

CHAPTER 3

ACCESS TO JUDICIAL REMEDIES

3.1 INTRODUCTION

This chapter is concerned with ‘access to judicial remedies’, an obvious requirement for effective judicial review and a prominent theme of the Breakwater Declaration. In administrative law, as indeed in all other branches, the importance of access to judicial remedies cannot be doubted. It is axiomatic that the utility of judicial review depends critically on the availability and effectiveness of its associated remedies. It is not surprising, then, that there was agreement in the Breakwater Declaration concerning the provision of ‘accessible, appropriate and adequate remedies for maladministration, including review of administrative action and, where desirable, alternative dispute resolution procedures’.¹ Here the Breakwater participants evidently had in mind remedies of all kinds, both judicial and non-judicial.

In this thesis non-judicial forms of relief are dealt with in Chapter 5, while judicial remedies are discussed in this chapter. However, the focus here is on *access* to judicial remedies rather than their content, a selective treatment that requires some explanation. The reason for it is simply that the judicial remedies available on review before 1994 were both ‘appropriate’ and ‘adequate’. The South African law relating to remedies has always been both straightforward and flexible, and mercifully free of the ‘complex technicalities’² that were once so characteristic of English law.³ In 1984 Baxter remarked on the wide range of remedies available at common law and under statute, and concluded that ‘[u]sed singly or in combination, these remedies are capable of providing adequate relief in nearly all cases of unlawful administrative action; in principle there is little the judges cannot do if they are so minded’.⁴ The problem was rather one of access to those remedies, which was frequently limited by the legislature by means of ouster clauses and similar devices. The transformation of administrative law would thus require such obstacles to be reduced or removed altogether.

¹ Item viii of the Areas of Agreement.

² Lawrence Baxter *Administrative Law* (1984) 675.

³ An overview of those complexities is provided by The Rt Hon The Lord Woolf, Jeffrey Jowell QC & Andrew Le Sueur *De Smith’s Judicial Review* 6 ed (2007) Chapter 15 ‘The Historical Development of Judicial Review Remedies and Procedures’ (at 779-820) (hereafter *De Smith*).

⁴ Baxter (note 2 above) 676.

Another aspect not dealt with in this chapter is the enforcement of judicial remedies. While it is of undoubted significance to the rule of law, securing the enforcement of court orders is a topic beyond the scope of this thesis.⁵

Before 1994 access to judicial remedies was further restricted by the law relating to locus standi or standing – a glaring deficiency of the pre-democratic system. The Breakwater participants clearly appreciated that the common-law rules of standing developed and applied by the courts before 1994 were unduly restrictive of public-law litigation and that they stood in need of sweeping change.⁶ As Budlender indicated in his contribution to the workshop, it was often difficult or impossible for an applicant to show a sufficient interest of a personal nature, particularly where large numbers of people were affected by administrative action.⁷ In such cases, he observed, ‘the rules of locus standi stultify justice, because the only person who is permitted to challenge the unlawful action in question is unable to do so’.⁸

These, then, are the two main themes of this chapter: the transformation of the (judge-made) rules relating to standing and the removal of legislative and other obstacles to judicial redress that existed in the pre-democratic era. As part of that second theme, the chapter will consider certain procedural limitations placed on access to judicial review by the PAJA itself.

3.2 STANDING

(a) *Introduction and overview*

Standing (or locus standi in judicio) is to be distinguished from related doctrines, particularly ripeness and mootness,⁹ which concern the timing of the application for review. Unlike these doctrines, standing relates to the appropriateness of the party who seeks relief from the court

⁵ In terms of s 165(5) of the Constitution, a court order ‘binds all persons to whom and all organs of state to which it applies’. In practice, however, this proved insufficient to prevent administrative non-compliance with court orders, particularly since s 3 of the State Liability Act 20 of 1957 did not permit execution and attachment against the state: see eg Clive Plasket ‘Administrative Justice and Social Assistance’ (2003) 120 SALJ 494; Alan Rycroft & Adrian Bellengère ‘Judicial Innovation and the Delinquent State: A Note on *The State and Mfezeko Zuba and 23 Similar Cases*’ (2004) 20 SAJHR 321; Rolien Roos ‘Executive Disregard of Court Orders: Enforcing Judgments Against the State’ (2006) 123 SALJ 744. The problem has since been addressed by the Constitutional Court: in *Nyathi v MEC for the Department of Health, Gauteng* 2008 (5) SA 94 (CC) the unconstitutionality of s 3 was confirmed and Parliament was given twelve months in which to enact legislation providing for the effective enforcement of court orders.

⁶ Item vi in the Areas of Agreement calls for ‘maximum feasible access to administrative justice, including class actions, a broad definition of legal standing and the provision of adequate legal services’. Note that the last item in this list is beyond the scope of this thesis and is not dealt with here.

⁷ Geoff Budlender ‘The Accessibility of Administrative Justice’ 1993 *Acta Juridica* 128 at 132.

⁸ Ibid 131.

⁹ These doctrines express the idea that courts should not concern themselves with abstract or hypothetical disputes: ripeness by avoiding litigation that is premature, and mootness by avoiding litigation when it is too late to have a meaningful effect. See generally Cheryl Loots ‘Standing, Ripeness and Mootness’ in Stuart Woolman et al *Constitutional Law of South Africa* 2 ed (OS 02-05) Chapter 7.

and requires the applicant to demonstrate a sufficient interest in the case. The interpretation of what constitutes sufficient interest has huge implications for access to administrative justice in our transformed legal order, for without standing to apply for judicial review and its associated remedies the entitlement to administrative justice cannot be enforced in court.

There is currently something of a tension between the restrictive common-law requirements of standing, which developed in the context of private-law litigation, and the very liberal provisions of the democratic Constitution. Originally contained in s 7 of the interim Constitution and now in s 38 of the 1996 Constitution, these provisions allow for class actions, associational standing and even public interest actions. The difficulty is that s 38 is, on the face of it, applicable only to litigation involving the infringement of or a threat to a right in the Bill of Rights. Furthermore, the contents of s 38 were deliberately omitted from the PAJA, which is now the default pathway to administrative-law review. In cases where the administrative justice rights in s 33 of the Constitution are not of direct application, then, the courts are apparently presented with a choice at present: to rely on the conventional approach of the common law, with its cautious private-law orientation, or to bring the common law into line with the constitutional provision.

Here it is argued that the latter is clearly the appropriate course to follow. As the Constitutional Court confirmed in *Ferreira v Levin NO*,¹⁰ a bold and generous approach to standing is wholly appropriate in a constitutional democracy. Indeed, there are indications that this course is being followed, and that a convergence of the common-law and constitutional routes is steadily taking place – in practice if not in theory. In the first few years of the democratic era the courts tended to adhere to the common-law requirements except when the infringement of a constitutional right was specifically alleged. Even then some courts seemed easily daunted by practical difficulties such as the constitution and definition of classes of litigants. This is an understandable reaction, for there is no doubt that legislation is needed to govern the technicalities of class actions and public interest actions in particular. In recent years, however, several courts have demonstrated a willingness to be more flexible about the rules of standing even in the absence of such legislation, and the tone of some of the judgments suggests growing judicial impatience with the use of standing as a formal barrier to the achievement of administrative justice. Such impatience is particularly evident in the judgment of Froneman J in *Ngxuza v Permanent Secretary, Department of Welfare, Eastern*

¹⁰ *Ferreira v Levin NO* 1996 (1) SA 984 (CC) para 165 (Chaskalson P).

Cape¹¹ and, on appeal, that of Cameron JA in *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza*.¹²

(b) Standing at common law

At common law the applicant for review must be able to show a sufficient, personal and direct interest in the case, a concept that has been defined narrowly and objectively rather than with reference to the complainant's subjective feelings.¹³ Significantly, the citizen's concern with the legality of governmental action is not regarded as an interest worth protecting in itself. The complainant must be able to point to something beyond a mere concern with legality: either to a right or to a factual interest, typically a financial one. Furthermore, South African common law recognises no *actio popularis* or class action whereby an individual or a group not personally affected may vindicate the public interest by exposing an illegality.

There was a wide range of *actiones populares* in Roman law, but with the exception of the *interdictum de libero homine exhibendo*¹⁴ these fell into disuse in Roman-Dutch law – which our common law of standing seems to have taken as its model.¹⁵ Thus at common law, a person is not entitled to 'protect the rights of the public' or 'champion the cause of the people'.¹⁶ The general rule is that a complainant cannot act on behalf of others, irrespective of the type of interest possessed by those others. Furthermore, where the complainant's only interest is in the *legality* of administrative action, this is regarded as tantamount to acting on behalf of the general public.

At common law, then, the administrative context does little or nothing to change the private-law flavour of the rules of standing, with their emphasis on personal as opposed to public interest. Yet the concerns of 'private' and 'public' litigation are usually very different, as indicated by O'Regan J in *Ferreira v Levin NO*:¹⁷

'Existing common-law rules of standing have often developed in the context of private litigation. As a general rule, private litigation is concerned with the determination of a dispute between two individuals, in which relief will be specific and, often, retrospective, in that it

¹¹ *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 609 (SE).

¹² *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA).

¹³ Such an objective interest may be accompanied by sentimental considerations (*Mweuhanga v Cabinet of the Interim Government of South West Africa* 1989 (1) SA 976 (SWA) at 982F), but strong feelings will not suffice on their own: see eg *Raubenheimer NO v Trustees, Johannes Bredenkamp Trust* 2006 (1) SA 124 (C) para 46.

¹⁴ See at (d)(ii) below.

¹⁵ See eg *Bagnall v The Colonial Government* (1907) 24 SC 470; *Dalrymple v Colonial Treasurer* 1910 TS 372 at 380; *Director of Education, Transvaal v McCagie* 1918 AD 616 at 627.

¹⁶ Rumpff CJ in *Wood v Ondangwa Tribal Authority* 1975 (2) SA 294 (A) at 310F.

¹⁷ Note 10 above, para 229 (in a separate concurring judgment).

applies to a set of past events. Such litigation will generally not directly affect people who are not parties to the litigation. In such cases, the plaintiff is both the victim of the harm and the beneficiary of the relief. In litigation of a public character, however, that nexus is rarely so intimate. The relief sought is generally forward-looking and general in its application, so that it may directly affect a wide range of people. In addition, the harm alleged may often be quite diffuse or amorphous.’

As a result of their private-law orientation the standing requirements of our common law are curiously at odds with the idea of legality, which focuses on the illegitimacy of illegal administrative action rather than on the position of the applicant.¹⁸ Indeed, there would seem to be no logical link at all between the two concepts, particularly since – as Loots has observed – the party who brings a public-law issue before the court frequently does so not for personal gain but out of a conviction that public authorities should not be allowed to act illegally.¹⁹ Yet (subject to a few recognised exceptions) the courts will refuse to exercise their jurisdiction if the applicant is unable to show the requisite personal interest, and an egregious illegality may thus evade the court’s scrutiny. It is worth asking, then, what lies behind the restrictiveness²⁰ of the common-law rules. This question is considered in Chapter 4, where it is suggested that the explanation lies largely in judicial formalism.

In the next section I turn to s 38 of the Constitution, which introduces a ‘radical departure’²¹ from the common law.

(c) *Standing under the Bill of Rights*

Section 38 of the Constitution provides as follows:

‘Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;

¹⁸ As Cane says, ‘[i]f the prime function of judicial review is seen as being to provide remedies against unlawful behaviour by government, then there should be no requirement of personal interest’: Peter Cane *Administrative Law* 4 ed (2004) 79.

¹⁹ Loots (note 9 above) 7--2.

²⁰ See generally Tembeka Ngcukaitobi ‘The Evolution of Standing Rules in South Africa and their Significance in Promoting Social Justice’ (2002) 18 *SAJHR* 590.

²¹ Yacoob J in *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC) para 14.

- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.’

