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# Redlight, Greenlight- Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council, Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal

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# REDLIGHT, GREENLIGHT

*Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC)

*Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC)

## I INTRODUCTION

At least in the neighbourhood in which I grew up, we played a game called 'redlight, greenlight'. One child played the traffic cop and the rest of us were cars trying to get to the finish line. The traffic cop would close his or her eyes and chant 'greenlight', 'greenlight', 'greenlight', etc. Whenever he or she wished, the traffic cop would open his or her eyes and shout 'redlight'. Any 'car' moving at that point lost and went back to the starting line. The first to finish became the new traffic cop. One could spend hours at this game.

What kind of a traffic cop is the Constitutional Court in the game of administrative justice? Two 1998 cases – *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* and *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* – seem to stand at opposite ends of the spectrum.[1] On the green-light side, *Fedsure* determined that a set of Johannesburg municipality budgetary resolutions were not administrative action and thus could not be challenged in terms of judicial review on grounds of administrative justice, including reasonableness. On the red-light side, *Mpumalanga* found a violation of the right of procedural fairness and invalidated the retrospective discontinuance of racially discriminatory bursaries without reasonable notice. If the result in *Fedsure* was a go, the result in *Mpumalanga* was a stop.

After laying out red-light, green-light and amber-light theories of administrative law as received in South Africa, this comment will examine *Fedsure* and *Mpumalanga* more closely. In terms of these theories, one could characterise the Constitutional Court as espousing an amber-light version. However, the usefulness of such theories is doubtful. The Court's amber-light administrative law theory is hardly fully developed in the cases decided to date. More significantly, the traffic-light metaphor has become ill-suited for the administrative law challenges presently facing South Africa.

1 I will cover only some of the administrative law aspects of these decisions here and do not intend to consider fully either of the two cases. Beyond the decision about the meaning of administrative action (paras 21–46), *Fedsure* points to at least one fundamental issue which can only be noted here. Does the right of administrative justice found an independent cause of action or one that is co-extensive with judicial review on administrative law principles? See para 105.

## II The Traffic-light Metaphor and its Application

### *(a) Red-light, Green-light and Amber-light Theories of Administrative Law*

The traffic-light metaphor in administrative law originated with the English public law academics Carol Harlow and Richard Rawlings.[2] The metaphor was used in the South African context by Laurence Boulle as a way of classifying the different approaches to the desirability and optimal scope of the state's power to administer.[3] In Boulle's rendition, the red-light theory of public law has a negative view of state power and is one 'in which the emphasis is on the control, limitation, and supervision of the state and its power, primarily through the institutions of the law'.[4] The state should be restricted to a very limited range of social functions such as law and order and defence but not including social welfare or economic regulation. The green-light theory of public law has a more positive view of state power. Here, state power 'is an instrument for giving effect to social policies which will benefit either the general public or specifically defined communities'. Red-light and green-light theories are essentially opposites.

The world is not entirely red and green. Boulle's third approach, the amber-light theory of public law, also has a positive view of state power. However, it differs from the green-light theory on the issue of accountability. Whereas the green-light theory sees political institutions as adequate to control state power, the amber-light theory sees a need to develop administrative law principles and procedures 'to supplement the democratic, political controls over those who exercise state power'. As Boulle goes on to say, the amber-light theory 'implies an important, but restricted, role for the courts and judicial review. An optimal balance is sought among internal administrative controls and external political and judicial controls over the administrative process.' While it is not fully developed, Boulle's amber-light theory thus seems to be a blend of red and green and to depend upon two principles. The first is that it is necessary to have judicial as well as political controls over administrative processes. The second is that such judicial review should be balanced against systemic needs of efficiency.

The traffic-light metaphor has not been prominent in South African administrative law jurisprudence or scholarship. It is not discussed in any case reported in the South African law reports and it is only incidentally mentioned in some academic work.[5] Nonetheless, the traffic-light metaphor does seem to describe well the terms in which many

2 C Harlow & R Rawlings *Law and Administration* (1984).

3 L Boulle, B Harris & C Hoexter *Constitutional and Administrative Law* (1989) 80–83.

4 Appropriately for his time, Boulle continued to use the English term 'theory of public law'. To take into account the constitutional law context, I have used the term 'theory of administrative law'.

5 See, for example, A Cockrell ' "Can You Paradigm?" – Another Perspective on the Public Law/Private Law Divide' in H Corder (ed) *Administrative Law Reform* (1993) 227, 246.

administrative law issues are presently and have been conceptualised, as a consideration of *Fedsure* and *Mpumalanga* show.

