

CHAPTER 2

DEVELOPMENT OF THE GROUNDS OF REVIEW

2.1 INTRODUCTION

As indicated in Chapter 1, judicial review was relied on heavily, and almost exclusively, to secure administrative accountability before 1994.¹ But the effectiveness of judicial review was seriously reduced by the narrowness of some of the grounds of review and by the uneven application of others according to the stultifying system of classifying administrative functions. This attenuated form of review suited the apartheid government. It was consistent with the prevailing culture of authority and the prevailing attitude of exaggerated judicial deference to the other branches of government. It was also consistent with the generally parsimonious character of the pre-democratic public law, which treated administrative justice as something to be hoarded rather than freely distributed.² However, it is incompatible with the era of constitutional democracy and the culture of justification it promises. The reason is that while the administrative process ‘is not, and cannot be, a succession of justiciable controversies’,³ effective judicial review remains essential to the achievement of administrative justice in this country – and surely in all jurisdictions where the institution of court-based review is prominent.⁴ Here, as in England, the principles developed through judicial review have become central to public administration generally.⁵ Furthermore, it is clear that the institution of review plays a special role as a control mechanism in the administrative system. While it can usefully be supplemented by other safeguards, it cannot necessarily be replaced by them.⁶

For these reasons the importance of well-developed grounds of review can hardly be overestimated even in a system that enjoys a range of safeguards against maladministration,

¹ See at 1.1 and 1.5(d).

² Cora Hoexter ‘The Principle of Legality in South African Administrative Law’ (2004) 4 *Macquarie Law Journal* 165 at 168.

³ The Rt Hon The Lord Woolf, Jeffrey Jowell QC & Andrew Le Sueur *De Smith’s Judicial Review* 6 ed (2007) (hereafter *De Smith*) 5.

⁴ See Jeffrey Jowell ‘The Democratic Necessity of Administrative Justice’ Paper Presented at a Conference on *Effective Judicial Review: A Cornerstone of Good Governance* Hong Kong (2008); and, from the same conference, Mahendra P Singh ‘Foundations of Judicial Review of Administrative Action in India – Tension Between Principle and Pragmatism’; Mark Daly ‘Judicial Review in the Hong Kong Special Administrative Region – Necessary Because of Bad Governance’.

⁵ See *De Smith* (note 3 above) 5.

⁶ See eg Peter Cane ‘Judicial Review in an Age of Tribunals’ Paper Presented at a Conference on *Effective Judicial Review: A Cornerstone of Good Governance* Hong Kong (2008), and see further at 5.2 below.

as South Africa's does today. Indeed, the development and extension of the common-law grounds of review was probably the most obvious challenge in the transformation of South African administrative law. The need for the reform of the grounds of review was amply recognised in the Breakwater Declaration, which called for improvements including participatory decision-making, a duty to give reasons on request and a test of justifiability and rationality for administrative decisions.⁷

While the Breakwater participants may not necessarily have agreed as to the desirability of codifying the grounds of review,⁸ such codification had in fact been proposed by the South African Law Commission in 1992⁹ and was later understood as a vital part of the mandate contained in s 33(3) of the 1996 Constitution.¹⁰ Codified grounds of review may rightly be regarded as an important aspect of the transformation of South African administrative law, not only because they are more accessible to those affected by administrative action but because they clarify what is (or what is not) expected of administrators. Written grounds thus have an educational effect and can help to spread a culture of administrative justice. Though it is probably too soon to judge whether these desired effects are indeed being experienced in South Africa, it is heartening that they have been borne out by the Australian experience of codification.¹¹

In each of the four main spheres of administrative justice – those of lawfulness, reasonableness, procedural fairness and reasons – the grounds of review of the pre-democratic era were weak or deficient to some extent. This chapter describes and analyses the development of the grounds of review since 1994 in each of those spheres. However, it does so selectively. The aim is not to provide a detailed discussion of every ground of review known in South African law, a lengthy exercise that could easily take up a thesis on its own. Rather, it is to highlight the main areas of deficiency in the pre-democratic law and the most important aspects of the law's transformation since the advent of democracy.

Before going further, it is necessary to say something about the relationship between 'lawfulness' and 'reasonableness' and the possible overlap of grounds of review between

⁷ Items ii and iv of the Areas of Agreement.

⁸ There was some debate about codification in general, as is evident from parts III and IV of the Declaration.

⁹ As part of Project 24, the Law Commission proposed a Judicial Review Act in its *Report* of 1992 and its *Supplementary Report* of 1994.

¹⁰ See Hugh Corder 'Administrative Justice in the Final Constitution' (1997) 13 *SAJHR* 28 and 'Administrative Justice: A Cornerstone of South Africa's Democracy' (1998) 14 *SAJHR* 38; and see the Law Commission's *Discussion Paper 81* (1999).

¹¹ See Cheryl Saunders 'Constitutions, Codes and Administrative Law: The Australian Experience' Paper Presented at a Conference on *Effective Judicial Review: A Cornerstone of Good Governance* Hong Kong (2008) 17-18.

these two spheres. The source of the overlap is the fairly common use of ‘reasonableness’ in the ‘umbrella’ sense,¹² where ‘unreasonableness’ is a synonym for various grounds of abuse of discretion: irrelevant considerations, ulterior purpose and so forth. That was the sense generally intended in South African administrative law before 1994, when reasonableness itself – reasonableness in the ‘substantive’ sense¹³ – had very limited application. In this thesis, however ‘reasonableness’ is used in the substantive sense as an independent ground of review, while grounds relating to abuse of discretion are treated under ‘lawfulness’. This is not to deny the overlap, but merely to highlight the particular role played by reasonableness in the substantive sense.

Turning to the areas of greatest deficiency in the pre-democratic era, they were briefly as follows. In the sphere of lawfulness, a distinct area of weakness was that of jurisdiction. Another was the law’s failure to recognise the relevance of motive as opposed to purpose in administrative decision-making. In relation to the second sphere, the vast majority of administrative decisions could not be reviewed for reasonableness per se: it existed as an independent ground of review in relation to only certain kinds of decisions. As to procedural fairness, the content of this sphere was well developed but the principles of fairness applied only to a very narrow category of decisions. Finally, the absence of a general right to reasons for administrative action further negated the accountability of administrators. These, then, are the main themes to be explored in this chapter.

An issue of relevance to all of these themes is the principle of legality, a very significant safeguard of the constitutional era. In 1998 this principle was identified by the Constitutional Court as an aspect of the rule of law,¹⁴ which in turn is the ‘mainspring’ of administrative law¹⁵ and one of the founding values of South Africa’s constitutional order.¹⁶ The legality principle applies to all exercises of public power, thus providing an essential safeguard when action does not qualify as ‘administrative action’ for the purposes of the PAJA or the Constitution.¹⁷ The principle has evolved at the hands of the Constitutional Court¹⁸ so that it now mirrors many of the grounds of review associated with ‘regular’

¹² P P Craig *Administrative Law* 6 ed (2008) 532 and 615.

¹³ *Ibid.*

¹⁴ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) (hereafter *Fedsure Life Assurance*) paras 56 and 58.

¹⁵ Christopher Forsyth *Administrative Law* 10 ed (2009) 20.

¹⁶ Section 1(c) of the Constitution. It is also implicit in our constitutional order: see *Fedsure Life Assurance* (note 14 above) paras 58-9 (in relation to the interim Constitution).

¹⁷ See *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) (hereafter *New Clicks (CC)*) paras 97 and 144.

¹⁸ Especially in *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) (hereafter the *SARFU* case) para 148 and *Pharmaceutical Manufacturers Association of SA: In re Ex parte*

administrative law, though not all of them; and it may well evolve further.¹⁹ In this chapter attention is also given to the extent of the overlap between the legality principle and the grounds of review pertaining to each of the four spheres of lawfulness, reasonableness, procedural fairness and reasons.

2.2 LAWFULNESS

(a) *Introduction and overview*

The sphere of ‘lawfulness’ encompasses the most basic and the least controversial principles of good administration, and in this area the pre-democratic grounds of review were generally well developed. There was an established set of common-law principles relating to the requirement of legal authority and governing the subdelegation of authority by administrators, including unlawful dictation and referral; and there was a highly detailed if not systematised body of law dealing with the *functus officio* doctrine and related areas.²⁰ There were also venerable and quite far-reaching grounds of review relating to the abuse of discretion: ulterior purpose, *mala fides* and ‘failure to apply the mind’ – the latter a carpetbag category encompassing several more particular grounds such as failure to act or consider, fettering, arbitrary and capricious decision-making, the taking into account of irrelevant considerations and the failure to take into account relevant considerations.²¹

There is no denying that some of these grounds were applied far too deferentially before 1994, particularly in ‘security’ cases decided during the emergencies of the 1980s. A well-known example is *Minister of Law and Order v Dempsey*,²² where the Appellate Division whittled away to almost nothing the general principles relating to relevant and irrelevant considerations. Yet in less politically fraught instances such grounds continued to be applied quite normally, as they were for instance in *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd*²³ – in a judgment of the same court handed down only days after *Dempsey*. The common law was, in fact, generally more resilient and fruitful than is often supposed today. For instance, a ground in the PAJA that is often regarded as a post-1994

President of the Republic of South Africa 2000 (2) SA 674 (CC) (hereafter *Pharmaceutical Manufacturers Association*) para 85.

¹⁹ See the remarks of Sachs J in his minority judgment in *New Clicks (CC)* (note 17 above) para 614 with reference to the unanimous judgment of O’Regan J in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) paras 85-6.

²⁰ See further Lawrence Baxter *Administrative Law* (1984) Chapter 11 on ‘Administrative Acts’ and Chapter 12 on ‘Administrative Power and its Use’, where the scope of these common-law grounds of review is described fully.

²¹ See *ibid* Chapter 13, ‘Acting Unreasonably’.

²² *Minister of Law and Order v Dempsey* 1988 (3) SA 19 (A) at 35D-F.

²³ *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) SA 132 (A) at 152C-D and 153J-154A.

innovation, failure to take a decision or to do so within a reasonable time,²⁴ was indeed catered for by the common law.²⁵ Its inclusion in the PAJA makes it more explicit and more accessible, and is to be welcomed for these reasons, but it ought not to be regarded as an entirely new ground of review.

In relation to lawfulness, then, it is not particularly surprising that only one area of deficiency was identified in the Breakwater Declaration. That document called for ‘the explicit articulation in empowering legislation of the purpose of conferring and the criteria governing the exercise of public power, to the greatest extent possible’,²⁶ thus pointing to the general absence of these things in pre-1994 legislation. However, that absence was not so much the fault of the grounds of review in administrative law as of the constitutional and political setup of the time. Given the dismal fact of parliamentary sovereignty and the pervasive legislative tendency to delegate very wide discretionary powers to administrators, the courts of that era cannot perhaps be blamed for recognising and tolerating the phenomenon of ‘unfettered’ discretion.²⁷ Happily, that concept is understood to be a constitutional impossibility today, as the Constitutional Court made clear in *Dawood v Minister of Home Affairs*.²⁸

However, as the effective guardians of the principles of good administration, the courts of the pre-democratic era may fairly be criticised for their failure to recognise or develop certain grounds of review that may be regarded as essential to the broad category of lawfulness. One distinct area of weakness in this regard was the courts’ failure consistently to treat dishonesty as a ground of review and their general reluctance to question the motives of administrators. A second area of weakness lay in the judge-made principles relating to jurisdiction. The court’s treatment of both errors of law and fact was somewhat artificial as well as cautious, and the corresponding grounds of review stood in need of expansion. These, then, are the aspects that will be discussed more fully below.

Before proceeding to those particular topics, it is worth noting a more general aspect of the transformation of the sphere of lawfulness: its complete congruence today with the

²⁴ Section 6(2)(g) read with s 6(3) of the PAJA.

²⁵ See *Chotabhai v Union Government (Minister of Justice) and Registrar of Asiatics* 1911 AD 13; *Lynch v Union Government (Minister of Justice)* 1929 AD 281; and see Baxter (note 20 above) 414.

²⁶ Item iii of the Areas of Agreement

²⁷ See eg *Britten v Pope* 1916 AD 150 at 171; *Sachs v Minister of Justice* 1934 AD 11 at 36; *Administrator, Cape Province v Ruyteplaats Estates (Pty) Ltd* 1952 (1) SA 541 (A) at 544.

²⁸ *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC). As O’Regan J explained, the Constitution requires that there be some constraints on broad discretionary powers, not only to minimise the danger of a violation of rights (para 54) but also so that those who are affected by the exercise of such powers will know what is relevant to their exercise (para 47). See also *Janse van Rensburg NO v Minister of Trade and Industry NO* 2001 (1) SA 29 (CC); *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC).

constitutional principle of legality. In *Fedsure Life Assurance*²⁹ the legality principle was found to imply that a local authority must act within its powers. In the *SARFU* case³⁰ it required the President to act in good faith and not to misconstrue his powers. As I have suggested elsewhere, to say that the wielders of public power must act within their powers, in good faith and without misconstruing their powers is to summarise a good number of well-established review grounds.³¹ The principle easily covers all the grounds ordinarily associated with authority, jurisdiction and abuse of discretion, and is thus a mirror image of ‘regular’ administrative law in this sphere. This explains why one sometimes sees the courts applying administrative-law principles to non-administrative action without any reference to the PAJA or to s 33 of the Constitution.³² There is arguably no ground of review relating to lawfulness in the PAJA that cannot be replicated by the principle of legality. Indeed, the legality principle is apparently capable of expanding the list of grounds in the PAJA. As will be seen below, it played a role in the development of mistake of non-jurisdictional fact as a ground of review.

(b) Dishonesty and the relevance of motive

While ulterior purpose was a well-established ground of review at common law,³³ ulterior motive was not. In this regard it should be noted that ulterior ‘purpose’ and ‘motive’ are not necessarily the same thing, notwithstanding the tendency in some of the older cases to treat them as synonymous.³⁴ *Purpose* is an objective concept, while *motive* (especially when coupled with the adjective ‘ulterior’) suggests the presence of hidden, subjective and possibly sinister aims. In the pre-democratic era the relevance of motive was uncertain, and there was similar doubt about the status of dishonesty as a ground of review.

The term ‘bad faith’ (like the Latin ‘*mala fides*’) was sometimes used by the courts in a loose sense, to mean an abuse of power induced by an honest mistake or mere stupidity; a sort of ‘failure to apply the mind’.³⁵ Furthermore, some writers denied that dishonesty was a ground of review at common law. Wiechers, in particular, argued that an administrator’s state of mind could not on its own render action invalid, and suggested that cases involving

²⁹ Note 14 above, paras 58-9.

³⁰ Note 18 above, para 148.

³¹ See Hoexter ‘Principle of Legality’ (note 2 above) 183.

³² As, for instance, in *Affordable Medicines Trust v Minister of Health* (note 28 above), in which regulations were challenged as ultra vires the empowering legislation in various respects.

³³ See eg *Orangezicht Estates Ltd v Cape Town Town Council* (1906) 23 SC 297 at 308; *Sinovich v Hercules Municipal Council* 1946 AD 783 at 792.

³⁴ See Baxter (note 20 above) 516-17.

³⁵ See eg *Radebe v Minister of Law and Order* 1987 (1) SA 586 (W) at 595I.

dishonesty had in reality been decided on some other ground.³⁶ Bad faith in the strict sense of dishonesty, he said, was ‘simply not relevant in law’.³⁷

This opinion was apparently supported by a line of pre-democratic cases concerning expropriation which established that an administrator’s actual motive was irrelevant once a legitimate ostensible purpose has been made out. These cases, including an Appellate Division decision in *Broadway Mansions (Pty) Ltd v Pretoria City Council*,³⁸ suggested unwillingness on the part of the courts to question an administrator’s motives even if these appeared to be of a reprehensible kind. Thus in *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality*,³⁹ where it was alleged that a local authority had chosen to expropriate prematurely for its financial advantage and in order to punish the applicant, Corbett J remarked that ‘provided that the expropriation is a bona fide one for a municipal purpose, [the municipality’s] motives would not be relevant to the question as to whether the power of expropriation had been validly exercised’.⁴⁰

These decisions may be contrasted with cases such as *Waks v Jacobs*⁴¹ and *Hart v Van Niekerk NO*,⁴² decided in the last days of apartheid, where the courts were prepared to confront the real motives of the administrators – in both instances, a desire to prevent people of colour from using municipal facilities – and to make it fairly clear that dishonesty did count as a ground of review.

In my view this second approach is obviously to be preferred. I have argued elsewhere that there are ‘cogent moral and practical reasons for rejecting the proposition that dishonesty is irrelevant in administrative law provided that things have the appearance of legitimacy on the surface’.⁴³ Though dishonesty can be difficult to prove, and while it is no doubt true that it is invariably accompanied by other grounds of review,⁴⁴ I endorse Baxter’s motivations for treating it as a separate ground of review. Those reasons include the tenacity of this ancient ground, its relevance in an award of damages, and its effect on the willingness of a court to

³⁶ Marinus Wiechers *Administrative Law* 2 ed (1985) 255.

³⁷ *Ibid.*

³⁸ *Broadway Mansions (Pty) Ltd v Pretoria City Council* 1955 (1) SA 517 (A). Other such cases are *Olifantsvlei Township Ltd v Group Areas Development Board* 1964 (3) SA 611 (T) and *White Rocks Farm (Pty) Ltd v Minister of Community Development* 1984 (3) SA 785 (N).

³⁹ *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C).

⁴⁰ *Ibid* at 270A-B.

⁴¹ *Waks v Jacobs* 1990 (1) SA 913 (T), confirmed on appeal in *Jacobs v Waks* 1992 (1) SA 521 (A).

⁴² *Hart v Van Niekerk NO* 1991 (3) SA 689 (W). Cf *Sunningdale Development (Pty) Ltd v Umhlanga Borough Town Council* 1993 (3) SA 711 (D), where Alexander J expressly avoided characterising the action of the council as mala fide.

⁴³ Cora Hoexter ‘Administrative Justice and Dishonesty’ (1994) 111 *SALJ* 700 at 715.

⁴⁴ Craig (note 12 above), for instance, seems to regard bad faith or dishonesty as a superfluous ground of review (at 544). In the South African context, see eg Sarah Driver & Clive Plasket ‘Administrative Law’ 2002 *AS* 88 at 112.

substitute its judgment for that of the administrator.⁴⁵ Another relevant consideration is the tendency in developed legal systems today to require not merely formally legal conduct but conscionable conduct, especially where (as is generally the case in administrative law) the parties are not in equally powerful positions.⁴⁶ Most importantly, however, and as I argued in 1994, the proposition that dishonesty is irrelevant is entirely inappropriate to South Africa's democratic order and to the political and constitutional ideals of transparency and accountability.⁴⁷ This was confirmed by the Constitutional Court in the *SARFU* case⁴⁸ when it stated that the principle of legality requires the holders of public power to act in good faith.

For all these reasons it is fortunate that the PAJA acknowledges dishonesty as a ground of review, and that it does so amply. Most explicitly, s 6(2)(e)(ii) provides for review where administrative action was taken 'for an ulterior purpose *or motive*',⁴⁹ while s 6(2)(e)(v) allows for review of administrative action taken 'in bad faith'. In addition, s 6(2)(e)(i) envisages review where the action was taken 'for a reason not authorised by the empowering provision'. This formulation, too, may be regarded as covering dishonest motives. The PAJA thus removes any doubt about the status of dishonesty as a ground of review.

(c) Review for error of law

For most of the pre-democratic era the South African courts were content with a limited form of review for error of law based on rather artificial reasoning. Before 1992 their approach was that an error of law was reviewable if it had prevented the administrator from appreciating the nature of its powers or had otherwise prevented the proper exercise of its discretion.⁵⁰ To avoid the conclusion that this was the effect of *all* errors of law, the courts drew on the English-law distinction between a jurisdictional error – one made by an authority in determining the limits or extent of its power – and a non-jurisdictional error made *in the course of deciding a matter which it had jurisdiction to decide*.

⁴⁵ Baxter (note 20 above) 519-20.

⁴⁶ Hoexter 'Dishonesty' (note 43 above) 716.

⁴⁷ Ibid 715. Though that article refers specifically to provisions of the interim Constitution, these values remain prominent in the 1996 Constitution – for instance in s 195, the list of 'basic values and principles governing public administration'.

⁴⁸ Note 18 above, para 148.

⁴⁹ My emphasis.

⁵⁰ *Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Ltd* 1928 AD 220 at 234-5. See also *South African Railways v Swanepoel* 1933 AD 370 at 378: 'Where a statute commits a matter to the determination of an administrative official, his determination is final and the Court cannot interfere, . . . [except] if the administration officer fails to appreciate the nature of his discretion through misreading the Act which confers the discretion.'

In English law jurisdictional errors of law were reviewable because, if authorities misinterpreted the extent of their jurisdiction, they dealt with and based their decisions on matters with which, ‘on a true construction of their powers, they had no right to deal’.⁵¹ They took on powers that they did not have or abdicated power that they should have exercised, and thus acted unlawfully.⁵² However, where the error was not jurisdictional – where it was made in the course of deciding the matter, and thus ‘within jurisdiction’ – the court would not intervene lest it interfere with the merits of the decision. The attitude was that if an authority had jurisdiction to make the right decision, it also had ‘jurisdiction to go wrong’.⁵³ This jurisdictional and non-jurisdictional reasoning applied particularly to the review of inferior courts rather than administrative tribunals,⁵⁴ and much of the early South African jurisprudence on errors of law also developed in that context before being extended to administrators more generally.⁵⁵

A classic South African case illustrating the orthodox non-jurisdictional approach is *Johannesburg City Council v Chesterfield House (Pty) Ltd*.⁵⁶ Here a compensation court had the discretion to determine ‘whether any person is entitled to compensation’ under the relevant legislation and had decided that the claimant was not an entitled person. Though it was argued cogently that this was a mistaken interpretation of the law, the Appellate Division declined to recognise an irregularity in the proceedings. Centlivres CJ held that the court ‘was entitled to and bound to decide the legal issues involved and even if it came to a wrong decision in law we cannot in review proceedings set its decision aside on that ground alone’.⁵⁷

This approach was not applied with perfect consistency, however. In *Local Road Transportation Board v Durban City Council*⁵⁸ the board had declared certain certificates void as a result of mistakenly interpreting a directory provision as mandatory, and ended by dismissing an application for the renewal of the certificates. This was regarded by the

⁵¹ *Anisimic Ltd v Foreign Compensation Commission* [1969] 1 All ER 208 at 216e.