Section 38(a) seems to reflect the position at common law. So, to a certain extent, do s 38(b) and (e). Section 38(c) and (d), however, go far beyond the common law. The former allows a class action, and the latter actually recognises an *actio popularis*. Such generous rules of standing for the vindication of fundamental rights are entirely appropriate in a constitutional democracy and also in line with international trends.²² As Chaskalson P explained for the majority in *Ferreira v Levin NO*²³ in relation to s 7(4)(b) of the interim Constitution (the precursor to s 38),

‘I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled.’²⁴

Section 38 of the Constitution refers specifically to cases in which a right in the Bill of Rights is infringed or threatened. It clearly does not cater for cases falling outside the Bill of Rights, such as common-law review and review of non-administrative action in general, including review under the principle of legality. What is not so clear is whether s 38 applies to cases involving the *indirect* application of the Bill of Rights, such as applications for review in terms of the PAJA – now the main cause of action for judicial review.²⁵ Commentators suggest, however, that cases of indirect application do not entail an infringement of or a threat to a right in the Bill of Rights in the strict sense.²⁶ On this view there is a very wide gap indeed between the restrictive rules of the common law and the liberal provisions of s 38. In cases directly concerning the Bill of Rights litigants are able to act in their own interest or on behalf of others, and even on behalf of the general public, provided they allege that a fundamental right has been infringed or threatened and as long as they have a sufficient

²² See Clive Plasket *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa* PhD Thesis, Rhodes University (2002) at 203-4.

²³ Note 10 above.

²⁴ *Ibid* para 165.

²⁵ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) paras 22, 25.

²⁶ Iain Currie & Johan de Waal *The Bill of Rights Handbook* 5 ed (2005) 81n10. Loots (note 9 above) appears to agree (at 7–13).

interest in obtaining the remedy they seek.²⁷ In cases not directly concerned with rights contained in Chapter 2 of the Constitution, our courts have something of a choice at present: they can either continue to apply the narrow common-law approach²⁸ or allow themselves to be influenced by the generosity of the Constitution.²⁹

The second approach is preferable for reasons of logic as well as principle. After all, s 39(2) of the Constitution enjoins courts and tribunals to promote the ‘spirit, purport and objects’ of the Bill of Rights when interpreting any legislation and when developing the common law or customary law. According to the Constitutional Court, the section ‘ensures that the common law will evolve within the framework of the Constitution’.³⁰ Furthermore, the court has insisted that there are not *two* systems of law relating to the control of public power, each operating in its own field with its own highest court. There is only *one* system of law, and it is ‘shaped by the Constitution’.³¹ There is also some judicial support for the proposition that s 38 applies not merely to Bill of Rights matters but also to all constitutional cases,³² and there is no doubt at all that judicial review of the exercise of public power is inevitably a constitutional matter³³ even if it is not a Bill of Rights matter. Indeed, it is worth remembering that the distinction between constitutional and non-constitutional worlds is an artificial one, and that any boundary between these two realms is likely to be drawn contextually. Thus a distinction implied for the purposes of jurisdiction or the powers of courts, as in ss 167(3) and 172(1) of the Constitution, may well require a different interpretation in the context of standing.

In the light of these considerations, it would be absurd to attempt to maintain a generous dispensation for cases falling within the Bill of Rights and a restrictive regime for other matters. Section 38 is already reflected in environmental legislation,³⁴ and Parliament could quite easily resolve the existing tension in other areas by enacting appropriate

²⁷ See Currie & De Waal (note 26 above) 191; and for a judicial summary of the constitutional position, see the judgment of Van Heerden AJ in *Dawood v Minister of Home Affairs* 2000 (1) SA 997 (C) at 1028G-1030C.

²⁸ See eg *Raubenheimer NO v Johannes Bredenkamp Trust* (note 13 above) paras 45-51, where Van Zyl J drew a sharp distinction between cases concerning a constitutional right and a statutory interest.

²⁹ See Loots (note 9 above) at 7--13.

³⁰ *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 49 (Chaskalson P).

³¹ *Ibid* para 44.

³² In *South African Association of Personal Injury Lawyers v Heath* 2000 (10) BCLR 1131 (T) at 1147I-1148E Coetzee J read the judgment of Chaskalson P in *Ferreira v Levin* (note 10 above) paras 164-5 as supporting this proposition. In *Rail Commuter Action Group v Transnet Ltd t/a Metrorail (No 1)* 2003 (5) SA 518 (C), where the standing of an association was challenged, Davis and Van Heerden JJ pointed out that the relief the applicants sought was ‘in part dependent upon the provisions of the Constitution’ and that where they relied on the common law, they sought to expand those rights by relying on the Constitution. Furthermore, they sought ‘to hold respondents accountable to the class of persons who use commuter trains in the Western Cape’ (at 556D-E).

³³ *Pharmaceutical Manufacturers Association* (note 30 above) para 51.

³⁴ Section 32 of the National Environmental Management Act 107 of 1998.

legislation more broadly. It is hoped that this will be done – not only to bring ‘general’ standing into line with standing under the Bill of Rights, but also to make detailed provision for class actions and public interest actions in particular.³⁵

In the context of administrative law the most pressing question is which requirements of standing apply in relation to cases brought under the PAJA. The version of the Act that was recommended by the South African Law Commission replicated the wording of s 38, although without mentioning its provenance.³⁶ Unfortunately the provision was deleted in the final stages of the parliamentary process,³⁷ thus causing some uncertainty as to the position. However, in the light of the arguments made above, and in view of the fact that the PAJA aims to give effect to s 33 of the Constitution, the provisions of s 38 must surely be read into the statute.³⁸

(d) The courts’ treatment of standing

While the provisions of s 38 of the Constitution go well beyond the common law, they also encompass the common-law position. This makes it convenient to deal with the common law and the Constitution together, under the various heads of s 38, and in the process to compare them.

(i) Anyone acting in their own interest

At common law the courts evolved the requirements of a *sufficient interest* that is *personal* to the applicant as well as *direct*.

As to the first, the courts have generally insisted on an interest that arises out of a legal right, such as a person’s right to liberty or property, or an interest that has a factual basis in money, property or some other benefit. Where, for example, competitors for a government post wished to challenge an allegedly illegal appointment, they were held not to have standing because it was not sufficiently certain that the illegal appointment had prejudiced them at

³⁵ The South African Law Commission included a draft Bill in its report of August 1998 on *The Recognition of Class Actions and Public Interest Actions in South African Law* (Project 88). The Bill dealt only with public interest actions and class actions, but was intended to apply in ‘non-constitutional’ cases as well as in Bill of Rights matters.

³⁶ See the definition of ‘qualified litigant’ in the Bill appended to the Commission’s *Report on Administrative Justice* (1999) 15 at 19-20 (clause 1(m)).

³⁷ The reasoning of the parliamentary committee is not entirely clear. For an account of its deliberations in relation to this issue, see J R de Ville *Judicial Review of Administrative Action in South Africa* (2003) 401.

³⁸ This view not only has academic support (see eg De Ville (note 37 above) 401) but was recently upheld in *SLC Property Group (Pty) Ltd v Minister of Environmental Affairs & Economic Development (Western Cape)* [2008] 1 All SA 627 (C).

all.³⁹ There are many other instances of this sort of narrow approach, even in cases decided in the democratic era. In *Naidenov v Minister of Home Affairs*⁴⁰ an illegal immigrant applied to interdict his deportation, alleging that his arrest was unconstitutional. Amazingly, he was found not to have an interest as required by law – the law in this case being ss 7(4)(b) and 24(c) of the interim Constitution⁴¹ – but rather a ‘wish to remain in this country or a wish not to be returned to his own country’.⁴²

At common law the second requirement was occasionally interpreted generously to mean that the interest could be shared by others provided that it was also personal to the applicant.⁴³ On the stricter and more orthodox construction, however, the interest had to be *unique* to the applicant. On this second approach, if the applicant belonged to a class of people who were all sufficiently injured in some way by the alleged illegality, then the applicant had to show ‘special damage’ greater than that of the rest of the class.⁴⁴ Alternatively, if he could show that a statutory provision had been enacted for the benefit of a class of which he formed part, the court would presume personal damage.⁴⁵ An illustration from the democratic era is *Verstappen v Port Edward Town Board*,⁴⁶ where the applicant sought to interdict a local authority against dumping waste illegally. The applicant was unable to show special damage to herself, however, and the court found that the legislation in question had been enacted for the benefit of the general public rather than for a class of which the applicant formed part.⁴⁷

The requirement of ‘directness’ may merely be another way of expressing the need for a personal interest,⁴⁸ and certainly the terms could be treated as synonymous in many cases. Whatever the position, organisations attempting represent their members have often fallen foul of it.⁴⁹

The three requirements outlined above have traditionally been relaxed in the case of ratepayers, who are presumed to have a legitimate interest in the legality of action taken by

³⁹ *Davies v Bekker NO and Smit* 1934 TPD 384 at 385.

⁴⁰ *Naidenov v Minister of Home Affairs* 1995 (7) BCLR 891 (T).

⁴¹ *Ibid* at 901-2, where Spoelstra J found that the two sorts of interest were of the same type.

⁴² *Ibid*. See also *Xu v Minister van Binnelandse Sake* 1995 (1) SA 185 (T).

⁴³ This more lenient construction is exemplified by *Bamford v Minister of Community Development and State Auxiliary Services* 1981 (3) SA 1054 (C).

⁴⁴ *Patz v Greene & Co* 1907 TS 427.

⁴⁵ *Ibid* at 433. See eg *Roodepoort-Maraiburg Town Council v Eastern Properties (Prop) Ltd* 1933 AD 87 at 96; *BEF (Pty) Ltd v Cape Town Municipality* 1983 (2) SA 387 (C) at 400.

⁴⁶ *Verstappen v Port Edward Town Board* 1994 (3) SA 569 (D).

⁴⁷ *Ibid* at 574.

⁴⁸ See Baxter (note 2 above) 654.

⁴⁹ See at (v) below.

their local authorities.⁵⁰ They were also subjected to some reappraisal in the important case of *Jacobs v Waks*,⁵¹ a decision dating from the end of the apartheid era. In this case the Appellate Division took an unusually liberal view of the types of interest that might qualify and also supported the more liberal meaning of ‘personal’ interest. The advent of the democratic constitution, however, has had an even more transformative effect on the traditional understanding of the type of interest required. In 1996, in *Ferreira v Levin NO*,⁵² a majority of the Constitutional Court held that is enough if the complainant is affected *directly* by the conduct complained of, and that he or she need not necessarily be affected *personally* as well. In the judgment of Chaskalson P, it was not necessary to interpret ‘a person acting in his or her own interest’⁵³ as requiring the complainant’s *own* constitutional right to have been infringed or threatened.⁵⁴ He held that the applicants had a sufficient interest to challenge a legislative provision on the basis that, viewed objectively, the provision infringed the right to a fair trial – even though the applicants were not themselves accused persons being tried.⁵⁵ The provision had a direct bearing on the applicants’ common-law rights, and their failure to comply with it had possible criminal consequences.⁵⁶ Furthermore, the matter was not of mere academic interest.⁵⁷

(ii) *Acting on behalf of another person who cannot act in their own name*

At common law the strict requirements of standing have been relaxed in applications for the interdict de libero homine exhibendo, an ancient method of challenging the unlawful deprivation of liberty.⁵⁸ In *Bozzoli v Station Commander, John Vorster Square, Johannesburg*⁵⁹ it was accepted that a university principal’s special interest in the welfare of his students gave him standing to apply for the release of students who had been detained. In

⁵⁰ This arises from the ‘relationship of trust’ between the council and their ratepayers which was referred to by Juta AJA in *Director of Education, Transvaal v McCagie* (note 15 above) at 628. See also *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (2) SA 1115 (SCA) at 122F-H (Mahomed CJ).

⁵¹ *Jacobs v Waks* 1992 (1) SA 521 (A). A flexible approach was also adopted in *Independent Food Processors (Pty) Ltd v Minister of Agriculture* 1993 (4) SA 294 (C).

