://scholar.sun.ac.za

of the application of both the statutory and common law grounds for review that continues to be relevant[72] will therefore be performed in terms of procedures contained by the Act.

Section 8(1) provides for the parallel application of the Act and the common law with regard to remedies in proceedings for judicial review.[73] Section 8(1)(a) to 8(1)(f), which specifies certain orders,[74] mainly codifies the remedies afforded in proceedings of the judicial review of administrative action as applied in the common law. No common law remedies have been omitted from the Act and the only development with regard to remedies provided in the common law is found in section 8(1)(a), which affords the equivalent of the common law *mandamus*. As it can be used to compel an administrator to perform administrative actions in terms of duties other than statutory duties, it is broader than the common law remedy. As section 8(1) provides for '*any* order', the courts remain empowered to develop the common law in this regard.

Section 8(2) governs remedies afforded in proceedings of review in terms of the statutory ground in section 6(2)(g), the ground relating to an action consisting of a failure to take a decision. As the remedies afforded by section 8(2) relate to a ground for review, which is introduced for the first time in South African administrative law by the Act,[75] the remedies provided for review in terms of this ground are also introduced for the first time. No codification of existing common law remedies therefore took place.

As the Act, and consequently the grounds for review introduced by it for the first time, has not entered into force yet, review for a failure to act and remedies provided in terms of the judicial review for a failure to act, are not currently available in the South African administrative law. Further, remedies provided in section 8(2) for a failure to act, will be

---

72 See 2.4.2 Chap 1.

73 De Lange Parliament 12 June 2000, with reference to grounds for review, but it could be implied that he referred to the Act and the common law in general.

74 De Lange (Parliament 12 June 2000) noted that one of the ideas behind the Act, was to encourage administrators to act by informing them of the procedures to be followed and the consequences if they are not followed. Specifying two of the orders that could be given in the judicial review of administrative action does this.

75 See 3.1.3 Chap 2.

Stellenbosch University http://scholar.sun.ac.za

governed only by section 8(2) once the Act enters into force, as there are no common law remedies in this regard. However, the court can develop the common law in this regard in terms of section 8(2) that allows for granting of '*any* order' that is just and equitable.

5. CONCLUSION

In conclusion it can therefore be said that that the Act, *enacted* on 3 February 2000, exists parallel to the common law, which informs the content of the right to 'just administrative action' guaranteed in section 33 FC, which entered into force on 3 February 2000 and stands above both the common law and the Act. Judicial review of administrative action will take place in terms of the statutory grounds for review and the common law grounds for review that continue to be relevant to the judicial review of administrative action once the Act enters into force. The procedures followed in the judicial review of administrative action in terms of these grounds, are provided solely by the Act, while remedies afforded in proceedings of review can be found in both the Act and the common law. Courts remain empowered to develop the common law with regard to most aspects of administrative law.

Stellenbosch University http://scholar.sun.ac.za

BIBLIOGRAPHY

1. TEXTBOOKS

Basson Dion *South Africa's Interim Constitution: Text and Notes* (1994) Juta & Co Ltd (Cape Town)

Baxter Lawrence *Administrative Law* (1984) Juta & Co Ltd (Cape Town)

Boulle Laurence, Harris Bede & Hoexter Cora *Constitutional and Administrative Law* (1989) Juta & Co Ltd (Cape Town)

Burns Yvonne *Administrative Law Under the 1996 Constitution* (1998) Butterworths (Durban)

De Waal Johan, Currie Iain, & Erasmus Gerhard *The Bill Of Rights Handbook* 3ed (2000) Juta & Co Ltd (Cape Town)

Du Plessis Lourens & Corder Hugh *Understanding South Africa's Transitional Bill of Rights* (1994) Juta & Co Ltd (Cape Town)

Halsbury Harding Stanley Gifford *Halsbury's Laws of England* vol I 4ed (1989) Butterworths (London)

Hoexter Cora 1991 Supplement to Baxter's Administrative Law Part III: Administrative Law in the Courts (1992) Juta & Co Ltd (Cape Town)

Simpson JA & Werner ESC *The Oxford English Dictionary* 2ed (1989) Vol I, II, V, VIII & IX Claredon Press Oxford

