

# 10. GOING TO COURT

## Taking a matter under judicial review

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For the right to just administrative action to be more than just a right on paper, there must be a way to enforce it. The most ultimately decisive way in which this right can be enforced is by **judicial review**.

This means that if reasons given by the administrator for their decision don't satisfy you and you still believe the administrative decision is wrong, you can **challenge the decision in court** – known as taking a matter under judicial review

### 1. Conducting a judicial review

There are certain important things to bear in mind when you consider taking a matter on judicial review.

#### a. Time limits

One of the most important rules in the AJA is that an application for judicial review must be made **within 180 days (approximately 6 months) of the date on which all internal remedies were exhausted**.

As we have said already, where internal remedies exist you have to use them before you apply for judicial review! However, where there are no internal remedies available, the application must be made within **180 days of the date on which the applicant became aware of the decision** (or could reasonably be expected to have become aware of the decision).

#### b. Standing: who can apply for judicial review?

Standing refers to the **right of a person to bring a case to court**. For a person to bring a case to court they must show that they have an **interest** in the matter that is being brought to court.



### BY THE END OF THIS SECTION

You will:

- Know the time periods for judicial review, and how to go about launching an application for review;
- Understand the grounds for judicial review;
- Be aware of the pitfalls in undertaking a judicial review; and
- Consider some possible alternatives to judicial review.



### JUDICIAL REVIEW

An application for judicial review must be made within 180 days of the date on which internal remedies were exhausted, or the date of the decision, if there are no internal remedies available.



### GOING TO COURT

You will need the help of a lawyer to bring a matter to court under the AJA. While it is technically possible to do it yourself, your chances of success are very slim.

As far as judicial review of administrative action goes, the **person who is affected the decision** can apply for judicial review. This person may seek assistance from other persons, including a legal practitioner.

However, there may be situations where you want to bring an application on behalf of another person. Section 38 of the constitution regulates standing for all matters involving rights under the Bill of Rights. As mentioned, just administrative action is a right under the Bill of Rights, therefore Section 38 will determine who should bring actions involving this right to court:

**i. Anyone acting in their own interest:**

You can take a case to court for yourself when your rights are affected.

**ii. Anyone acting on behalf of another person who cannot act in their own name**

If a person is deprived of freedom or incapacitated, and cannot act for themselves (for example, someone who is being kept in detention in a way that is not allowed by the Bill of Rights and cannot get to court), you can act on their behalf.

**EXAMPLE**

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*Ngxusa v Permanent Secretary, Department of Welfare, Eastern Cape 1999 (4) SA 367 (T)*

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**Four applicants brought a case against the department for discontinuing their disability grants. The four represented also a number of other people whose grants had been discontinued.**

**The court held that many people in the same position as the four applicants were unable to bring cases individually because they were too poor, do not have access to lawyers and will have difficulty in obtaining legal aid, and ruled on the case as a class action.**

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**SECTION 38 OF THE CONSTITUTION**

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

- a. anyone acting in their own interest;
- b. anyone acting on behalf of another person who cannot act in their own name;
- c. anyone acting as a member of, or in the interest of, a group or class of persons;
- d. anyone acting in the public interest; and
- e. an association acting in the interest of its members.

**iii. Anyone acting as a member of, or in the interest of, a group or class of persons**

This action requires that there should be a common interest between members of a group or class. There is no need for the members of the group or class to be individually identified. To make this application easier usually people who form a group or a class would put their name on a list and sign it.

**iv. Anyone acting in the public interest**

This application is usually brought where the individual claims that the relief sought has advantages for the entire public or a segment of the public. A determination affecting the environment or public health may lead to such an application.

**v. An association acting in the interest of its members.**

Here an association must have express or implied authority to bring a case on behalf of its members. Where authority does not exist, the association should have suffered harm in a manner not restricted to its members.