⁵² Note 10 above. See especially paras 162-8 in the judgment of Chaskalson P.

⁵³ This was the wording of s 7(4)(b)(i) of the interim Constitution, the precursor to s 38(a) of the 1996 Constitution.

⁵⁴ See also *Nomala v Permanent Secretary, Department of Welfare* 2001 (8) BCLR 844 (E) at 852-3.

⁵⁵ Note 10 above, para 168.

⁵⁶ *Ibid* para 166.

⁵⁷ *Ibid* para 164.

⁵⁸ The interdict was frequently used to challenge detentions during the states of emergency of the 1980s. Today it has effectively been replaced by ss 12 and 35(2) of the Constitution. In particular, s 35(2)(d) gives detainees the right ‘to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released’.

⁵⁹ *Bozzoli v Station Commander, John Vorster Square, Johannesburg* 1972 (3) SA 934 (W).

the famous case of *Wood v Ondangwa Tribal Authority*⁶⁰ this relaxation was extended to allow the members of a political and a church organisation to seek an interdict prohibiting the detention of their members, who (though not yet detained) were unable themselves to go to court. However, the Appellate Division made it clear that this liberal approach should not be regarded as anything more than an exception to the usual requirements. Far from introducing an interest in legality or an *actio popularis*, Rumpff CJ likened the position of the applicant to that of the *negotiorum gestor* or the *curator ad litem* – further demonstration, Baxter notes, of the private-law orientation of our common-law rules of standing.⁶¹

The position is, or should be, quite different under s 38(b) – though this was not immediately apparent from *Maluleke v MEC, Health and Welfare, Northern Province*,⁶² one of the few cases to have dealt with the provision. The case arose out of the decision of the respondent to suspend the payment of old-age pensions to thousands of beneficiaries whose records did not comply with statutory requirements. The applicant sought to have this decision declared unlawful not only in relation to her own pension, but also on behalf of about 92 000 other affected pensioners. Her personal application was successful, but the court held that she did not have standing to act on behalf of the other beneficiaries. On the assumption that the violation of a right in the Bill of Rights had been established, Southwood J held that there was no evidence to show that the other 92 000 pensioners could not act in their own names.⁶³

One wonders what would happen to our court rolls if each of those pensioners made an individual application to court. But more to the point, it is surely fairly clear that impoverished pensioners would not, practically speaking, be in a position to act for themselves. This was explicitly recognised in *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape*,⁶⁴ a case dealing with the suspension of the disability grants of the four applicants and any number of others whose grants had been discontinued by the Eastern Cape administration since 1996. Here Froneman J was able to distinguish the decision in *Maluleke*. Although the identities of the thousands of people in question were known only to the respondents, he found that there was evidence that the ‘many people’ situated similarly to the applicants were unable individually to pursue their claims ‘because they are poor, do not have

⁶⁰ Note 16 above.

⁶¹ Baxter (note 2 above) 662.

⁶² *Maluleke v MEC, Health and Welfare, Northern Province* 1999 (4) SA 367 (T).

⁶³ *Ibid* at 374B-C.

⁶⁴ Note 11 above.

access to lawyers and will have difficulty in obtaining legal aid'.⁶⁵ Referring to the Indian experience, Froneman J endorsed the view that

‘flexibility and a generous approach to standing in a poor country is “absolutely essential for maintaining the rule of law, furthering the cause of justice and accelerating the pace of realisation of the constitutional objective”. . . .’⁶⁶

A flexible approach to standing, he indicated, by making it easier for disadvantaged and poor people to approach the court on public interest issues, ‘serves our new democracy well’ – particularly when the courts are effectively the only means of enforcing the requirements of legality.⁶⁷

(iii) Acting as a member of, or in the interest of, a group or class of persons

By providing that a person may act ‘as a member of or in the interests of a group or class of persons’, the Constitution introduces a class action into South African law. This is something foreign to our common law since Roman times, with one or two exceptions. In particular, local authorities are acknowledged to have standing to defend the public interest in administrative areas falling within their powers, such as town-planning schemes and any other matters affecting their ratepayers.⁶⁸ Apart from such exceptions, the only way in which South African law has permitted other parties to participate in an existing action is by means of formal joinder.⁶⁹

In its report on class actions and public interest actions⁷⁰ the South African Law Commission defines a class action as ‘a device by which a single plaintiff may pursue an action on behalf of all persons with a common interest in the subject matter of the suit’. The court’s ruling will then benefit and bind all members of the class. One of its advantages is that people whose claims are too small to be pursued individually – or people who cannot afford to pursue their claims, large or small – are given access to court. Another is that the courts

⁶⁵ Ibid at 622J-623A.

⁶⁶ Ibid at 623D, quoting the words of Bhagwati J in *S P Gupta v President of India* (1982) 2 SCR 385.

⁶⁷ Ibid at 629F-H.

⁶⁸ See *Madrassa Anjuman Islamia v Johannesburg Municipality* 1917 AD 718; *Roodepoort-Maraaisburg Town Council* (note 45 above). In addition, some statutes expressly confer standing on local authorities for specific purposes.

⁶⁹ See generally Louis de Villiers van Winsen et al *Herbstein and Van Winsen The Civil Practice of the Superior Courts in South Africa* 4 ed (1997) 165-9 and 170-7.

⁷⁰ SALC Report (note 35 above) para 2.3.1. See also Cheryl Loots ‘Locus Standi to Claim Relief in the Public Interest in Matters Involving the Enforcement of Legislation’ (1987) 104 SALJ 131; Wouter de Vos ‘Reflections on the Introduction of a Class Action in South Africa’ 1996 TSAR 639.

themselves are not ‘inundated with numerous claims relating to a common subject matter’.⁷¹ The Law Commission rightly recommends the enactment of legislation to regulate the class action provided for in s 38(c) and to extend the action to non-constitutional matters.⁷² It notes that the development of this area of the law could be left to the courts, but that this option carries the danger of inconsistency among the various divisions of the High Court.⁷³

One of the most difficult questions raised by a class action is the degree of homogeneity and identification required of the class. A generous approach was adopted in *Beukes v Krugersdorp Transitional Local Council*,⁷⁴ which concerned a challenge to the unequal tariffs imposed on ratepayers by a local authority. Here Cameron J indicated that it would

‘run counter to the spirit and purport of the interim Constitution to require that persons who identify themselves as members of a group or class . . . should reiterate with formalistic precision the complaint with which they associate themselves. Even more contrary to the spirit and purport would be to require that they attest to their status or that they put in affidavits joining in the litigation.’⁷⁵

In this case, however, the parties to the class action (120 signatories) had at least identified themselves by writing their names and addresses on a form headed ‘List of group to class action’, thereby authorising the applicant to act on their behalf. This was not the position in *Maluleke v MEC, Health and Welfare, Northern Province*,⁷⁶ where the welfare benefits of thousands of pensioners had been suspended. Here a class action foundered partly because of the applicant’s failure to allege ‘that a right in the Bill of Rights has been infringed or threatened’, as required by s 38 (though it was, with respect, fairly obvious that the right to lawful administrative action in s 33(1) of the Constitution had been infringed).⁷⁷ Another factor was the absence of other important evidence establishing the need for a class action. In particular, Southwood J noted that there was no evidence as to the identity of the 92 000 beneficiaries, that they constituted a group or class, that they knew of the application or that

⁷¹ SALRC Report (note 35 above) para 2.3.1.

⁷² Ibid paras 3.1.1-3.1.4.

⁷³ Ibid para 3.4.1.

⁷⁴ *Beukes v Krugersdorp Transitional Local Council* 1996 (3) SA 467 (W). See also *Esterhuyse v Jan Jooste Family Trust* 1998 (4) SA 241 (C) at 253-4. Cf the approach of Daniels J in *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* 2002 (1) BCLR 23 (T) at 27E-H.

⁷⁵ *Beukes v Krugersdorp TLC* (note 74 above) at 474G-H. See also *Dawood v Minister of Home Affairs* (note 27 above) at 1029I-1030F.

⁷⁶ Note 62 above.

⁷⁷ See Clive Plasket ‘Standing, Welfare Rights and Administrative Justice: *Maluleke v MEC, Health and Welfare, Northern Province*’ (2000) 117 SALJ 647 at 651-2.

they were willing to be bound by the results of the litigation.⁷⁸ In his view, they were a class or group ‘in only the vaguest and broadest sense’.⁷⁹

By contrast, Froneman J was undismayed by similar features of the application in *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape*.⁸⁰ Evidently unimpressed by the respondents’ reliance on the rules of standing as a barrier to the application, he remarked that the ‘many practical difficulties’ associated with representative and class actions, and highlighted in the *Maluleke* case, ‘cannot justify the denial of such an action where the Constitution makes specific provision for it’.⁸¹ Though the identities of those forming the class – the many thousands whose social benefits had been suspended in the Eastern Cape since 1996 – were not individually identified, this presented no difficulty, since it would be ‘surprising if the respondents did not know the identities of those people whose benefits they have discontinued since 1996’.⁸² As for the need for a common interest, Froneman J had this to say:

‘The common interest must relate to the alleged infringement of a fundamental right as required by section 38. In this matter the applicants have established that on the papers. They and those they seek to represent have this in common: their social benefits were all allegedly discontinued in the same unlawful manner by the respondents.’⁸³

Froneman J thus found that the class in this case was sufficiently clear and identifiable, and he allowed the applicants standing on the basis of s 38(c) as well as (b). In *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza*⁸⁴ a unanimous Supreme Court of Appeal upheld this judgment and disapproved the approach taken in *Maluleke*. In a judgment whose tone suggests impatience with the respondents’ technical objections to the standing of the applicants,⁸⁵ Cameron JA dismissed complaints about

⁷⁸ *Maluleke v MEC, Health and Welfare* (note 62 above) at 374B-E.

⁷⁹ Ibid at 374C-D. For criticism, see Plasket ‘Standing’ (note 77 above) at 655ff.

⁸⁰ Note 11 above.

⁸¹ Ibid at 623B-C.

⁸² Ibid at 623B.

⁸³ Ibid at 624F-G.

⁸⁴ Note 12 above.

⁸⁵ Cameron JA was very critical of the province’s unlawful termination of thousands of welfare benefits without notice and of the respondents’ shameless recourse during the litigation ‘to every stratagem and device and obstruction, every legal argument and non-argument that [they] thought lay to hand’ (ibid para 14). Though he was not as critical of the respondents’ two arguments on standing – the inadequate definition of the class and the problem of extra-jurisdictional applicants – his attitude was that neither had substance (ibid para 16).

applicants who fell outside the jurisdiction of the court *a quo*⁸⁶ and held that there could be no complaint about the clarity of the group's definition:

'From the point of view of practical definition, it is beyond dispute that (1) the class is so numerous that joinder of all its members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims of the applicants representing the class are typical of the claims of the rest; and (4) the applicants through their legal representatives, the Legal Resources Centre, will fairly and adequately protect the interests of the class. The quintessential requisites for a class action are therefore present.'⁸⁷

The judgment of Cameron JA has done much to clarify the boundaries of the class action envisaged by the Constitution. However, legislation is still needed in order to deal explicitly with issues such as the nature and identification of a group or class in terms of s 38(c), and methods of giving notice to the other members of the class. These and other problem areas were specifically noted by the Constitutional Court in *Independent Electoral Commission v Langeberg Municipality*.⁸⁸

(iv) *Acting in the public interest*

Broadly speaking, public interest litigation arises whenever an individual or an organisation brings legal issues of public significance to the courts. The individual, corporation or group bringing the action purports to represent the 'public' interest rather than the interests of any identifiable individuals.⁸⁹ The Law Commission points out that there is no clear dividing line between a class action and a public interest action, which may overlap to some extent.⁹⁰ However, a distinguishing feature is that the judgment in a public interest action is not *res judicata* against all interested parties, whereas the judgment in a class action ordinarily binds all the members of the class.⁹¹

The reintroduction of an *actio popularis* into South African law is very welcome. Though developments in the common law offer some relief from the harsh effects of the time-honoured standing requirements, they are limited in their scope and do not challenge the supremacy of the private-law model of dispute-settling. In practice, a qualified applicant (one

⁸⁶ Ibid paras 20-27.

