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TEACHING PROCEDURAL JURISDICTIONAL FACTS

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I never had the formal status of student in a class taught by Etienne, although I co-taught administrative law. The distinction mattered little; all of us listening to him benefitted enormously. One of his favourite topics in the administrative law course taught to all final year law students at the University of the Witwatersrand was that of procedural jurisdictional facts. His treatment of the topic illustrated the care he took in teaching, as well as his characteristic analytical precision. Etienne will be remembered by most for his advocacy, research, and writing. For me he was first and foremost a teacher and he was a very good one.

In many instances, parliamentary legislation stipulates that certain formalities must be complied with and particular procedures followed when administrative power is exercised. According to the received doctrine of South African administrative law, these are procedural jurisdictional facts. In these instances, administrative action in the absence of such facts is invalid. Procedural compliance of this sort may be required of the state official or body exercising the power or of the private individual affected by its exercise.

The decided cases and the academic literature confuse the terms they employ in considering this issue.[1] Two quite different concepts are conflated. The first is the degree of compliance required by the statute. The second is whether that degree of compliance is a necessary condition for validity of action taken in terms of the statutory scheme. The second question is occupied with the appropriate remedial consequence and logically follows an answer to the first.[2] Hence, as a matter of statutory interpretation, the courts need to ask two questions: what degree of compliance is required (exact or rough?) and what is the effect of non-compliance (nullity or validity?).[3]

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1 L Baxter *Administrative Law* (1984) 446-452.

2 Upon a proper interpretation of the statute, a court may order remedies other than nullity such as reconsideration as well as declaratory or mandamus orders. Baxter op cit note 1 at 451-2.

3 In truth, Etienne most often presented these questions in reverse order, viewing what I have termed above as a second and remedial question as a matter separate from remedies and instead squarely a question of interpretation. Nonetheless, for him what counted was not the sequence but the separation of the questions. Another of Etienne's teaching colleagues, Martin Brassey,

Etienne set up this topic with *Maharaj v Rampersand*.[4] The case concerned a dispute between two Durban bus operators over the granting of two motor carrier certificates. The relevant regulation provided that applications for such certificates should be accompanied by both a route description and a plan or map of the route.[5] On the facts, the application of one of the bus operators had a route description but no plan or map tracing of the route. Taking it that there was no plan or map tracing, the court asked what the effect of this non-compliance was: was the requirement for a plan or map tracing of the route peremptory (and the application a nullity) or directory (and the application valid)? The court treated this as a matter of legislative intention and looked to the whole of the enabling Act. The court noted one factor in favour of nullity, the use of the term 'shall' or in Afrikaans 'moet'. Against nullity were three factors: the additional requirement of a plan was for administrative convenience only;[6] plans are quite uncertain things; and the route not the plan was the important component of the application. The court found the effect of non-compliance with the plan requirement to be merely directory and the application did not fail on that ground.[7] Beyond providing it as a concrete example, Etienne used *Maharaj* to introduce the point that there may be more than one procedural jurisdictional fact in a given problem. The *Maharaj* court had no problem in finding the route description peremptory. But the requirement for a map or plan was another matter. A regulation (or statutory provision) may be thus part peremptory and part directory.

By means of another case dealing in part with a requirement for a plan, *Feinberg v Pietermaritzburg Liquor Licensing Board*,[8] Etienne next cautioned students against adopting a mechanistic approach to statutory interpretation. The regulation at issue in this case required a 'plan drawn to scale' in connection with an application for a hotel liquor license.[9]

differed with him and took the position that there could be no such thing as rough or substantial compliance. The proper and sole question was thus: properly interpreted, what compliance did the statute require? See Baxter op cit note 1 at 449-51. Brassey never quite convinced Etienne on this point.

4 1964 (4) SA 638 (A).