⁵² See eg the dictum of Farwell LJ in *R v Shoreditch Assessment Committee ex parte Morgan* [1910] 2 KB 859 at 880: ‘[T]he High Court . . . does not permit the inferior tribunal either to usurp a jurisdiction which it does not possess . . . or to refuse to exercise a jurisdiction which it has.’

⁵³ Lord Reid in *Armah v Government of Ghana* [1968] AC 192 at 234.

⁵⁴ Indeed, it still does in English law. The *Anisimic* case (note 51 above) was largely responsible for eroding the distinction between jurisdictional and non-jurisdictional errors of law in the case of tribunals, but the House of Lords made it clear in *R v Hull University Visitor, ex parte Page* [1993] AC 682 that the jurisdictional/non-jurisdictional distinction is still alive when it comes to inferior courts. See also *R v Visitors to the Inns of Court, ex parte Calder* [1994] QB 1.

⁵⁵ See especially *Doyle v Shenker & Co Ltd* 1915 AD 233. The approach in *Doyle* was followed in a number of cases including *Administrator, South West Africa v Jooste Lithium Myne (Edms) Bpk* 1955 (1) SA 557 (A), *Harpur v Steyn NO* 1974 (1) SA 54 (O) and *Theron v Ring van Wellington van die NG Sendingkerk in Suid-Afrika* 1976 (2) SA 1 (A).

⁵⁶ *Johannesburg City Council v Chesterfield House (Pty) Ltd* 1952 (3) SA 809 (A).

⁵⁷ *Ibid* at 825A.

⁵⁸ *Local Road Transportation Board v Durban City Council* 1965 (1) SA 586 (A).

Appellate Division as a reviewable error. The Appellate Division similarly found a reviewable jurisdictional error where an administrator's mistaken interpretation of the word 'available' had prevented it from properly considering an application for a permit.⁵⁹

It is not easy to see why these errors should have been reviewable while that in *Chesterfield House* was not. Indeed, the distinction between jurisdictional and non-jurisdictional errors often seems arbitrary, and it is difficult in any event to appreciate why any error of law does not prevent a decision-maker from 'properly considering' the matter. This began to be conceded in English law – at least in relation to the decisions of administrative tribunals – in the famous case of *Anisminic Ltd v Foreign Compensation Commission*,⁶⁰ which was instrumental in suggesting that any error of law could go to jurisdiction and thus be ultra vires.

In South African law the issue was resolved in the important case of *Hira v Booysen*.⁶¹ Two teachers had been convicted in a disciplinary inquiry of 'publicly' criticising the Department of Education in contravention of the Indians Education Act 61 of 1965. Their appeal to the Minister was unsuccessful. So was an application for review. On appeal the Appellate Division, however, found that the presiding officer (a magistrate acting administratively) and the Minister had both erred in holding that the criticism had been public: since it had taken the form of an article in a newsletter circulated to members of a teachers' association, it was 'domestic' rather than 'public' criticism.⁶²

As to whether the error was reviewable, the court admitted that the traditional distinction between reviewable and non-reviewable errors was by no means a clear one and that it was difficult to reconcile cases such as *Chesterfield House* and *Reynolds Brothers*. For example, the court in *Chesterfield House* could conceivably have found that error made by the compensation court had prevented it from exercising the power conferred upon it – that is, determining the claim for compensation. The error would then have been a reviewable one.⁶³ Drawing on *Anisminic*, *Re Racal Communications*⁶⁴ and the judgment of Jansen JA in *Theron*

⁵⁹ *Reynolds Brothers Ltd v Chairman, Local Road Transportation Board, Johannesburg* 1985 (2) SA 790 (A).

⁶⁰ Note 51 above. Here the Foreign Compensation Commission was found to have erred in rejecting a claim for compensation on the basis of nationality. This would typically have been a non-reviewable error, but a majority of the House of Lords decided that the Commission had no power (jurisdiction) to take nationality into account. As a result, they 'dealt with and based their decision on a matter with which, on a true construction of their powers, they had no right to deal' (in the judgment of Lord Reid at 216e). The majority view showed, in fact, that any error of law could be made to be jurisdictional.

⁶¹ *Hira v Booysen* 1992 (4) SA 69 (A).

⁶² *Ibid* at 80-1 in the judgment of Nicholas AJA and at 83C-E in the judgment of Corbett CJ.

⁶³ *Ibid* at 90F-G.

⁶⁴ *Re Racal Communications* [1981] AC 374, where Lord Diplock concluded that the distinction between jurisdictional and non-jurisdictional errors had effectively been abolished. Though it remained possible for

v Ring van Wellington van die NG Sendingkerk in Suid-Afrika,⁶⁵ Corbett JA held that the reviewability of an error of law depended on whether the legislature intended the administrator to have exclusive authority to decide the question of law concerned. Such a construction would not easily be supported in ‘purely judicial’ cases in which the administrator ‘is merely required to decide whether or not a person’s conduct falls within a defined and objectively ascertainable statutory criterion’.⁶⁶ Importantly, too, invalidity of the decision would depend on the materiality of the error.⁶⁷ Corbett CJ concluded that the case before him was a ‘purely judicial’ one in which the legislature did not intend the administrator to have exclusive jurisdiction to interpret the grounds of misconduct in the Act.

In *Hira* Corbett CJ found justification for the review of error of law in the intention of the legislature. But the democratic Constitution provides a much broader justification for such review. By giving rights to lawful and reasonable administrative action, the Constitution seems indeed to give the courts the power to review *every* error of law, provided of course that it is material – in other words, an error that affects the outcome.⁶⁸ Section 6(2)(d) of the PAJA gives specific effect to this aspect of s 33 by permitting judicial review where ‘the action was materially influenced by an error of law’. The PAJA thus explicitly recognises the reviewability of material errors of law – a position far removed from the cautious and artificial reasoning relied on in the pre-democratic era.

In my view, however, it would be a mistake for the courts to discard altogether the reasoning used by Corbett CJ in *Hira*.⁶⁹ By giving due weight to the intention of the legislature the *Hira* approach acknowledges that the courts are not the only interpreters of the Constitution. The legislature, too, must be entitled to express its own interpretation of the Constitution,⁷⁰ and the courts should give that interpretation at least some respect. As Currie has suggested (in a more general context), the courts’ ‘awesome power’ to give the final and

legislation to entrust to administrators the power to decide questions of law, this would require ‘clear words’.

⁶⁵ Note 55 above, where Jansen JA made a distinction (at 20-1) between cases in which the legislature intends the decision-maker to have exclusive jurisdiction to decide a question of law, and those in which it does not.

⁶⁶ *Hira v Booyen* (note 61 above) at 93E-F.

⁶⁷ *Ibid* at 93G-H.

⁶⁸ See *Liberty Life Association of Africa Ltd v Kachelhoffer NO* 2005 (3) SA 69 (C) para 48, where Van Reenen J (Jali J concurring) laid stress on the requirement of materiality and noted that an error of law ‘is not material or relevant if the decision was justifiable on the facts despite such an error’.

⁶⁹ In *South African Jewish Board of Deputies v Sutherland NO* 2004 (4) SA 368 (W) para 27, Malan J found it unnecessary to decide ‘whether *Hira* should be discarded in view of the Constitution and the apparently wide powers given by s 6(2)(d) of PAJA’, but noted that ‘much can be said in favour of the view that all decisions based on material error of law stand to be reviewed’ (*ibid*).

⁷⁰ See Iain Currie ‘Judicious Avoidance’ (1999) 15 *SAJHR* 138 at 158-9.

authoritative interpretation of the Constitution can only be exercised with the co-operation of the other branches of the state.⁷¹

Section 6(2)(d) of the PAJA has so far been applied in only a few cases, one of the most noteworthy being *Governing Body, Mikro Primary School v Minister of Education, Western Cape*.⁷² In this case the provincial Head of Education had issued a directive to the principal of an Afrikaans-medium school instructing him forthwith to admit a group of forty learners and to teach them in English. Thring J found that an error of law had been made in that the Head of Education had not been entitled unilaterally to impose a new language on the school or to issue the directive in defiance of the school's existing language policy.⁷³ This reasoning was upheld by the Supreme Court of Appeal.⁷⁴

In another case, *J F E Sapela Electronics (Pty) Ltd v Chairperson, Standing Committee*,⁷⁵ Erasmus J found that a tender committee had misconstrued the statutory requirement of an 'acceptable tender', defined in s 1 of the Preferential Procurement Policy Framework Act 5 of 2000 as a tender which complies 'in all respects' with the specifications and conditions set out in the tender document. By allowing a tender that deviated materially from the specifications and conditions set out, the committee had committed an error of law.⁷⁶

(d) Review for mistake of fact

(i) Jurisdictional facts

South African common law also distinguishes between 'jurisdictional' and 'non-jurisdictional' facts, again following the English tradition.⁷⁷ But here the distinction is easier

⁷¹ Ibid 158.

⁷² *Governing Body, Mikro Primary School v Minister of Education, Western Cape* 2005 (3) SA 504 (C). The provision received some attention from the full bench in *Liberty Life Association v Kachelhoffer* (note 68 above) paras 47 and 48, where the court emphasised the requirement of materiality in s 6(2)(d) but ultimately found no error of law. Section 6(2)(d) was not applicable in *Antonie v Governing Body, Settlers High School* 2002 (4) SA 738 (C), a case in which error of law seemed to play a role, or in *Boesak v Chairman, Legal Aid Board* 2003 (6) SA 382 (T). It was applicable in *SA Jewish Board of Deputies v Sutherland* (note 69 above), but here Malan J decided that as far as the matter before him was concerned, there was no clash between the common-law principles and the provision in the PAJA. The case, he said, could be disposed of 'on the grounds in *Hira's* case as well as on s 6(2)(d)' (para 27). More recently s 6(2)(d) was applied in *Tantoush v Refugee Appeal Board* 2008 (1) SA 232 (T), where Murphy J identified a material error (para 99) as well as an error that was not material (para 93).

⁷³ *Governing Body, Mikro Primary School v Minister of Education* (note 72 above) at 521E-F.

⁷⁴ *Minister of Education, Western Cape v Governing Body, Mikro Primary School* 2006 (1) SA 1 (SCA).

⁷⁵ *J F E Sapela Electronics (Pty) Ltd v Chairperson, Standing Committee* [2004] All SA 715 (C).

⁷⁶ Ibid at 729g. On appeal in *Chairperson, Standing Tender Committee v J F E Sapela Electronics (Pty) Ltd* [2005] 4 All SA 487 (SCA) the court upheld the invalidity of the tenders but set aside the order of the court a quo, holding that this was a case where an invalid administrative act must be permitted to stand (para 29).

⁷⁷ See especially *R v Nat Bell Liquors Ltd* [1922] 2 AC 128 at 151: '[I]f his jurisdiction to entertain the [matter] is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not.'

to discern. ‘Jurisdictional facts’ refer broadly to preconditions that must exist prior to the exercise of the power and procedures to be followed, or formalities to be observed, when exercising the power: ‘substantive’ jurisdictional facts in the case of preconditions, and ‘procedural’ jurisdictional facts in the case of procedural requirements and formalities. These facts are jurisdictional because the exercise of the power depends on their existence or observance, as the case may be.⁷⁸ They are usually characterised by the familiar legislative formula ‘if x, then the administrator may do y’, or a variant of that formula. If the jurisdictional facts are not present or observed (or, to put it differently, if the administrator makes a jurisdictional mistake of fact), then the exercise of the power will as a general rule be unlawful. To hold otherwise, the courts have always reasoned, would be to allow administrators to arrogate powers to themselves or inflate their own jurisdiction.

The important role traditionally played in our law by jurisdictional facts is acknowledged in s 6(2)(b) of the PAJA, which provides for judicial review where ‘a mandatory and material procedure or condition prescribed by an empowering provision was not complied with’. This provision seems capable of covering any procedural or substantive jurisdictional fact,⁷⁹ notwithstanding that it abandons the standard jurisdictional terminology. The PAJA thus confirms the reviewability of jurisdictional facts generally. This is of some significance when one considers the courts’ past treatment of subjectively phrased clauses – a type of substantive jurisdictional fact used to signal wide discretionary power and thus to minimise the scope of judicial review as far as possible.⁸⁰ Clauses such as ‘is satisfied’ and ‘is of the opinion that’ often appeared in security legislation allowing for arrest and detention, and tended to be treated with extreme deference by the courts before 1994. While the administrator bore the burden of showing that the action had been taken lawfully, that onus could be discharged merely by the administrator’s ipse dixit – and the applicant then had the far harder task of demonstrating mala fides, ulterior motive or a failure to apply the mind on the part of the administrator.⁸¹ A notable exception to this type of reasoning was the case of *Hurley*,⁸² where the Appellate Division held that the administrator bore the onus of showing that there were objective grounds forming the basis of his ‘reason to believe’.

⁷⁸ See eg *Meyer v South African Medical and Dental Council* 1982 (4) SA 451 (T) at 454E-H.

⁷⁹ See *Police and Prisons Civil Rights Union v Minister of Correctional Services* 2006 (8) BCLR 971 (E) para 67.

⁸⁰ As Corbett J explained in *South African Defence and Aid Fund v Minister of Justice* 1967 (1) SA 31 (C) at 35A-B, this type of clause entrusted to the administrator ‘the sole and exclusive function of determining whether in its opinion the prerequisite fact existed’.

⁸¹ See especially *Kabinet van die Tussentydse Regering vir Suidwes-Afrika v Katofa* 1987 (1) SA 695 (A) and *Minister of Law and Order v Dempsey* (note 22 above).

⁸² *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A) at 578-9.

Since 1994 the sting has effectively been removed from subjectively phrased clauses, for the right to lawful administrative action in s 33(1) of the Constitution and the constitutional principle of legality both imply that the courts must be able to satisfy themselves as to the lawfulness of administrative action, including any assumptions on which that action is based.⁸³ Furthermore, the right to reasonable administrative action (and equally the requirement of rationality inherent in the principle of legality) mean that the courts are entitled to adopt a *Hurley*-like approach irrespective of the wording of a particular clause. Thus, whether or not the action qualifies as administrative action, the courts of the constitutional era may investigate the rationality of an opinion or a belief.⁸⁴ This is borne out by the approach of the Constitutional Court to an ‘is satisfied’ clause in *Walele v City of Cape Town*.⁸⁵ Jafta AJ insisted that the decision-maker ‘must now show that the subjective opinion it relied on for exercising power was based on reasonable grounds’,⁸⁶ and found that the documents relied on by the City of Cape Town fell short of providing a basis for a rational opinion.

(ii) *Non-jurisdictional facts*

Non-jurisdictional facts are those on which jurisdiction does not depend, which is to say where the legislation cannot be read as stipulating ‘if x, then the administrator may do y’. A factual finding as to the location of premises to be licensed, for instance, would be non-jurisdictional if the administrator’s power did not depend on it. A mistake as to the location of the premises would then be a mistake ‘within’ the jurisdiction of the administrator, and not reviewable as such at common law. Mindful of the distinction between review and appeal, the courts have traditionally reasoned that they had no power to enquire into the correctness of conclusions arrived at by administrators properly vested with the discretion to do so.⁸⁷ It is for

⁸³ This is implicit in the judgment of Van der Westhuizen J in *Henbase 3392 (Pty) Ltd v Commissioner, South African Revenue Service* 2002 (2) SA 180 (T).

⁸⁴ See *Camps Bay Ratepayers and Residents Association v Minister of Planning, Culture and Administration, Western Cape* 2001 (4) SA 294 (C) at 321B-C, and see also *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC) para 31.

⁸⁵ *Walele v City of Cape Town* 2008 (6) SA 129 (CC). The dissenting judgment of O’Regan J (concurring in by four other judges) does not seem to disagree with this principle.

⁸⁶ *Ibid* para 60.

⁸⁷ See eg *National Transport Commission v Chetty’s Motor Transport (Pty) Ltd* 1972 (3) SA 726 (A) at 735E-G; *Davies v Chairman, Committee of the Johannesburg Stock Exchange* 1991 (4) SA 23 (W) at 47C-G.

this reason that Forsyth and Dring describe review for mistake of fact as the last frontier of judicial review.⁸⁸

The pre-democratic approach to non-jurisdictional mistake of fact is well illustrated by *De Freitas v Somerset West Municipality*,⁸⁹ one of the few South African cases to deal squarely with this kind of error. In this matter the court had been asked to set aside an approval of plans given, it was argued, as a result of a mistaken assumption as to the capacity of a storm-water drainage system. Farlam J found that the functionary's erroneous assumption of fact did not go to his jurisdiction, and went on to hold that

‘it is not open to this Court to set aside a discretionary decision by a functionary, acting within his powers, merely because he made a mistake of fact. . . . Where the functionary had the power to decide and applied his mind, the decision can as a general rule not be set aside, even if on the merits it is “wrong” and in making it the functionary made an error of fact. To hold otherwise would be to turn basic principles of administrative law relating to discretionary decisions on their heads.’⁹⁰

As this indicates, non-jurisdictional mistakes of fact were reviewable to some extent: they could be challenged on the traditional grounds of abuse of discretion, mala fides, ulterior motive and failure to apply the mind.⁹¹ The latter ultimately came to cover a good deal of territory, including taking into account irrelevant considerations and ignoring relevant ones.⁹² On the other hand, these grounds were of use only in a situation where the decision-maker personally made the mistake. If incorrect facts were found by another functionary and placed before the administrator who then made the decision, it could not be said that the administrator had failed to apply his mind.

The law changed dramatically as a result of *Pepcor Retirement Fund v Financial Services Board*,⁹³ where s 33(1) of the Constitution and the principle of legality were held to demand the recognition of material mistake of fact as a ground of review. In this case certificates had been issued by the Registrar of Pension Funds on the basis of what turned out to be incorrect actuarial information provided to him, and a large sum of money had in

⁸⁸ Christopher Forsyth & Emma Dring ‘The Final Frontier: The Emergence of Material Error of Fact as a Ground of Judicial Review’ Paper Presented at a Conference on *Effective Judicial Review: A Cornerstone of Good Governance* Hong Kong (2008).

⁸⁹ *De Freitas v Somerset West Municipality* 1997 (3) SA 1080 (C).

⁹⁰ *Ibid* at 1084E and G-H. See also *Ferreira v Premier, Free State* 2000 (1) SA 241 (O), where similar reasoning was employed.

⁹¹ In other words, these sorts of mistakes were treated like subjective jurisdictional facts.

⁹² See *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* (note 23 above) at 152C-D.

⁹³ *Pepcor Retirement Fund v Financial Services Board* 2003 (6) SA 38 (SCA) para 32.

consequence been transferred to a retirement fund. The court a quo had set aside the decisions on the basis that the Registrar had been precluded from applying his mind properly to the matter.⁹⁴ The Supreme Court of Appeal upheld this result by means of somewhat different reasoning. Drawing on English authority including the seminal *Tameside* case,⁹⁵ Cloete wrote as follows for the unanimous court:

‘In my view, a material mistake of fact should be a basis on which a Court can review an administrative action. If legislation has empowered a functionary to make a decision, in the public interest, the decision should be made on the material facts which should have been available for the decision properly to have been made. And if a decision has been made in ignorance of facts material to the decision and which therefore should have been before the functionary, the decision should . . . be reviewable . . . The doctrine of legality . . . requires that the power conferred on a functionary to make decisions in the public interest, should be exercised properly, ie on the basis of the true facts; it should not be confined to cases where the common law would categorise the decision as *ultra vires*.’⁹⁶

Cloete JA went on to indicate that the public interest and other factors, such as prejudice to one or other of the parties, would play a role in the reviewability of a mistake of fact, and that it would be necessary to balance these factors.⁹⁷ In this case, however, there was no unjustifiable prejudice and there was a strong public interest in the proper regulation of pension funds.

Section 6 of the PAJA lists the material influence of an error of law as a ground of review but does not mention material mistake of fact⁹⁸ – an apparently deliberate omission that could have been regarded as significant. In *Pepcor* the Supreme Court of Appeal clearly did not see it so, however. Although the PAJA had not come into force when the proceedings were instituted, the court nevertheless dealt with it, remarking that s 6(2)(e)(iii), and especially the reference to relevant considerations not considered, could be interpreted as

⁹⁴ *Financial Services Board v De Wet NO 2002 (5) SA 525 (C)* paras 262-3. As already noted, it would be inaccurate in such a situation to say that the administrator had failed to apply his mind properly.

⁹⁵ *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1976] 3 All ER 665, where Scarman LJ regarded the scope of review as including ‘misunderstanding or ignorance of an established and relevant fact’ (at 675b-c); and *R v Criminal Injuries Compensation Board, Ex parte A* [1999] 2 AC 330 at 344G-345C, where Lord Slynn referred to the need for such a ground of review. On the current position in English law, see Forsyth (note 15 above) 232ff.

⁹⁶ *Pepcor Retirement Fund v FSB* (note 93 above) para 47, with reference to *Fedsure Life Assurance* (note 14 above), the *SARFU* case (note 18 above) and *Pharmaceutical Manufacturers Association* (note 18 above).

⁹⁷ *Pepcor Retirement Fund v FSB* (note 93 above) para 49.

⁹⁸ Initial drafts of the PAJA included such a ground, but it did not appear in the final version of the South African Law Commission’s draft Bill (*Report on Administrative Justice*, Project 115 (1999)).

restating the common law but could equally well be interpreted as bearing the ‘extended meaning’⁹⁹ that material mistake of fact is a ground of review.

Having reached this bold conclusion, the court was quick to point out the dangers of its own approach. It warned that the recognition of material mistake of fact as a ground of review should not be employed ‘so as to blur, far less eliminate’¹⁰⁰ the fundamental distinction between appeal and review. As an example, it suggested that a court would not be able to interfere with a material mistake of fact where the functionary had the power to decide both what facts were relevant to the decision *and* whether those facts existed. However, it is difficult to imagine how such a situation could arise without the mistake’s being or becoming a jurisdictional one – and the court made it clear that it had no intention of reducing the reviewability of jurisdictional facts.¹⁰¹ For all its talk of the distinction between appeal and review, *Pepcor* represents something of a revolution in South African administrative law.

The *Pepcor* principle was relied on somewhat obliquely in *Bullock NO v Provincial Government, North West Province*¹⁰² and received a mention in *Oudekraal Estates (Pty) Ltd v City of Cape Town*.¹⁰³ The subsequent case of *Government Employees Pension Fund v Buitendag*¹⁰⁴ gave the Supreme Court of Appeal an opportunity to catalogue these cases and to apply the *Pepcor* principle squarely. In this case the board of the pension fund, in ignorance of the existence of children of the deceased, exercised its discretion to award a gratuity to the husband of the deceased. Cloete JA found that the children had not been considered by the board as a result of a material mistake of fact.¹⁰⁵ Taking into account the public interest, the position of the various family members and the interests of the pension fund, he held that it would be a miscarriage of justice not to set aside the decision.¹⁰⁶

(e) Conclusion

The discussion above points to the successful transformation of the grounds of review associated with lawfulness, both in ‘regular’ administrative law and as far as the principle of legality is concerned. As has been shown here, the PAJA explicitly takes forward the gains

⁹⁹ *Pepcor Retirement Fund v FSB* (note 93 above) para 46.