⁸⁷ Ibid para 16.

⁸⁸ *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) para 15.

⁸⁹ Peter Cane 'Standing up for the Public' 1995 *Public Law* 276.

⁹⁰ SALC *Report* (note 35 above) para 2.4 1.

⁹¹ Ibid para 2.4.3. See the draft Bill appended to the *Report*, where this difference is given form in clauses 2(4) and 10(3).

with a sufficient, direct and personal interest) may be very hard to find in the sorts of cases that cry out for a public interest action – typically cases concerning consumer interests, animal welfare and the environment.⁹²

In *Lawyers for Human Rights v Minister of Home Affairs*⁹³ the Constitutional Court noted the importance of establishing that the person or organisation concerned is genuinely acting in the public interest, objectively speaking, and it referred with approval⁹⁴ to the factors listed by O'Regan J in her separate judgment in *Ferreira v Levin NO*.⁹⁵ These include whether there is a reasonable and effective manner in which the challenge can be brought, the nature of the relief sought, the range of persons or groups who may be directly or indirectly affected by any order made, and the opportunity they have had to present evidence and argument to the court. The factors were of relevance once again in *Campus Law Clinic, University of KwaZulu-Natal, v Standard Bank of South Africa*,⁹⁶ an application for leave to appeal where the applicant had not been a party to the proceedings in any of the three courts concerned. The Constitutional Court held that this was not an absolute bar to its being accorded standing, particularly since there was no other litigant willing and able to take the matter further.⁹⁷

The public interest action has been the subject of several High Court judgments in administrative matters. One example is *Port Elizabeth Municipality v Prut NO*,⁹⁸ which concerned the decision of a municipality to write off millions of rands worth of debts owed by residents for services. The court accepted that it was 'clearly in the public interest to have clarity on whether the municipality's decision to write off more than R62 m discriminate[d] unfairly against other service-charge debtors or ratepayers',⁹⁹ and observed that a court should be slow to refuse to exercise its jurisdiction where a decision 'will be in the public interest and where it may put an end to similar disputes'.¹⁰⁰ In *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape*,¹⁰¹ Froneman J was satisfied by the fact that 'the applicants . . . and those they seek to represent have this in common: their social benefits were

⁹² Ibid para 2.2.2.

⁹³ Note 21 above.

⁹⁴ Both in the majority judgment of Yacoob J (paras 16-17) and in the minority judgment of Madala J (para 72), who added 'the egregiousness of the conduct complained of' as a further relevant factor (para 73).

⁹⁵ Note 10 above, para 234.

⁹⁶ *Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa Ltd* 2006 (6) SA 103 (CC).

⁹⁷ Ibid paras 20, 22. Direct access to the Constitutional Court was refused, however.

⁹⁸ *Port Elizabeth Municipality v Prut NO* 1996 (4) SA 318 (E). See also *Prior v Battle* 1998 (8) BCLR 1013 (Tk).

⁹⁹ *Port Elizabeth Municipality v Prut NO* (note 98 above) at 325-6.

¹⁰⁰ Ibid at 325E.

¹⁰¹ Note 11 above.

all allegedly discontinued in the same unlawful manner by the respondents'.¹⁰² The applicants thus had standing to challenge the legality of the suspensions not only on the basis of s 38(b) and (c), but also under s 38(d).¹⁰³ And in *Van Rooyen v The State*¹⁰⁴ Southwood J held that a magistrate and an association of magistrates had standing in terms of s 38(d) to challenge the constitutionality of parts of the Magistrates' Courts Act 32 of 1944, since it was 'clearly in the public interest' that issues relating to the independence of the courts be addressed and resolved.¹⁰⁵

In relation to s 38(d), as with other parts of s 38, legislation is certainly desirable in order to clarify the elements of a public interest action (such as the nomination of a representative to conduct the action) and to extend the public interest action to non-constitutional cases. Meanwhile, the case law suggests a willingness on the part of the judiciary to overcome the practical difficulties connected with the public interest action.

(v) *An association acting in the interest of its members*

In the absence of an express or implied provision¹⁰⁶ enabling them to represent their members, voluntary associations purporting to do so at common law have frequently been denied standing on the basis that the injury was suffered by the *members* and not by the association itself. However, the members of an unincorporated association may be able to sue in the name of the organisation in terms of Uniform Rule 14, and it is possible for an unincorporated body having the characteristics of a *universitas personarum* to sue in its own name, even if there is no provision to that effect in its constitution.¹⁰⁷

¹⁰² Ibid at 624G. Cf the approach of the court in *Maluleke v MEC, Health and Welfare, Northern Province* (note 62 above).

¹⁰³ Ibid at 625D-E. This aspect of the judgment was not considered by the Supreme Court of Appeal in *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* (note 12 above), since the applicants had decided to proceed on the basis of s 38(c).

¹⁰⁴ *Van Rooyen v The State* 2001 (4) SA 396 (T) at 424H.

¹⁰⁵ The issue was not dealt with by the Constitutional Court in *Van Rooyen v The State* 2002 (5) SA 246 (CC).

¹⁰⁶ In order to imply a power to sue, it must be incidental to the express powers, or 'absolutely requisite for the due carrying out of the express objects of the association': King AJ in *Bantu Callies Football Club v Motlhamme* 1978 (4) SA 486 (T) at 490B. Cf *Society for the Prevention of Cruelty to Animals, Standerton v Nel* 1988 (4) SA 42 (W), where a far more liberal approach was adopted.

¹⁰⁷ See eg *Molotlegi v President of Bophuthatswana* 1989 (3) SA 119 (B) at 126J; *Nelson Mandela Metropolitan Municipality v Greyvenouw* CC 2004 (2) SA 81 (SE) paras 60-1. Cf *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council* 2002 (6) SA 66 (T) para 24. In *Rail Commuter Action Group v Transnet Ltd t/a Metrorail (No 1)* (note 32 above) Davis and Van Heerden JJ found that 'strict adherence to the requirements of a *universitas personarum* is incompatible with the spirit of the Constitution' (at 556G-I). However, the issue of standing was not considered subsequently by the Supreme Court of Appeal or the Constitutional Court.

The case of *South African Optometric Association v Frames Distributors (Pty) Ltd t/a Frames Unlimited*¹⁰⁸ illustrates the difficulties typically encountered where an organisation is not able to take advantage of the concessions just mentioned. In this case the association sought to prevent the respondent from selling spectacle frames illegally. However, the association was a non-profit organisation, and its interest was found to be ‘at best, merely an indirect interest’.¹⁰⁹ While some of its members stood to lose money from having to compete with the respondent, the association itself lacked standing to bring the application.

However, there are a number of older cases that go against the trend of requiring damage to the organisation apart from that suffered by its members.¹¹⁰ A famous instance is *Transvaal Indian Congress v Land Tenure Advisory Board*,¹¹¹ where De Wet J allowed the standing of the congress to challenge a decision of the Board even though the congress was representing the interests of its members. And in *Ex parte Natal Bottle Store-Keeping and Off-Sales Licensees’ Association*¹¹² Henochsberg J pointed out that the court would be overburdened if all 89 licensees being represented by the association were to bring their own applications.

Over the last two decades our courts have seemed increasingly willing to recognise the important role played by associations in protecting certain public interests. For example, in *Society for the Prevention of Cruelty to Animals, Standerton v Nel*¹¹³ Gordon AJ took into account that the SPCA ‘has, over the years, become well established and fully recognised as the authoritative voice in the protection of injury or cruelty to animals from whatever source’.¹¹⁴ In another case Pickering J found that a wildlife society, ‘with its main object being to promote environmental conservation in South Africa, should have locus standi at common law’¹¹⁵ to apply for an order requiring the state to fulfil its statutory duty to protect the environment. Cases such as these¹¹⁶ suggest that our courts have been moving steadily

¹⁰⁸ *South African Optometric Association v Frames Distributors (Pty) Ltd t/a Frames Unlimited* 1985 (3) SA 100 (O).

¹⁰⁹ Ibid at 104E-F (Lichtenburg J).

¹¹⁰ The usual difficulty is that the members have suffered damage and that the organisation, which seeks standing to sue, has not. The opposite problem presented itself in *McCarthy v Constantia Property Owners’ Association* 1999 (4) SA 847 (C). Section 38 itself was not relied upon, but Davis J found it had ‘radically extended’ the common-law rules (at 854H) and that the culture of justification introduced by the Bill of Rights in respect of public law should be extended to the exercise of private power as well. Thus the applicant members had standing to ‘protect the environmental fabric of their suburb’ (at 855E).

¹¹¹ *Transvaal Indian Congress v Land Tenure Advisory Board* 1955 (1) SA 85 (T).

¹¹² *Ex parte Natal Bottle Store-Keeping and Off-Sales Licensees’ Association* 1962 (4) SA 273 (D) at 276C.

¹¹³ Note 106 above.

¹¹⁴ Ibid at 47B-E.

¹¹⁵ *Wildlife Society of Southern Africa v Minister of Environmental Affairs and Tourism of the Republic of South Africa* 1996 (3) SA 1095 (Tk) at 1105B.

¹¹⁶ See also *Teachers Association of South Africa v Pillay* 1993 (1) SA 111 (D). In the constitutional context the

towards the recognition of associational standing as now provided for by s 38(e) of the Constitution. What remains now is to explore its limits.¹¹⁷

(e) Conclusion

The common-law rules of standing remain a formidable obstacle to the enforcement of administrative law. While s 38 of the Constitution apparently transforms the law by making very generous provision for standing to vindicate constitutional rights (including those in s 33), there is continuing uncertainty as to the place of s 38 in cases not involving the direct application of rights. The uncertainty was unfortunately compounded by the deliberate omission of the provisions of s 38 from the PAJA. It has been argued above that the correct judicial course is to bring the common-law rules of standing into line with s 38, and it has been suggested that there is increasing evidence of a tendency in this direction. The recent case law evinces a refreshing judicial reluctance to allow the formal rules of standing to frustrate the achievement of administrative justice, as they so often did in the pre-democratic era.

3.3 LEGISLATIVE OBSTACLES TO JUDICIAL REDRESS

(a) Introduction and overview

At common law the superior courts have inherent jurisdiction¹¹⁸ to review administrative decisions and set aside or ‘correct’ them – that is, substitute the court’s decision for that of the administrator – and to grant remedies such as declaratory orders and interdicts.¹¹⁹ As has already been noted, the remedies available before 1994 to applicants for review were generally both appropriate and adequate in their nature and scope. Notoriously, however, in that era the courts’ review and associated remedial jurisdiction was under constant threat from the legislature. By means of devices such as ouster clauses, finality clauses, indemnity provisions and limitation clauses, Parliament sought either to remove or circumscribe the

Constitutional Court seems to have been particularly ready to accept that an organisation has standing to litigate on behalf of its members: see eg *Transvaal Agricultural Union v Minister of Land Affairs* 1997 (2) SA 621 (CC) para 1; *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) para 3.

¹¹⁷ Cf eg *South African Veterinary Council v Veterinary Defence Association* 2003 (4) SA 546 (SCA) para 46; *Western Cape Residents’ Association obo Williams v Parow High School* 2006 (3) SA 542 (C) at 544D-E.

¹¹⁸ In his oft-cited dictum in *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111 at 115, Innes CJ remarked that the review power did not call on any ‘special machinery created by the Legislature’ but was ‘a right inherent in the Court’.

¹¹⁹ For a full account of the common law in this regard, see Baxter (note 2 above) Chapter 17, ‘Judicial Remedies and Procedure’, at 673-760.

relief ordinarily available to applicants for review. Subjective language, too, was used to confer particularly wide discretion on administrative decision-makers, with the aim of limiting the scope of review of their decisions.