5 Reg 4(2) of the regulations promulgated under s 19 of Act 39 of 1930 on 29 June 1956 provided: '[With regard to a route], that route shall be fully described in the application form in such a manner as to leave no doubt as to the exact route to be followed on the forward and return journeys and, in addition, a plan or map tracing clearly and setting forth the route to be followed and showing the situation and names of terminal and intermediate points, places, roads and streets on that route, shall be attached to the said application form.' *Maharaj* at 643.

6 The court supported this point by noting that the regulation did not require the plan to be advertised while route points were to be advertised in the *Gazette*, thus alerting persons who wished to have an opportunity to oppose or support the application.

7 However, the route description was not unique, and the application ultimately failed.

8 1953 (4) SA 415 (A).

9 A hotel-owner who had a license application (with a plan for an initial addition to the hotel) approved by the local licensing board wanted to construct a further addition for a bar or a bar lounge. However, he forgot to submit a plan drawn to scale for the further addition. Section

When the case reached the Appellate Division, the court said the requirement of a plan was peremptory (with the effect of non-compliance being nullity) but the question of the requirement that the plan be drawn to scale was not decided, although *obiter* the court opined it was directory.[10] Because the conditional approval was invalid, the owner's attempt to set aside the decision failed.[11]

As in *Maharaj*, there was an additional requirement to the requirement for a plan in the legal provision at issue in *Feinberg*. In *Feinberg*, this additional requirement was that the plan be drawn to scale; in *Maharaj* it was that there be a route description. However, the two cases differed markedly in the interpretation of the plan requirement. The *Feinberg* court cited cases for the proposition that 'shall' or 'moet' meant the effect of non-compliance is nullity. The court also noted that the statutory object of the procedure – objector participation in the board hearing – would be denied without a plan. Finally, the legislature had specifically provided that other requirements were merely directory and did not entail nullity; with no such provision for the requirement for the plan, such requirement was arguably peremptory. The *Maharaj* court decided that the term 'shall' would be interpreted contrary to *Feinberg* and that the plan requirement was not that important in terms of the statutory scheme. Class discussion on the ways to reconcile these two cases inevitably produced the conclusion that the factors could be applied differently by different courts in different situations and that everything depended on the correct interpretation of the statute.[12]

The last case Etienne would use was *Sutter v Scheepers*.[13] This case is a professional favourite since it sets out a handy checklist of factors

31(2)(d) of Act 30 of 1928 provides that every license application shall set forth: '(d) a description of the premises which shall be accompanied by a plan drawn to scale clearly showing [the internal arrangements, doors, and streets]: Provided that no such plan shall be necessary in the case of an application for the renewal of a license if [the applicant submits an affidavit that nothing material has changed].' The owner then filed an application for renewal of the license. Because there was no plan for the further addition, the license granted by the board allowed only drinking by hotel residents and not by the general public. The hotel-owner applied to court for an order to set aside that condition.

10 *Feinberg* supra note 8 at 421.

11 The case has a procedural complication which confused students who took time to consider it. The board is essentially defending itself against an application to set aside a conditional approval by arguing that it had no jurisdiction to have granted the approval at all in the first place. Etienne used this aspect, if raised by a student, to explore some of the contradictory nature of the doctrine of jurisdictional facts. See the discussion of this doctrine in P P Craig *Administrative Law* (3ed) (1994) at 337-50, including a reference to E Mureinik, 'The Application of Rules: Law or Fact?' (1982) *LQR* 587; see also Baxter op cit note 1 at 452-7.

12 That conclusion was only part of the matter. In discussion, Etienne would pose the question: why would the *Feinberg* court term the drawn to scale requirement as directory even if obiter where the plan was peremptory? As he pointed out, if a plan was not drawn to scale, it could be and most likely would be misleading. A plan not drawn to scale was as bad as no plan at all. In this case, the answer was that the court was looking at the question of degree of compliance in relation to the drawn to scale requirement, not the question of effect of non-compliance.