**c. Grounds for judicial review**

The Constitution says administrative **action must be lawful, reasonable and procedurally fair**. Section 6 of the AJA gives more detail about these requirements. It sets out a list of ‘grounds’ on which courts can review administrative action.

We will now look at some of these grounds in more detail:

**i. The administrator was not authorised**

An administrator **must obey the law and must have authority in law for all decisions**. If they make decisions that are not allowed by law, they will have acted ‘unlawfully’ and the decisions will be invalid. In most cases, administrators need to be able to show a specific law (enabling statute) that gives them the authority to perform an administrative action.

Many laws require a decision to be made by an official of a **certain rank or with certain qualifications**. If someone without these qualifications makes such a decision, they will have acted without authority. For example, if a law says an official who makes a particular decision must have a legal qualification, a

decision made by someone without a legal qualification will not be authorised.

**Unauthorised delegation** is a similar idea. While many laws allow the official mentioned in the law to delegate this function to others, some do not. If a law says only a particular official (such as a DG) must make a decision, then only that official can make that decision. This official cannot delegate the power to make the decision to anyone else.

**EXAMPLE**

**The law governing public schools says the principal must decide to start disciplinary proceedings against learners. The principal cannot give this function to anyone else. If, for example, a teacher decides to start disciplinary proceedings against a learner, the decision (which is an administrative action as it adversely affects the rights of the learner) will be unauthorised and invalid and can be set aside by a court.**

**ii. Lawful procedure was not followed**

Empowering provisions often require certain **procedures to be followed, or certain conditions to be met**, before an action is taken. If this is not done, any further decisions will not be authorised. For example, if a law says that notice must be given to a licence-holder before the licence is withdrawn, it will not be lawful to withdraw the licence unless notice has been given.

**iii. The decision was unconstitutional or unlawful**

The constitution, as we have said already, is the highest law in the land, and everyone is subject to it, from the President down. An **administrator cannot take a decision that is unlawful** (with respect to the constitution or any other law).

**iv. An administrator misinterprets the law**

Where administrative action is based on a mistake about what the law requires (called an “**error of law**”), a court may set the action aside.

**EXAMPLE**

Generally, people only qualify for social assistance if they are South African citizens. However, where a foster parent is appointed by a court, these parents can apply for a foster child grant, even where the child is not a SA citizen.

So, for example, if a person is appointed as the foster parent of a Mozambican child and applies for a foster child grant in respect of that child, and the administrator turns it down because the child does not have a 13 digit, bar coded, SA identity document, the decision is reviewable on the basis of mistake of law.

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**v. Irrelevant considerations were taken into account, or relevant considerations were not taken into account**

When using discretion, an **administrator can only take relevant factors into account**. If relevant factors are not considered, or if they takes irrelevant factors into account, then the decision will not have been taken for good reason.

Discretionary powers must also only be used by the person given these powers and not by others.

**EXAMPLE**

Linda Mokokoane was born in Maseru, but married a South African , Mr. Zulu, 20 years ago, and became a South African citizen.

Provided she is over 60, and does not earn over the prescribed amount, she must be issued with a state pension when she applies for one. She cannot be denied the pension because she was born in Lesotho.

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**vi. There was no rational connection between the decision and the information before administrator**

When an administrator is asked by the court to explain why they made a decision, they will have to demonstrate a clear rational, or logical connection between the decision and the



### BIAS

Bias means that the person making the decision is unfairly slanted towards or in favour of a particular person or decision. It means too that the person making the decision is not independent and impartial.



### MONETARY INTEREST, PERSONAL INTEREST AND PREJUDICE

**Monetary interest:** If there is the possibility that an administrator could make money out of the decision or save money by taking it, it will be reasonable to suspect that they will be biased.

**Personal interest:** An administrator will have a conflict of interest and could be reasonably suspected of bias if they have to make decisions about someone with whom they have a personal or family relationship.