¹⁰⁰ *Ibid* para 48.

¹⁰¹ *Ibid*: ‘[I]n my view, it will continue to be both necessary and desirable to maintain that particular category of fact.’

¹⁰² *Bullock NO v Provincial Government, North West Province* 2004 (5) SA 262 (SCA).

¹⁰³ *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) para 25n16.

¹⁰⁴ *Government Employees Pension Fund v Buitendag* [2006] SCA 121 RSA.

¹⁰⁵ *Ibid* para 11.

¹⁰⁶ *Ibid* para 14. Mistake of fact also vitiated decisions in *Chairpersons’ Association v Minister of Arts and Culture* 2007 (5) SA 236 (SCA) paras 48-9 and *Hangklip Environmental Action Group v MEC for Agriculture, Environmental Affairs and Development Planning, Western Cape* 2007 (6) SA 65 (C) at 81-2.

made at the end of the pre-democratic era in relation to the treatment of dishonesty, the relevance of motive and the reviewability of errors of law. While the statute does not deal explicitly with mistake of fact, the highest courts have engaged with the Constitution so as to render all factual mistakes – whether jurisdictional and non-jurisdictional – objectively reviewable in the democratic era.

2.3 REASONABLENESS

(a) *Introduction and overview*

Section 33(1) of the Constitution gives a right to administrative action that is ‘reasonable’. This is remarkable in itself, and especially so in view of our history, for before 1994 the existence of a ground of review of reasonableness was a matter of great controversy in South African administrative law. There is no doubt, however, that the right to reasonable administrative action is a proper component of democratic South African constitutionalism in general and of our transformed administrative law in particular. In the very first case to be heard by the Constitutional Court, Ackermann J laid stress on the importance of reason and justification in a constitutional state.¹⁰⁷ As he indicated, to allow arbitrary conduct on the part of the government would contradict the foundations of our new legal order.¹⁰⁸ In *Pharmaceutical Manufacturers Association*¹⁰⁹ Chaskalson P reiterated that in our legal order, rationality is a minimum requirement of every exercise of public power by state functionaries. Accountability and responsiveness, too, are values that feature very prominently in our democratic Constitution, and they demand institutions that foster the justification of government decisions. As Mureinik explained it, the aspiration to better justified decisions translates ‘pre-eminently’ into review for unreasonableness.¹¹⁰ Review on this ground is thus a fundamental and essential part of the culture of justification heralded by the interim Constitution.¹¹¹

But in South Africa, as in the common-law world, administrative-law review for reasonableness remains problematic. Deciding what is reasonable or unreasonable is thought to be an incurably substantive undertaking, and thus quite inappropriate to the business of administrative-law review. The fear is that such decisions inevitably draw the courts into the merits of administrative decisions, thereby breaking down the crucial distinction between

¹⁰⁷ *S v Makwanyane* 1995 (3) SA 391 (CC) para 156.

¹⁰⁸ *Ibid.*

¹⁰⁹ Note 18 above, para 85.

¹¹⁰ Etienne Mureinik ‘Reconsidering Review: Participation and Accountability’ 1993 *Acta Juridica* 35 at 40.

¹¹¹ Etienne Mureinik ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 *SAJHR* 31.

appeal and review. It is not surprising, then, that reasonableness has always been the most controversial review ground in our administrative law, and that it remains the most controversial requirement of s 33. More than any other ground, review for reasonableness exposes the tension between the conflicting judicial emotions that characterise administrative law:¹¹² in this instance, the desire for adequate control over the decisions of administrators and the fear of encroaching on the executive branch by entering into the merits of decisions.

In the pre-democratic era our courts attempted to resolve this tension by mechanical means, using the device of classifying administrative functions. Administrative decisions were classified into three types, 'legislative', 'purely judicial' and merely 'administrative', and each was subjected to different treatment in relation to reasonableness. In the first two categories considerable scope was given to the ground of unreasonableness, but in the third category – the largest by far – the courts were deferential to the extent of denying the application of the ground altogether. Thus one of the greatest challenges for our transformed administrative law has been to give the right to reasonable action proper significance without at the same time allowing judges too much scope for intervention in administrative matters.

The PAJA has been a mixed blessing in this regard. While the grounds of review listed in s 6 certainly give full scope to one aspect of reasonableness, that of rationality, the legislature rejected the Law Commission's proposed ground relating to the second aspect – proportionality. It chose instead a ground of review of unreasonableness which apparently sets such a low standard that it reverts to the overly deferential pre-democratic position. Fortunately, thoughtful interpretation by the Constitutional Court has avoided this reading, and thus also the all-or-nothing results associated with the common-law era. Significantly, this court has also established that the principle of legality demands rationality of all those who use public power. The legality principle has been held to demand clarity, too, in both original and delegated legislation.

(b) The pre-democratic law

Before 1994 the courts' determination to uphold the distinction between review and appeal led them to recognise three different tests for the review of unreasonable administrative action in accordance with the classification of functions. The test enunciated by Lord Russell in the venerable English case of *Kruse v Johnson*¹¹³ was applied in the context of 'legislative'

¹¹² As to this tension more generally, see Cynthia Farina 'Administrative Law as Regulation: The Paradox of Attempting to Control and to Inspire the Use of Public Power' (2004) 19 *SA Public Law* 489.

¹¹³ *Kruse v Johnson* [1898] 2 QB 91 at 99-100.

decisions, and was regularly used to strike down discriminatory delegated legislation – at least until the depressing decision of the Appellate Division in *Minister of the Interior v Lockhat*.¹¹⁴ In 1976 a ‘no reasonable evidence’ test was developed for ‘purely judicial’ decisions, which is to say decisions characterised by the application of legal rules and principles rather than policy. In *Theron v Ring van Wellington van die NG Sendingkerk in Suid-Afrika* Jansen JA found support in the common law for an ‘extended formal standard’ in terms of which such decisions could be declared unreasonable if they were not reasonably supported by the evidence available.¹¹⁵

Neither of these two tests applied to ‘administrative’ decisions, however. Indeed, the pre-democratic courts denied the existence of a ground of reasonableness as such and relied instead on ‘symptomatic unreasonableness’.¹¹⁶ In terms of this approach the unreasonableness of a decision, if it were sufficiently gross, would operate as a symptom of some other, apparently less threatening ground of review. In the leading case, *Union Government v Union Steel Corporation*, Stratford JA said:¹¹⁷

‘[N]owhere has it been held that unreasonableness is sufficient ground for interference; emphasis is always laid upon the necessity of the unreasonableness being so gross that something else can be inferred from it, either that it is “inexplicable except on the assumption of *mala fides* or ulterior motive” . . . or that it amounts to proof that the person on whom the discretion is conferred has not applied his mind to the matter.’

The review grounds referred to here – *mala fides*, ulterior motive and failure to apply the mind – are the well-established grounds relating to abuse of discretion which were identified as appropriate where a matter ‘has been left to the discretion or determination of a public officer’.¹¹⁸ As indicated by the *Union Steel* dictum, our courts preferred to rely on these traditional and far less controversial grounds of review rather than risk usurping the functions of administrators by inquiring directly into the unreasonableness of decisions. Thus only

¹¹⁴ In *Minister of the Interior v Lockhat* 1961 (2) SA 587 (A) Holmes JA admitted that Parliament must have envisaged ‘substantial inequalities’ resulting from the ‘colossal social experiment’ of the Group Areas Act 77 of 1957 (at 602D-E). The court thus found implied authority for discriminatory delegated legislation.

¹¹⁵ Note 55 above at 20D-21C (Van Blerk JA concurring). Jansen JA drew on cases establishing, in the context of special statutory review, that the proceedings of an inferior court or tribunal may be set aside if there is no reasonable evidence to justify the tribunal’s finding.

¹¹⁶ A term coined by Jérôld Taitz in ‘But ’Twas a Famous Victory’ 1978 *Acta Juridica* 109 at 111.

¹¹⁷ Note 50 above at 236-7.

¹¹⁸ *Shidiack v Union Government (Minister of the Interior)* 1912 AD 746 at 755-6.

unreasonableness of a gross or egregious kind counted, and it counted only as a sign that some other ground of review was present.¹¹⁹

In 1972 Holmes JA added a famous gloss in *National Transport Commission v Chetty's Motor Transport (Pty) Ltd*: the administrative decision had to be 'so grossly unreasonable to so striking a degree' as to warrant an inference of some other illegality or irregularity.¹²⁰ Despite criticism of these 'super-superlatives',¹²¹ dicta such as those in *Union Steel* and *Chetty* continued to dominate until the advent of the democratic era.¹²² Symptomatic unreasonableness typically applied in policy-laden areas of administrative decision-making, such as licensing, rent control and 'security' – that is, in the vast majority of cases.

(c) *The constitutional era*

The demand for a unified ground of reasonableness¹²³ was met when s 24(d) of the interim Constitution gave 'every person' a right to 'administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened'. In this formula the controversial word 'reasonable' was avoided and 'justifiable' was preferred as a less dangerous alternative. In contrast with the more liberal formulations in s 24(a), (b) and (c),¹²⁴ the requirement of affected or threatened *rights* in s 24(d) was clear evidence of a desire to confine the application of the right to reasonable action along pre-democratic lines, but without resorting to the 'purely judicial' label. Ironically, however, 'justifiable' was widely taken by commentators to be a synonym for 'rational'.¹²⁵ The correctness of this understanding was recently confirmed by Chaskalson CJ in the *New Clicks* case, where he indicated that 24(d) 'in substance set rationality as the review standard'.¹²⁶

¹¹⁹ See eg *Administrator, Transvaal and The Firs Investments (Pty) Ltd v Johannesburg City Council* 1971 (1) SA 56 (A) at 80C-H; *Johannesburg City Council v Administrator, Transvaal and Mayofis* 1971 (1) SA 87 (A) at 100A-B.

¹²⁰ Note 87 above at 735G-H.

¹²¹ Henning J in *Bangtoo Bros v National Transport Commission* 1973 (4) SA 667 (N) at 683H.

¹²² There are countless examples, including *Goldberg v Minister of Prisons* 1979 (1) SA 14 (A) at 38F-G and *Castel NO v Metal & Allied Workers Union* 1987 (4) SA 795 (A) at 812-14.

¹²³ Expressed most compellingly by Baxter: see *Administrative Law* (note 20 above) 477ff.

¹²⁴ Section 24(a) applied most widely by giving a right to lawful administrative action to all whose *rights or interests* were *affected or threatened*. Section 24(b) extended the right to procedurally fair administrative action to those whose *rights or legitimate expectations* (but not mere interests) were *affected or threatened*; and s 24(c) offered reasons in writing to those whose *rights or interests* were *affected* (but not merely threatened) by administrative action.

¹²⁵ See eg Michael Asimov 'Towards a South African Administrative Justice Act' (1997) 3 *Michigan Journal of Race & Law* 1 at 13-14 and Johan de Waal, Iain Currie & Gerhard Erasmus *The Bill of Rights Handbook* 3 ed (2000) 473. Etienne Mureinik, who actually proposed the term 'justifiable' as a compromise, apparently took it to mean the same thing as 'reasonable': see his 'A Bridge to Where?' (note 111 above) 40n34.

¹²⁶ *New Clicks (CC)* (note 17 above) para 108. While it is difficult to be exact about it, this proposition seems to have attracted the support of a majority of the court.

The courts' application of s 24(d) was neither consistent nor particularly coherent.¹²⁷ In *Kotzé v Minister of Health*, for instance, the court used the terminology associated with symptomatic unreasonableness but went on to suggest that the difference between a review and an appeal 'may have been largely eroded' by s 24(d).¹²⁸ In *Roman v Williams NO*¹²⁹ justifiability was held to impose a standard of 'suitability, necessity and proportionality' and to have extended review to the 'substance and merits' of a decision – but, rather surprisingly in view of this approach, the decision was found to be justifiable. But in any event, the cases decided under s 24(d) are of limited assistance in shedding light on s 33(1) of the 1996 Constitution. Here the formula of justifiability is abandoned and replaced with a simple right to 'reasonable' administrative action. This, Chaskalson CJ stated in *New Clicks*, sets a 'variable but higher standard' than s 24(d).¹³⁰ Reasonableness will in many cases 'call for a more intensive scrutiny than would have been competent under the interim Constitution'.¹³¹

(i) *The elements of 'reasonable' administrative action*

No single meaning can be attributed to reasonableness, whether in administrative law or in South African public law more broadly.¹³² However, it is uncontroversial today that the first element promised by 'reasonable' administrative action in s 33(1) is rationality.¹³³ This means in essence that a decision must be supported by the evidence and information before the administrator as well as the reasons given for it. It must also be objectively capable of furthering the purpose for which the power was given and for which the decision was purportedly taken. Asimow suggests that '[a]fter examining the evidence that both supports and opposes the agency decision, a court must conclude that a reasonable person could have arrived at the agency's conclusion' – a formulation that resembles the American test of substantial evidence.¹³⁴ In the case of *Carephone (Pty) Ltd v Marcus NO* a full bench of the Labour Appeal Court put the question in similar terms:¹³⁵

¹²⁷ Ross R Kriel 'Administrative Law' 1998 *AS* 89 at 95.

¹²⁸ *Kotzé v Minister of Health* 1996 (3) BCLR 417 (T) at 425F-G.

¹²⁹ *Roman v Williams NO* 1998 (1) SA 270 (C) at 281-82; and see also at 284I.

¹³⁰ *New Clicks (CC)* (note 17 above) para 108.

¹³¹ *Ibid.*

¹³² See Anashri Pillay 'Reviewing Reasonableness: An Appropriate Standard for Evaluating State Action and Inaction?' (2005) 122 *SALJ* 419 and I M Rautenbach 'The Limitation of Rights and "Reasonableness" in the Right to Just Administrative Action and the Rights to Access to Adequate Housing, Health Services and Social Security' 2005 *TSAR* 627.

¹³³ See eg *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 43.

¹³⁴ Asimow (note 125 above) 14-15, citing *Universal Camera Corp v NLRB* 340 US 474 (1951) as the leading case. This test 'does not allow a court to reweigh the evidence and overturn the decision merely because it prefers a conclusion different from the agency's' (at 15).

¹³⁵ *Carephone (Pty) Ltd v Marcus NO* 1999 (3) SA 304 (LAC) para 37. See also *Liberty Life Association of*

‘Is there a rational objective basis justifying the conclusion made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at?’

In *Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa* this formulation was approved and applied by the Supreme Court of Appeal in the context of the PAJA, which expressly recognises rationality as a ground of review.¹³⁶

Section 6(2)(f)(ii) of the PAJA, which was taken directly from the proposals of the South African Law Commission in its draft Bill,¹³⁷ gives ample scope to the element of rationality by referring to action that is not rationally connected to

- ‘(aa) the purpose for which it was taken;
- (bb) the purpose of the empowering provision;
- (cc) the information before the administrator; or
- (dd) the reasons given for it by the administrator.’

This formulation encompasses what was previously covered by s 24(d) of the interim Constitution, ie the need for a rational connection between action and the reasons given for it. It goes a good deal further than s 24(d), however, in referring to the evidence before the decision-maker¹³⁸ and in distinguishing between the purpose of the empowering provision and the purpose for which the action was taken – purposes which, as the drafters recognised, might not coincide.

Section 6(2)(f)(ii) of the PAJA undoubtedly serves as a thorough and searching ground of review. At the same time, there is nothing particularly alarming or even very novel about it.¹³⁹ It may be regarded as covering much the same territory as venerable common-law grounds, such as ulterior purpose, failure to apply the mind and arbitrariness. A crucial feature is that it demands merely a rational connection – not perfect or ideal rationality. In a different

Africa v Kachelhoffer (note 68 above) para 45 and the authorities cited there.

¹³⁶ *Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa* 2004 (3) SA 346 (SCA) para 21. See also *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa* 2008 (2) SA 164 (SCA).

¹³⁷ Note 98 above.

¹³⁸ See eg *Total Computer Services (Pty) Ltd v Municipal Manager, Potchefstroom Local Municipality* 2008 (4) SA 346 (T) para 55 (award of tender not rationally connected to the information before the adjudicators).

¹³⁹ Cora Hoexter ‘Unreasonableness in the Administrative Justice Act’ in Claudia Lange & Jakkie Wessels (eds) *The Right to Know: South Africa’s Promotion of Administrative Justice and Access to Information Acts* (2004) 148 at 159.

context Davis J has described a rational connection test of this sort as ‘relatively deferential’ because it calls for ‘rationality and justification rather than the substitution of the Court’s opinion for that of the tribunal on the basis that it finds the decision . . . substantively incorrect’.¹⁴⁰

Rationality is not all there is to reasonableness.¹⁴¹ The second component of the ‘reasonable’ administrative action promised in s 33(1) is proportionality. Unlike rationality, however, the status of this ground of review in our law remains somewhat controversial.

Proportionality may be defined as the notion that one ought not to use a sledgehammer to crack a nut.¹⁴² Its purpose is ‘to avoid an imbalance between the adverse and beneficial effects . . . of an action and to encourage the administrator to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end’.¹⁴³ Two of its essential elements, then, are balance and necessity, while a third is suitability – usually referring to the use of lawful and appropriate means¹⁴⁴ to accomplish the administrator’s objective.

The concept of proportionality derives from German law and is well established in European¹⁴⁵ and English¹⁴⁶ administrative law. In South Africa it has been accepted as a crucial requirement in the field of administrative lawmaking at least since *Kruse v Johnson*,¹⁴⁷ but – as the court in *Roman v Williams NO*¹⁴⁸ seemed to recognise – should certainly not be confined to that type of administrative function.¹⁴⁹ This was acknowledged by the South

¹⁴⁰ *Niewoudt v Chairman, Amnesty Subcommittee, Truth and Reconciliation Commission* 2002 (3) SA 143 (C) at 155G-H and 164G-H.

¹⁴¹ The Constitutional Court has drawn a distinction in its jurisprudence generally between mere rationality and a more onerous standard of reasonableness: see eg *Bel Porto School Governing Body v Premier, Western Cape* 2002 (3) SA 265 (CC) para 46 and *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) para 67.

¹⁴² *S v Manamela* 2000 (3) SA 1 (CC) para 34; and see Jeffrey Jowell & Anthony Lester QC ‘Proportionality: Neither Novel nor Dangerous’ in Jeffrey Jowell & Dawn Oliver (eds) *New Directions in Judicial Review* (1988) 51.

¹⁴³ Cora Hoexter ‘Standards of Review of Administrative Action: Review for Reasonableness’ in Jonathan Klaaren (ed) *A Delicate Balance: The Place of the Judiciary in a Constitutional Democracy* (2006) 61 at 64.

¹⁴⁴ *De Smith* (note 3 above) 587. The exact role of ‘suitability’ tends to vary; it can be regarded, for instance, as relating to lawful means or to the suitability of the purpose. See further Julian Rivers ‘Proportionality and Variable Intensity of Review’ (2006) 65 *Cambridge Law Journal* 174 at 181.

¹⁴⁵ On the application of proportionality in the European courts, see generally Rivers (note 144 above).

¹⁴⁶ At least in cases involving human rights or those having a European Community law element, though there is support for applying the test outside this category: see David Feldman ‘The Internationalization of Public Law and its Impact on the United Kingdom’ in Jeffrey Jowell & Dawn Oliver *The Changing Constitution* 6 ed (2007) 108 at 130. See further Shivaji Felix ‘Engaging Unreasonableness and Proportionality as Standards of Review in England, India and Sri Lanka’ 2006 *Acta Juridica* 95.

¹⁴⁷ Note 113 above.

¹⁴⁸ Note 129 above at 281D-E. See further J R de Ville ‘Proportionality as a Requirement of the Legality in Administrative Law in Terms of the New Constitution’ (1994) 9 *SA Public Law* 360, especially at 365ff.

¹⁴⁹ A famous pre-democratic instance of its application outside the area of legislative administrative action is *Dempsey v Minister of Law and Order* (note 22 above). J R de Ville *Judicial Review of Administrative Action in South Africa* (2003) (hereafter simply ‘De Ville’) 206n96 offers further examples.

African Law Commission in its proposal that the courts be able to review administrative action generally on the grounds of ‘disproportionality between the adverse and beneficial consequences of the action’ and the existence of ‘less restrictive means to achieve the purpose for which the action was taken’.¹⁵⁰

Proportionality has a number of strong supporters in South Africa, particularly De Ville¹⁵¹ and Plasket,¹⁵² and has attracted some judicial support in recent years as well.¹⁵³ This makes it all the more unfortunate that the ground of proportionality proposed in the Law Commission’s draft Bill was not enacted as part of the PAJA. The drafters ultimately decided to replace it with s 6(2)(h), a ground dealing with unreasonable effects but not specifically with proportionality. Section 6(2)(h) says that a court or tribunal has the power to review an administrative action if

‘the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function.’

This ground is very similar to the well-known test enunciated by Lord Greene MR in the English case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*,¹⁵⁴ where he referred to a decision ‘so unreasonable that no reasonable authority could ever have come to it’.

Unlike the Law Commission’s proposed clause, which was explicit about the type of conduct it sought to prevent, s 6(2)(h) and its counterpart in *Wednesbury* offer no real clues as to the content or meaning of reasonableness. Rather, they are unhelpfully circular, merely linking the reasonableness of the action to the reasonableness of the actor.¹⁵⁵ Tests of this

¹⁵⁰ Clause 7(1)(g) of the SALC draft Bill (note 98 above).

¹⁵¹ See De Ville ‘Proportionality’ (note 148 above) and De Ville (note 149 above), especially at 203ff. He does not seem to regard proportionality as an aspect of reasonableness, however.

¹⁵² 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).

¹⁵³ See eg *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* 2001 (4) SA 661 (W) para 36; *Schoonbee v MEC for Education, Mpumalanga* 2002 (4) SA 877 (T) at 885D-E; *Mafongosi v United Democratic Movement* 2002 (5) SA 567 (Tk) paras 14-15; and the minority judgment of Mokgoro and Sachs JJ in *Bel Porto SGB v Premier, Western Cape* (note 141 above), especially para 166. In his minority judgment in *New Clicks (CC)* (note 17 above) para 637 Sachs J observed that ‘[p]roportionality will always be a significant element of reasonableness’.

¹⁵⁴ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680 at 683E and 685C-D.