These features explain why, in the transformation of our legal order, a concern of the drafters of the Constitution was to protect people's access to court. This was achieved mainly through s 34 of the Constitution (previously s 22 of the interim Constitution).¹²⁰ Section 34 states:

‘Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing in a court or, where appropriate, another independent and impartial forum.’

Together with s 33 and s 38 (discussed in the first part of this chapter), s 34 of the Constitution has utterly changed the remedial landscape in administrative matters, and of course in constitutional matters more generally.¹²¹ Today any purported limitation of the courts' review or remedial jurisdiction will be invalid unless it can be constitutionally justified, as will be shown by the discussion below. In addition to these provisions, s 172(1) of the Constitution gives the courts remedial powers to deal with ‘law or conduct that is inconsistent with the Constitution’.¹²²

As already noted in this chapter, s 38 of the Constitution is concerned with the direct enforcement of constitutional rights. Today, however, most cases in administrative law do not involve the direct application of the Constitution.¹²³ The default pathway to judicial review is now the PAJA, which gives effect to the rights in s 33(1) and (2) in three main ways. Section 6 of the PAJA sets out the grounds of review (considered in Chapter 2 above); s 8 empowers the reviewing court to grant ‘any order that is just and equitable’, including certain specified

¹²⁰ Section 22: ‘Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum.’

¹²¹ Today almost any administrative matter will satisfy the definition of ‘constitutional matter’ in s 167(7) of the Constitution: ‘any issue involving the interpretation, protection or enforcement of the Constitution’. Only the review of exercises of private power potentially fall outside the Constitution, and even these can be brought within it by virtue of s 39(2) (which facilitates the indirect horizontal application of the Bill of Rights).

¹²² Section 172(1)(a) requires such law or conduct to be declared invalid to the extent of its inconsistency. In terms of s 172(1)(b) the court may grant any order that is ‘just and equitable’, including orders limiting or suspending the retrospective effect of the declaration of invalidity.

¹²³ A rare example of direct application is *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC), which concerned the constitutionality of original legislation allowing animals to be impounded. The legislation was thus held up against the higher norm of s 33 rather than the PAJA, another piece of original legislation.

remedies;¹²⁴ and s 7 lays down procedural requirements for judicial review – specifically a time limit within which review must be brought and a duty to exhaust internal remedies before applying for judicial review. These parts of s 7 were introduced precisely in order to restrict access to judicial review and its attendant remedies, and have attracted criticism for being too rigorous. They, too, are considered in the discussion that follows. Both provisions have the potential to restrict judicial review unduly, and the time limit may be unconstitutional for this reason. As to the stringent duty to exhaust internal remedies, however, indications are that the courts are interpreting the PAJA fairly liberally, in line with the common law.

(b) The main legislative obstacles

(i) Ouster clauses

Ouster or ‘privative’ clauses are legislative provisions intended to prevent the court from exercising its review jurisdiction over specified administrative decisions. They purport to give the administration *carte blanche* to act as it pleases, without regard for the standards of legality, reasonableness and procedural fairness. In the apartheid era ousters were relied upon particularly heavily by the authors of security legislation, but were not unknown in other legislative contexts – especially immigration. A typical example is the clause that appeared in s 29(6) of the Internal Security Act 74 of 1982:

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

On a number of occasions, notably in immigration cases, the Appellate Division held that ouster clauses were effective in preventing judicial review.¹²⁵ But there was also strong judicial antipathy towards privative clauses, reflected in a long-standing presumption against ousting and several cases in which such clauses were found to be ineffective.¹²⁶

¹²⁴ The list includes the remedies familiar at common law and a couple of less familiar ones, such as orders to give reasons and a specialised remedy linked to the ground of failure to take a decision within a reasonable time. In fact the common law was easily able to supply both of these. The codification of these remedies is nevertheless welcome because it makes them more accessible and because of its educational effect.

¹²⁵ See eg *Schermbrucker v Klindt* NO 1965 (4) SA 606 (A); *Barday v Passport Control Officer* 1967 (2) SA 346 (A).

¹²⁶ In *Union Government v Fakir* 1923 AD 466 at 469 Innes CJ said that cases ‘could be conceived in which interference would be justified’, such as those involving a manifest absence of jurisdiction or fraud. In *Narainsamy v Principal Immigration Officer* 1923 AD 673 at 675 the Chief Justice repeated that an ouster clause

The most important case of the apartheid era is *Minister of Law and Order v Hurley*,¹²⁷ where the Appellate Division endorsed a line of reasoning adopted in a number of earlier judgments. *Hurley* arose out of the arrest and detention of K, a pacifist, under s 29 of the Internal Security Act. That section required the arresting officer to have ‘reason to believe’ that the person to be detained had committed or was likely to commit an offence involving violence as set out in s 54 of the Act, or that the person was withholding from the police information relating to the commission of such a violent offence. As indicated above, the section also purported to prevent the court from ‘pronouncing on any action taken in terms of this section’. In the court a quo¹²⁸ the applicants successfully contended that the officer could not possibly have had reason to believe that K was such a person. On the basis that the arresting officer was ultra vires his powers, and relying largely on English case authority, Leon ADJP found that the ouster clause in s 29 did not prevent him from interfering, since action which is ultra vires is action which is *not* in terms of the section. This result was approved by the Appellate Division on appeal.¹²⁹

In spite of *Hurley*, however, a majority of the same court reasoned differently in *Staatspresident v United Democratic Front*,¹³⁰ the most notorious judgment to be handed down during the states of emergency of the 1980s. After many years of supporting a wide ultra vires doctrine,¹³¹ the Appellate Division performed a *volte-face* in the *UDF* case. It held that an ouster clause contained in s 5B of the Public Safety Act 3 of 1953 effectively prevented review of emergency regulations where the challenge was based on the ground of vagueness. Though the regulations in question were found to be vague (and therefore invalid), the court reasoned that the regulations were not *literally* beyond the powers of the State President: the Public Safety Act neither required the State President to make clear regulations nor explicitly prohibited him from making vague regulations.

would not prevent a court from interfering with a decision which showed a manifest absence of jurisdiction, fraud ‘or a similar element’. See also eg *South West African Peoples Democratic United Front v Administrateur-Generaal, Suidwes-Afrika* 1983 (1) SA 411 (A) at 433B.

¹²⁷ *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A). See also *Mpisi v Trebble* 1994 (2) SA 136 (A); *Minister of Education, Transkei v Mgole* 1994 (1) SA 612 (TkA).

¹²⁸ *Hurley v Minister of Law and Order* 1985 (4) SA 709 (D).

¹²⁹ *Minister of Law and Order v Hurley* (note 127 above).

¹³⁰ *Staatspresident v United Democratic Front* 1988 (4) SA 830 (A). See also *Staatspresident v Release Mandela Campaign* 1999 (4) SA 903 (A), decided by the same court on the same day.

¹³¹ *Lipschitz v Watruss NO* 1980 (2) SA 662 (T) stood then as possibly the sole exception to the courts’ general acceptance of the wide doctrine.

The majority judgment in the *UDF* case turned a century of jurisprudence on its head, but not for long. The decision was fiercely criticised¹³² and, having been applied in one or two subsequent cases,¹³³ it was either ignored or forgotten before being relegated to history by the coming of the democratic era in 1994.

Today s 34 of the Constitution¹³⁴ ensures that an ouster clause will seldom pass constitutional muster.¹³⁵ The right of access to court has been described by the Constitutional Court as the corollary of the first aspect of the rule of law, which is the state's obligation to provide mechanisms for citizens to resolve their disputes.¹³⁶ In *Chief Lesapo v North West Agricultural Bank* Mokgoro J explained the function of the right as follows:¹³⁷

‘The right of access to a court is . . . foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes.’

More recently, in *Zondi v MEC for Traditional and Local Government Affairs*,¹³⁸ Ngcobo J described s 34 as an express constitutional recognition of the importance of resolving social conflict by means of impartial and independent institutions. He observed for a unanimous court that ‘[t]he sharper the potential for social conflict, the more important it is, if our constitutional order is to flourish, that disputes are resolved by courts’.¹³⁹

Section 34 does not apply to all administrative action, since it refers specifically to disputes ‘that can be resolved by the application of law’.¹⁴⁰ This would seem to include administrative action of a judicial nature, such as proceedings before a valuation court; but it would seem not to include administrative decisions that are shaped as much by policy

¹³² See especially Nicholas Haysom & Clive Plasket ‘The War Against Law: Judicial Activism and the Appellate Division’ (1988) 4 *SAJHR* 303 and Etienne Mureinik ‘Pursuing Principle: The Appellate Division and Review Under the State of Emergency’ (1989) 5 *SAJHR* 60.

¹³³ See especially *Natal Indian Congress v State President* 1989 (3) SA 588 (D), where this reasoning was applied with obvious reluctance. Unfortunately, in *Catholic Bishops Publishing Co v State President* 1990 (1) SA 849 (A) the Appellate Division was unable to find the *UDF* decision clearly wrong.

¹³⁴ Quoted in 3.3(a) above.

¹³⁵ See the remarks of Hlophe J in *De Lille v Speaker of the National Assembly* 1998 (3) SA 430 (C) paras 34-7. This aspect of the decision was not considered on appeal in *Speaker of the National Assembly v De Lille* 1999 (4) SA 863 (SCA).

¹³⁶ *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) para 21.

¹³⁷ *Chief Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC) para 22.

¹³⁸ Note 123 above, para 61.

¹³⁹ *Ibid.*

¹⁴⁰ Cf *Kolbatschenko v King* NO 2001 (4) SA 336 (C), where it was held that conduct touching on foreign affairs (the issuing of a letter of request to a foreign government) was nevertheless justiciable.

considerations as they are by the application of law.¹⁴¹ As Currie and De Waal indicate, an application for a licence is not a ‘dispute’ and thus it will not attract the s 34 right.¹⁴² Rather, it is governed by the rights in s 33, including the right to procedural fairness. It seems fairly clear that even an appeal against a refusal of the licence will not amount to a ‘dispute’ for the purposes of s 34, particularly where it is heard by an administrative rather than a legal body.¹⁴³ If the aggrieved applicant seeks judicial review of the decision, however, this would undoubtedly amount to a dispute that can be resolved in a court or other forum. Section 34 would thus render ineffective an ouster clause that purported to preclude such judicial review.

The constitutionality of ouster clauses is also informed by s 33(1) of the Constitution. As Klaaren and Penfold put it, the right to lawful administrative action in s 33(1) means at a minimum that ‘an Act of Parliament can no longer oust a court’s constitutional jurisdiction and deprive the courts of their review function to ensure the lawfulness of administrative action’.¹⁴⁴ Furthermore, ouster clauses undermine the rule of law and the independence of the courts, as was pointed out by the court in *De Lille v Speaker of the National Assembly*.¹⁴⁵ This case concerned s 5 of the Powers and Privileges of Parliament Act 91 of 1963, in terms of which the Speaker of Parliament could produce a certificate stating that a matter concerned parliamentary privileges. On production of such a certificate the section instructed the court to stay the proceedings, which would then ‘be deemed to be finally determined’. The Cape High Court declared the section unconstitutional and invalid, partly on the grounds of its subversion of the rule of law and the separation of powers.¹⁴⁶

In the *Chief Lesapo* case¹⁴⁷ Mokgoro J said of the s 34 right that ‘very powerful considerations would be required for its limitation to be reasonable and justifiable’. However, both s 34 and s 33(3)(a)¹⁴⁸ of the Constitution envisage that the jurisdiction of a court may be replaced by that of an independent and impartial forum or tribunal where this is

¹⁴¹ Cf *Baramoto v Minister of Home Affairs* 1998 (5) BCLR 562 (W), where the court seemed to accept that the decision of an administrative body to grant or refuse refugee status did attract the s 34 right.

¹⁴² Currie & De Waal (note 26 above) 705.

¹⁴³ Ibid 556.