Wiechers Marinus *Administratiefreg* 2ed (1984) Butterworts (Durban)

2. ARTICLES

Asimow Michael "Administrative law under South Africa's Final Constitution: The need for an Administrative Justice Act" (1996) 113 *SALJ* 613-630

Stellenbosch University http://scholar.sun.ac.za

Bezuidenhout Nick "Staat Kry Reg op Inligting in Konsepwet" *Die Burger* 21 January 2000

Burns Yvonne "Administrative Justice" (1994) 9 *SAPL* 347-359

Carpenter Gretchen "Administratiewe Geregtigheid: Meer Vrae as Antwoorde" (1994) 57 *THRHR* 467-473

Corder Hugh "Administrative Justice in the Final Constitution" (1997) 13 *SAJHR* 28-43

Corder Hugh "Administrative Justice: A Cornerstone of South Africa's Democracy" (1998) 14 *SAJHR* 38-59

Corder Hugh "Administrative Review in South African Law" (1998) 9 *Public Law Review* 89-97

De Ville Jacques "Proportionality as a Requirement for Legality in Administrative Law in Terms of the New Constitution" (1994) 9 *SAPL* 360-378

De Ville Jacques "The Right to Administrative Justice: An Examination of Section 24 of the Interim Constitution" (1995) 11 *SAJHR* 264-280

Devenish George "The Interim Constitution and Administrative Justice in South Africa" 1996 *TSAR* 458-474

Govender Karthy "Administrative Justice" (1999) 14 *SAPL* 62-95

Hoexter Cora "The Future of Judicial Review in South African Administrative Law" (to be published in (2000) 117 *SALJ* volume 3, memorandum on file with the author)

Klaaren Jonathan "Constitutional Authority to Enforce Rights of Administrative Justice and Access to Information" (1997) 13 *SAJHR* 549-564

Klaaren Jonathan "Redlight, Greenlight: *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council*; *Premier Mpumalanga v Executive Committee, Asosiation of State-Aided Schools, Eastern Transvaal*" (1999) 15 SAJHR 209-217

Mureinik Etienne "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10 *SAJHR* 31-48

Stellenbosch University http://scholar.sun.ac.za

Pashke "Open Democracy Bill- Some Constitutional Issues" (Unpublished memorandum presented at a workshop on the draft Open Democracy Bill presented by Idasa's Political Information and Monitoring Service, the Human Rights Committee, the Human Rights Commission (Cape Town Office), and the Black Sash, 28 August 1997) as cited by Klaaren Jonathan "Constitutional Authority to Enforce Rights of Administrative Justice and Access to Information" (1997) 13 *SAJHR* 549-564

Pretorius Daniel Malan "The Outsider and Natural Justice: A Re-examination of the Scope of the Application of the Audi Alterem Partem Principle" (2000) 63 *THRHR* 93-110

SA Law Commission Discussion Paper 81 Project 115: *Administrative Law* January 1999

Van Wyk Daniël "'n Paar Opmerkings en Vrae Oor die Nuwe Grondwet" (1997) 60 *THRHR* 377-394

3. TABLE OF CASES

Administrator, Cape v Raas Röntgen and Vermeulen (Pty) Ltd 1992 (1) SA 245 (A)

Administrator, Transvaal v Traub 1989 (4) SA 731 (A)

Anchor Publishing Co (Pty) Ltd v Publishing Control Board 1987 (4) SA 708 (N)

Associated Provincial Picture Houses v Wednesbury Corpotaion 1948 1 KB 223

Cabinet of the Transitional Government for the Territory of South West Africa v Eins 1988 (3) SA 294 (A)

Carephone (Pty) Ltd v Marcus NO 1998 (11) BLLR (LAC)

Cf Diedericks v Minister of Lands 1964 (1) SA 49 (N)

Chotabhai v Union Government 1911 AD 13

City and Suburban Transport (Pty) Ltd v Local Board Road Transportation, Johannesburg 1932 WLD 100

Stellenbosch University http://scholar.sun.ac.za

Commissioner of Customs and Excise v Container Logistics (Pty) Ltd; Commissioner of Customs and Excise v Rennies Group Ltd t/a Renfreight 1999 (8) BCLR 833 (SCA)