**Prejudice:** Is a form of prejudgement of an issue. An administrator will be reasonably suspected of prejudice if, for example, they have expressed strong views on a particular subject in the past.

facts they had before them – i.e. the facts become the grounds for the decision or, in legal terms, the evidence that brought the administrator to make the decision.

#### viii. The administrator’s decision appears unreasonable

Administrative action must be **reasonable and rational**. The courts have something called the test of the “reasonable person” – i.e. that an average person in the street could be expected to make such a decision.

Briefly, this means that the action taken must make sense given the information that is available to the person taking the decision.

#### EXAMPLE

A person’s application for a building permit cannot be turned down because their neighbour complains often to the police that they make a lot of noise. There is no rational connection between the two, and the court is going to assume that either the administrator made a technical error, or that there was some form of bias or corruption in the decision.

#### vii. There was a failure to take a decision, or an unreasonable delay in taking a decision

As we have said many times in this workbook, the **failure to take a decision is considered to be a decision** under the AJA. What is a reasonable or unreasonable delay would have to be assessed in each different situation.

#### EXAMPLE

Government policy promises free primary education to all school children in the country. The small community of Hentiesdorp in the Karoo are 300km from the nearest school, but there are 50, 7 to 9-year old children who want to go to school.

For two years the community has been waiting for a school to be built for the children, but nothing has

been done. This is a long delay which compromises the future of the children. Under the AJA it could be considered that a decision had been taken against them.

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**ix. There was bias on the part of the administrator**

Administrators must **use their power without bias**. There are two types of bias: **actual bias** and **apparent bias**. Both types make an administrative decision invalid. This is explained by the saying that “justice must not only be done but must also be seen to be done”.

Even if an administrator is not actually biased against a particular person or decision, they will act without authority if it **reasonably appears that they are biased**. That is, if a reasonable member of the community could think that an administrator is biased, this will be apparent bias.

The circumstances that usually create such an impression are where there is a **conflict of interest**. This could be a monetary interest, a personal interest or a prejudice.

**x. There was an apparent ulterior motive, or the administrator acted in bad faith or arbitrarily**

This is closely linked to bias. The basic principle is that the administrator has an obligation to apply the law to the facts of the case before them. They cannot allow any other factors to come into play as a result of their personal opinion, prejudice or emotions. This will result in a corruption of justice.

**EXAMPLE**

**You come to the Motor Vehicle Licensing Department to re-register your car, which was stolen, scrapped, and then recovered by the police.**

**You have had a bad day, and waited for two hours in the queue in a hot room. When you get to the front of the queue, the clerk ignores you by talking on the phone for five minutes before serving you. You get angry with him, and berate him for poor service.**

The clerk cannot turn down your application because he was angry at you for shouting at him. This action would be considered arbitrary.

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#### d. How to initiate a judicial review

Although theoretically it is possible for any individual to take a matter to court, to have any chance of success you are going to have to enlist the help of lawyers.

There are several considerations to bear in mind when doing so:

- **Lawyers are very expensive**, although depending on the merits of your case and your financial position you may be able to get legal aid.
- To a certain extent, handing the matter over to a lawyer **takes control of the process out of your hands**. Legal processes are confusing to the average person, happen very slowly, and can involve a number of compromises you may not be willing to make.
- **Things happen very slowly in court** – there may be postponements and adjournments, and it could take several years to resolve your case.
- By going to court, you **hand over the power to make decisions** in your case to another person – the judge – who may or may not see things as you do. The judge’s decision is also final, although in an extreme case you may take the matter on appeal.

However, despite these warnings, and as a last resort, you may still wish to take the matter to court. The person who takes the administrative action to court (the Applicant), through their lawyers, will issue a “**notice of motion**”. This is a notice to the other side (the Respondent) that a court action is being started.

The Applicant will attach affidavits and other relevant documents to the notice of motion. This notice of motion will be served on the administrator (who will be the Respondent in this matter).