¹⁴⁴ Jonathan Klaaren & Glenn Penfold ‘Administrative Justice’ (OS 06-08) in Woolman et al (note 9 above) Chapter 63 at 63–22.

¹⁴⁵ Note 135 above, para 41.

¹⁴⁶ This issue was not dealt with on appeal as reliance on the certificate was abandoned. See *Speaker of the National Assembly v De Lille* (note 135 above) para 33.

¹⁴⁷ *Chief Lesapo v North West Agricultural Bank* (note 137 above) para 22.

¹⁴⁸ Section 33(3)(a) demands the enactment of legislation to ‘provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal’. This is taken up in ss 6, 7 and 8 of the PAJA, which contemplate review in a ‘court or tribunal’.

‘appropriate’.¹⁴⁹ In the context of administrative law, then, it would be permissible for the legislature to provide for review or the granting of some other remedy by an independent and impartial tribunal instead of a court.¹⁵⁰ It goes without saying, however, that the qualities of independence and impartiality would have to be beyond question. There would also have to be a ‘fair public hearing’ as required by s 34.

(ii) *Limitation clauses*

Limitation clauses are partial ousters: their object is to confine access to judicial relief rather than to prevent it altogether. These clauses typically set time limits within which applications must be brought, often stipulating minimum periods of notice that must be given to the respondent authority. Limitation clauses may also interfere with the power of the court to award certain remedies.

The use of limitation clauses is supported by reasons of practical convenience, such as the need to establish the legality of action at the earliest possible stage and the danger of losing evidence as time passes.¹⁵¹ As Baxter notes, there is also an important interest in finality:

‘[P]ublic authorities must be able to proceed with public works (which are often extremely expensive) without fearing that the entire basis of their action might be undermined by a successful attack on the legality of the undertaking.’¹⁵²

Because they do not preclude judicial scrutiny altogether, limitation clauses tend not to excite the indignation aroused by ousters. Even so, our courts have always tended to interpret them restrictively, especially where injustice would otherwise be done.¹⁵³

Since the right of access to a court (or another tribunal or forum) is now enshrined in the Constitution, limitation clauses must satisfy the test laid down in s 36 of the Constitution.¹⁵⁴ In *Mohlomi v Minister of Defence*¹⁵⁵ the Constitutional Court struck down s 113(1) of the Defence Act 44 of 1957, which required an action against the Minister of

¹⁴⁹ In relation to private arbitration see *Telcordia Technologies Inc v Telkom SA Ltd* [2006] SCA 139 (RSA) paras 46-8.

¹⁵⁰ The possibility of a general type of non-judicial review is in fact allowed for by the PAJA (see the preamble and ss 6-10), but so far no steps have been taken to make it a reality.

¹⁵¹ See eg *Qokose v Chairman, Ciskei Council of State* 1994 (2) SA 198 (Ck).

¹⁵² Baxter (note 2 above) 735.

¹⁵³ See eg *Montsisi v Minister van Polisie* 1984 (1) SA 619 (A).

¹⁵⁴ On limitation and s 36, see generally Currie & De Waal (note 26 above) 163ff.

¹⁵⁵ *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC).

Defence to be instituted within six months after the cause of action arose, and also stipulated that notice had to be given to the Minister one month before the commencement of the action. The court laid stress on the fact that many South Africans ‘are either unaware of or poorly informed about their legal rights’,¹⁵⁶ and also compared the subsection unfavourably with the less stringent provisions in the Prescription Act 68 of 1969 and the South African Police Service Act 68 of 1995. It concluded that the subsection simply left claimants with too short a time within which to give notice, and too short a time within which to sue.¹⁵⁷

Ironically, a significant limitation clause has been introduced by the PAJA itself: s 7(1) requires review proceedings to be brought within an outer limit of 180 days (six months). This provision and the PAJA’s formulation of the duty to exhaust internal remedies in s 7(2) are considered below.¹⁵⁸

(iii) Finality clauses

A statutory provision stating that a decision is ‘final’ is often termed a finality clause. In a manner reminiscent of the attitude of the English courts to such clauses,¹⁵⁹ they have generally been interpreted restrictively and as excluding only appeal and not review.¹⁶⁰ In *Parys Drankwinkel (Edms) Bpk v Minister van Nywerheidswese, Handel en Toerisme*,¹⁶¹ for instance, Van der Walt J said that a ‘final’ decision would be immune from review only if it were unimpeachable on review. In *Gilbey Distillers and Vintners (Pty) Ltd v Morris NO*,¹⁶² a case dealing with special statutory review, the Appellate Division held that a finality clause immunised a decision from challenge on review grounds as well; but because of its very specific context, the decision would not seem to speak to ordinary review under the PAJA or at common law.

Writing before 1994, Mureinik took the view that a finality clause might be ‘entitled to more respectful treatment’¹⁶³ than an ouster clause. He suggested also that if the legislature creates a special statutory jurisdiction which confers powers that are *wider* than ordinary

¹⁵⁶ Ibid para 14 (Didcott J).

¹⁵⁷ Ibid. See also *Moise v Greater Germiston Transitional Local Council* 2001 (4) SA 491 (CC), where the Constitutional Court confirmed the constitutional invalidity of s 2(1)(a) of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970. Cf *Minister of Home Affairs, Namibia v Majiedt* 2008 (5) SA 543 (NmS) in relation to the Namibian Constitution.

¹⁵⁸ At (c).

¹⁵⁹ For instance, the authors of *De Smith* (note 3 above) observe that ‘[e]ven such words as “final and conclusive” were ineffective to abridge or attenuate judicial review’ (at 186).

¹⁶⁰ See eg *Blue Circle Ltd v Valuation Appeal Board, Lichtenburg* 1991 (2) SA 772 (A).

¹⁶¹ *Parys Drankwinkel (Edms) Bpk v Minister van Nywerheidswese, Handel en Toerisme* 1985 (2) SA 584 (T) at 590.

¹⁶² *Gilbey Distillers and Vintners (Pty) Ltd v Morris NO* 1991 (1) SA 648 (A) at 658-9.

¹⁶³ Etienne Mureinik ‘Administrative Law’ 1991 AS 620 at 637.

review, then the legislature should be allowed to create it on its own terms.¹⁶⁴ Today, it need hardly be said, any statutory regime of this kind would have to pass the test of constitutional justifiability.

(iv) Indemnity and amnesty clauses

The most common kind of indemnity clause is the retrospective indemnity or amnesty, whose aim is to protect public authorities from the legal consequences of unlawful acts committed in the past.¹⁶⁵ Prospective indemnities are even more worrying. As Budlender has put it, by enacting a prospective indemnity the state ‘effectively says that it anticipates that its officials are going to act unlawfully, but it cannot or will not do anything to prevent this. State officials must therefore be given a free hand.’¹⁶⁶ An example from the apartheid era is s 103ter of the Defence Act 44 of 1957, which sheltered the the State President, the Minister of Defence, members of the South African Defence Force ‘any other person in the service of the state’ from civil or criminal proceedings arising out of acts performed ‘in connection with the prevention of terrorism in any operational area’.

Prospective indemnities were routinely included in emergency regulations during the states of emergency of the 1980s, with the saving grace of referring to acts taken ‘in good faith’ and ‘in terms of these regulations’.¹⁶⁷ Though it is not entirely clear what ‘good faith’ meant,¹⁶⁸ the second phrase did leave such clauses open to circumvention in the manner of ouster clauses.¹⁶⁹

Nowadays indemnities of any kind are unlikely to survive s 34 of the Constitution unless there is an extremely compelling reason for them. In *AZAPO v President of the Republic of South Africa*¹⁷⁰ the Constitutional Court said the following of a retrospective amnesty provision contained in the Promotion of National Unity and Reconciliation Act 34 of 1995:

‘The effect of an amnesty undoubtedly impacts upon very fundamental rights. All persons are entitled to the protection of the law against unlawful invasions of their right to life, their right

¹⁶⁴ Ibid.

¹⁶⁵ An example is the Indemnity Act 13 of 1977, enacted as a result of police brutality and other official excesses during the Soweto uprising of June 1976. State actors were indemnified for the period 16 June 1976 to the date of promulgation of the Act.

¹⁶⁶ Geoff Budlender ‘Law and Lawlessness in South Africa’ (1988) 4 *SAJHR* 139 at 144.

¹⁶⁷ For instance, reg 12(1) promulgated in Proc R96 of 1987; reg 16(1) promulgated in Proc R109 of 1986.

¹⁶⁸ See A S Mathews *Freedom, State Security and the Rule of Law* (1986) 205-7.

¹⁶⁹ See generally Kathleen Satchwell ‘Indemnity Provided for in Emergency Regulations’ in Nicholas Haysom & Clive Plasket (eds) *Developments in Emergency Law* (1989) 117.

¹⁷⁰ *AZAPO v President of the Republic of South Africa* 1996 (4) SA 671 (CC).

to respect for and protection of dignity and their right not to be subject to torture of any kind. When those rights are invaded those aggrieved by such invasion have the right to obtain redress in the ordinary courts of law and those guilty of perpetrating such violations are answerable before such courts, both civilly and criminally. An amnesty to the wrongdoer effectively obliterates such rights.’¹⁷¹

Although the amnesty provision in question was ultimately judged to be constitutional, this was because the interim Constitution had specifically envisaged and authorised such an amnesty.

(v) Subjective language

In Chapter 2 it was explained that subjectively phrased clauses, such as ‘if in his opinion’ and ‘if satisfied that’, were used by the apartheid government to confer the widest kind of discretion and thereby to minimise the scope of judicial review.¹⁷² Innes ACJ remarked a century ago that the effect of such clauses was ‘practically to oust the jurisdiction of the courts’.¹⁷³ Indeed, subjectively phrased clauses were often a more effective technique than a conventional ouster clause for restricting a court’s jurisdiction. While the courts tended to react contrarily to a crude attempt to oust their jurisdiction altogether, they felt constrained to acknowledge instances in which Parliament had clearly vested a discretion exclusively in the administrator.

Today subjectively phrased clauses have been rendered harmless by the democratic Constitution. The requirement of rationality inherent in both s 33(1) and the principle of legality entail that the courts are entitled to adopt a *Hurley*-like¹⁷⁴ approach irrespective of the wording of a particular clause. Thus, irrespective of whether action qualifies as administrative action, the courts will always be able to investigate the rationality of an opinion or belief.¹⁷⁵ While subjective language may still be capable of signalling the legislature’s desire for deference on the part of the court, its effect is no longer that of a covert ouster clause.

(c) Section 7 of the PAJA

Section 7 of the PAJA introduces two significant limitations on access to judicial review. Their effects and constitutionality are considered in what follows.

¹⁷¹ Ibid para 9.

¹⁷² At 2.2(d)(i).

¹⁷³ *Shidiack v Union Government (Minister of the Interior)* 1912 AD 642 at 653.

¹⁷⁴ *Minister of Law and Order v Hurley* (note 127 above).

¹⁷⁵ As demonstrated in *Walele v City of Cape Town* 2008 (6) SA 129 (CC) para 60.

(i) *The 180-day time limit*

At common law, review set aside or correct is a discretionary remedy that may be refused if the applicant fails to bring the application within a reasonable time. This is in the interests of finality in administrative matters, which upholds the value of certainty as well as obviating prejudice to the respondent.¹⁷⁶ What is ‘reasonable’ at common law depends on the circumstances.¹⁷⁷ Importantly, the court may condone an unreasonable delay if the applicant can give a satisfactory explanation for it. Furthermore, if the court raises the issue of delay *mero motu*, it is ‘obliged to consider whether the delay should be condoned’.¹⁷⁸

The flexibility of the common law is illustrated by the case of *Jeffery v President, South African Medical and Dental Council*, where Berman J was concerned with an ‘inordinate’ delay of one year.¹⁷⁹ In deciding to condone the delay, the judge took into account the time-consuming preparation required by the application, the fact that the delay was not attributable to the applicant’s fault, and the respondent’s failure to allege that the delay had caused prejudice.¹⁸⁰ There are limits, of course. In a case in which the applicant had waited almost fourteen years before challenging the validity of an expropriation, condonation was understandably refused.¹⁸¹ However, in a more recent case dealing with the common-law requirement, *Ntame v MEC for Social Development, Eastern Cape, and Two Similar Cases*,¹⁸² Plasket J was prepared to condone delays of several years. In doing so he took account of s 34 of the Constitution; s 1(c) of the Constitution, which establishes the rule of law, and thus the principle of legality, as a founding value of our constitutional order; and the vulnerable position of the applicants, who were seeking to enforce the fundamental right of access to social assistance.¹⁸³ He noted that the applicants were unsophisticated people with little formal education, and found that ‘[w]hen this is taken together with their poverty, their access

¹⁷⁶ *Wolgroeiërs Afslaeërs (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 41E-F (Miller JA). See also the remarks of Nugent JA in his majority judgment in *Gqwetha v Transkei Corporation Ltd* 2006 (2) SA 603 (SCA) para 22.