Dawood, Shalabi and Thomas v The Minister of Home Affairs and Others (CC) 07/06/2000 Case no. CCT 35/99

Deacon v Controller of Customs and Excise 1999 (6) BCLR 637 (SE)

Du Preez v Truth and Reconciliation Commission 1997 (3) SA 204 (A)

Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC)

Farjas (Pty) Ltd and Another v Regional Land Claims Commissioner Kwazulu-Natal 1998 (2) SA 900 (LCC)

Fedsure Life Assurance Ltd and Others v Greater Johannesburgh Transitional Metropolitan Council and Others 1998 (12) BCLR 1458 (CC)

G v Superintendent, Groote Schuur Hospital 1993 (2) SA 255 (C)

Gardener v East London Transitional Local Council 1996 (3) SA 99 (E)

Government of the Province of KwaZulu Natal v Ngwane 1996 (4) SA 943 (A)

Hardman NO v Administrator, Natal 1975 (1) SA 340 (N)

Harpur v Steyn NO 1974 (1) SA 54 (O)

Hira v Booysen NO 1992 (4) SA 69 (A)

Jenkins v Government of the Republic of South Africa 1996 (8) BCLR 1059 (Tk)

Johannesburg Stock Exchange v Witwatersrand Nigel Ltd 1988 (3) SA 132 (A)

Jooste v Score Supermarket Trading (Pty) Ltd 1999 (2) BCLR 139 (CC)

Kadalie v Hemsworth 1928 TPD 483

Kotze v Minister of Health and Another 1996 (3) BCLR 417 (T)

Kruse v Johnson 1898 (2) (QB) 91

Lawson v Cape Town Municipality 1982 (4) SA 1 (C)

Stellenbosch University http://scholar.sun.ac.za

Liebenberg v Brakpan Liquor Licencing Board 1944 WLD 52

Local Road Transport Board v Durban City Council 1965 (1) SA 586 (A)

Loxton v Kenhardt Liquor Licensing Board 1942 AD 275

Mafuya v Mature City Council 1984 (2) SA 124 (ZCH)

Maharaj v Chairman, Liquor Board 1997 (2) BCLR 248 (N)

Mohlomi v Minister of Defence 1996 (12) BCLR 1559 (CC)

Moletsane v Premier of the Free State 1996 (2) SA 95 (O)

Moulder v Thom 1974 (1) SA 336 (T)

National Transport Commission v Chetty's Motor Transport (Pty) Ltd 1972 (3) SA 726 (A)

Northwest Townships (Pty) Ltd v Administrator, Transvaal 1975 (4) SA 1 (T)

Opperman v Uitvoerende Komitee van die Verteenwoordigende Owerheid 1991 (1) SA 372 (SWA)

Oranje Vrystaatse Vereniging vir Staatsondersteunde Skole en 'n Ander v Premier van die Provinsie Vrystaat en Andere 1996 (2) BCLR 248 (O)

Pennington v The Minister of Justice and Others 1995 (3) BCLR 270 (C)

Phalaborwa Verhuur v Stadsraad van Phalaborwa 1979 (3) SA 1260 (A)

Pharmaceutical Manufacturers Association In Re: ex parte The President of The Republic of South Africa 2000 (3) BCLR 241 (CC)

Podlas v Cohen and Brydon 1994 (3) BCLR 137 (T)

Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools, Eastern Transvaal 1999 (2) BCLR 151 (CC)

President of the Republic of South Africa and Others v South African Rugby and Football Union and Others 1999 (10) BCLR 1059 (CC)

President of the Republic of South Africa v Hugo 1997 (6) BCLR 708 (CC)

Stellenbosch University http://scholar.sun.ac.za

Prinsloo v Van Der Linde and Another 1997 (11) BCLR 1498 (CC)

R v Big M Drug Mart (1985) 18 DLR (4th) 321

R v Jopp 1949 (4) SA 11 (N)

R v Oakes (1986) 26 DLR (4th) 200

Rapholo v State President 1993 (1) SA 680 (T)

Rèan International Supply Company (Pty) Ltd and Others v Mpumalanga Gaming Board 1999 (8) BCLR 918 (T)