### *(b)* Fedsure *and* Mpumalanga

The *Fedsure* result and rationale initially seem to exemplify the green-light theory of administrative law. In *Fedsure*, a group of corporate ratepayers challenged a number of resolutions adopted by the Greater Johannesburg Transitional Metropolitan Council (TMC) and the Eastern Metropolitan Substructure (EMS). These resolutions consisted of a set of rates, levies, and subsidies intended to both balance the budget and make uniform rates on land across the Johannesburg municipality. Among other arguments, the ratepayers claimed these resolutions were unreasonable administrative action in terms of the constitutional right to administrative justice in the interim Constitution. In a judgment jointly authored by Chaskalson P, Goldstone J and O'Regan J, the Constitutional Court dismissed the challenge, holding that the challenged resolutions were legislative and not administrative action and that the right to administrative justice did not apply.

*Fedsure's* rationale parallels its green-light result. In surveying the treatment various types of legislation had received in terms of pre-Constitutional administrative law, the three-judge plurality judgment distinguished between laws made in such a deliberative process and laws made by functionaries in whom the power to make laws has been vested by a competent legislature. The latter were subject to administrative justice; the former were not.[6] Although in the past, the budget resolutions at issue here would have been subject to judicial review on the principles of administrative law, these resolutions came from a deliberative process and thus were not administrative action, although they were subject to a constitutional principle of legality separate from that contained in the right of administrative justice.[7] This part of the opinion was concurred in by all members of the Court.

The driving rationale in the joint judgment was that the resolutions were taken by a deliberative legislative assembly, a local government required to be established in terms of the Constitution. In expressing a faith in political processes of accountability, the Chaskalson/Goldstone/O'Regan judgment refused to intervene and stated:

> The deliberation ordinarily takes place in the assembly in public where the members articulate their own views on the subject of the proposed resolutions. Each member is entitled to his or her own reasons for voting for or against any resolution and is entitled to do so on political grounds. It is for the members and not the Courts to judge what is relevant in such circumstances.[8]

6 *Fedsure* para 27.
7 Ibid para 45.
8 Ibid para 41

This is green-light theory in a fairly pure form. Nonetheless, the rest of judgment introduces a different shade. After refusing to classify the challenged resolutions as administrative, the Court goes on to apply not the right of administrative justice but the independent constitutional principle of legality. The judgment thus embarks upon an extensive and disputatious examination of whether the resolutions were intra vires the relevant legislation. This is using the principles of administrative law even if by another name. On the whole one would have to state that *Fedsure* fits into an amber-light theory of administrative law as described by Boulle: the efficient use of state power is a good thing and courts are a limited but necessary supplement to political accountability.

In contrast to *Fedsure*, the result of *Mpumalanga* initially appears consistent with red-light theory of administrative law. An association of governing bodies of 'Model C' schools, which mainly educated white children, challenged a Member of the Executive Council (MEC) in the provincial government of Mpumalanga's decision to terminate bursaries paid to their students as a violation of the right to administrative justice. The MEC had discontinued the bursaries retrospectively, without reasonable notice, and without affording the association of governing bodies an opportunity to be heard or to take action to avoid the impact of the action. In the circumstances, the Court determined that the right to procedural fairness – which the Court was at pains to stress needed to be balanced with the need to substantively address the effects of apartheid discrimination – had not been respected by this decision.

However, there are at least three reasons why the case should not be counted squarely in the red-light category. First, the retroactive aspect of the MEC's decision perhaps made *Mpumalanga* an easy case in which to decide that the right of procedural fairness had been violated.[9] O'Regan J noted a line of European Court of Justice cases holding that 'a retroactive termination of benefits will not be fair no matter what process is followed unless there is an overriding public interest' and indicated agreement with such a position.[10] Perhaps this explains O'Regan J's identification of the legitimate expectation in this case as one 'which has intertwined substantive and procedural aspects. . . .'[11] On the facts, the association of governing bodies had a strong case.

Second, in the consideration of the remedy, the Court was careful to signal respect for the political process of transformation.[12] In deciding

9 For a definition of retroactivity and retrospectivity, see *S v Mhlungu* 1995 (3) SA 867 (CC) para 65 (Kentridge AJ) ('By retroactive legislation is meant legislation which invalidates what was previously valid, or vice versa, i.e. which affects transactions completed before the new statute came into operation. . . . There is also a presumption against reading legislation as being retrospective in the sense that, while it takes effect only from its date of commencement, it impairs existing rights and obligations, e.g. by invalidating current contracts or impairing existing property rights.').