¹⁷⁷ Hefer JA in *Setsokeosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie* 1986 (2) SA 57 (A) at 86D-E; and see eg *Lion Match Co Ltd v Paper Printing Wood & Allied Workers Union* 2001 (4) SA 149 (SCA) paras 27-9.

¹⁷⁸ *Ibid* at 141J.

¹⁷⁹ *Jeffery v President, South African Medical and Dental Council* 1987 (1) SA 387 (C) at 391B.

¹⁸⁰ See also *Spier Properties (Pty) Ltd v Chairman, Wine and Spirit Board* 1999 (3) SA 832 (C). In relation to a delayed counter-application, see *Mnisi v Chauke; Chauke v Provincial Secretary, Transvaal* 1994 (4) SA 715 (T).

¹⁸¹ *Radebe v Government of the Republic of South Africa* 1995 (3) SA 787 (N). See also *Bellocchio Trust Trustees v Engelbrecht NO* 2002 (3) SA 519 (C) (delay of 18 months unreasonable).

¹⁸² *Ntame v MEC for Social Development, Eastern Cape, and Two Similar Cases* 2005 (6) SA 248 (E).

¹⁸³ *Ibid* para 25. Quoting the words of Cameron JA in *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuzza* (note 12 above) para 11, Plasket J noted that the applicants were ‘drawn from the very poorest within our society’ and had ‘the least chance of vindicating their rights through the legal process’.

to court is severely hampered and a more lenient approach . . . is warranted'.¹⁸⁴ The lack of prejudice to the respondent was a further consideration pointing towards condonation.¹⁸⁵

The position may well be different where it is reasonable to expect more of the applicant. In a matter relating to the determination of pension transfer values, the Supreme Court of Appeal warned that applicants are not entitled to take a 'supine attitude', but are expected rather 'to take all reasonable steps available to them to investigate the reviewability of administrative decisions adversely affecting them as soon as they are aware of the decision'.¹⁸⁶ Here the applicants had waited nearly four years before seeking review of the offending determination, and the explanation of one applicant was that he had had no reason to question the accuracy of the determination until litigation in a similar case came to his attention. Brand JA found that a reasonable person in his position would have made enquiries as to how the determination was made and would have followed these up.¹⁸⁷ The court refused to condone the delay, largely on account of the 'severe prejudice'¹⁸⁸ that would otherwise be caused to a large number of people who had arranged their affairs on the basis of the presumed validity of the determination.

The PAJA differs markedly from the common law by requiring review proceedings to be instituted without unreasonable delay *and* not later than 180 days after domestic or internal remedies have been exhausted.¹⁸⁹ Where there are no such remedies, the period of 180 days begins to run from the date on which the applicant was informed of the administrative action, became aware of the action and the reasons for it, or 'might reasonably have been expected to have become aware of' the action and the reasons.¹⁹⁰ Provision is made in s 9 for the extension of the period by agreement or on application by the person concerned, and an extension may be granted 'where the interests of justice so require'.¹⁹¹ An example of the exercise of this discretion in the applicant's favour is *Scenematic Fourteen (Pty) Ltd v Minister of Environmental Affairs and Tourism*, where '[e]ven on the respondents' version,

¹⁸⁴ Ibid para 26.

¹⁸⁵ Ibid para 28. On this point see also eg *McDonald v Minister of Minerals and Energy* 2007 (5) SA 642 (C) para 32.

¹⁸⁶ *Associated Institutions Pension Fund v Van Zyl* 2005 (2) SA 302 (SCA) paras 50-1 (Brand JA)

¹⁸⁷ Ibid para 52.

¹⁸⁸ Ibid 53. See also in this regard *Chairperson: Standing Tender Committee v J F E Sapela Electronics (Pty) Ltd* [2005] 4 All SA 487 (SCA) paras 28-9. Here Scott JA found that there was 'no culpable delay' on the part of the respondents, but that 'considerations of pragmatism and practicality' – the passing of time and intervening events – justified the court in declining to set aside an invalid administrative act.

¹⁸⁹ Section 7(1)(a). De Ville (note 37 above) outlines the history of this provision and notes that an express time limit of this nature was first proposed in 1986 (at 435).

¹⁹⁰ Section 7(1)(b).

¹⁹¹ Section 9(2).

the application for review was instituted some 9 court days late’ – which the court sensibly regarded as a case of *de minimis non curat lex*.¹⁹²

While the common-law rule may be regarded as reasonably regulating access to court,¹⁹³ the 180-day limit laid down by the PAJA is more controversial. Indeed, it may well be unconstitutional in the light of the decision of the Constitutional Court in *Mohlomi v Minister of Defence*.¹⁹⁴ Expert commentators are of the view that the requirement ‘will undoubtedly work to the detriment of the poor, the illiterate, the marginalised’.¹⁹⁵ It will also encourage lawyers to institute proceedings as soon as possible, thus discouraging the resolution of disputes by non-judicial methods¹⁹⁶ and tending to work against another provision of the PAJA – its stringent duty to exhaust domestic remedies (discussed immediately below). While s 9(1) of the Act allows for the extension of the 180-day period by agreement, the state’s agreement is unlikely to be easily obtained.¹⁹⁷ This means that complainants must apply to the court (or tribunal) for an extension, which may only be granted ‘where the interests of justice so require’.¹⁹⁸

In the light of these criticisms, it is remarkable that s 7(1) of the PAJA has not yet been challenged in court.

(ii) *The duty to exhaust internal remedies*

At common law a complainant may be obliged to make use of the domestic, internal or extra-judicial remedies available before seeking help from a court of law.¹⁹⁹ The duty to exhaust

¹⁹² *Scenematic Fourteen (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) BCLR 430 (C) at 436I. Brusser AJ found in any event that the respondents’ version was not compelling. In his view the period of 180 days started running when the applicant received a clear intimation of the decision rather than when it received an equivocal e-mail sent earlier (at 436E-G). (The issue of delay was not dealt with when the respondents subsequently appealed successfully in *Minister of Environmental Affairs & Tourism v Scenematic Fourteen (Pty) Ltd* 2005 (6) SA 182 (SCA).)

¹⁹³ In *Bellocchio Trust Trustees v Engelbrecht* (note 181 above) at 524 Hlophe JP found that the rule was constitutionally justifiable if and to the extent that it limited s 34. (His primary view that it did not limit the right in s 34 cannot, with respect, be correct.)

¹⁹⁴ Note 155 above.

¹⁹⁵ Para 41 of *Representations on the Administrative Justice Bill* submitted to the Portfolio Committee on Justice in November 1999 by the Legal Resources Centre (LRC) and Clive Plasket, former Director of the Grahamstown Office of the LRC.

¹⁹⁶ *Ibid* para 50.

¹⁹⁷ *Ibid* para 46.

¹⁹⁸ On the problems presented by this provision, see Clive Plasket ‘The Exhaustion of Internal Remedies and Section 7(2) of the Promotion of Administrative Justice Act 3 of 2000’ (2002) 118 SALJ 50, especially at 59; and for an example of failure to apply properly for an extension, see *Directory Solutions CC v TDS Directory Operations (Pty) Ltd* 2008 JDR 0589 (SE).

¹⁹⁹ *Shames v South African Railways and Harbours* 1922 AD 228, and see generally Daniel Malan Pretorius ‘The Wisdom of Solomon: The Obligation to Exhaust Domestic Remedies in South African Administrative Law’ (1999) 116 SALJ 113.

internal or domestic remedies thus has the effect of deferring rather than excluding a complainant's access to court-based remedies.²⁰⁰

The advantages of such a duty are that it avoids wasting the courts' time with complaints that could have been settled sooner and more cheaply by officials chosen specifically for the purpose. However, the common-law rule is applied sparingly.²⁰¹ The mere existence of an internal remedy is not enough by itself to indicate an intention that the remedy must first be exhausted.²⁰² There must be a clear legislative or contractual intention to that effect.²⁰³ Even then, there is no general principle at common law that an aggrieved person may not go to court 'while there is hope of extra-judicial redress'.²⁰⁴ In fact, there are indications that the existence of a fundamental illegality, such as fraud or failure to make any decision at all, does away with the common-law duty to exhaust domestic remedies altogether.²⁰⁵

A court will condone a failure to pursue an available remedy where the remedy is illusory or inadequate, or because it is tainted by the alleged illegality. In *Mahlaela v De Beer NO*,²⁰⁶ for instance, a township superintendent had decided not to allocate the applicant a house in the township. Instead of appealing to the development board, the applicant applied for review of the decision. Stafford J found that an appeal to the board would have been useless, because it had laid down a fixed policy that houses were not to be allocated.²⁰⁷ Similarly, where the Minister concerned had already condoned the respondents' action, an appeal to him would have 'yielded a fruitless result'.²⁰⁸

The PAJA includes a duty to exhaust internal remedies on terms that are rather more demanding than those of the common law. Subsection 7(2) reads as follows:

²⁰⁰ In *Kiva v Minister of Correctional Services* (2007) 28 ILJ 597 (E) para 15 Plasket J described the duty in s 7(2) of the PAJA as deferring a person's right of access to court 'until the internal remedy has been exhausted, or until the right to utilise it has lapsed'.

²⁰¹ *Ntame v MEC for Social Development, Eastern Cape* (note 182 above) para 31.

²⁰² *Welkom Village Management Board v Leteno* 1958 (1) SA 490 (A) at 503B.

²⁰³ *Jockey Club of South Africa v Feldman* 1942 AD 340 at 351-2. For instance, in *Ntame v MEC for Social Development, Eastern Cape* (note 182 above) para 32, where s 10 of the Social Assistance Act 59 of 1992 created a right of appeal, Plasket J found that nothing in the Act pointed to an obligation on the aggrieved party to exhaust this remedy before approaching a court.

²⁰⁴ Van den Heever JA in *Bindura Town Management Board v Desai & Co* 1953 (1) SA 358 (A) at 362H.

²⁰⁵ See Baxter (note 2 above) 723; Pretorius (note 199 above) 125. The illegality may not even have to be fundamental: for example, in *Maluleke v MEC, Health and Welfare, Northern Province* (note 62 above) at 372G-H Southwood J noted that the duty will 'seldom be upheld', especially where the applicant's complaint is the illegality of the decision.

²⁰⁶ *Mahlaela v De Beer NO* 1986 (4) SA 782 (T).

²⁰⁷ *Ibid* at 790I. This sort of practical approach would also seem to have been adopted in *South African Transport Services v Chairman, Local Road Transportation Board, Cape Town* 1988 (1) SA 665 (C).

²⁰⁸ *Mathale v Secretary for Education, Gazankulu* 1986 (4) SA 427 (T) at 431A.

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

(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.’