¹⁵⁵ See Michael Kidd ‘Following *Bato Star*: A Guide to Pinpointing Reasonableness’ Unpublished Paper Presented at a Conference of the Society of Law Teachers of South Africa, Bloemfontein (2005).

nature are also unhelpful in another sense: they set such a low standard as to be worthless except as grounds of last resort. As Craig indicates, *Wednesbury* unreasonableness in its (undeveloped) substantive sense demands something extreme, and some other ground of review is bound to be present in cases of such an egregiously unreasonable nature.¹⁵⁶

Fortunately, the Constitutional Court found itself able to interpret s 6(2)(h) in a more nuanced way, and moreover in a manner that allows proportionality be read into it.

(ii) *The interpretation of section 6(2)(h) of the PAJA*

By promising administrative action that is ‘reasonable’, s 33(1) of the Constitution demolishes the doctrine of symptomatic unreasonableness. As for gross unreasonableness, a requirement Mureinik described as revealing a ‘zealous antipathy to rationality review’,¹⁵⁷ s 33(1) offers no basis for it. Gross unreasonableness is not merely an unpopular standard,¹⁵⁸ then, but also seems incompatible with the Bill of Rights.¹⁵⁹ Some commentators have nevertheless suggested that reasonableness review ought to be applied with caution. For example, Asimow warns of two particular dangers: that this kind of review can be burdensome on courts,¹⁶⁰ and that ‘judges can utilise the power to declare agency action unreasonable as a device to substitute their own policy preferences in place of the agency’s’.¹⁶¹ In the *Carephone*¹⁶² case Froneman DJP notes that the constitutional value of accountability gives legitimacy to the judicial review of administrative action – but not to the judicial exercise of executive or administrative authority. Kriel, too, remarks that ‘in the shift to a constitutional democracy one is more rather than less concerned to find the right balance between judicial supervision of the executive and respect for its popular mandate and imperatives to govern’.¹⁶³

The view I have always defended is that qualifications such as ‘gross’ are unnecessary even in contexts demanding a measure of judicial deference. The ordinary dictionary meaning

¹⁵⁶ Craig (note 12 above) 615ff, and see the text to notes 12-13 above.

¹⁵⁷ Mureinik ‘Reconsidering Review’ (note 110 above) 41.

¹⁵⁸ See Baxter (note 20 above) 477ff. During the constitutional negotiations the African National Congress (ANC) attracted criticism by proposing to include such a standard in a future administrative justice right. The proposed wording was ‘such gross unreasonableness . . . as to amount to manifest injustice’: see art 2(24) of the ANC’s draft Bill of Rights, published in (1991) 7 *SAJHR* 110. See also in the same volume of the journal the critical comment ‘Judicial Review Under an ANC Government’ by Gilbert Marcus and Dennis Davis (at 93) and the reply by Albie Sachs (at 98).

¹⁵⁹ As pointed out by Friedman J in *Standard Bank of Bophuthatswana Ltd v Reynolds NO* 1995 (3) SA 74 (B) at 96E-G.

¹⁶⁰ Asimow (note 125 above) 14: in order to decide whether a scheme of environmental regulation meets rationality standards, for example, ‘the judges must master detailed and often highly technical records. Limited judicial resources of time and talent militate against this sort of review.’

¹⁶¹ *Ibid.*

¹⁶² *Carephone v Marcus* (note 135 above) para 34.

¹⁶³ Kriel (note 127 above) 96.

of ‘reasonable’ – in accordance with reason or within the limits of reason – suggests an area of ‘legitimate diversity’, a space within which various reasonable choices may be made. It does not suggest that a decision is reasonable only when it is correct or perfect in the court’s eyes. On the ordinary dictionary meaning of ‘reasonable’, in fact, s 33 captures exactly the right standard.¹⁶⁴ To require less than reasonableness so defined would be to allow capricious decision-making. To require more – to require correctness or perfection – would be to allow the courts to substitute their own views for those of the administrator.¹⁶⁵ It is worth noting that this approach accords with the Constitutional Court’s interpretation of reasonableness in the context of socio-economic rights.¹⁶⁶

The PAJA does not resurrect symptomatic unreasonableness, and nor does ‘gross’ unreasonableness feature explicitly in s 6(2)(h); but all the same, egregiousness seems to be envisaged here just as it is in the *Wednesbury* test. In fact, one could argue that ‘gross’ is not strong enough: that only a decision which is utterly and completely unreasonable will be so unreasonable that no reasonable person could have arrived at it. In accordance with this thinking, the idea of ‘perversity’ was suggested by counsel in *Trinity Broadcasting* case¹⁶⁷ as the appropriate standard. Cane rightly remarks that taken literally, this sort of standard is so stringent that it an unreasonable decision will be a very rare occurrence in real life.¹⁶⁸ It is not surprising that the English courts have often criticised the ‘tautologous formula’¹⁶⁹ of *Wednesbury* and have sometimes resorted to less strict formulations.¹⁷⁰

However, this is not the only way to read s 6(2)(h) (or the *Wednesbury* formulation). On another interpretation, these tests mean simply that the decision must be reasonable. Since an unreasonable action is ‘axiomatically something that no reasonable person or authority would perform’,¹⁷¹ saying that no reasonable person could have performed it means merely that it is unreasonable – and not egregiously so.

¹⁶⁴ Cora Hoexter ‘The Future of Judicial Review in South African Administrative Law’ (2000) 117 *SALJ* 484 at 509-10.

¹⁶⁵ *Ibid* 510, and see under the next heading.

¹⁶⁶ See especially *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC).

¹⁶⁷ Note 136 above, para 21. Howie P found it unnecessary to express an opinion on the subject, however, since the case was concerned with rationality rather than unreasonable effects. Cf *Radio Pretoria v Voorsitter van die Onafhanklike Kommunikasie-Owerheid van SA* 2006 (3) BCLR 444 (T).

¹⁶⁸ Peter Cane *Administrative Law* 4 ed (2004) 250.

¹⁶⁹ Lord Cooke used this term in *R v Chief Constable of Sussex, ex parte International Trader’s Ferry Ltd* [1999] 1 All ER 129 at 157. In *R v Secretary of State for the Home Department, ex parte Daly* [2001] 3 All ER 433 para 32 he went further, describing *Wednesbury* as ‘an unfortunately retrogressive decision’.

¹⁷⁰ Craig (note 12 above) 617ff records the ‘loosening’ of the *Wednesbury* test in several different contexts.

¹⁷¹ Hoexter ‘Future of Judicial Review’ (note 164 above) 518. Baxter (note 20 above) 490, 496-7 and 534 would seem to have something like this in mind in proposing a uniform standard of conduct that no reasonable person would accept.

Happily, this second interpretation was preferred by the Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*,¹⁷² a case concerning the allocation of fishing quotas by the Chief Director responsible for marine management. In this seminal case O'Regan J made it clear that s 6(2)(h) must be read in conformity with s 33 of the Constitution, and that the standard called for by s 33(1) is simply that of reasonableness, and not some exaggerated version of it. Referring to the judgment of Lord Cooke in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd*,¹⁷³ she stated:

‘Even if it may be thought that the language of s 6(2)(h), if taken literally, might set a standard such that a decision would rarely if ever be found unreasonable, that is not the proper constitutional meaning which should be attached to the subsection. The subsection must be construed consistently with the Constitution and in particular s 33 which requires administrative action to be ‘reasonable’. Section 6(2)(h) should then be understood to require a simple test, namely that *an administrative decision will be reviewable if*, in Lord Cooke’s words, *it is one that a reasonable decision-maker could not reach*.’¹⁷⁴

In *Bato Star* O'Regan J made it clear that what is reasonable depends on the circumstances. In particular, she indicated, it is appropriate for a court to show deference or respect to ‘a decision that requires an equilibrium to be struck between a range of competing interests or considerations . . . by a person or institution with specific expertise in that area’.¹⁷⁵ She went on to list other factors relevant in deciding whether a decision is reasonable:

‘[T]he nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.’¹⁷⁶

While one must not expect lists of this kind to perform magic, this particular list is to be welcomed for several reasons. First, the factors offer some frame of reference for reasonableness, which is otherwise a rather colourless concept. Secondly, they confirm the

¹⁷² Note 133 above, para 44. See also *Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management* 2006 (2) SA 191 (SCA) para 12.

¹⁷³ Note 169 above at 157.

¹⁷⁴ *Bato Star v Minister of Environmental Affairs* (note 133 above) para 44, my emphasis.

¹⁷⁵ *Ibid* para 48. For a recent example of the application of this dictum, see *Head of Western Cape Education Department v Governing Body of Point High School* [2008] 3 All SA 35 (SCA). The development of a South African doctrine of deference is discussed at 4.5(b) below.

¹⁷⁶ *Ibid* para 45.

inherent variability of reasonableness¹⁷⁷ and offer a new basis for its operation – a very far cry from the old method of making reasonableness a requirement for only some kinds of administrative decisions and not for others. As a matter of logic, all the grounds of review set out in the PAJA apply to all administrative action as defined; there does not seem to be room for the notion that rationality alone would apply to some kinds of administrative action while both rationality and proportionality would apply to others.¹⁷⁸

Thirdly, the factors give scope to the element of proportionality. This crucial ingredient would otherwise be missing from the PAJA, and would either have to be inserted by means of legislative reform (which seems unlikely to be forthcoming) or be read into the catch-all ground of ‘otherwise unconstitutional or unlawful’ in s 6(2)(i). The last of the *Bato Star* factors, the ‘impact of the decision’, connotes the effects of the decision, and thus seems to invite a proportionality enquiry in a fairly explicit way. But other items in this list, such as ‘the nature of the competing interests involved’ and ‘the range of factors relevant to the decision’, could be regarded as inviting a proportionality inquiry (and perhaps especially an inquiry as regards balance) in a more indirect fashion. The list of factors thus offers a way of bringing proportionality into s 6 of the PAJA. If properly developed by the courts, this feature would make it unnecessary to read proportionality into s 6(2)(i) of the PAJA; but that solution certainly remains an option, and is not ruled out by anything said in *Bato Star*.

(iii) *The distinction between review and appeal*

In *Bato Star* O’Regan J admitted that review for reasonableness gives administrative-law review a substantive ingredient.¹⁷⁹ Nevertheless, she said, the distinction between appeal and review ‘continues to be significant’, and in carrying out their task of ensuring that administrative decisions fall within the bounds of reasonableness the courts ‘must take care not to usurp the functions of administrative agencies’.¹⁸⁰ Similarly, Howie P issued a reminder in the *Trinity Broadcasting* case that action in review proceedings must not ‘be tested against the reasonableness of the merits of the decision in the same way as in an appeal’.¹⁸¹ But for some observers statements such as these appear to pull in two directions at once. How is it that the distinction between appeal and review can be maintained while carrying on review

¹⁷⁷ Craig (note 12 above) 536 remarks in the context of English law that ‘[i]t is becoming increasingly common for courts to adopt a variable standard of review, the intensity of which alters depending upon the subject-matter of the action’, and notes that grounds such as irrationality or proportionality can be applied with differing degrees of rigour or intensity.

¹⁷⁸ Hoexter ‘Standards of Review’ (note 143 above) 69. Cf De Ville (note 149 above) 213-16.

¹⁷⁹ *Bato Star v Minister of Environmental Affairs* (note 133 above) para 45.

¹⁸⁰ *Ibid.*

¹⁸¹ *Trinity Broadcasting v ICASA* (note 136 above) para 20.

that has a substantive ingredient? How can the courts manage to apply reasonableness as a ground of review *without* usurping the functions of administrators?

I maintain that review for reasonableness does threaten the distinction between review and appeal – but it does so in the limited sense that it necessarily entails *scrutiny* of the merits of administrative decisions.¹⁸² The same is true of several other grounds of review, such as ulterior purpose and failure to apply the mind, which are generally supposed to be less dangerous than reasonableness in the substantive sense.¹⁸³ In my argument it is, in fact, quite impossible to judge whether a decision is within the limits of reason or ‘defensible’¹⁸⁴ without looking closely at matters such as the information before the administrator, the weight given to various factors and the purpose sought to be achieved by the decision.¹⁸⁵ Only cases decided on the narrowest and most technical of grounds will not entail such scrutiny: for instance, failure to comply with a mandatory formality will not necessarily involve scrutiny of the merits.¹⁸⁶ Furthermore, it seems to me that the courts unavoidably entered into the merits even in the very cases in which they propounded the idea of ‘gross’ and even ‘strikingly gross’ unreasonableness¹⁸⁷ in an attempt to *avoid* the merits. Chan expresses a similar view in his discussion of *Wednesbury* unreasonableness:

‘[I]t is almost impossible to determine rationality without at the same time considering the merits of the decision. . . . Hence, it is misleading to characterize judicial review as concerning only the decision-making process and not the decision itself. Indeed, even in the most extreme formulation of the *Wednesbury* unreasonableness test, such as a decision ‘so absurd that no sensible person could ever dream that it lay within the powers of the authority’, or a decision ‘so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it’, there is an implicit acceptance of the necessity of entering into the merits of a decision.’¹⁸⁸

I would argue that the distinction between appeal and review can best be served by distinguishing between the two distinct usages of the word ‘review’: review as a process and

¹⁸² This proposition attracted the approval of five members of the Constitutional Court in *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) para 109.

¹⁸³ See Hoexter ‘Future of Judicial Review’ (note 164 above) 512.

¹⁸⁴ A word used as a synonym for ‘justifiable’ by Froneman DJP in *Carephone v Marcus* (note 135 above) at 1336F.

¹⁸⁵ For fuller argument, see eg the works referred to in notes 139 and 164 above.

¹⁸⁶ Hoexter ‘Standards of Review’ (note 143 above) 68.

¹⁸⁷ Hoexter ‘Future of Judicial Review’ (note 164 above) 512. In *Union Government v Union Steel* (note 117 above), for example, the various factors that led the Minister to decide not to award a bounty for iron production were subjected to a detailed examination by De Villiers JA.

¹⁸⁸ Johannes Chan ‘A Sliding Scale of Reasonableness in Judicial Review’ 2006 *Acta Juridica* 233 at 234-5.

as a remedy. The process of review, judicial scrutiny of administrative action, is something harmless in itself – provided it is not taken further. The danger lies not in careful *scrutiny* but in judicial overzealousness in setting aside administrative decisions that do not coincide with the judge’s own opinions.¹⁸⁹ Judges will be less likely to usurp administrative powers if they remember that review for reasonableness does not demand perfection (or what the court regards as perfection), but ought indeed to give scope for legitimate diversity. The important thing, then, is that judges should not use the opportunity of scrutiny to prefer their own views as to the correctness of the decision. This was put very well by the court in *Carephone*:¹⁹⁰

‘In determining whether administrative action is justifiable in terms of the reasons given for it, value judgements will have to be made which will, almost inevitably, involve the consideration of the ‘merits’ in some way or another. As long as the judge determining [the] issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order.’

This, then, is the answer to the conundrum posed earlier.

(d) Reasonableness and the principle of legality

The principle of legality has become an important source of administrative law not only in the sphere of lawfulness but also in relation to reasonableness.

First, original legislation, which does not qualify as administrative action either under s 33 of the Constitution or in terms of the PAJA, and which has never been under the control of administrative law, is now subject to the rule against vagueness – a rule that is traditionally part of the doctrine of reasonableness in administrative law.¹⁹¹ Thus in *Dawood v Minister of Home Affairs* O’Regan J confirmed that it is an important principle of the rule of law that rules ‘be stated in a clear and accessible manner’.¹⁹² In another case, Langa DP noted that the legislature ‘is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what it expected of them’.¹⁹³

¹⁸⁹ Hoexter ‘Future of Judicial Review’ (note 164 above) 512.

¹⁹⁰ *Carephone v Marcus* (note 135 above) para 36.

¹⁹¹ *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 102.

¹⁹² *Dawood v Minister of Home Affairs* (note 28 above) para 47.

¹⁹³ *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) para 24.

Unlike original legislation, delegated legislation has always been subject to the control of ‘regular’ administrative law; and in the pre-democratic era the common-law rule against vagueness was of considerable assistance to the courts in controlling it. In the democratic era, however, there is continuing uncertainty about whether delegated legislation amounts to administrative action,¹⁹⁴ not least because the legislature saw fit to delete from the PAJA a proposed ground of review relating to vagueness. As a result, the rule of law tends to be relied on in this regard as well.¹⁹⁵ Dealing with the validity of pharmaceutical regulations, the Constitutional Court referred to several venerable administrative-law cases¹⁹⁶ in holding that

‘[t]he doctrine of vagueness is founded on the rule of law, which . . . is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly.’¹⁹⁷

A further important consequence of the rule of law is that rationality, another very familiar aspect of administrative law, is a ‘minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries’, as stated by the Constitutional Court in *Pharmaceutical Manufacturers Association*.¹⁹⁸ More specifically, rationality in this context is dictated by the principle of legality and means that there must be a rational relationship between the exercise of the power and the purpose for which the power was given.¹⁹⁹ As the court has indicated, not even the most political of acts will be exempt from this wide-ranging obligation.²⁰⁰ Original legislation, too, is subject to a

¹⁹⁴ Unfortunately, this burning issue was not resolved in *New Clicks (CC)* (note 17 above).

¹⁹⁵ Cf the approach of Chaskalson CJ in *New Clicks (CC)* (note 17 above) para 246, where he treated vagueness as included in the PAJA by virtue of the catch-all ground in s 6(2)(i).

¹⁹⁶ Including *R v Jopp* 1949 (4) SA 11 (N) and *R v Pretoria Timber Co (Pty) Ltd* 1950 (3) SA 163 (A).

¹⁹⁷ Ngcobo J in *Affordable Medicines Trust v Minister of Health* (note 32 above) para 108. See too *South African Liquor Traders’ Association v Chairperson, Gauteng Liquor Board* 2006 (8) BCLR 901 (CC) paras 27-8.

¹⁹⁸ Note 109 above, para 90.

¹⁹⁹ *Ibid* para 85.

²⁰⁰ In *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) para 80, a case concerning diplomatic protection, Chaskalson P remarked that if the government ‘refuses to consider a legitimate request [for protection], or deals with it in bad faith or irrationally, a court could require government to deal with the matter properly’.

similar test of ‘rational connection’ between the scheme the legislature adopts and the achievement of a legitimate governmental purpose.²⁰¹

The Constitutional Court has not so far extended the principle of legality to cover proportionality, but one member of the court, Sachs J, has indicated his willingness to do so in no uncertain terms. In his closely reasoned minority judgment in the *New Clicks* case, Sachs J proposes that subordinate legislation be governed in general by the principle of legality²⁰² and that the appropriate standard for judging its fit with the parent legislation is reasonableness, including proportionality.²⁰³

(e) Conclusion

The right to reasonable administrative action is an essential element of South Africa’s transformed administrative law and of our constitutionalism more broadly. The challenge for the courts in the democratic era has been to give the concept of reasonableness proper significance without obliterating the established bounds of administrative law. This discussion has shown that notwithstanding the retrogressive wording of s 6(2)(h) of the PAJA, the Constitutional Court has developed the area of reasonableness so as to make it possible to achieve an appropriate balance between judicial intervention and non-intervention – and that it has moved decisively away from the stultifying style of reasoning associated with the pre-democratic era.

2.4 PROCEDURAL FAIRNESS

In South African administrative law, procedural fairness encompasses two ancient and fundamental principles: *audi alteram partem*, which expresses the need for a fair hearing; and *nemo iudex in sua causa*, which calls for an impartial decision-maker. The latter principle (with its corresponding ground of review) was well developed before 1994²⁰⁴ and will not be dealt with in this discussion. In what follows, then, references to ‘procedural fairness’ and ‘fairness’ should be understood as relating to *audi alteram partem* rather than the rule against bias.

²⁰¹ *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC) para 19; *Affordable Medicines Trust v Minister of Health* (note 197 above) paras 74-9.

²⁰² *New Clicks (CC)* (note 17 above) para 579 et seq.

²⁰³ *Ibid* para 637.

²⁰⁴ Financial interest, personal interest and prejudice were all well established as typical sources of bias in South African law, while ‘institutional’ or ‘official’ bias was recognised in 1992 in *Council of Review, South African Defence Force v Mönnig* 1992 (3) SA 482 (A). In that same year the Appellate Division also finally resolved the test for bias, opting for a ‘reasonable suspicion’ of bias as opposed to a ‘real likelihood’ in *BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers’ Union* 1992 (3) SA 673 (A).

(a) Introduction and overview

The audi alteram partem principle is a safeguard that not only signals respect for the dignity and worth of the participants but is also likely to improve the quality and rationality of administrative decision-making and to enhance its legitimacy.²⁰⁵ This was well explained by the Constitutional Court in *Janse van Rensburg NO v Minister of Trade and Industry NO*, where Goldstone J linked the importance of fairness to the growth of discretionary power:²⁰⁶

‘In modern States it has become more and more common to grant far-reaching powers to administrative functionaries. The safeguards provided by the rules of procedural fairness and thus all the more important . . . Observance of the rules of procedural fairness ensures that an administrative functionary has an open mind and a complete picture of the facts and circumstances within which the administrative action is to be taken. In that way the functionary is more likely to apply his or her mind to the matter in a fair and regular manner.’

But there is a role of even more fundamental importance for procedural fairness. As Mureinik explains, an essential aspect of responsive democracy, ‘the aspiration to participate in a governmental decision that affects one’, translates most obviously into the right to be heard in administrative law.²⁰⁷ Fairness is ‘more than a set of merely technical entitlements arbitrarily dreamt up by administrative lawyers’,²⁰⁸ for the attainment of responsive democracy depends crucially on both its content and its application.

In relation to its content – the principles relating to what fairness requires in particular cases – procedural fairness, formerly ‘natural justice’, has always been one of the most vibrant areas of South African administrative law. Apart from the absence of a general duty to give reasons for administrative action,²⁰⁹ the pre-democratic law in this regard was fairly well developed.²¹⁰ The best of the common law has since been codified in the PAJA.

The Act not only lists procedural unfairness as a ground of review (s 6(2)(c)) but sets out the requirements of fairness ‘affecting any person’ in the form of five mandatory but

²⁰⁵ *De Smith* (note 3 above) 318-19.

²⁰⁶ Note 28 above, para 24. See also *De Lange v Smuts NO* 1998 (3) SA 785 (CC) para 131.

²⁰⁷ Mureinik ‘Reconsidering Review’ (note 110 above) 36.

²⁰⁸ *Ibid* 43.

²⁰⁹ Dealt with in 2.5 below.