10 *Mpumalanga* para 41.

11 Ibid paras 37–38.

12 Indeed, this appreciation pervades O'Regan's judgment. See, for example, *Mpumalanga* para 7.

the substitution remedy imposed by the court a quo to be inappropriately ordered, O'Regan J stated:

> [A] Court should generally be reluctant to assume the responsibility of exercising a discretion which the Legislature has conferred expressly upon an elected member of the executive branch of government. Accordingly, the Court should be slow to conclude that there is bias such as to require a Court to exercise a discretion, particularly where the discretion is one conferred upon a senior member of the executive branch of government.[13]

This go signal is more than window-dressing. What the Constitutional Court does in these paragraphs is to deliver a clear signal that the South African courts must reset their attitude towards judicial remedies in administrative law to the more deferential attitude of their English and Australian counterparts. No longer should South African judges be 'more willing to step into the shoes of the decision-maker than [are] the English courts.'[14]

Consider finally the way in which the Court reached the decision that it did. In Boulle's terms, the theory of *Mpumalanga* is even more explicitly amber-light than that of *Fedsure*. The crucial passage is one that explicitly sounds the theme of balance:[15]

> In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognised in our common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly. On the other hand, to permit the implementation of retroactive decisions without, for example, affording parties an effective opportunity to make representations would flout another important principle, that of procedural fairness.

This balancing style continues elsewhere in O'Regan's judgment. The case is sprinkled liberally with qualifiers such as 'in this case' and 'in all the circumstances'.[16] The precise content of the legitimate expectation as identified by the Court will also provide a doctrinal location for balancing.[17] From its facts, remedy, and style, it seems clear that the *Mpumalanga* Court is a Court that is willing to protect the right of procedural fairness but is also one that is committed to letting the nation's political processes try to get administrative decisions right in the first place. This is amber-light theory again.

13 Ibid para 51.

14 Ibid para 50 (citing *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141, 143, 156 (HL) and *Attorney-General, New South Wales v Quin* (1990) 93 ALR 1, 25).

15 *Mpumalanga* para 41.

16 See, for example, *Mpumalanga* para 37, 38, 40, and 42. Doctrinally, O'Regan is simply reaffirming what she terms the 'well-established' principle 'that what will constitute fairness in a particular case will depend on the circumstances of the case' (para 39).

17 Ibid para 48 ('Crucial to the making of . . . an order would be the nature of the legitimate expectation . . .').

## III Why Stop at Traffic-lights?

It is the function of a good theory or model to point to significant aspects of an empirical case to be researched. The preceding section has argued that in terms of Boulle's adoption of the traffic-light metaphor, the cases of *Fedsure* and *Mpumalanga* show that the Constitutional Court is using an amber-light theory of administrative law. This section considers the next question: whether anything useful can be pulled out of such an amber-light theory? Does identifying such a model lead (on one level) to accurate legal advice and (on another level) to a vision of transforming South African administrative law? Although section II above has been engaged in applying the traffic-light metaphor, this section argues that the result has little practical significance or explanatory power, even assuming that it has been correctly identified.

The Constitutional Court's amber-light theory of administrative law lacks practical significance for two reasons. The first is simply that the model is incomplete. The Court may be showing its colours but it remains far short of elaborating a theory. For it to be useful, the Court's amber-light theory of administrative law would need much greater definition than it has received to date. Indeed, these two cases can be seen as simply the latest in a series of delphic pronouncements on administrative justice. In the First Certification case, the Court enunciated the need for an executive that was 'energetic and effective, yet answerable'.[18] In *Transvaal Agricultural Union v Minister of Land Affairs,*[19] the Court indicated that it would take a balancing approach to procedural fairness.[20] Even taking these cases together with *Fedsure* and *Mpumalanga*, there is at most an attitude towards administrative law there; there is no worked out theory or model.[21]

The second reason for the lack of explanatory power of such an amber-light theory of administrative law is more fundamental and significant, going to the utility of the metaphor itself. Even if the Court were to attempt to tell us exactly what shade of amber is its favourite colour, administrative law would be trapped on a stop-start line between red and green. Indeed, a recent review article by Michael Taggart questions the continued usefulness of the traffic-light metaphor.[22] Fundamentally,

18 *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) para 112.