These are stringent provisions cast in peremptory language. Review is prohibited unless *any internal remedy* provided for in *any other law* has been exhausted. The court is obliged to turn the applicant away if it is not satisfied that internal remedies have been exhausted, and may grant exemption from the duty only *in exceptional circumstances* where it is in the interests of justice to do so. Critics have pointed out that the provision is ‘tailor-made for points-taking respondents wishing to avoid the merits’,²⁰⁹ and it may well be asked whether it will be regarded as unjustifiably infringing the right of access to a court of law – or, indeed, as contradicting too flatly the duty in s 172(1)(a) of the Constitution.²¹⁰

In this regard much depends on how the courts interpret the adjective ‘internal’ and the phrase ‘any other law’. These terms ought to be read restrictively to include only remedies specifically provided for in the legislation with which the case is concerned. It would obviously be both unrealistic and unjustifiable to expect an aggrieved individual to pursue every possible avenue provided for by law, such as recourse to the Public Protector, before approaching the courts for relief. This point was well made in *Reed v Master of the High Court*,²¹¹ where Plasket J laid emphasis on the extra-curial²¹² and internal²¹³ nature of what

²⁰⁹ Wandisile Wakwa-Mandlana & Clive Plasket ‘Administrative Law’ 2004 AS 74 at 100. See also Plasket ‘The Exhaustion of Internal Remedies’ (note 198 above).

²¹⁰ Note 122 above; see De Ville (note 37 above) at 467.

²¹¹ *Reed v Master of the High Court* [2005] 2 All SA 429 (E).

²¹² Ibid para 26.

²¹³ Ibid paras 24-5. See in this regard *Kiva v Minister of Correctional Services* (note 200 above), where the applicant had been refused access to the records of the interviews for a relevant post and subsequently applied for an order compelling reasons to be given in terms of s 5 of the PAJA. Plasket J held that the appeal created by s 74 of the Promotion of Access to Information Act 2 of 2000 (PAIA) was not an internal remedy for a refusal to furnish reasons in terms of the PAJA (para 14), and further that s 7(2) of the PAJA applied only to the review of administrative action and not to an application to compel reasons to be given (para 16). See also *McDonald v Minister of Minerals and Energy* (note 185 above) para 26 (appeal to a High Court in terms of s 46(3) of the National Nuclear Regulator Act 47 of 1999 not an internal remedy as contemplated by the PAJA); *Reader v Ikin*

are generally regarded as domestic remedies in administrative law. He summed up the position as follows:

‘Section 7(2) does not . . . place an obligation on a person aggrieved by a decision to exhaust all possible avenues of redress provided for in the political or administrative system – such as approaching a parliamentary committee or a Member of Parliament, or writing to complain to the superiors of the decision-maker. Similarly, it is not required of an aggrieved person that he or she approach one or more of the Chapter 9 institutions – such as the Public Protector or the Human Rights Commission – prior to resorting to judicial review.’²¹⁴

Section 7(2) also has to be read in the light of the statutory requirement that applications for review be made within six months.²¹⁵ This requirement is likely to dampen an applicant’s enthusiasm for pursuing non-judicial avenues of relief. While it is true that the six-month period begins to run only once internal remedies have been exhausted, the arrival of that critical moment will not necessarily be apparent to the applicant.

Another way of softening the effects of s 7(2) is by means of judicious interpretation of the ‘exceptional circumstances’ provision. In this regard it is interesting to note the treatment of another such provision in the PAJA. Section 8(1)(c)(ii) of the Act permits a court to substitute its decision for that of the administrator in ‘exceptional cases’, but without saying what those might be. While this would seem to be a legislative attempt to reduce the power of substitution that is enjoyed by the courts at common law, in *Gauteng Gambling Board v Silverstar Development Ltd*²¹⁶ the Supreme Court of Appeal seemed to be oblivious of any such intention. If anything, it expanded the courts’ discretion to substitute by means of its interpretation of the common-law factors generally relied on in such a situation.²¹⁷ The court a quo had taken the bold step of ordering the Gauteng Gambling Board to award a casino licence to Silverstar.²¹⁸ The appeal court upheld this decision, reasoning that the outcome was inevitable: since Silverstar was the only remaining applicant for the area in question, the

2008 (2) SA 582 (C) paras 14-32 (no viable internal remedy created by s 62 of the National Building Regulations and Building Standards Act 103 of 1977), upheld in *City of Cape Town v Reader* 2009 (1) SA 555 (SCA).

²¹⁴ *Reed v Master of the High Court* (note 211 above) para 20.

²¹⁵ See at 3.3(c)(i) above.

²¹⁶ *Gauteng Gambling Board v Silverstar Development Ltd* 2005 (4) SA 67 (SCA) para 29.

²¹⁷ Three of these emerge from the judgment of Hiemstra J in the case of *Johannesburg City Council v Administrator, Transvaal* 1969 (2) SA 72 (T): substitution will be indicated where the end result is a foregone conclusion, where further delay would cause the applicant unjustifiable prejudice, or where the original decision-maker has exhibited bias or incompetence. A fourth factor has gained currency since *Theron v Ring van Wellington van die NG Sendingkerk in Suid-Afrika* 1976 (2) SA 1 (A): substitution will be indicated where the court is as well qualified as the original authority to make the decision. See generally Baxter (note 2 above) 684.

²¹⁸ *Silverstar Development Ltd v Gauteng Gambling Board* 2004 (2) SA 289 (T).

board would surely award it a casino licence.²¹⁹ Although it was argued that further advertising might well draw other interested applicants, the court was unconvinced that this would occur or, if it did, that the process would produce a proposal superior to that of Silverstar. Taking into account also the improbability of possible prejudice to the board and to the public, the court concluded that this was an exceptional case – notwithstanding the board’s expertise and its other institutional advantages in relation to the decision.²²⁰

What makes circumstances exceptional for the purposes of s 7(2) is also not explained in the PAJA, but was interpreted by a unanimous Supreme Court of Appeal in *Nichol v Registrar of Pension Funds* to mean that the circumstances must ‘be such as to require the immediate intervention of the courts rather than resort to the applicable internal remedy’.²²¹ Here Van Heerden JA referred with approval to the words of Sir John Donaldson MR in *R v Secretary of State for the Home Department, ex parte Swati*:²²² ‘[E]xceptional circumstances defy definition, but, where Parliament provides an appeal procedure, judicial review will have no place unless the applicant can distinguish his case from the type of case for which the appeal procedure was provided.’ This test was not satisfied in *Nichol*, where the applicant’s main argument for exemption seemed to be that he had good grounds for review. As Van Heerden JA pointed out, allegations of administrative irregularities can hardly be described as ‘exceptional’ in the context of judicial review.²²³

The words of Sir John Donaldson MR were also quoted in the earlier case of *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism*,²²⁴ where the facts gave the court greater scope for finding exceptional circumstances. The case concerned a decision to allow the construction of a nuclear reactor in terms of the Environment Conservation Act 73 of 1989. It was argued that the applicant ought not to have brought an application for review of this decision without waiting for the outcome of its appeal to the Minister in terms of s 35(3) of the Act. In a closely reasoned judgment Griesel J (Davis and Moosa JJ concurring) exempted the applicant from the duty to exhaust internal remedies. Crucially, the court pointed out that s 36 of the Conservation Act actually envisaged an application for judicial review ‘notwithstanding the provisions of s 35’ – meaning that there was no question of a legislative intention that the internal remedy be

²¹⁹ Ibid paras 38-9.

²²⁰ *Gauteng Gambling Board v Silverstar Development* (note 216 above) paras 40-1.

²²¹ *Nichol v Registrar of Pension Funds* [2006] 1 All SA 589 (SCA) para 16.

²²² *R v Secretary of State for the Home Department, ex parte Swati* [1986] 1 All ER 717 at 724a-b.

²²³ *Nichol v Registrar of Pension Funds* (note 221 above) para 24.

²²⁴ *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism* 2005 (3) SA 156 (C) para 31.

exhausted before resorting to review.²²⁵ The court also took into account factors including the undesirability of dismissing a case of national interest and importance on a technical ground and the large number of appeals pending with the Minister.²²⁶ As Griesel J pointed out,

‘[t]his case is different from the ordinary one contemplated by s 7(2)(a) of PAJA, where a balance has to be struck between a single applicant’s internal remedy, on the one hand, and judicial review, on the other. The balance that has to be struck in this case is between a single applicant’s limited review, on the one hand, and more than 70 complicated appeals. It is, in other words, an exceptional case in which the interests of justice dictate that the Court should allow the review to proceed.’²²⁷

In relation to the interests of justice, the court pointed to several additional factors of relevance. These included the deficiencies of the record on which the applicant based its appeal²²⁸ and the risk, if the applicant waited for the outcome of the appeal, of being time-barred in relation to a review in terms of s 36 of the Conservation Act.²²⁹ Griesel J took the view that when in doubt, the court should ‘incline to an interpretation of the facts and the law that promotes, rather than hampers, access to the courts’²³⁰ – though with due regard to the warning of O’Regan J in the *Bato Star* case²³¹ about the dangers of duplicate or contradictory relief when a litigant is permitted simultaneously to pursue review and an internal remedy.

A similarly generous approach was adopted by the Cape High Court in *Governing Body, Mikro Primary School v Minister of Education, Western Cape*,²³² a case relating to the placement of some twenty English-speaking children in an Afrikaans-medium public school. Thring J found that the urgency of the case and the public importance of issues relating to language policy made the circumstances ‘exceptional’ for the purposes of s 7(2) of the

²²⁵ Ibid paras 24 and 32. See also *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd* 2006 (5) SA 483 (SCA).

²²⁶ *Earthlife Africa v Director-General: DEAT* (note 224 above) para 33.

²²⁷ Ibid para 33.

²²⁸ Ibid para 41.

²²⁹ Ibid para 43.

²³⁰ Ibid para 44.

²³¹ *Bato Star v Minister of Environmental Affairs* (note 25 above).

²³² *Governing Body, Mikro Primary School v Minister of Education, Western Cape* 2005 (3) SA 504 (C).

PAJA.²³³ As Sutherland AJ observed in *Ulde v Minister of Home Affairs*, the courts' approach to the provision has tended to be 'pragmatic' – which is to say generous to applicants.²³⁴

(d) Conclusion

Access to judicial review and its associated remedies was frequently blocked by the legislature before 1994. The law has since been transformed by the democratic Constitution, for today any purported ousting or limitation of the courts' jurisdiction is required to be constitutionally justified. Fortified by the provisions of ss 33 and 38 of the Constitution, the courts no longer have to resort to the convoluted type of reasoning employed in the *Hurley* case²³⁵ in the context of ouster clauses.

Significantly, however, s 7 of the PAJA itself places considerable obstacles in the way of applicants for judicial review. The time limit imposed by s 7(1) has attracted criticism and might not pass constitutional muster if and when it is challenged in court. As to the duty to exhaust internal remedies in s 7(2), there are indications of judicial resistance to it. Notwithstanding the stringent and peremptory wording of the subsection, the courts' tendency has been to interpret the PAJA in line with the more generous common law – thus suggesting, once again, a certain lack of sympathy with formal obstacles to judicial redress.

²³³ Ibid at 515C-J. On appeal, in *Minister of Education, Western Cape v Governing Body of Mikro Primary School* 2006 (1) SA 1 (SCA) para 25, the Supreme Court of Appeal declined to interfere with the discretion exercised by the court a quo in this regard.

²³⁴ *Ulde v Minister of Home Affairs* 2008 (6) SA 483 (W) para 17. This case involved a challenge to detention under the Immigration Act 13 of 2002. The court found that there were no apparent internal alternatives to review and that, in any event, non-compliance with the duty would generally be condoned where personal liberty was at stake (paras 16-17). Cf *Directory Solutions CC v TDS Directory Operations* (note 198 above), where the applicant failed to make an application for exemption and to show exceptional circumstances. See further *Meepo v Kotze* 2008 (1) SA 104 (NC), where it was found that internal remedies had 'in essence been exhausted' (para 32). Here the governing legislation made no provision for exemption, creating an apparent conflict between it and s 7(2)(c) of the PAJA. In view of its conclusion, however, the court found it unnecessary to pronounce on the conflict.

²³⁵ *Minister of Law and Order v Hurley* (note 127 above).