²¹⁰ See Baxter (note 20 above) 542ff and Hugh Corder ‘The Content of the Audi Alteram Partem Rule in South African Administrative Law’ (1980) 43 *THRHR* 156.

variable requirements²¹¹ and three discretionary ones.²¹² Section 4 of the Act then extends the requirements of fairness to the public in general by giving administrators a range of participatory procedures to choose from. Sections 3 and 4 thus give specific and yet flexible content to the right to procedural fairness in s 33(1) of the Constitution, often reflecting the common law but sometimes adding to it in innovative ways – particularly in the case of s 4, which allows for forms of public participation that were hardly dreamt of before 1994.²¹³ Ample allowance is made in both ss 3 and 4 for the use of procedures that are ‘fair but different’,²¹⁴ but otherwise all enabling legislation is to be read together with the relevant provisions of the PAJA and to be supplemented by it where necessary.²¹⁵ Sections 3 and 4, duly fleshed out by a set of Regulations on Fair Administrative Procedures,²¹⁶ will surely prove beneficial in alerting the public to their rights, educating administrators and spreading a culture of administrative justice.

However, the discussion below is concerned not with the content of procedural fairness but with its application, for that is where the deficiency of the pre-democratic law was most acute. Apparently governed by fears of overburdening the administration, the courts followed an all-or-nothing approach to fairness for most of the twentieth century. They tended to dispense fair hearings in the most grudging fashion: in essence, such hearings were held to be merited only where *existing rights* were adversely affected by administrative action. This placed a very effective limit on the application of fairness, since in practice most victims of adverse administrative action are ‘outsiders’ or ‘mere applicants’ who have no right to whatever it is they are applying for. From the late 1980s, however, the Appellate Division considerably liberalised this position in a series of vigorous and imaginative decisions. In the most celebrated of these cases, *Administrator, Transvaal v Traub*,²¹⁷ the court officially introduced the doctrine of legitimate expectations into South African law. There followed a steady retreat from the old formalistic and narrow approach to ‘natural justice’ and towards a

²¹¹ Section 3(2)(b) requires adequate notice of the nature and purpose of proposed administrative action; a reasonable opportunity to make representations; a clear statement of the administrative action; adequate notice of any right of review or internal appeal; and adequate notice of the right to request reasons.

²¹² Section 3(3) gives the administrator discretion to allow, in addition to the minimum requirements, an opportunity to obtain assistance and, in serious or complex cases, legal representation; to present and dispute information and arguments; and to appear in person.

²¹³ See further at 5.5 below.

²¹⁴ Sections 3(5) and 4(1)(d).

²¹⁵ In relation to s 3, see *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) para 101. In relation to s 4, see *Minister of Home Affairs v Eisenberg & Associates: In re Eisenberg & Associates v Minister of Home Affairs* 2003 (5) SA 281 (CC) para 59 and *New Clicks (CC)* (note 17 above) para 150.

²¹⁶ Published in GN R1022 GG 23674 of 31 July 2002.

²¹⁷ *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A).

broad and flexible duty to act fairly in all cases. That transformation of the law was captured in the s 33(1) right of ‘everyone’ to administrative action that is procedurally fair.

However, an unfortunate feature of the democratic era is the PAJA’s rather parsimonious approach to the application of procedural fairness. The constitutional right is an extremely broad one (though it is limited to some extent by the concept of ‘administrative action’ as shaped by the courts after 1994). The PAJA, which supposedly gives effect to the constitutional right, seems to be considerably narrower in its application. Section 3(1) of the Act says that only administrative action which ‘materially and adversely affects the rights or legitimate expectations of any person’ need be procedurally fair, and s 4 omits the reference to legitimate expectations altogether. Furthermore (as discussed in Chapter 4 below), the Act’s definition of administrative action is far more restrictive than that developed by the courts under s 33 of the Constitution. Indeed, when it comes to ‘public’ fairness in s 4 of the PAJA, the Act’s definition of administrative action apparently makes the use of its innovative procedures entirely optional.

Then there are the various escape routes offered to administrators by the PAJA. Section 2 of the Act allows the Minister to grant exemptions from the provisions of ss 3, 4 and 5 in respect of any administrative action ‘or a group or class of administrative actions’, and to permit an administrator to vary some of the requirements relating to fairness. In addition, allowance is made in both ss 3 and 4 for departures from their provisions where this is reasonable and justifiable having regard to a list of factors.²¹⁸ The government was evidently concerned that legislating the requirements of fairness might place an intolerable burden on the administration, but this proliferation of escape routes seems unnecessarily cautious, particularly when one considers the inherent flexibility of the provisions of ss 3 and 4 and the provision already made for ‘fair but different’ procedures.

Ironically, our common law had by 1994 successfully changed its parsimonious, all-or-nothing style in relation to the application of fairness, and in some respects would be more progressive than the PAJA is today. Worryingly, too, the principle of legality is not available to act as a safety-net in this instance. While procedural fairness is a standard component of the rule of law,²¹⁹ the Constitutional Court has recently confirmed that the narrower legality

²¹⁸ These factors are the objects of the empowering provision; the nature and purpose of, and the need to take, the administrative action; the likely effect of the administrative action; the urgency of taking the action or the urgency of the matter; and the need to promote an efficient administration and good governance.

²¹⁹ See Hoexter ‘Principle of Legality’ (note 2 above) 184.

principle does not demand procedural fairness – at least not in the context of an ‘executive’ dismissal.²²⁰

(b) *The application of fairness at common law*

When legislation was silent on the subject of fairness, which it generally was, the orthodox approach of our courts in the pre-democratic era was to apply a rebuttable presumption that Parliament intended the audi alteram partem principle to operate. Set out by Centlivres CJ in *R v Ngwevela*,²²¹ this approach was surprisingly liberal.²²² However, it left Parliament free to exclude the application of audi alteram partem, either expressly or by necessary implication, and to empower delegated lawmakers to do the same. As Stratford ACJ once said, ‘[s]acred though the maxim is held to be, Parliament is free to violate it’.²²³

(i) *The classification of functions*

In *Ngwevela* Centlivres CJ made it clear that the presumption in favour of fairness was confined to action ‘prejudicially affecting the property or liberty of an individual’²²⁴ or, in the terminology of the classification of functions, ‘quasi-judicial’ decisions. ‘Legislative’ and ‘purely administrative’ acts did not attract fairness in the absence of a legislative provision specifically calling for it. This attitude was informed by practical considerations. The courts were afraid of the tremendous administrative burden that would result if every administrative decision entailed a duty to hear the affected person’s case. There was also a quaint fear on the part of some judges that to apply the audi alteram partem principle ‘outside its proper limits’ would somehow lessen its value,²²⁵ perhaps because the burden of all those hearings would inevitably result in the payment of lip-service to the requirement. This fear was consonant with the pervasive sense at the time that administrative justice was something to be carefully hoarded rather than given out freely.²²⁶

²²⁰ *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) paras 77-8. For criticism of this decision, see Cora Hoexter ‘Clearing the Intersection? Administrative Law and Labour Law in the Constitutional Court’ (2008) 1 *Constitutional Court Review* 209.

²²¹ *R v Ngwevela* 1954 (1) SA 123 (A) at 131H.

²²² Cf *South African Defence and Aid Fund v Minister of Justice* 1967 (1) SA 263 (A) at 270F, where the Appellate Division insisted that audi alteram partem would not apply unless the maxim were found to be impliedly incorporated in the relevant legislation. This approach was followed in cases including *Winter v Administrator-in-Executive Committee* 1973 (1) SA 873 (A) and *Omar v Minister of Law and Order* 1987 (3) SA 859 (A), but was rejected in favour of the *Ngwevela* formulation in *Attorney-General, Eastern Cape v Blom* 1988 (4) SA 645 (A) at 662G-I.

²²³ *Sachs v Minister of Justice* (note 27 above) at 38.

²²⁴ Note 221 above at 127F.

²²⁵ Schreiner JA in *Laubscher v Native Commissioner, Piet Retief* 1958 (1) SA 546 (A) at 549B-C.

²²⁶ See Hoexter ‘Principle of Legality’ (note 2 above) 168.

But classification into ‘quasi-judicial’ and other categories was a highly artificial solution that frequently caused injustice. Because the courts insisted on the presence of existing rights as the mark of a quasi-judicial decision, hearings were denied where common sense dictated the need for them, but where no rights yet existed.²²⁷ In *Laubscher v Native Commissioner, Piet Retief*,²²⁸ for instance, the appellant had been refused a permit to enter a Native Trust area. Schreiner JA declined to apply the quasi-judicial label on the basis that the decision had not affected any legal right already held by the appellant, and had no prejudicial effects on his liberty or property. Those who wished to challenge advisory or investigative action were similarly handicapped. This is illustrated by cases such as *Cassem v Oos-Kaapse Komitee van die Groepsgebiederaad*²²⁹ and *South African Defence and Aid Fund v Minister of Justice*,²³⁰ in which the Appellate Division refused to acknowledge a link between a preliminary decision by one body and the subsequent prejudicial decision of another.

While a wider definition of a quasi-judicial decision²³¹ attracted some attention even in the Appellate Division,²³² the courts generally followed the narrower conception. Furthermore, they often applied it rigidly or illogically, so that hearings were denied even where existing rights were obviously being affected prejudicially. Thus a decision to expropriate a person’s property under the Group Areas Development Act 69 of 1955 was dubbed a ‘purely administrative’ decision because it was not ‘directed against any individual’²³³ but happened to affect the property interests of an entire community as well. And even where action clearly *was* directed at a particular individual, and did affect his or her property rights, it still did not attract natural justice if it was essentially ‘legislative’ in character.²³⁴ By means of this sort of cynical manipulation, aliens could be expelled without being heard.²³⁵ The passports of citizens could be withdrawn without hearings, notwithstanding the effect on the liberty of their holders.²³⁶ Public employees could be

²²⁷ For a full account see Baxter (note 20 above) 569ff.

²²⁸ Note 225 above. See further Hoexter ‘Principle of Legality’ (note 2 above) 169-70.

²²⁹ *Cassem v Oos-Kaapse Komitee van die Groepsgebiederaad* 1959 (3) SA 651 (A).

²³⁰ Note 222 above.

²³¹ In *Hack v Venterspost Municipality* 1950 (1) SA 172 (W) at 190 Roper J distinguished between decisions made by a body in its ‘own arbitrary discretion’ and judicial or quasi-judicial decisions made ‘as a result of an enquiry into matters of fact, or of fact and law’ which could affect the rights of individuals or have ‘civil consequences’ for them.

²³² See eg *Minister of the Interior v Mariam* 1961 (4) SA 740 (A) at 751H.

²³³ *Pretoria City Council v Modimola* 1966 (3) SA 250 (A) at 262F in the majority judgment of Botha JA.

²³⁴ *E Snell and Co (Transvaal) (Pty) Ltd v Minister of Agricultural Economics* 1986 (3) SA 532 (D).

²³⁵ See eg *Minister of the Interior v Bechler* 1948 (3) SA 409 (A).

²³⁶ See eg *Boesak v Minister of Home Affairs* 1987 (3) SA 665 (C).

dismissed without a hearing,²³⁷ even though dismissal would clearly affect their pension rights as well as the right to continue in employment.

(ii) *Rejection of the classification of functions*

In English law the classification of functions fell into disrepute in the 1960s, stimulated by the decision in *Ridge v Baldwin*.²³⁸ In South Africa the limitations of the classification of functions in the context of the audi principle were finally acknowledged in the late 1980s, in the case of *Administrator, Transvaal v Traub*.²³⁹ By 1991, in *South African Roads Board v Johannesburg City Council*, Milne JA was able to say that the Appellate Division had clearly ‘moved away from the classification of powers . . . in order to determine whether the audi principle applies’.²⁴⁰ Indeed, it was in this case that the Appellate Division first applied natural justice to ‘legislative’ action: a decision to declare a toll road.²⁴¹

As the attractions of classification waned the courts became more interested in the ‘duty to act fairly’, a doctrine also associated with English law.²⁴² The duty was referred to in a few South African decisions before 1994.²⁴³ Its great attraction was that it applied to *all* administrative acts. It was thus capable of rescuing natural justice from the ‘conceptual wilderness’ created by reliance on the classification of functions and the all-or-nothing approach.²⁴⁴ Baxter regarded it as ‘nothing other than the duty to observe the principles of natural justice expressed in more fundamental terms’.²⁴⁵ However, like natural justice itself, the duty to act fairly could of course be excluded by statute at any time.

A parallel and even more significant development of the pre-democratic era was the doctrine of legitimate expectations.

(iii) *The rise of the legitimate expectation doctrine*

Traub’s case not only rejected the practice of classifying administrative functions but also heralded the acceptance into our law of legitimate expectations, an English-law doctrine²⁴⁶

²³⁷ See eg *Le Roux v Minister van Bantoe-Administrasie en Ontwikkeling* 1966 (1) SA 481 (A); *Swart v Minister of Education and Culture, House of Representatives* 1986 (3) SA 331 (C).

²³⁸ *Ridge v Baldwin* [1964] AC 40.

²³⁹ Note 217 above.

²⁴⁰ *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A) at 10J.

²⁴¹ See further at (c)(v) below.

²⁴² The term is usually attributed to the speech of Lord Parker CJ in *In re H K (An Infant)* [1967] 2 QB 617.

²⁴³ See eg *Roberts v Chairman, Local Road Transportation Board* 1980 (2) SA 480 (C); *Khan t/a Khan’s Motor Transport v Chairman, Pietermaritzburg Local Road Transportation Board* 1990 (3) SA 234 (N).

²⁴⁴ Baxter (note 20 above) 596.

²⁴⁵ *Ibid* 595.

²⁴⁶ The term ‘legitimate expectation’ is generally attributed to Lord Denning MR in *Schmidt v Secretary of State*

that extends the application of natural justice well beyond the traditional sphere of its operation. Instead of requiring prejudicial effects to existing rights, the doctrine asks whether the affected person has a legitimate expectation of a certain outcome that will entitle him or her to a fair hearing in the circumstances. In a seminal English case, *Council of Civil Service Unions v Minister for the Civil Service*, a legitimate expectation was defined as arising ‘either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue’.²⁴⁷ Before *Traub* similar reasoning had been applied by South African courts in a series of cases concerning the dismissal of hospital employees²⁴⁸ as well as in a few other cases.²⁴⁹

In *Traub*’s case the applicants were doctors who had been recommended for posts as Senior House Officers at a provincial hospital. There was a long-standing practice of appointing any doctor who had been recommended in this way. However, the applicants were not in fact appointed, apparently because they had all signed a published letter that was critical of the provincial administration. Noting that a mere applicant would not ordinarily be entitled to a hearing before an adverse decision was made, Corbett CJ felt that these facts cried out for a remedy. While the applicants clearly had no existing rights to be appointed to the posts, he found that past practice had given them a legitimate expectation of being appointed – and thus of being heard before a decision was taken to depart from the practice.²⁵⁰

In *Traub* Corbett CJ warned that the legitimate expectation doctrine could become an ‘unruly horse’ that might require curbing.²⁵¹ The doctrine certainly acquired instant popularity. It was applied in a number of cases before 1994²⁵² – sometimes unnecessarily, since natural justice would have been applied even on traditional rights-based reasoning.²⁵³ The reason for this is probably that the doctrine appeals to ordinary logic and common sense. Instead of concerning itself with formalistic tests, it asks the natural question: whether there is any particular reason why fairness would require someone to be given a hearing before a

for *Home Affairs* [1969] 2 Ch 149.

²⁴⁷ *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 at 943j-944a (Lord Fraser).

²⁴⁸ *Langeni v Minister of Health and Welfare* 1988 (4) SA 93 (W); *Mokoena v Administrator, Transvaal* 1988 (4) SA 912 (W); *Mokopanele v Administrateur, Oranje Vrystaat* 1989 (1) SA 434 (O). The first two cases were decided by Goldstone J, who also presided in the court a quo in *Traub* (*Traube v Administrator, Transvaal* 1989 (1) SA 397 (W)).

²⁴⁹ These include *Everett v Minister of the Interior* 1981 (2) SA 453 (C) (expulsion of an alien) and *Boesak v Minister of Home Affairs* (note 236 above) (withdrawal of a passport).

²⁵⁰ *Administrator, Transvaal v Traub* (note 217 above) at 762B-D.

²⁵¹ *Ibid* at 761F.

²⁵² Examples include *Khan's Motor Transport v Chairman, Pietermaritzburg LRTB* (note 243 above) and *Union of Teachers' Associations of South Africa v Minister of Education and Culture, House of Representatives* 1993 (2) SA 828 (C).

²⁵³ See eg *Minister of Justice, Transkei v Gemi* 1994 (3) SA 28 (Tka).

decision is made in a particular case. The court in the *SARFU* case seemed to acknowledge this when it equated the question whether a legitimate expectation of a hearing exists with the question ‘whether the duty to act fairly would require a hearing in those circumstances’.²⁵⁴

The legitimate expectation doctrine is no longer simply a creature of the common law. It has developed considerably in the democratic era, and has in fact become one of the most important themes relating to procedural fairness in our law. These developments are explored more fully below.²⁵⁵

(c) The constitutional era

The interim Constitution did not abandon the traditional reliance on rights as a trigger for the application of procedural fairness, but it did take account of the development of the doctrine of legitimate expectations. Section 24(b) conferred a right to procedurally fair administrative action on those whose ‘rights or legitimate expectations’ were ‘affected or threatened’. While (or perhaps because) this provision was perhaps the most far-reaching of the four rights enumerated in s 24, the tendency was to interpret it very conservatively.²⁵⁶ Ironically, it was replaced by something even broader. Today s 33(1) of the 1996 Constitution simply confers on ‘everyone’ a right to administrative action that is ‘lawful, reasonable and procedurally fair’. That right has since been given detailed content by the PAJA.

(i) Section 3(1) of the PAJA

As regards the application of fairness, s 3(1) of the PAJA provides that administrative action which ‘materially and adversely affects the rights or legitimate expectations of any person’ must be procedurally fair. This is a noteworthy formulation in two ways. On one hand it is more generous than the definition of administrative action in s 1 of the Act, for this recognises only rights and not legitimate expectations. On the other, s 3(1) is less generous than s 1 in requiring that rights or legitimate expectations be affected materially as well as adversely. This last addition apparently warns the courts that any adverse effects must not be of a trivial nature, and is probably an unnecessary injunction. As Plasket J has remarked in the context of the right to reasons, it is ‘difficult to imagine a situation where a person’s rights have been adversely affected but the effect is not material’.²⁵⁷

²⁵⁴ Note 18 above, para 216.

²⁵⁵ See at (c)(iv) below.

²⁵⁶ See eg *Podlas v Cohen and Bryden NNO* 1994 (4) SA 662 (T), *Park-Ross v Director, Office for Serious Economic Offences* 1998 (1) SA 108 (C) and *The Master v Deedat* 2000 (3) SA 1076 (N).

²⁵⁷ *Kiva v Minister of Correctional Services* (2007) 28 ILJ 597 (E) para 23.

The reference to legitimate expectations, however, seems entirely illogical. This is because in terms of s 1 of the PAJA, action that does not adversely affect rights does not qualify as administrative action; and therefore the Act, including s 3, does not apply to such action at all. In short, s 3 specifically stipulates that action not covered by the Act is nevertheless required to be fair. This drafting error presents an interesting puzzle²⁵⁸ that has recently been solved by the Constitutional Court in *Walele v City of Cape Town*.²⁵⁹ Here Jafta AJ found for the majority that applying the s 1 definition to the interpretation of s 3 would lead to an absurdity, and reasoned that '[i]n the context of s 3, administrative action cannot mean what was intended in the definition section'.²⁶⁰ O'Regan J arrived at a similar solution in her minority judgment, finding that the more specific provision (s 3(1) of the PAJA) had to be read as supplementing the more general provision (s 1).²⁶¹ The result is that the reference to legitimate expectations in s 3(1) is given meaning notwithstanding the narrower terms of s 1 of the PAJA.

This was of no assistance to the appellant in *Walele*, however, as he was found to have neither a right nor a legitimate expectation for the purposes of s 3(1). The court's reasoning in this regard raises another puzzling question: the meaning of 'adversely affects . . . rights'.

(ii) *Determination or deprivation?*

As indicated above, the common-law tradition is that procedural fairness is attracted only by the infringement of an 'existing right' to property or liberty. A decision having such an effect used to be called a quasi-judicial decision, but a more graphic way of describing it is to say that it involves the forfeiture²⁶² or deprivation of rights. This may be contrasted with situations in which people's rights are merely being determined,²⁶³ as for example when an individual applies for a transport licence or a disability pension, or a firm submits a tender for a government contract. In such cases the applicant is dependent on an administrative decision-maker for the determination of the entitlement to the licence, the pension or the contract. The point is that there is no pre-existing entitlement or right: the applicant has only an interest in the matter, at least until the determination has been made. At common law, and in what used to be called 'purely administrative' decisions, such applicants – mere applicants or outsiders –

²⁵⁸ See especially De Ville (note 149 above) 222-3 and Iain Currie *The Promotion of Administrative Justice Act: A Commentary* 2 ed (2007) paras 4.7-4.9.

²⁵⁹ Note 85 above.

²⁶⁰ *Ibid* para 37.

²⁶¹ *Ibid* para 126.

²⁶² See *McInnes v Onslow Fane* [1978] 3 All ER 211 at 218, where Megarry VC distinguished between 'forfeiture cases', cases of legitimate expectations, and cases involving 'mere applicants'.

²⁶³ Mureinik draws this distinction in 'Reconsidering Review' (note 110 above) 36ff.

have not generally been entitled to natural justice.²⁶⁴ In between the two extremes of a right and an interest lies the idea of a legitimate expectation, an intermediate category whose border with the deprivation and determination cases is imprecise.²⁶⁵

It is not entirely clear whether South African law of the constitutional era adheres to the deprivation theory of fairness, duly tempered by the legitimate expectation doctrine, or whether the determination theory now also protects mere applicants as well, or at least some of them. As far as s 24 of the interim Constitution is concerned, most cases pull in the first and more conservative direction, though there are one or two suggesting that fairness applies when it is ‘right and just and fair’ to apply it.²⁶⁶ Cases like these echo the duty to act fairly, which was attractive in the pre-democratic era precisely because it applied to *all* forms of administrative decision-making.