19 1997 (2) SA 621 (CC).

20 See J Klaaren 'Administrative Justice' in M Chaskalson et al (eds) *Constitutional Law of South Africa* (1996, 3 rev 1998) 25.6.

21 One should perhaps note that O'Regan J participated in the jointly authored judgment of *Fedsure* and solely authored the judgment of the Court in *Mpumalanga*. One could perhaps argue that the fullest articulation of the Court's amber-light theory comes in a perceptive and influential article by O'Regan written before she joined the Constitutional Court. O'Regan lays out a normative vision of administrative law based on the values of efficiency, fairness, and accountability. C O'Regan 'Rules for Rule-Making: Administrative Law and Subordinate Legislation' in H Corder (ed) (note 5 above) 157.

22 M Taggart 'Reinvented Government, Traffic Lights and the Convergence of Public and Private Law. Review of Harlow and Rawlings *Law and Administration*' (1999) *Public Law* 124.

Taggart's claim is that the world has moved on from the debate over the appropriate role for state power that lay behind the red-light green-light theory. As he puts it, '[t]he red and green light theories were forged on the anvil of the emergent welfare state.'[23] However, the metaphor is not well-suited for the new world of reinvented government with its themes of privatisation, the contracting state, commercialisation, and globalisation. There are no traffic-lights on the internet. For Taggart, '[i]n an era of reinvented government, the old labels of left and right seem to confuse more than illuminate, and if they have any utility they may have suffered role reversal in terms of the traffic light'.[24] The explicit suggestion is that '[t]he right will preach judicial deference to the will of parliamentary majorities, while the left will extol the virtues of fundamental rights and judicial activism'.[25]

While these propositions remain to be fully explored, the thrust of Taggart's observation would seem applicable to the new South Africa. The buzzwords of both opposition and majority political parties are those such as privatisation, public–private partnership, incentives, and effective public management. Although the South African focus on reinvented government takes place in a developmental context, Taggart's themes of globalisation and commercialisation are nonetheless evident in governmental strategies here such as the Batho Pele White Paper.[26] One correlation of this trend has been a lessening of resistance within the legal profession to blurring the public/private divide.[27]

Accepting that the traffic-light metaphor has outlived its usefulness would mean some new directions for administrative law in South Africa. For a specific instance, take regulation of anti-competitive conduct. The only option here is not an extension of judicial review into the private sphere as in the famous *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange*.[28] One can fully support the infusion of public law values into such a private sector area yet view judicial review of such laws with suspicion. Judicial review may well be inexpert, politically illegitimate, and likely to be so cautious as to be ineffective. Instead, one may well make a case for transparency and accountability within the new regulatory project through access to information legislation, publication regimes and the like.

The subterranean influence of the traffic-light conceptualisation within South African administrative law has meant that there are several topics

23 Ibid 125.

24 Ibid 128.

25 Ibid 128 (quoting H Arthurs '"Mechanical Arts and Merchandise": Canadian Public Administration in the New Economy' (1997) 42 *McGill LJ* 29, 52).

26 *White Paper on Transforming Public Service Delivery (Batho Pele White Paper)* GN 1459 of 1 October 1997. The White Paper (p 13) states that *Batho Pele* is 'a Sesotho adage meaning "People First" '.

27 Indeed, this blurring has been recognised in the Constitutional Court. See *Fose v Minister of Safety and Security* 1997 (3) SA 819 (Ackermann J) para 57 (citing South African treatments of the issue).

28 1983 (3) SA 344 (W).

of administrative law that have not received the treatment they deserve. One of these important areas is recasting the set of interpretive techniques in the field of administrative law.[29] Such techniques of interpretation would include but should not be limited to statutory interpretation in view of the greater variety of legal instruments in the context of Batho Pele government. In this respect, *Fedsure* may prove more interesting in the long run than *Mpumalanga* as statutory interpretation was the main battleground in *Fedsure*.[30] Work remains to be done to outline a model of statutory interpretation for the South African constitutional democracy.[31] Such a model might take democracy and human rights as its starting points in a project of transformative constitutionalism.[32]

## IV Conclusion

One could also apply the red-light green-light theory and its critique to the draft Administrative Justice Bill.[33] Indeed, the drafters of the Bill