Reinecke v Incorporated General Insurance Ltd 1974 (2) SA 84 (A)

Roman v Williams NO 1997 (9) BCLR 1267 (C)

Rose v Johannesburg Local Road Transportation Board 1947 (4) SA 272 (W)

Rudolph and Another v Commissioner for Inland Revenue and Others 1996 (2) SA 886 (A)

S v Lasker 1991 (1) SA 558 (C)

S v Makwanyane 1995 (6) BCLR 665 (CC)

SA Metal Machinery Company Ltd v Transnet Ltd 1999 (1) BCLR 58 (W)

Schoeman v Administrateur OVS 1961 (4) SA 856 (O)

Sculte v Van den Berg and Others NNO 1991 (3) SA 717 (C)

Somfongo v Government of the Republic of South Africa 1995 (4) SA 738 (Tk)

Soobramoney v Minister of Health, KwaZulu-Natal 1997 (12) BCLR 1696 (CC)

South African Roads Board v Johannesburg City Council 1991 (4) SA 1 (A)

Staatspresident v United Democratic Front 1988 (4) SA 830 (A)

Standard Bank of Bophuthatswana Ltd v Reynolds NO and Others 1995 (3) BCLR 305 (B)

Theron v Ring van Wellington van NG Sending Kerk in Suid Afrika 1976 (2) SA 1 (A)

Stellenbosch University http://scholar.sun.ac.za

Transkei Public Servants Association v Government of the Republic of South Africa 1995 (9) BCLR 1235 (Tk)

Tseleng v Chairman, Unemployment Insurance Board 1995 (3) SA 162 (T)

Turner v Jockey Club 1974 (3) SA 633 (A)

Union Government v Union Steel Corporation Ltd 1928 AD 319

Van Huysteen NO v Minister of Environmental Affairs and Tourism 1995 (9) BCLR 1191 (C)

Vereniging van Advokate v Moskeeplein (Edms) Bpk 1982 (3) SA 159 (T)

Vokwana v National Transport Commission 1984 (2) SA 245 (Tk)

Vrystaat Ko-operasie Bpk v Minister van Landbou-Ekonomie en Bemarking 1965 (3) SA 377 (A)

Walker v Stadsraad van Pretoria 1997 (3) BCLR 416 (T)

4. TABLE OF STATUTES

Constitution of the Republic of South Africa, Act 108 of 1996

Constitution of the Republic of South Africa, Act 200 of 1993

Defence Act 44 of 1957

Police Service Act 68 of 1995

Prescription Act 68 of 1969

Promotion of Access to Information Act 2 of 2000

Promotion of Administrative Justice Act 3 of 2000

5. SEMINARS

Breitenbach Andrew at the University of Cape Town New Legislation Seminars on 6 April 2000 (on file with the author)

Stellenbosch University http://scholar.sun.ac.za

6. INTERVIEWS

De Lange Johnny at Parliament 12 June 2000 (taped conversation in possession of the author)

Stellenbosch University http://scholar.sun.ac.za

REPUBLIC OF SOUTH AFRICA

GOVERNMENT GAZETTE

Registered at the Post Office as a Newspaper

VOL. 416 CAPE TOWN, 3 FEBRUARY 2000 No. 20853

OFFICE OF THE PRESIDENCY

No. 96. 3 February 2000

It is hereby notified that the President has assented to the following Act which is hereby published for general information:—

No. 3 of 2000: Promotion of Administrative Justice Act, 2000.

Stellenbosch University http://scholar.sun.ac.za

(English text signed by the President.)
(Assented to 3 February 2000.)