However, the Constitutional Court did not go so far in *Minister of Public Works v Kyalami Ridge Environmental Association*,²⁶⁷ a case dealing with what was s 33 in name but s 24 in substance. Chaskalson P noted that the same court had not decided in *Premier, Mpumalanga*²⁶⁸ whether a mere interest – something less than a right or a legitimate expectation – was capable of attracting procedural fairness under the Constitution. While he was willing to assume for the purposes of the judgment that ‘decisions affecting a material interest short of an enforceable or prospective right’²⁶⁹ might attract fairness, he doubted whether this was indeed so. The court was also alive to the practicalities in this case, which concerned a decision to establish a transit camp for the victims of a flood and thus involved the different interests of a considerable number of people. Chaskalson P pointed out that if all persons with an interest in the matter had had to be heard, ‘the process would almost certainly have been contentious and drawn out’.²⁷⁰

Section 24 has, of course, given way to the far wider wording of s 33. In fact the right in s 33(1), unlike that in s 24(b) (and even more significantly, unlike the right to reasons in s 33(2)) is unqualified: *all* administrative action must be lawful, reasonable and procedurally fair. In the context of fairness, and leaving the PAJA’s narrow definition of administrative action out of account, this is a strong indication that the all-or-nothing rights-based approach

²⁶⁴ With some exceptions: see Daniel Malan Pretorius ‘The Outsider and Natural Justice: A Re-examination of the Scope of Application of the *Audi Alteram Partem* Principle’ (2000) 63 *THRHR* 93.

²⁶⁵ Margaret Allars ‘Fairness: Writ Large or Small’ (1987) 11 *Sydney Law Review* 306 at 308.

²⁶⁶ *Van Huyssteen NO v Minister of Environmental Affairs and Tourism* 1996 (1) SA 283 (C) at 1214B-C.

²⁶⁷ *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC).

²⁶⁸ *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) (hereafter *Premier, Mpumalanga*).

²⁶⁹ *Minister of Public Works v Kyalami Ridge* (note 267 above) para 100.

²⁷⁰ *Ibid* para 101.

belongs in the past. As the authors of *De Smith* point out, the use of categories such as ‘forfeiture’ and ‘application’, like any other attempt at classification, has definite shortcomings.²⁷¹ Their call for a more comprehensive approach recognising that ‘the duty of fairness cannot and should not be restricted by artificial barriers or confined by inflexible categories’²⁷² received eloquent support from Griesel J when he found it ‘unthinkable’ that mere applicants would be less well protected under the Constitution than at common law.²⁷³

The picture one gets from the PAJA is a very different one, however. It seems clear that the exclusion of ‘interests’ from ss 3 and 4 was a deliberate choice of the legislature, as was the exclusion of legitimate expectations from s 4.²⁷⁴ Equally, there can be little doubt that the triggers in these provisions were chosen with the specific intention of limiting the application of procedural fairness so as to reduce the potential burden on the administration. There is a pervasive fear of what might happen if every person with a mere interest in a case were entitled to a hearing. It is a concern shared by the Constitutional Court, as suggested by the *Kyalami Ridge* remark quoted above and the following passage from the *Mpumalanga* case:

‘In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly.’²⁷⁵

In *Grey’s Marine Hout Bay (Pty) Ltd v Minister of Public Works*,²⁷⁶ where it was sought to apply s 3(1) of the PAJA to the Minister’s decision to let quayside property, Nugent JA referred to both of these Constitutional Court cases before suggesting that while ‘rights’ might possibly include prospective rights that have yet to accrue, ‘it is difficult to see how the term could encompass interests that fall short of that’.²⁷⁷ In this case the appellants had not established a legitimate expectation that the property would not be let or that they would be

²⁷¹ *De Smith* (note 3 above) 359.

²⁷² *Ibid.*

²⁷³ *Du Bois v Stompdrift-Kamanassie Besproeiingsraad* 2002 (5) SA 186 (C) at 197H-198A, referring to examples offered by Pretorius (note 264 above).

²⁷⁴ The corresponding provision in the SALC draft Bill (note 98 above), clause 4(1), referred to ‘administrative action which adversely affects rights, interests or legitimate expectations’.

²⁷⁵ O’Regan J in *Premier, Mpumalanga* (note 268 above) para 41.

²⁷⁶ *Grey’s Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA).

²⁷⁷ *Ibid* para 30.

consulted beforehand,²⁷⁸ and even if it were possible to place reliance on some other interest, the appellants had not shown that they had ‘a peculiar interest transcending those enjoyed by the public at large’.²⁷⁹

Those few words of Nugent JA may encourage one to suppose that ‘rights’ should not be taken literally in s 3 any more than in s 1 of the PAJA.²⁸⁰ More recently, however, the Constitutional Court took a strict view of what it means to affect rights adversely. *Walele v City of Cape Town*²⁸¹ concerned the approval of building plans for a four-storey block of flats in an area zoned for blocks of up to seven storeys. The appellant, the owner of a neighbouring property, no doubt had a ‘peculiar interest’ in the approval, but the court held that he was not entitled to be heard in the approval process. Writing for the majority, Jafta AJ reasoned that the granting of the approval could not *in itself* affect the appellant’s property rights. While the subsequent erection of the building might affect him adversely, Jafta AJ read s 3 as demanding a ‘*pre-existing right* or legitimate expectation’ that would be ‘materially and adversely affected *by the administrative action itself*’.²⁸² Even if it were otherwise, the appellant had failed to prove that his property would be devalued by the erection of the flats.²⁸³

The minority judgment of O’Regan J took a less technical approach that was grounded in a reluctance to hamper efficient government. She noted that ‘our use and enjoyment of property are affected by many things’,²⁸⁴ and went on to find that ‘where an owner seeks to use his property within the terms of the zoning scheme, it cannot be said that the rights of surrounding owners are affected materially or adversely’.²⁸⁵ To hold otherwise might well ‘cause great disruption to the administration of urban spaces’.²⁸⁶

While *Walele* does not itself illustrate the deprivation and determination approaches as possible alternatives (for it was not the appellant’s rights that were being determined in this case), the majority judgment is a conservative and rather formalistic one having more in common with the deprivation than the determination approach. Indeed, the reasoning of the

²⁷⁸ Ibid paras 32-3. This feature made the matter distinguishable from *Bullock NO v Provincial Government, North West Province* (note 102 above), a case discussed below at iv in the context of legitimate expectations.

²⁷⁹ *Grey’s Marine v Minister of Public Works* (note 276 above) para 31.

²⁸⁰ See *ibid* para 23, where the court resisted a literal interpretation of the term ‘rights’ in s 1 of the PAJA and concluded that the Act ‘probably intended rather to convey that administrative action is action that has the capacity to affect legal rights’.

²⁸¹ Note 85 above.

²⁸² *Ibid* para 32, my emphasis.

²⁸³ *Ibid* para 33.

²⁸⁴ *Ibid* para 132.

²⁸⁵ *Ibid* para 130.

²⁸⁶ *Ibid* para 132.

majority seems to take South African law right back to the pre-democratic position on ‘existing rights’, as if the promise of s 33(1) had never been made.

(iii) *The application of fairness in multi-staged decision-making*

What it means to affect rights adversely is especially problematic in the context of multi-staged decision-making. The attitude of the pre-democratic era was simply that preliminary action did not attract natural justice because rights were not affected by it.²⁸⁷ Notwithstanding the potentially far-reaching nature of investigative and advisory action,²⁸⁸ this parsimonious approach continued to prevail in the constitutional era in cases such as *Podlas v Cohen and Bryden NNO*²⁸⁹ and *Transkei Public Servants Association v Government of the Republic of South Africa*.²⁹⁰ But in *Director: Mineral Development, Gauteng Region v Save the Vaal Environment*²⁹¹ the Supreme Court of Appeal took a bold step in the opposite direction.

The case concerned an application for a mining licence in terms of the Minerals Act 50 of 1991, a two-stage process consisting of application under s 9 followed by the approval of an environmental management programme under s 39. The respondent objectors successfully sought the application of principles of fairness at the first stage.²⁹² Rejecting the argument that no rights were violated at that stage, the unanimous court reasoned that the granting of the s 9 licence

‘opens the door to the licensee and sets in motion a chain of events which can, and in the ordinary course of events might well, lead to the commencement of mining operations. It is settled law that a mere preliminary decision can have serious consequences in particular cases, *inter alia* where it lays “. . . the necessary foundation for a possible decision . . .” which may have grave results. In such a case the *audi* rule applies to the consideration of the preliminary decision . . .’²⁹³

²⁸⁷ See at 2.4(b)(i) above.

²⁸⁸ Noted famously by Lord Denning MR in *Re Pergamon Press Ltd* [1970] 3 All ER 535 at 539d-f.

²⁸⁹ Note 256 above (decision to issue notices to attend an inquiry in terms of s 152 of the Insolvency Act 24 of 1936 did not attract natural justice in terms of s 24(b) of the interim Constitution, since no existing rights were prejudicially affected).

²⁹⁰ *Transkei Public Servants Association v Government of the Republic of South Africa* 1995 (9) BCLR 1235 (Tk) (the drawing up of a Public Service Staff Code which entailed reduced housing subsidies had been preceded by a ‘purely investigative’ inquiry that did not attract natural justice). See also *Van der Merwe v Slabbert NO* 1998 (3) SA 613 (N) (purely investigative inquiry).

²⁹¹ *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 (2) SA 709 (SCA).

²⁹² *Ibid.*

²⁹³ *Ibid* para 17, quoting a dictum of Schreiner JA in *Van Wyk NO v Van der Merwe* 1957 (1) SA 181 (A) at 189A-B.

The court also rejected the argument that since the audi principle would be applied at the second stage, there was no need for it to be applied at the first stage. As Olivier JA pointed out, the granting of a licence under s 9 could exempt the holder from the obligation to submit an environmental management plan and lead to a temporary mining authorisation.²⁹⁴

Save the Vaal was not concerned with a purely investigative inquiry, or mere fact-finding, and so the court was not required to confront apartheid-era cases such as *Cassem v Oos-Kaapse Komitee van die Groepsgebiederaad*²⁹⁵ and *South African Defence and Aid Fund v Minister of Justice*.²⁹⁶ Nor did the court engage with the democratic Constitution.

Nevertheless, the judgment suggests that the courts have moved beyond the narrow reasoning that characterised so much of the pre-democratic case law. It was followed by the full bench in *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism*,²⁹⁷ a case concerning the construction of a pebble-bed nuclear reactor. Here Griesel J pointed out that an initial step, the granting of authorisation by the Director-General, was not merely a necessary prerequisite to further steps in the process but also a final step as far as the Environment Conservation Act 73 of 1989 was concerned.²⁹⁸

*Chairman, Board on Tariffs and Trade v Brenco Inc*²⁹⁹ presented the Supreme Court of Appeal with an opportunity to consider procedural fairness in the context of investigative action – an inquiry into the ‘dumping’ of goods on the South African market. This, too, is an encouraging judgment, though it is a pity that the Supreme Court of Appeal did not use the occasion to lay the ghosts of *Cassem* and *Defence and Aid Fund*. Importantly, however, there is no suggestion in the unanimous judgment of Zulman JA that the requirements of fairness are inapplicable or necessarily attenuated when it comes to investigative action. Nor is any reliance placed on the presence of affected rights in order to attract the principles of fairness. Quite the contrary, in fact, since the judgment decides that the *final* decision to impose an anti-dumping duty does not warrant a further hearing, even though it is the one that affects rights most directly.³⁰⁰

²⁹⁴ Ibid para 19.

²⁹⁵ Note 229 above.

²⁹⁶ Note 222 above.

²⁹⁷ *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism* 2005 (3) SA 156 (C).

²⁹⁸ Ibid paras 35-7. Cf *Buffalo City Municipality v Gauss* 2005 (4) SA 498 (SCA), where the Supreme Court of Appeal seemed to retreat from the spirit of *Save the Vaal*, although the earlier case seems not to have been referred to.

²⁹⁹ *Chairman, Board on Tariffs and Trade v Brenco Inc* 2001 (4) SA 511 (SCA).

³⁰⁰ Ibid paras 71-2.

None of the cases discussed so far was decided under the PAJA, however, and the statute may well have a retrogressive effect as far as multi-staged decisions are concerned. Indeed, certain ingredients of the PAJA's definition of administrative action suggest that preliminary conduct (such as the investigation stage in *Brenco*) is entirely excluded from the purview of the Act. The requirement of 'direct' legal effect, in particular, seems to translate into a requirement of finality.³⁰¹ This was certainly how two of three judges understood the term when they held in *New Clicks South Africa (Pty) Ltd v Tshabalala-Msimang NO*³⁰² that recommendations of a pricing committee did not constitute administrative action. The PAJA's insistence on a 'decision' reinforces this understanding in so far as it suggests a *final* decision. On top of the requirement of adversely affected rights, these features invite the courts to return to pre-democratic reasoning.³⁰³ The PAJA thus seems to undo the thoughtful and nuanced work done by the Supreme Court of Appeal since 1994 in the area of multi-staged decisions, and that is a great pity.

The PAJA could conceivably be interpreted so as to avoid this effect,³⁰⁴ and in many cases this would be facilitated by viewing multi-staged processes more holistically. It is instructive that on final appeal in the *New Clicks* case, several members of the Constitutional Court expressly declined to treat the two stages of the process – recommendations from the pricing committee and subsequent regulations made by the Minister – as separate and independent decisions. To treat them thus, said Chaskalson CJ, 'would be to put form above substance'.³⁰⁵ But the literal-minded reasoning of the majority in the more recent case of *Walele v City of Cape Town*³⁰⁶ (discussed under the previous heading) suggests that the Constitutional Court may not be committed to putting substance over form. Jafta AJ's insistence in *Walele* that the mere granting of the approval 'could not, by itself, affect the applicant's rights'³⁰⁷ resonates with the pre-democratic insistence that preliminary decisions can never affect rights.

³⁰¹ See at 4.4(a) below.

³⁰² *New Clicks South Africa (Pty) Ltd v Tshabalala-Msimang NO* 2005 (2) SA 530 (C) paras 40-1 (Yekiso J, Hlophe JP concurring). The issue was not resolved on appeal in *New Clicks (CC)* (note 17 above).

³⁰³ See eg *Law Society, Northern Provinces v Maseka* 2005 (6) SA 372 (B), a case concerning a decision to inspect an attorney's books. Landman J reasoned that '[w]here a functionary merely performs an investigative function which does not materially and adversely affect a person's rights, he or she need not, unless a statute provides otherwise, observe the principles of natural justice' (at 382D-E).

³⁰⁴ See eg *Oosthuizen's Transport (Pty) Ltd v MEC, Road Traffic Matters, Mpumalanga* 2008 (2) SA 570 (T) para 32 in relation to a recommendation having far-reaching consequences.

³⁰⁵ *New Clicks (CC)* (note 17 above) para 137, and see para 441 in the judgment of Ngcobo J and para 672 in the judgment of Moseneke J. Taking into account the concurrence in these judgments, this holistic treatment seems to have attracted the support of most of the members of the court.

³⁰⁶ Note 85 above.

³⁰⁷ *Ibid* para 31.

(iv) *The development of the legitimate expectation doctrine*

As explained above,³⁰⁸ the recognition of the legitimate expectation doctrine in the seminal case of *Administrator, Transvaal v Traub*³⁰⁹ provided much-needed relief from the strict deprivation theory of the common law. In the constitutional era it has continued to prove very popular with our courts and has been applied in a number of contexts. The expectations held have varied widely and have been engendered in a variety of ways, such as by an express assurance³¹⁰ or an established policy³¹¹ or practice.³¹² The courts have emphasised that the expectation must be a legitimate one in an objective sense.³¹³ In *National Director of Public Prosecutions v Phillips*³¹⁴ Heher J described the requirements of legitimacy as including (though not in this exact order) (i) a reasonable expectation that was (ii) induced by the decision-maker based on (iii) a clear, unambiguous representation which it was (iv) competent and lawful for the decision-maker to make. This description was endorsed in *South African Veterinary Council v Szymanski*,³¹⁵ where Cameron JA stressed that subjective confusion or misinterpretation cannot give rise to a legitimate expectation.³¹⁶ An expectation is equally unlikely to be found to be legitimate where a promise is ultra vires,³¹⁷ or where the expectation relates to the doing of something unlawful or may prevent a functionary from discharging a statutory duty.³¹⁸

In their development of the doctrine since 1994, the courts have not yet given definitive answers to two important questions: whether the doctrine applies to interests that are broader than legitimate expectations in the strict sense, and whether a legitimate expectation is capable of attracting substantive as opposed to merely procedural protection. The first question is perhaps the more pressing of the two. As commentators have noted, the

³⁰⁸ At 2.4(b)(iii).

³⁰⁹ Note 217 above. A thorough treatment of the doctrine in South African law is contained in Daniel Malan Pretorius 'Ten Years After *Traub*: The Doctrine of Legitimate Expectation in South African Administrative Law' (2000) 117 *SALJ*. See also Daniel Malan Pretorius 'Letting the Unruly Horse Gallop in the Field of Private Law: The Doctrine of Legitimate Expectation in "Purely Contractual" Relations' (2001) 118 *SALJ* 503.

³¹⁰ For instance, *Claude Neon Ltd v City Council of Germiston* 1995 (3) SA 710 (W).

³¹¹ For instance, parole policy in *Winckler v Minister of Correctional Services* 2001 (2) SA 747 (C), *Combrinck v Minister of Correctional Services* 2001 (3) SA 338 (D) and *Mohammed v Minister of Correctional Services* 2003 (6) SA 169 (SE).

³¹² For instance, *MEC for Education, Northern Cape Province v Bateleur Books (Pty) Ltd* 2009 (4) SA 639 (SCA).

³¹³ The full court in the *SARFU* case (note 18 above) para 216.

³¹⁴ *National Director of Public Prosecutions v Phillips* 2002 (4) SA 60 (W) para 28.

³¹⁵ *South African Veterinary Council v Szymanski* 2003 (4) SA 42 (SCA) para 20.

³¹⁶ *Ibid* para 18. See also *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA).

³¹⁷ See eg *Khani v Premier, Vrystaat* 1999 (2) SA 863 (O) at 869H-I; and see *Gibbs v Minister of Justice and Constitutional Development* [2009] ZASCA 73 para 26.

³¹⁸ See *University of the Western Cape v MEC for Health and Social Services* 1998 (3) SA 124 (C) at 134C-G.

trend towards a wider understanding of legitimate expectations would allow the doctrine to cover mere interests as well as expectations in the usual sense, thus offering a way around the insistence on rights in s 3 of the PAJA.³¹⁹

The Supreme Court of Appeal first deviated from the well-established requirements of a past practice or a promise in *Nortjé v Minister van Korrektiewe Dienste*.³²⁰ The case concerned a decision to transfer certain prisoners to the maximum security section of a prison, which entailed a substantial reduction in the privileges they had been enjoying. The court held that the prisoners had had a legitimate expectation that they would not be transferred without being heard – but without giving any indication as to the basis of this expectation. The judgment seemed rather to imply an inevitable connection between decisions with sufficiently adverse effects and the existence of legitimate expectations.³²¹ The traditional requirements seem also to have been relaxed in *Bullock NO v Provincial Government, North West Province*.³²² Here the same court upheld a legitimate expectation that a lease would be renewed, and did so without adverting to the most relevant factor: the successive renewal of the lease in the past.³²³

As De Ville suggests,³²⁴ apparent support for this looser approach to legitimate expectations may be found in the *SARFU* case.³²⁵ In this instance the Constitutional Court equated the question ‘whether, viewed objectively, [the] expectation is, in a legal sense, legitimate’ with the question ‘whether the duty to act fairly would require a hearing in those circumstances’,³²⁶ thus suggesting that there is no need to identify a past practice or a promise at all. However, the trend is not a uniform one, having been interrupted by cases such as *Szymanski*³²⁷ which evince a stricter approach. Orthodoxy also characterised the judgment of the majority in the more recent case of *Walele v City of Cape Town*, where Jafta AJ referred more than once to the traditional requirements.³²⁸ In her minority judgment in *Walele* O’Regan J appreciated that ‘a broader understanding of “legitimate expectation” may be

³¹⁹ See Wandisile Wakwa-Mandlana & Clive Plasket ‘Administrative Law’ 2004 *AS* 74 at 93.

³²⁰ *Nortjé v Minister van Korrektiewe Dienste* 2001 (3) SA 472 (SCA), and see also *Gencor SA Ltd v Transitional Council for Rustenburg and Environs* 1998 (2) SA 1052 (T).

³²¹ For criticism see D M Pretorius ‘Die Leerstuk van Regverdige Verwagting en die Reg op ‘n Billike Aanhoring: *Nortjé v Minister van Korrektiewe Dienste* 2001 3 SA 472 (HHA)’ (2002) 64 *THRHR* 436.

³²² Note 278 above.

³²³ Wakwa-Mandlana & Plasket (note 319 above) 91-2.

³²⁴ De Ville (note 149 above) 230ff, citing examples that include *Foulds v Minister of Home Affairs* 1996 (4) SA 137 (W) and *Minister of Justice, Transkei v Gemi* (note 253 above).

³²⁵ Note 18 above. See also eg *Premier, Mpumalanga* (note 268 above) para 35, where O’Regan J spoke of a promise or a practice as being ‘at least two circumstances’ that could give rise to a legitimate expectation.

³²⁶ *Ibid* para 216.

³²⁷ *SA Veterinary Council v Szymanski* (note 315 above).

³²⁸ Note 259 above, paras 35 and 42.

appropriate given the language of s 33 of the Constitution',³²⁹ but she found it unnecessary to pronounce on the issue. The debate thus remains unresolved.

As to the manner in which legitimate expectations may be protected, the English courts have over the last twenty years moved from tentative recognition of the possibility of substantive protection to full acceptance of the idea.³³⁰ Closer to home, the Zimbabwe Fiscal Appeal Court was fairly explicit about substantive enforcement when it held the Commissioner of Taxes to past assurances that certain sales were exempt from sales tax.³³¹ The South African courts do not seem as resistant to it as some common-law jurisdictions³³² but have approached the question cautiously so far.³³³ While the law reports contain several examples of what would count as substantive enforcement, these seem to have been effected unconsciously for the most part.³³⁴

The topic of substantive protection has been aired in the two highest courts, but without much result. In *Premier, Mpumalanga*,³³⁵ O'Regan J found it unnecessary to decide the point – despite the fact that the court's order actually had some substantive effect.³³⁶ In *Bel Porto School Governing Body v Premier, Western Cape* Madala J seemed to take substantive protection for granted,³³⁷ while Chaskalson P cautioned that this was a contentious issue 'on which there is no clear authority in our law'.³³⁸ More recently, in *Meyer v Iscor*

³²⁹ Ibid para 133.

³³⁰ In *R v North and East Devon Health Authority, ex parte Coughlan* [2000] 2 WLR 622. See also *R (Abdi and Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363, a case offering proportionality as a reason to hold a public authority to its promise or past practice.

³³¹ ITC 1674 (2000) 62 SATC 116. For comment, see Kevin Burt 'The Justification for Section 79(1) of the Income Tax Act and the Hypothetical Application of the Doctrine of Substantive Legitimate Expectations in the Tax Context' (2004) 121 *SALJ* 544.