The Respondent (or Respondents) must deliver all documentation and records regarding the administrative action to the

relevant registrar or clerk of the court within 15 court days (working days).

While all of the above will be handled by the lawyers involved, the administrator, as **the decision-maker, may be required to make an affidavit** explaining the circumstances and factors that they took into account when making the decision. The attorney or advocate handling the matter for their department will assist them to do this. The administrator will also probably be expected to give the attorney or advocate acting for their department a copy of the person's file and any note they made in it.

## 2. What can the court decide to do?

The AJA has a number of '**remedies**' available – that is, it sets out what a court hearing a matter on review might decide to do. The most important of these are:

- It can **review** the matter and either:
  - o Refer it back to the decision maker (with or without instructions) to reconsider their decision; or
  - o Replace the decision with its own decision.
- It can issue an **interdict** (which is an order preventing the administration from acting or continuing to act).
- It can issue a **mandamus** (which is an order compelling the administration to do something).

You must also consider the possibility that you will lose the case – the court may always decide in favour of the administrator, and allow their decision to stand.

## 3. What about alternatives to judicial review?

Like any court procedure, taking a matter on review can be extremely costly. Luckily, **there are other, cheaper ways of dealing with decisions** that go against people's rights. A minority of NGOs are active in the legal field; for most NGOs, the options which follow will be practical ways that administrative decisions can be challenged.

### a. Internal Appeals

We have already discussed internal remedies, but perhaps it is worth reminding ourselves – many departments and government structures have internal appeal bodies. **These must be used before taking a matter on review** and usually there is no charge for the appeal.

### b. The local level

People could:

- Check if there is a **constituency office of a political party** in their area that may be able to help them;
- **Complain to the area or regional manager of the department** concerned; or
- **Complain to their Ward Counsellor or Provincial MEC** of the relevant department.

### c. Letter to the Minister or Director-General

It can be quite helpful to **write to the Minister or Director-General** in charge of the department concerned. This is cheap and, in some cases, quite effective. Letters should contain similar information to a request for reasons.

### d. NGOs, CBOs and Paralegals

This is the service you are being trained to offer in this workshop. There are many **non-governmental organisations (NGOs), community based organisations (CBOs) and paralegals in South Africa that can help**. Most will do so for free. People should be encouraged to check in their community whether there are any of these they can ask for assistance.

### e. The Public Protector

Where it seems there has been **misadministration** (for example, if it seems someone was bribed to take a decision or was biased or there was any form of corruption involved), people can **approach the Public Protector for assistance**. This is provided free of charge.

Tel: (012) 322 2916 Fax: (012) 322 5093  
Private Bag X677, PRETORIA, 0001  
Email: [publicprotector@hotmail.com](mailto:publicprotector@hotmail.com)  
<http://www.gov.za/structure/justice.htm>

## **f. The South African Human Rights Commission**

Since decisions will involve **possible violations of Section 33 of the Constitution**, people can ask the SAHRC to assist them. Again, this will be done free of charge if the SAHRC believes there is a violation.

Tel: (011) 484 8300 Fax: (011) 484 7146  
Private Bag X2700, HOUGHTON, 2041  
Email: [sahrcinfo@sahrc.org.za](mailto:sahrcinfo@sahrc.org.za) <http://www.sahrc.org.za>

## **g. Legal Aid Board and Justice Centres**

Justice Centres are being set up at courts around the country. These have lawyers available to provide free services to poor people. If there is not yet a Justice Centre in a person's area, they can ask the Legal Aid officer at the nearest Court to give them a lawyer free of charge.

Tel: (012) 481 2700  
(or visit their offices at any court near you)

## **h. Foundation for Human Rights**

The FHR is a foundation established to realize the fulfillment of human rights in South Africa. The foundation supports and sponsors cases that seek to realize basic human rights.

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PO Box 1581, Brooklyn Square, Pretoria, 0001