29 Taggart (note 22 above) 136 (citing J Evans, H Janisch & D Mullan *Administrative Law: Cases, Texts, and Materials* (1995)) refers to a Canadian work laying out four interpretive backgrounds. The first (which is linked to the red-light theory) is 'the common law or private rights background, which favours an interpretation that disturbs as little as possible rights protected by the common law'. The second (which is linked to the green-light theory) is 'the "functional" background which favours an interpretation that will facilitate the implementation of the statutory programme or scheme'. The third is 'the "human rights" background which favours an interpretation of legislation that will protect and enhance rights contained in domestic legislation and regional and international human rights instruments'. The fourth is the background that is concerned with 'the protection of democratic values'. The third and the fourth interpretive backgrounds may constitute important starting points for a South African model of interpretive techniques.

30 Attempting to employ a purposive approach, the Chaskalson/Goldstone/O'Regan judgment read item 23(c) of Annexure A to Proc 35 to require that the levy imposed by the TMC be 'based on' the gross or rates incomes of the substructures in the sense of being directly related to those incomes as for instance being a proportion or a percentage. There was no such relationship. *Fedsure* paras 88–95. Kriegler J read item 23(c) to require that the levy be 'based on' the gross or rates income in the sense that the levy imposed by the TMC could constitute the surplus that remained of gross income after account had been taken of the expenditure budgeted for by the substructure. Paras 170–77. While Kriegler J does not make this argument directly, what makes his textual reading of the term 'based on' plausible is his sketch of the political and administrative negotiating context in which the substructure budget and the TMC levy were negotiated. Kriegler J's judgment may be an example (albeit incomplete) of an interpretive technique that would support administrative interpretations of laws provided that such interpretations have a rational basis and provided that the administrative interpreters have the expertise to interpret such laws. See generally M Asimow 'Administrative Law under South Africa's Final Constitution: The Need for an Administrative Justice Act' (1996) 113 *SALJ* 613, 623–24 (arguing that deference by courts to administrative interpretations is only appropriate where the statutory language is ambiguous, the interpretation carefully reasoned, and where the administrative body's expertise gives it a genuine advantage over a general court or tribunal).

31 See E Mureinik 'Administrative Law in South Africa' (1986) 103 *SALJ* 615 (treating both the theory of jurisdictional fact and the theory of error of law as a matter of particular construction of a statute and noting the central concern to administrative lawyers of the study of the interpretation of statutes).

32 See J Klaaren 'Structures of Government in the 1996 South African Constitution: Putting Democracy Back into Human Rights' (1997) 13 *SAJHR* 3; K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146.

33 SA Law Commission Discussion Paper 81 *Draft Administrative Justice Bill 1999* (January 1999).

claim that it is caught between those who want more and those who want less administrative justice.[34] But – as I hope to have indicated above – the question to ask is not whether there should be more or less administrative justice. In a world where public and private law blur and where the constitution requires more than a cautious amber-light approach to transformation, the important question is not how much administrative justice, it is how to give meaning to administrative justice.

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## REVITALISING THE FREEDOM RIGHT?

*De Lange v Smuts NO* 1998 (3) SA 785 (CC)

### I INTRODUCTION

The Constitutional Court's decision in *De Lange v Smuts NO* will be of interest to those who are involved with or affected by the work of investigatory commissions. More particularly, the decision adds to the constitutional parameters, laid down in four earlier decisions,[1] for statutory mechanisms designed to secure the cooperation of witnesses in proceedings such as liquidation enquiries. I will deal with the implications of *De Lange* for conducting these types of proceedings in part IV of this note. In the first part, I will consider the contribution made by *De Lange* to the constitutional jurisprudence dealing with s 12 of the 1996 Constitution, the right to freedom. Despite the shackles placed on it in *Ferreira v Levin NO*,[2] the Court's decision in *De Lange* shows that the freedom right may yet play an important role in our constitutional jurisprudence.

34 SA Law Commission *Revised and Annotated Administrative Justice Bill* (May 1999) 1 ('Generally speaking there is a tension between those who argue that the Bill is too focussed on judicial review and is too cautious in its scope, on the one hand, and those who are concerned about imposing too onerous obligations on organs of state, on the other.')

1 In chronological order: *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC); *Ferreira v Levin NO* 1996 (1) SA 984 (CC); *Bernstein v Bester NO* 1996 (2) SA 751 (CC); *Nel v Le Roux NO* 1996 (4) BCLR 592; 1996 (3) SA 562 (CC).

2 Note 1 above.