³³² In New Zealand there is no clear acceptance of the doctrine of substantive protection, while the highest courts of Australia and Canada have resisted the idea of substantive protection: see especially *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 and *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)* [2001] 2 SCR 281. For a survey of the approaches in these and other jurisdictions, see *De Smith* (note 3 above) 644-50.

³³³ See further John Campbell 'Legitimate Expectations: The Potential and Limits of Substantive Protection in South Africa' (2003) 12 *SALJ* 292; Geo Quinot 'The Developing Doctrine of Substantive Legitimate Expectations in South African Administrative Law' (2004) 19 *SA Public Law* 543; Richard Stacey 'Substantive Protection of Legitimate Expectations in the Promotion of Administrative Justice Act – *Tirfu Raiders Rugby Club v SA Rugby Union*' (2006) 22 *SAJHR* 664.

³³⁴ Quinot (note 333 above) cites examples including *Ampofo v MEC for Education, Arts, Culture, Sports and Recreation, Northern Province* 2002 (2) SA 215 (T) and *Coetzer v Minister of Safety and Security* 2003 (3) SA 368 (LC). Cf *Putco Ltd v Minister of Transport for the RSA* 2003 JDR 0408 (W), another case cited by Quinot, where Gildenhuys J was willing to assume that South African law allows for substantive enforcement (para 45).

³³⁵ Note 268 above, para 36.

³³⁶ The case upheld an expectation that a bursary scheme would continue subject to reasonable notice of its termination. As noted by Quinot (note 333 above) 552, the court's order had the effect that bursaries would be paid out until the end of the year in question.

³³⁷ Note 141 above, para 213, concurring in the dissenting judgment of Mokgoro and Sachs JJ.

³³⁸ Ibid para 96.

Pension Fund,³³⁹ the Supreme Court of Appeal issued a warning against too hastily incorporating the developments of English law into our own law. However, a slightly more encouraging tone may perhaps be discerned in *Szymanski*,³⁴⁰ a decision handed down by the same court a few months later.

Overall, then, the way would seem to have been left open by the highest courts. As Quinot suggests, the manner in which substantive enforcement is conceived and theorised is bound to influence its attractiveness to our courts,³⁴¹ and in this regard they have a number of options to choose from.³⁴² But whatever happens, it should be borne in mind that in South Africa substantive expectations are unlikely to be enforced with the vigour of courts in a first-world country with an established, sophisticated and reliable public administration. As citizens of a developing country with a more erratic administrative system, South Africans will almost certainly be expected to be more tolerant of administrative changes of mind and more stoical about their disappointed expectations.³⁴³

(v) *Section 4 of the PAJA*

Section 4 of the PAJA is concerned with fairness ‘where an administrative action materially and adversely affects the rights of the public’. In such cases s 4(1) places an explicit duty on administrators to decide whether to hold a public inquiry, to follow a notice and comment procedure, to do both of these things, to follow a ‘fair but different’ procedure in terms of other legislation, or to follow ‘another appropriate procedure’ which gives effect to s 3. The provision goes on to specify certain requirements for public inquiries and notice and comment procedures, and to make provision for departures from these. Given that there is almost nothing of a comparable nature to be found in the common law, s 4 amounts to a very significant innovation in South African administrative law. Furthermore, the requirement of adversely affected rights is likely to be far more easily satisfied here than in s 3, since there is no such thing as a right inhering in the public.³⁴⁴ However, the exclusion of decisions under

³³⁹ Note 316 above, para 27.

³⁴⁰ *SA Veterinary Council v Szymanski* (note 315 above) para 15.

³⁴¹ Quinot (note 333 above) 556.

³⁴² These include the direct *Coughlan* approach, the *Wednesbury* and ‘modified *Wednesbury*’ approaches discussed by Campbell (note 333 above) and Quinot (note 333 above); and the more recent proportionality-driven *Nadarajah* approach.

³⁴³ See eg *Premier, Mpumalanga* (note 268 above) para 41 – a warning issued in the context of procedural rather than substantive protection.

³⁴⁴ De Ville (note 149 above) argues at 227-8 that for this reason, ‘rights’ in this context should be understood as including ‘interests’. See also Currie *Commentary* (note 258 above) para 5.9 and Karthy Govender ‘An Assessment of Section 4 of the Promotion of Administrative Justice Act 2000 as a Means of Advancing Participatory Democracy in South Africa’ (2003) 18 *SA Public Law* 404 at 414.

s 4(1) from the realm of administrative action³⁴⁵ would seem to detract considerably from the significance of the provision as a whole.

In the pre-democratic era, a time when hearings were conceived of in individual terms, the courts were especially fearful of applying the audi principle too widely.³⁴⁶ In accordance with the classification of functions, decisions that affected large numbers of people were usually given the 'legislative' label and the audi alteram partem principle was simply held not to apply to them. Botha JA expressed the attitude of the courts as follows in *Pretoria City Council v Modimola*:³⁴⁷

'[W]here a public authority is authorised to take a decision prejudicially affecting the property or liberty of the members of the whole community, . . . no principle of natural justice is violated by a decision taken under the statute without affording an opportunity to every individual member of the community to be heard before the decision, which obviously prejudicially affects his property or liberty, is taken. In exercising its powers under such an enactment, the public authority is guided solely by what is best for the community as a whole, and the peculiar conduct or circumstances of any individual member of that community is a completely irrelevant consideration.'

This statement is a good example of the unimaginative, all-or-nothing reasoning so prevalent in our administrative law at that time: there is no question of a compromise between the idea of an individual hearing and no hearing at all. Yet 'legislative'³⁴⁸ decisions, because of their wide sweep, were and are capable of effects even more devastating than 'judicial' and 'purely administrative' ones. As commentators pointed out,³⁴⁹ there was an urgent need to find a compromise between the all and the nothing in our law.

The Appellate Division ultimately found such a compromise in the early 1990s, in the important case of *South African Roads Board v Johannesburg City Council*.³⁵⁰ Here Milne JA rejected the classification of functions as the decisive criterion.³⁵¹ Instead he drew a distinction between statutory powers 'which, when exercised, affect equally members of the

³⁴⁵ Section 1(ii) of the PAJA.

³⁴⁶ See eg *S v Moroka* 1969 (2) SA 394 (A) at 398D-E.

³⁴⁷ Note 233 above at 261H-262A. See also eg *Le Roux v Minister van Bantoe-Administrasie en Ontwikkeling* 1966 (1) SA 481 (A).

³⁴⁸ This should not be taken too literally, as not all decisions labelled 'legislative' in the pre-democratic era were legislative in the strict sense.

³⁴⁹ See especially Catherine O'Regan 'Rules for Rule-making: Administrative Law and Subordinate Legislation' and Lawrence G Baxter 'Rule-making and Policy Formulation in South African Administrative-law Reform' 1993 *Acta Juridica* 157 and 176.

³⁵⁰ Note 240 above.

³⁵¹ *Ibid* at 10I-J and 12E.

community at large’ and powers that ‘while possibly also having a general impact, are calculated to cause particular prejudice to an individual or a particular group of individuals’.³⁵² In cases falling into the second category the decision-maker would be obliged to hear the party or parties particularly affected – that is, unless the statute provided otherwise. Applying this test, it was clear that a decision to declare a toll-road was likely to have a particular impact on the respondent city council, which would be responsible for upgrading alternative routes. It was held that the council ought to have been heard before the decision was made.³⁵³

The common-law solution found in *Roads Board* has largely been superseded by s 4 of the PAJA. This is in no small part because the thinking behind s 4 is quite different from the reasoning of the Appellate Division. *Roads Board*, because it sees prejudice as significant only where it is *particular* prejudice, replicates the old-fashioned view of fairness as something essentially individual; whereas the PAJA is designed to allow for public participation as such. Mass sums up the benefits of such participation as follows:³⁵⁴

‘On the one hand, it is a helpful tool for the administration because it provides new information and exposes possible weaknesses in a planned administrative action. On the other hand, it alerts the public to the intention of the administration, allowing for early control and, possibly, protest. Public participation can, at the same time, increase the general acceptance of the administrative action, and it might be argued that, by providing for a “surrogate political process”, it increases the democratic legitimacy of administrative action and helps to compensate for the fact that most administrative actions are not taken by democratically elected representatives.’

Clearly the requirements of s 4 have the potential to enrich South African administrative justice considerably. However, much depends on the enthusiasm with which they are applied and enforced. The PAJA subverts itself here, since the administrator’s decision under s 4(1) is expressly excluded from the definition of ‘administrative action’ in the Act, and is thus not reviewable or otherwise enforceable under the PAJA.³⁵⁵ Because the decision is non-administrative action the provisions of the PAJA do not apply to it, so that

³⁵² Ibid at 12E-13C, where Milne JA explained that ‘calculated’ meant nothing more than ‘likely in the ordinary course of things’.

³⁵³ Ibid at 16D.

³⁵⁴ Caroline Mass ‘Section 4 of the AJA and Procedural Fairness in Administrative Action Affecting the Public: A Comparative Perspective’ in Lange & Wessels (note 139 above) 63 at 63-4. See also Currie *Commentary* (note 258 above) para 5.1.

³⁵⁵ Section 1(ii) read with s 6(1).

(for instance) reasons would not have to be given for such a decision. This would seem to make the use of the procedures in s 4 entirely voluntary,³⁵⁶ a feature that naturally reduces the impact that s 4 is likely to make on South African law.³⁵⁷ There is no doubt, however, that having once decided to hold a public inquiry or follow a notice and comment procedure, the administrator is bound by the subsections that respectively govern these procedures and by the regulations that supply more detailed instructions.

As regards the decision under s 4(1), Currie suggests that ‘[o]ne is left only with political and organisational accountability mechanisms’.³⁵⁸ However, this may be an overly pessimistic assessment. There would seem to be nothing to prevent the constitutional principle of legality from being relied on, either to force an administrator to make a decision under s 4(1) or to review a decision that has already been made. This would be simply a matter of enforcing compliance with an express statutory duty (the duty to decide imposed by s 4(1)) or recognising a failure to comply with the duty, and it would thus require no expansion or development of the principle of legality.

(d) Conclusion

The application of procedural fairness would seem to be one area in which South African administrative law has not yet transformed itself satisfactorily. In sharp contrast to the grudging application of natural justice before 1994, s 33(1) of the Constitution promises ‘everyone’ procedurally fair administrative action. However, this generosity is not matched by the provisions of the PAJA. As far as s 4 is concerned, the use of its innovative provisions may be merely voluntary; while in relation to s 3, the requirement of an adversely affected right seems to replicate the pre-democratic position. While the legitimate expectation doctrine could conceivably be extended in order to avoid this last result, it is not yet clear whether and to what extent the courts will be willing to protect mere interests in addition to rights and legitimate expectations in the traditional sense.

³⁵⁶ That was indeed the view expressed by Chaskalson CJ, obiter, in *New Clicks (CC)* (note 17 above) para 132. An interested person might attempt under s 8 to obtain an order forcing an administrator to make a decision in terms of s 4(1), but in order to do so the proceedings would have to qualify as ‘proceedings for judicial review in terms of s 6(1)’ (see s 8(1)). It seems that such proceedings would not qualify, however, since s 6 itself refers to ‘judicial review of an administrative action’ – and a failure to make a decision in terms of s 4(1) is excluded from the definition of administrative action.

³⁵⁷ In the context of socio-economic regulation, see Paula Proudlock *The Social Assistance Act Has Been Interpreted to Delegate the Decisions on the Qualifying Age Limit and Income Threshold for the Child Support Grant to Two Executive Ministers. Is the Delegation Constitutional?* LLM Minor Dissertation, University of Cape Town (2009) Chapter 6.

³⁵⁸ Currie *Commentary* (note 258 above) para 5.12.

2.5 REASONS

(a) *Introduction and overview*

The giving of reasons³⁵⁹ is generally regarded as a fundamental requirement of administrative justice and an essential component of natural justice or procedural fairness.³⁶⁰ A duty to give reasons increases public confidence in the administrative process and thus adds to its legitimacy.³⁶¹ It improves the quality of administrative decision-making and offers the affected person considerable procedural advantages.³⁶² In South Africa today, however, the provision of reasons by government functionaries has special constitutional significance, for it is a prime mechanism for achieving the culture of justification our Constitution commits us to. A duty to give reasons not only enhances the participation of citizens in the decisions that affect them but makes administrators accountable and responsive to the people they serve. The close link between reasons and accountability has indeed been acknowledged by the Constitutional Court, albeit in the context of judicial rather than administrative decisions.³⁶³

The giving of reasons for administrative action is an innovation associated with the post-1994 era. There was no general duty to give reasons in our pre-democratic law, though it did acknowledge occasional duties to do so. This great lacuna in our law was filled with the coming into force of the interim Constitution, whose Bill of Rights included s 24(c) – a provision with the potential to advance the transformation of our administrative law immeasurably. Section 24(c) conferred a broad right to written reasons for administrative action that affected any of the complainant's 'rights or interests'. Today s 33(2) of the 1996 Constitution contains a similar right, though it is couched in less liberal terms: one has a right to written reasons only if one's rights (and not interests) are adversely affected (and not

³⁵⁹ In administrative law reasons are statements that explain a decision. They are generally to be distinguished from findings of fact or law, which may inform the reasons but do not in themselves constitute an explanation for administrative conduct. (Findings and other information are governed by the right of access to information in s 32 of the Constitution, which is broader than the right to reasons in s 33(2).) A distinction is also to be drawn between reasons for administrative action and the discovery of documents in the course of litigation, which is governed by Rule 35 of the Uniform Rules of Court: see further *King William's Town Transitional Local Council v Border Alliance Taxi Association (BATA)* 2002 (4) SA 152 (E).

³⁶⁰ In relation to English law see eg Craig (note 12 above) 401ff; Forsyth (note 15 above) 436. In India, where the duty to give reasons is very well developed as a result of its long history, it has been described as the 'third principle of natural justice': Plasket (note 152 above) 470, quoting Takwani. The PAJA acknowledges the link between reasons and fairness in s 3(2)(b)(v), which lists 'adequate notice of the right to request reasons' as one of the mandatory requirements of fairness.

³⁶¹ See eg *De Smith* (note 3 above) 415.

³⁶² The decision whether and how to challenge an unfavourable administrative decision is far more sensibly made once reasons have been given for it; see eg the remarks of Southwood J in *Afrisun Mpumalanga (Pty) Ltd v Kunene NO* 1999 (2) SA 599 (T) at 630F-G and those of Mokgoro and Sachs JJ in their minority judgment in *Bel Porto School Governing Body v Premier, Western Cape* (note 141 above) para 159.

³⁶³ *Mphahlele v First National Bank of SA Ltd* 1999 (2) SA 667 (CC) para 12.

simply affected). This more guarded language is taken up in s 5 of the PAJA, which adds that rights must be affected ‘materially’ as well.

The courts seemed initially to be cowed by the very expansiveness of the right conferred by the interim Constitution, and showed a tendency at first to raise technical barriers to its application. However, that trend would seem to have been halted a few years ago by the bold decision of the court a quo and subsequently the Supreme Court of Appeal in the *Goodman Brothers* case.³⁶⁴ The courts have responded well to the challenge of applying and developing the right to reasons in relation to s 5 of the PAJA. The reasoning used in *Goodman Brothers* has since been applied by a High Court so as to decline the invitation to parsimony contained in the language of s 33(2) of the Constitution and s 5 of the PAJA. Furthermore, the courts have responded creditably to the Act’s requirement of ‘adequate’ reasons, and are in the process of developing a suitably flexible concept of adequacy. These issues are explored in what follows.

(b) *The treatment of reasons at common law*

Until the enactment of the interim Constitution South Africans had no general right to reasons for administrative action, though legislation occasionally imposed a particular duty to give reasons.³⁶⁵ In addition, the common law demanded a duty to give reasons in certain situations, such as arrest³⁶⁶ – a rule so hallowed that the courts were prepared to imply into the emergency regulations of the 1980s a duty to give reasons for emergency arrest and detention.³⁶⁷

The courts were also prepared sometimes to draw an adverse inference from a failure or refusal to give reasons, even in the absence of a specific duty to give them. A failure or refusal to give reasons would be ‘weighed together with all the other factors in the totality of the case’³⁶⁸ in deciding whether there had been an illegality, and was capable of being ‘an important element in deciding whether the decision had been *bona fide*, or whether it had not been influenced by ulterior or improper motives’.³⁶⁹ For the most part, however, the courts

³⁶⁴ *Goodman Bros (Pty) Ltd v Transnet Ltd* 1998 (4) SA 989 (W) and *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA).

³⁶⁵ For examples, see Baxter (note 20 above) 226n239.

³⁶⁶ See the judgment of Rabie ACJ in *Ngqumba v Staatspresident* 1988 (4) SA 224 (A) at 263-7.

³⁶⁷ *Ibid.* See also *Minister of Law and Order v Swart* 1989 (1) SA 295 (A); *State President v Tsenoli* 1986 (4) SA 1150 (A).

³⁶⁸ Holmes JA in *National Transport Commission v Chetty’s Motor Transport* (note 87 above) at 736G. See eg *Pretoria North Town Council v AI Electric Ice-Cream Factory* 1953 (3) SA 1 (A); *W C Greyling & Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board* 1982 (4) SA 427 (A).

³⁶⁹ Innes CJ in *Judes v District Registrar of Mining Rights, Krugersdorp* 1907 TS 1046 at 1052.

were slow to require the giving of adequate reasons for administrative action. The pre-democratic administrative law was thus seriously lacking in one of the fundamentals of accountability and justification.

(c) Section 24(c) of the interim Constitution

Section 24(c) of the interim Constitution conferred on every person a right to ‘be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public’. This formulation inevitably focused the attention of the courts and commentators on the meaning of ‘rights’, ‘interests’ and ‘affects’.

As already noted in this chapter, interests and rights may be regarded as lying at either end of a spectrum and legitimate expectations (which made their appearance in s 24(b))³⁷⁰ as lying somewhere in between. This suggests a very broad meaning for ‘interests’.³⁷¹ Perhaps because of this, the courts made little or nothing of that term and clung instead to the rights-based reasoning so characteristic of the pre-democratic jurisprudence relating to procedural fairness. In *Podlas v Cohen and Bryden NNO*,³⁷² for example, Spoelstra J stated obiter that reasons would not have to be given for the decision to hold a ‘purely investigative’ inquiry which would not affect existing rights. And in *SA Metal Machinery Co Ltd v Transnet Ltd*,³⁷³ while he treated ‘interests’ as a distinct concept, Heher J held that a tenderer who was effectively a stranger to the tender process, or a mere applicant, did not have an interest that was deserving of protection under the Constitution.

However, in *Goodman Bros (Pty) Ltd v Transnet Ltd*,³⁷⁴ which also concerned a tender, Blieden J adopted a bolder approach. Here the court held that an unsuccessful tenderer – a mere applicant – was entitled to reasons for its failure to be awarded the tender to supply

³⁷⁰ Section 24(b) conferred on every person a right to procedurally fair administrative action ‘where any of his or her rights or legitimate expectations is affected or threatened’ (my emphasis).

³⁷¹ For instance, David M Walker *The Oxford Companion to Law* (1980) 629 defines ‘interests’ as ‘[t]hose claims, wants, desires, or demands which persons individually or in groups seek to satisfy and protect, and of which the ordering of human relations in society must take account’.

³⁷² Note 256 above at 675I. See also *Xu v Minister van Binnelandse Sake* 1995 (1) SA 185 (T), where Stafford J seemed to equate ‘interests’ with ‘legitimate expectations’.

³⁷³ *SA Metal Machinery Co Ltd v Transnet Ltd* (WLD) unreported case 30825/97 of 22 March 1998. Cf *ABBM Printing & Publishing (Pty) Ltd v Transnet Ltd* 1998 (2) SA 109 (W) at 117I-J (an ‘obvious interest’ found where a tenderer had printed and published the relevant magazine for sixteen years); *Commissioner, SAPS v Maimela* 2003 (5) SA 480 (T) at 487G-H.

³⁷⁴ Note 364 above.

wrist watches. The right referred to in s 24(c), the court found, was precisely the tenderer's constitutional right to reasons.³⁷⁵

This result was unanimously upheld on appeal in *Transnet Ltd v Goodman Brothers (Pty) Ltd*,³⁷⁶ a case that pours scorn on the diffidence shown by some of the High Court decisions. Here it was argued that the respondent (the tenderer) was 'effectively a stranger to the tender process',³⁷⁷ and thus had no right or interest to be protected by s 24(c). The argument was unsuccessful. As in several of the other cases, the court did not see any need to define 'interests' – this time because it relied purely on 'rights'. However, these were not the rights traditionally referred to in administrative law, since the Supreme Court of Appeal did not base its decision on the 'right' of the tenderer to the award of the tender. Instead, the judgments of Schutz JA and Olivier JA focused on *fundamental* rights, and the rights to administrative justice in particular. The majority relied on the rights to lawful and procedurally fair administrative action, which would be adversely affected if the respondent were not given reasons: it would have no way of knowing whether those rights had been violated.³⁷⁸ The respondent would thus be 'deprived of the opportunity, to which he is entitled, to consider further action'.³⁷⁹ In his separate judgment Olivier JA relied in addition on the right to equality. The right to equal treatment, he pointed out,

'pervades the whole field of administrative law, where the opportunity for nepotism and unfair discrimination lurks in every dark corner. How can such right be protected other than by insisting that reasons be given for an adverse decision? It is cynical to say to an individual: you have a constitutional right to equal treatment, but you are not allowed to know whether you have been treated equally.'³⁸⁰

Goodman Brothers is a landmark case in which the Supreme Court of Appeal effectively rejected the long tradition of reliance on rights in the conventional and narrow

³⁷⁵ Ibid at 998G. In coming to this conclusion Blieden J relied on *Aquafund (Pty) Ltd v Premier of the Province of the Western Cape* 1997 (7) BCLR 907 (C), a case relating to the right of access to information. Here Traverso J reasoned that '[i]f the applicant is entitled to lawful administrative action, it must, in my view, follow that it will be entitled to all such information as may reasonably be required by it to establish whether or not its right to lawful administrative action has been violated' (at 915I-J).

³⁷⁶ Note 364 above.

³⁷⁷ See *ibid* para 10 in the judgment of Schutz JA, relying on the judgment of Heher J in *SA Metal Machinery v Transnet* (note 373 above). The argument was clearly unsound, however. Although the respondent certainly had no *right* to the tender, it had been the successful tenderer for several years, and – in accordance with the decision in *ABBM Printing & Publishing* (note 373 above) – had at least an interest in the outcome of the process, if not a legitimate expectation of being awarded the tender again.