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,

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:—

Definitions

1. In this Act, unless the context indicates otherwise—

(i) "**administrative action**" means any decision taken, or any failure to take a decision, by— 5

(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 10

(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— 15

Stellenbosch University http://scholar.sun.ac.za

(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; 5

(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; 10

(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 15 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 appointment of a judicial officer, by the Judicial Service Commission; 20

(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);

(ii) "**administrator**" means an organ of state or any natural or juristic person 25 taking administrative action;

(iii) "**Constitution**" means the Constitution of the Republic of South Africa, 1996;

(iv) "**court**" means—

(a) the Constitutional Court acting in terms of section 167(6)*(a)* of the 30 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 designated in 35 writing by the Minister after consultation with the Magistrates Commission,

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 40 resident or the adverse effect of the administrative action was, is or will be experienced;

(v) "**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— 45

(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 50 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, 55 and a reference to a failure to take a decision must be construed accordingly;

(vi) "**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;

(vii) "**failure**", in relation to the taking of a decision, includes a refusal to take the 60 decision;

(viii) "**Minister**" means the Cabinet member responsible for the administration of justice;

Stellenbosch University http://scholar.sun.ac.za

(ix) "**organ of state**" bears the meaning assigned to it in section 239 of the Constitution;
(x) "**prescribed**" means prescribed by regulation made under section 10;
(xi) "**public**", for the purposes of section 4, includes any group or class of the public; 5
(xii) "**this Act**" includes the regulations; and
(xiii) "**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.

Application of Act 10

2. (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 15 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. 20

Procedurally fair administrative action affecting any person

3. (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 25 administrator, subject to subsection (4), must give a person referred to in subsection (1)—
(a) adequate notice of the nature and purpose of the proposed administrative action;
(b) a reasonable opportunity to make representations; 30
(c) a clear statement of the administrative action;
(d) adequate notice of any right of review or internal appeal, where applicable; and
(e) adequate notice of the right to request reasons in terms of section 5.

(3) In order to give effect to the right to procedurally fair administrative action, an 35 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. 40

(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; 45
(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. 50

(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.

Administrative action affecting public

4. (1) In cases where an administrative action materially and adversely affects the 55 rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether—

Stellenbosch University http://scholar.sun.ac.za

(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 5
(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— 10
(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; 15
(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 20 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. 25

(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; 30
(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. 35

(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; 40
(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. 45

Reasons for administrative action

5. (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 50 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, 55 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 60 person making the request of such departure.

Stellenbosch University http://scholar.sun.ac.za

(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; 5
- (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 10 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 15 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. 20

Judicial review of administrative action

6. (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— 25
  - (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; 30
- *(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; 35
  - (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; 40
  - (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— 45
    - *(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; 50
- *(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. 55

(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 60
  - (iii) the administrator has failed to take that decision,

Stellenbosch University http://scholar.sun.ac.za

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 5
(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 10 duty to take the decision notwithstanding the expiration of that period.

Procedure for judicial review

7. (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 15 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 20 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 25 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 30 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 No. 107 of 1985), must within one year after the date of commencement of this Act, make and implement rules of procedure for judicial review.

(4) Before the implementation of the rules of procedure referred to in subsection (3), 35 all proceedings for judicial review must be instituted in a High Court or the Constitutional Court.

(5) Any rule made under subsection (3) must, before publication in the *Gazette*, be approved by Parliament.

Remedies in proceedings for judicial review 40

8. (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; 45

(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— 50
(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 55 administrative action relates;

(e) granting a temporary interdict or other temporary relief; or

(f) as to costs.

Stellenbosch University http://scholar.sun.ac.za

(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 5
(d) as to costs.

Variation of time

9. (1) The period of— 10

(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. 15

(2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require.

Regulations

10. (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; 20
(b) the procedures to be followed in connection with public inquiries;
(c) the procedures to be followed in connection with notice and comment procedures; 25
(d) the procedures to be followed in connection with requests for reasons; and
(e) 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.

(2) The Minister may make regulations relating to— 30

(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; 35
   (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; 40
   (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; 45
   (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; 50
   (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; 55
(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

Stellenbosch University http://scholar.sun.ac.za

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 5

(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 Public Service Commission, regarding any matter which may be regulated by the Public Service Commission under the 10 Constitution or any other law.

(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 (1)*(e)* and (2)*(a)* and *(b)* must, before publication in 15 the *Gazette*, be approved by Parliament.

(5) Any regulation made under subsections (1) and (2) which may result in financial expenditure for the State must be made in consultation with the Minister of Finance.

(6) The regulations contemplated in subsection (1)*(e)* must be approved by Cabinet and must be made within two years after the commencement of this Act. 20

Short title and commencement

11. 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*.