13 1932 AD 165.

pointing to whether or not 'shall' should be interpreted to be peremptory or directory. This list is perfect for the student or the lawyer (or even the judge) in a rush. Indeed, the case appears to be more cited for its list of factors than for its value as a precedent.[14] Taken from the digested report in the *South African Law Journal* of the time, the factors are the following:

> '(1) If a provision is couched in a negative form, it is to be regarded as a peremptory rather than a directory mandate. (2) If a provision is couched in positive language and there is no sanction added in case the requisites are not carried out, the presumption is in favour of an intention to make the provision only directory. . . . (3) When it is found that the scope and objects of a provision, if strictly carried out, lead to injustice and fraud, and if there is no explicit statement that the act is to be void if the conditions are not complied with or if no sanction is added, then the presumption is rather in favour the provision being directory.'

However, Etienne was not satisfied with merely presenting such a checklist. Either at the prompting of a student or on his own, Etienne would begin to pay special attention to rule number two on the list above. Taken at face value, it must be wrongly stated by the learned judge. Rather than no sanctions in the event of non-compliance indicating that non-compliant action might still be visited with validity, it is the opposite proposition that makes more sense. It is the existence of sanctions that tends towards validity (that the effect of non-compliance is not necessarily nullity) because the legislature has provided for a remedy other than nullity.[15] What, Etienne would ask, was going on? In between rules number one and three, the *Sutter* judge has slipped out of the question of effect of non-compliance and into the question of degree of compliance intended by the legislature. Indeed, within the degree of compliance question, the *Sutter* second proposition makes sense: the lack of provision for sanctions indicates relative non-significance and rough compliance is acceptable. As far as one can tell, Etienne appears to be the first to notice this discrepancy since 1932.[16] The contemporary reports of the

14 In the case, a father is trying to get out of paying up on bailing his son out of a financial agreement gone awry. One of his defences to payment is that the power of attorney upon which the claim is based needed to be witnessed simultaneously and in the presence of two witnesses under Union law (*Sutter* at 172). It was common cause that this was not done. The question thus becomes the effect of the non-compliance with the requirements about the power of attorney. If nullity, then the father escapes liability; if valid, the father must pay.

15 *Standard Bank v Estate van Rhyn*, 1925 AD 266, demonstrates that the existence of sanctions points towards the provision at issue being directory. The remedy intended by the legislature for non-compliance was the operation of those sanctions and not nullity. In *Standard Bank*, the effect of non-compliance by an executor with naming requirements for cheques drawn on the estate in terms of s 116(1) of the Administration of Estates Act 4 of 1913 was not nullity but rather criminal sanctions against the executor as provided for in s 108. As the court stated, the effect of non-compliance by the executor was not nullity, the phrase was 'directory'; 'after all, what we have to get at is the intention of the Legislature' (*Standard Bank* at 274).

16 Etienne said he had noticed this quirk but simply had never thought it worth the time to write the point up for the journals. The importance that many have placed on his teaching makes it worthwhile to take that time and space here.

case merely state its holding.[17] Commentators appear also not to be aware of the confusion.[18] Baxter's standard treatise is on to the point but is content to note briefly that '[t]he existence of sanctions for failure to comply provides a relevant though somewhat unreliable guide'.[19]

His treatment of this topic was vintage Etienne. In this sense, his teaching style was also that of a quintessential common law lawyer. He revelled in taking a collection of cases and demonstrating through their inconsistencies what set of principles the judges were pursuing, even if the members of the judiciary were themselves only dimly aware of what they were pursuing. The style was to start with a set of cases, add close analysis and logical principles, and to thereby end up with the cases arranged with precision according to a simple but elegant grid or spectrum.

One classic sense of the term 'education' focuses on its origin as a process of leading out. In that sense, Etienne excelled simultaneously at drawing a lesson out of the cases and at educating those listening.

17 See P Smith and G Duncan (eds) *Digest of South African Case Law from 1922-1933* (1936) at 400, 1090.

18 The case is not discussed in L A Rose Innes *Judicial Review of Administrative Tribunals in South Africa* (1963).

19 Baxter op cit note 1 at 448; see also 449-51.