³⁷⁸ *Transnet v Goodman Brothers* (note 364 above) para 11 in the judgment of Schutz JA.

³⁷⁹ *Ibid* para 12.

³⁸⁰ *Ibid* para 42 in the judgment of Olivier JA.

administrative-law sense. Both the majority and minority judgments thus resist the conceptual reasoning that characterised our pre-democratic law and the courts' early interpretations of s 24(c). On *Goodman Brothers* reasoning any of the other rights in s 24 inevitably entitle one to the right to reasons, for one or other of them will always be adversely affected by a failure to give reasons. The implications for the interpretation of s 33(2) of the 1996 Constitution and the PAJA are equally significant.

(d) *The 1996 Constitution and the PAJA*

Section 33(2) of the 1996 Constitution is more guarded than s 24(c) of the interim Constitution. The latter conferred a right to written reasons where a person's *rights or interests* were *affected* by administrative action. Section 33(2), on the other hand, gives a right to written reasons only if one's *rights* are *adversely affected* by such action. This language is taken up in s 5 of the PAJA, which adds that rights must be affected 'materially' as well as adversely. There is also a considerable difference between the rights in s 33(2) and (1), since the right to lawful, reasonable and procedurally fair administrative action is not subject to any internal qualification at all. One apparently gets the benefit of this provision without demonstrating even that an interest has been affected, let alone a right; whereas one is entitled to reasons only where a right has been affected adversely.

However, these apparently deliberate differences seem to be erased by the reasoning used in *Goodman Brothers*,³⁸¹ discussed above. The case was decided under s 24(c) of the interim Constitution and does not purport to deal with the right to reasons in s 33(2) of the 1996 Constitution. Nevertheless, the reasoning used has significant implications for s 33(2), and thus for s 5 of the PAJA, because it seems to mean that the right to reasons will automatically apply to anyone to whom s 33(1) applies. In other words, the s 33(1) right inevitably entitles one to the right to reasons, since the s 33(1) right will always be adversely affected by the failure to give reasons.

This is no doubt a kind of 'bootstraps' reasoning, and it cannot be quite what the drafters of the Constitution intended. For one thing, it glosses over the apparent requirement that rights be affected by the administrative action rather than by the failure to give reasons for it. However, it is reasoning that will appeal to anyone who cares about the values of participation and accountability. Interestingly, it is also reasoning that could be used in relation to other parts of the PAJA, for 'rights' feature as a trigger not only in s 5 but also in

³⁸¹ *Transnet v Goodman Brothers* (note 364 above).

ss 3 and 4 of the Act, and most notably in the definition of administrative action in s 1. But the Supreme Court of Appeal does not seem to have been attracted by the possibility of applying its own reasoning in this way. In the case of *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works*,³⁸² where *Goodman Brothers* could presumably have been used in the administrative action enquiry in this extended manner, the court instead suggested simply that a literal meaning could not have been intended for 'rights' in s 1 of the PAJA, and that the term 'was probably intended rather to convey . . . action that has the capacity to affect legal rights'.³⁸³

Strangely enough, *Goodman Brothers* reasoning also failed to take hold in its original context of reasons. While its possibilities were highlighted in academic commentary,³⁸⁴ the courts themselves did not resort to it for many years and seemed indeed to have forgotten about it altogether. However, *Goodman Brothers* was recently put to imaginative use in *Kiva v Minister of Correctional Services*,³⁸⁵ a case concerning a decision not to promote the applicant. Here Plasket J explicitly drew on both judgments of the Supreme Court of Appeal in holding that the applicant's rights to equality and to just administrative action had been materially and adversely affected by the decision, and that the applicant was thus entitled to be furnished with reasons for the decision under s 5 of the PAJA – a statute, he added, that had to be interpreted consistently with s 33 of the Constitution.³⁸⁶ Plasket J found that the rights of access to court and to fair labour practices, too, had been materially and adversely affected by the decision not to promote the applicant:

‘As the right to reasons is intended to make judicial review effective, it can also be said that the right affected is the right of access to court entrenched in s 34 of the Constitution: without reasons for an administrative action, an affected person is not able adequately to consider whether he or she should challenge it by way of review. It is also evident that the applicant, without reasons, cannot determine whether he was the victim of an unfair labour practice, in violation of the fundamental right to fair labour practices entrenched in s 23(1) of the Constitution.’³⁸⁷

³⁸² Note 276 above.

³⁸³ *Ibid* para 23. See further at 4.4(a) below.

³⁸⁴ See eg Cora Hoexter ‘The Current State of South African Administrative Law’ in Hugh Corder & Linda van der Vijver (eds) *Realising Administrative Justice* (2002) 20 at 30-2.

³⁸⁵ Note 257 above, paras 29-32.

³⁸⁶ *Ibid* para 21.

³⁸⁷ *Ibid* para 31.

This deliberate resurrection of the *Goodman Brothers* line of reasoning is an interesting and important development, particularly when one considers that the general duty on administrators to give reasons is still confined to the realm of administrative action. As far as non-administrative action is concerned, the constitutional principle of legality does not extend to the giving of reasons by administrators. The Constitutional Court held in *Mphahlele v First National Bank of SA Ltd*³⁸⁸ that the rule of law ordinarily requires judges to account for their decisions by giving reasons; but the same is not yet demanded of administrators. The need for a broad application of the right to reasons in s 33(2) is thus much greater than in relation to the rights to lawful administrative action, where the requirements of the principle of legality are identical to those of s 33, and in relation to reasonable administrative action, where there is some overlap of the requirements.

(i) *Section 5 of the PAJA*

Section 5(1) of the PAJA, which now most directly governs the right to reasons for administrative action, reads as follows:

‘Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.’

The Act thus follows the terminology of s 33(2), though it is more cautious still: one is entitled to written reasons on request only if one’s rights are affected adversely and *materially*. Several other qualifications are also placed on the right.

As in s 3 of the PAJA, the presence of the word ‘materially’ probably makes no great difference. First, the courts already have the principle ‘de minimis non curat lex’ to deal with cases that are too trivial to have a material effect on rights. Secondly, nothing in s 5 of the PAJA prevents the reasoning in *Goodman Brothers*³⁸⁹ from being applied to cases decided under the Act. On this reasoning, as we have just seen, one will always have an adversely affected right to point to, for the right to lawful, reasonable and procedurally fair administrative action in s 33(1) will always be adversely affected by a failure to give reasons;

³⁸⁸ Note 363 above, para 12.

³⁸⁹ *Transnet v Goodman Brothers* (note 364 above).

and presumably the effect will be ‘material’ too. It is hard to imagine a situation in which an adverse effect on this fundamental right would be too trivial to bother about – a point made by Plasket J in the *Kiva* case.³⁹⁰

Section 5(1) allows 90 days within which to make a request, a period that runs from the date the requester became aware of the action or might reasonably be expected to have become aware of it. The 90 days may, in terms of s 9(1)(b) of the PAJA, be extended for a fixed period, either by agreement or by a court or tribunal ‘where the interests of justice so require’;³⁹¹ and it may also be ‘reduced’ in terms of s 9(1)(a).³⁹² Chapter 4 of the Regulations on Fair Administrative Procedures³⁹³ sets out a number of formal requirements for making requests, while s 5(6) of the PAJA envisages that there may be situations in which reasons will be furnished automatically rather than on request.³⁹⁴

In terms of s 5(2), an administrator to whom a request has been made has 90 days within which to furnish ‘adequate’ reasons in writing. This period may once again be extended in terms of s 9 of the PAJA, either by agreement or by a court or tribunal; or it may be reduced.³⁹⁵ The duty to furnish reasons is fleshed out somewhat in reg 28(1) of the regulations, which requires an administrator to acknowledge receipt of a request for reasons and either accede to the request or decline it. If the request is declined, reg 28(2) says that the administrator ‘must give reasons in writing to the person who made the request why the request was declined’.

The duty to give reasons is by no means an absolute one. First, s 2 of the PAJA provides for the granting of exemptions from and permissions to vary the requirements of ss 3, 4 and 5. Secondly, s 5(4) allows for departures from the duty, and sets out a list of factors

³⁹⁰ *Kiva v Minister of Correctional Services* (note 257 above) para 23: ‘I find it difficult to imagine a situation where a person’s rights have been adversely affected but the effect is not material.’

³⁹¹ Section 9(2) of the PAJA.

³⁹² The PAJA does not indicate whether the reduction and extension apply to *this* period of 90 days or the period of 90 days within which the administrator must furnish reasons in s 5(2), or both. De Ville (note 149 above) 292-3 and Currie *Commentary* (note 258 above) para 6.8 seem to regard the provisions as applying to both periods.

³⁹³ Note 216 above.

³⁹⁴ Section 5(6) enables the Minister, at the behest of an administrator, to publish a list specifying administrative action in respect of which the administrator concerned will automatically furnish reasons without their having to be requested.

³⁹⁵ See note 392 above. In *Sikutshwa v MEC for Social Development, Eastern Cape* 2009 (3) SA 47 (Tk) the applicant, having waited many months to hear why his application for a disability grant had been refused, requested written reasons from the administrator. When he subsequently launched legal proceedings it was argued that these were premature, since only 60 days had passed since the applicant had made his request. Goosen AJ held that the 90 days referred to in s 5(2) of the PAJA had to be construed as a period ‘afforded to the administrator to gather the information necessary in order to present the reasons for the administrative decision’ (para 70). Taking the view that the administrator is obliged to furnish the reasons sought as soon as they are available, the court held that s 5(2) did not bar the institution of proceedings before the 90 days had expired (para 77). Not only had reasons ‘already been formulated, drafted and dispatched’ on the respondents’ version (para 80), but the circumstances of the case warranted a reduction of the period in terms of s 9 of the PAJA (para 78).

(similar but not identical to those in ss 3 and 4) to be taken into account when the administrator is deciding whether it would be reasonable and justifiable to depart from the requirements of s 5.³⁹⁶ Thirdly, as with ss 3 and 4, the administrator may in terms of s 5(5) follow a procedure which is ‘fair but different’ from that in s 5(2). This allows for the fact that enabling legislation may well have its own specific scheme for the giving of reasons, and that such a scheme may involve a different timetable or, for that matter, be tied to a different notion of adequacy. That different scheme may be followed in preference to the ‘default setting’ established by the PAJA, provided of course that it is fair.

Notwithstanding all this scope for exemptions, variations and departures of one kind or another, there will be cases in which the administrator is clearly under a duty to give adequate reasons. If the administrator simply fails to give them, as opposed to declining to give them or offering inadequate reasons, the aggrieved person may in terms of s 8(1)(a)(i) of the PAJA apply for an order directing the administrator to give reasons or simply apply for judicial review of the administrative action.³⁹⁷ Section 5(3) instructs a reviewing court to presume, ‘subject to subsection (4) and in the absence of proof to the contrary’, that the administrative action was taken without good reason. This provision is a souped-up version of the common-law inference,³⁹⁸ and lawyers familiar with our pre-democratic jurisprudence will find it a heartening addition to our law. The effect of this rebuttable presumption is to place the onus on the administrator to show that the action was taken lawfully notwithstanding the failure to give reasons.

(ii) The development of the concept of ‘adequate’ reasons

Section 5(2) of the PAJA requires ‘adequate’ reasons. The courts have begun to explore the meaning of this term and are in the process of developing principles to govern and inform the notion of adequacy. They have correctly discerned that adequacy is necessarily a variable concept. As Kirk-Cohen ADJP pointed out in *Rèan International Supply Company (Pty) Ltd v Mpumalanga Gaming Board*, it is ‘impossible to lay down a general rule of what could constitute adequate or proper reasons, for each case must depend upon its own facts’.³⁹⁹ Much

³⁹⁶ Section 5(4)(b).

³⁹⁷ See De Ville (note 149 above) 296.

³⁹⁸ As Boruchowitz J noted in *Dendy v University of the Witwatersrand* 2005 (5) SA 357 (W) para 53, though without reference to the PAJA, it is well established in our law ‘that the failure to give written reasons has an important bearing on the question whether the decision-maker or makers acted in good faith or had been influenced by ulterior or improper motives’.

³⁹⁹ *Rèan International Supply Company (Pty) Ltd v Mpumalanga Gaming Board* 1999 (8) BCLR 918 (T) at 926F.

will depend also on the statutory context in which the reasons are to be given. On the other hand, adequacy cannot be an intrinsically meaningless or infinitely variable concept, and some of its ingredients at least must be common to all cases. In particular, there must be an inevitable connection between the adequacy of reasons and their explanatory power. The point is nicely illustrated by the legal battle fought in the pre-democratic era over s 28(3)(b) of the Internal Security Act 74 of 1982, although unlike the PAJA this provision made no explicit reference to adequacy.

Section 28(3)(b) of the Internal Security Act required the Minister of Law and Order to furnish a person detained under s 28(1) of the Act with written reasons for the detention and ‘so much of the information which induced the Minister (to detain the person) as can, in the opinion of the Minister, be disclosed without detriment to the public interest’. Section 28(1), in turn, empowered the Minister to detain a person ‘if he is satisfied that the person engages in activities which endanger . . . the security of the state’. The case of *Gumede v Minister of Law and Order*⁴⁰⁰ arose out of such a detention. In the detention notice the Minister had given as his ‘reason’ a statement which read: ‘I am satisfied that the said [detainee in question] engages in activities which endanger the maintenance of law and order’. Similarly, the ‘information’ given was simply a reiteration of the empowering provision. In the court a quo Law J rightly held that a mere reiteration of the wording of the enabling legislation did not constitute reasons, a ruling that was upheld by the Appellate Division.⁴⁰¹ In short, the requirement of a minimum standard of explanatory ability is so fundamental that it was upheld by our courts during an era characterised by its pro-executive decisions. Unfortunately, the appeal court did not find it necessary to decide whether the ‘information’ given was sufficient for the purposes of the subsection.⁴⁰²

The Supreme Court of Appeal laid stress once again on the explanatory nature of reasons in *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd* – this time in relation to s 5 of the PAJA – and, quoting from an Australian case, linked the idea

⁴⁰⁰ *Gumede v Minister of Law and Order* 1984 (4) SA 915 (N).

⁴⁰¹ *Nkondo & Gumede v Minister of Law and Order* 1986 (2) SA 756 (A). See also *Sachs v Minister of Justice* (note 27 above), especially at 40; and see *Self v Munisipaliteit van Mosselbaai* [2006] 2 All SA 518 (C) paras 18-19. Cf the view taken in *Moletsane v Premier of the Free State* 1996 (2) SA 95 (O), criticised by Clive Plasket & Francisco Khoza ‘The Fundamental Right to Reasons for Administrative Action: *Moletsane v The Premier of the Free State* (1996) 17 *ILJ* 251 (O)’ (2001) 22 *ILJ* 52.

⁴⁰² In *Gumede v Minister of Law and Order* 1985 (2) SA 529 (N) a full bench of the Natal Provincial Division had overruled the decision of Law J, holding that the Minister had given adequate reasons and information. This decision, in turn, was overruled by the Appellate Division, but only on the point relating to reasons.

of adequacy with the affected person's appreciation of 'why the decision went against me'.⁴⁰³ In *Phambili Schutz JA* regarded the following as an 'apt description' of what constitutes adequate reasons:

[T]hat the decision-maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute), and the reasoning process which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation. The appropriate length of the statement covering such matters will depend upon considerations such as the nature and importance of the decision, its complexity and the time available to formulate the statement. Often those factors may suggest a brief statement of one or two pages only.⁴⁰⁴

This quotation is a rich source of guidelines for officials, although South African administrators may well be appalled at the suggestion of 'a brief statement of one or two pages only'! Two main propositions emerge from it.

First, adequate reasons should be specific, be written in clear language and be of a length and detail appropriate to the circumstances. Relevant factors in this regard include the nature and importance of the decision, its complexity and the time available to the administrator – but this is by no means a complete list. In *Commissioner, South African Police Service v Maimela*⁴⁰⁵ a full bench of the Transvaal Provincial Division added 'the factual context of the administrative action', 'the nature of the proceedings leading up to the action' and 'the nature of the functionary taking the action' as relevant factors. Over and above these, De Ville lists as potentially influential the nature of the right that is adversely affected, whether the issue involves an application for a benefit or the deprivation of a right, and administrative efficiency.⁴⁰⁶

Secondly, reasons should consist of more than mere conclusions, and should refer to the relevant facts and law as well as the reasoning process leading to those conclusions.⁴⁰⁷

⁴⁰³ *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd* 2003 (6) SA 407 (SCA) para 40, quoting Woodward J in *Ansett Transport Industries (Operations) v Wraith* (1983) 48 ALR 500 at 507: 'Even though I may not agree with it, I now understand why the decision went against me . . .'

⁴⁰⁴ *Ibid*, continuing to quote from the judgment of Woodward J.

⁴⁰⁵ Note 373 above at 485J-486B.

⁴⁰⁶ De Ville (note 149 above) 294.

⁴⁰⁷ See further Jakkie Wessels 'Adequate Reasons' in Terms of the Promotion of Administrative Justice Act' in Claudia Lange & Jakkie Wessels (eds) *The Right to Know: South Africa's Promotion of Administrative Justice and Access to Information Acts* (2004) 116 at 129ff. As noted by De Ville (note 149 above) 293, clause 6(2) of the SALC draft Bill specifically required the administrator's reasons to incorporate 'the essential facts and the

These propositions find some illustration in the case law, albeit often in cases decided without reference to s 5 of the PAJA.

As regards the factors informing the length and detail of the reasons, in *Moletsane v Premier of the Free State*⁴⁰⁸ Hancke J seemed to set greater store by the ‘nature and importance’ of the decision than its ‘complexity’. He expressed the view (though not in relation to s 5 of the PAJA) that ‘[t]he degree of seriousness of the administrative act should . . . determine the particularity of the reasons given’.⁴⁰⁹ However, as Currie points out, there is no necessary connection between the degree of seriousness of a decision and the reasons required to explain it.⁴¹⁰ On the contrary, he suggests, ‘[a] single-line statement of reasons may quite adequately explain a straightforward decision with far-reaching consequences, while a decision involving complex assessments of fact and the exercise of considerable interpretative discretion will take a great deal more explaining, no matter what its consequences are’.⁴¹¹

The second proposition is well illustrated by *Nomala v Permanent Secretary, Department of Welfare*.⁴¹² Here the decision to terminate the applicant’s disability grant had been explained baldly in a standard-form letter which allowed the administrator to tick any of five possible reasons: ‘not disabled’, ‘condition is treatable’, ‘specialist’s report is required’, ‘medical form incomplete’ and ‘not enough objective medical information’. The court found the reliance on standard-form reasons wholly unacceptable. The first two ‘reasons’ on the form were in fact merely conclusions, and offered no hint of the facts and reasoning process leading to those conclusions.⁴¹³ As pointed out on behalf of the applicant, the last three would provide even less justification for a decision to terminate a grant, being no more than admissions that the administrator actually lacked sufficient information to make a proper decision.⁴¹⁴

legal basis for the decision’: see the SALC *Report* (note 98 above) at 26. Unfortunately this was deleted during the parliamentary committee stage.

⁴⁰⁸ Note 401 above.

⁴⁰⁹ *Ibid* at 98H.

⁴¹⁰ Currie *Commentary* (note 258 above) para 6.11.

⁴¹¹ *Ibid*.

⁴¹² *Nomala v Permanent Secretary, Department of Welfare* 2001 (8) BCLR 844 (E).

⁴¹³ *Ibid* 856D-E. See also eg *Kulati v MEC for Social Development, Eastern Cape* (SECLD) unreported case 512/04 of 5 April 2005, para 9; *Sikutshwa v MEC for Social Development, Eastern Cape* (note 395 above) para 33; and *Satula v MEC for Social Development (TkD)* unreported case 859/2004 of 3 August 2005, para 5 (in each case, no reason given for the conclusion that the medical officer had not recommended a grant). See further *Kiva v Minister of Correctional Services* (note 385 above) paras 39 and 40 (letter merely informed the applicant of the result of his application).

⁴¹⁴ *Nomala v Permanent Secretary, Department of Welfare* (note 412 above) at 855H-I.

A further example of an inadequate reason is provided by *Commissioner, South African Police Service v Maimela*,⁴¹⁵ a case decided under the interim Constitution. Here the administrator had refused the respondents' applications for licences to possess firearms. The reason given to the first respondent, 'premises/residence does not conform to the required standard', was found to be cryptic in that it did not indicate which dwelling was referred to or where the required standard was to be found. As Du Plessis J indicated for a full bench, it was no answer to say that these essentials had later been provided by the administrator in an affidavit:

'Reasons must not be intelligible and informative [only] with the benefit of hindsight They must from the outset be intelligible and informative to the reasonable reader thereof who has knowledge of the context of the administrative action. If reasons refer to an extraneous source, that extraneous source must be intelligible to the reasonable reader. The reason given to the first respondent does not, in this respect, pass muster.'⁴¹⁶

The position is different when reasons have in fact been given and the complaint is that they are inadequate. While the terms of s 8 of the PAJA would not seem to rule out an order directing the administrator to furnish further or better reasons, this remedy was judged to be inappropriate in the *Maimela* case. Here, following the provision of cryptic reasons, an order had been sought for 'full and proper written reasons'. The full bench took the view that the proper course in such a situation is not to ask for better reasons but to have the action reviewed. As Du Plessis J indicated, a court can order reasons to be furnished 'only if it concludes that the decision-maker did not give reasons at all or that what are purported to be "reasons" do not in law constitute reasons'.⁴¹⁷

(e) Conclusion

In a constitutional setting that places so much emphasis on the rationality of exercises of public power and on their justification, Plasket observes, the right to demand reasons for administrative action 'follows like day follows night': it is 'an indispensable adjunct to the fundamental rights entrenched in s 33(1)' and 'an important mechanism to ensure that public powers of an administrative nature are exercised in accordance with the values of

⁴¹⁵ Note 373 above.

⁴¹⁶ Ibid 486F-H.

⁴¹⁷ Ibid 487C-D.

accountability, responsiveness and openness'.⁴¹⁸ The inclusion of a right to reasons for administrative action is of special significance, then, to the transformation of South African administrative law. The courts initially responded cautiously to the right as contained in the interim Constitution, and there was a danger that its application would be unduly inhibited by the more cautious wording of s 32(2) of the Constitution and s 5 of the PAJA. However, the courts seem successfully to have averted this danger. Furthermore, they have begun to develop a useful jurisprudence as to what constitutes reasons and a suitably variable theory of what makes written reasons 'adequate' for the purposes of the PAJA.

⁴¹⁸ Plasket (note 149 above) 462.