CASE LAW

The seventh edition of the PAJA newsletter begins with a review of the Constitutional Court case of **Steenkamp NO v Provincial Tender Board of the Eastern Cape (unreported) CCT 71/05, 28 September 2006.** The case does not deal directly with PAJA, but carries implications for administrative law more widely. The SCA judgment in the matter, reported as *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) was reviewed in the sixth edition of this newsletter. The case concerned an action for damages in delict for the loss caused to the applicant by the setting aside of a tender award made by the respondent. The applicant was the liquidator of Balraz (Pty) Ltd, which in 1995 won a tender to provide automated cash payment systems for pensions and other social welfare grants. An unsuccessful tenderer, Cash Paymaster Services (Pty) Ltd, challenged the administrative process by which contract had been awarded to Balraz. The challenge was upheld in the High Court in a judgment reported as *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province and others* 1999 (1) SA 324 (CkH). Before the initial award was set aside, however, Balraz took steps to perform in terms of the contract, and incurred significant expenses in doing so. By the time the respondent called for fresh tenders, following the setting aside by the High Court of its original award, Balraz had been placed in final liquidation. The applicant's case was that, in the absence of any other remedy, Balraz ought to be compensated for the loss it suffered as a result of the respondent's initial reviewable decision.

Although the applicant's claim was couched squarely in the law of delict, the case presented relied on the breach of a public law administrative duty to establish the element of wrongfulness. It was the breach of this duty, the applicant claimed, that founded delictual liability on the part of the respondent. Moseneke DCJ, writing for the majority, outlined the applicant's case:

> "The applicant's claim is couched in the private law of delict. The particulars of claim aver that when the tender board considered the tenders it owed Balraz a duty in law to: (a) exercise its powers and functions fairly, impartially and independently; (b) take reasonable care in the evaluation and investigation of tenders and (c) properly evaluate tenders within the parameters imposed by the tender requirements so as to ensure that the award of the tender was reasonable in the circumstances." (para 27)

(i) The majority judgment

Moseneke DCJ began his consideration of the applicant's case by remarking that it is unlikely that private law remedies will be used to correct breaches of public law. In this regard he mirrored the SCA's approach that where a party is the victim of administrative injustice he or she should seek recourse in administrative law, rather than any other branch of the law (see the SCA judgment at para 27) Moseneke DCJ said in this regard:

> "It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public law remedies and not private law remedies. The purpose of a public law remedy is to pre-empt or correct or reverse an improper administrative function. In some instances the remedy takes the form of an order to make or not to make a particular decision or an order declaring rights or an injunction to furnish reasons for an adverse decision. Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law." (para 29, footnotes omitted)

A finding that the respondent did act in a manner inconsistent with the principles of administrative justice did not therefore aid the applicant's case. The existence of an administrative law duty does not support the inference of a duty for the purpose of the law of delict:

> "In our constitutional dispensation, every failure of administrative justice amounts to a breach of a constitutional duty. But the breach is not an equivalent of unlawfulness in a delictual liability sense. Therefore, an administrative act which constitutes a breach of a statutory duty is not for that reason alone wrongful." (para 37)

Rather, Moseneke DCJ said, the existence of a duty the breach of which would attract delictual liability depends on a "value judgment embracing all the relevant facts and involving what is reasonable and, in the view of the court, consistent with the common convictions of society." (para 39) The applicant contended that, because Balraz had no alternative remedy by which it could seek to mitigate or make good its loss, the legal convictions of the community and the values of governmental transparency and accountability required that a delictual action lie against the respondent (para 43). Moseneke DCJ disagreed, and dismissed the appeal. Three reasons for this conclusion appear from the judgment. The first is that Balraz was not without recourse after the setting aside of the respondent's initial award. On the contrary, Moseneke DCJ stated, Balraz was free to tender again, along with all other companies that wished to present a tender for the consideration of the tender board (para 49). The second reason is that Moseneke DCJ could see no difference in the positions of a successful tenderer and an unsuccessful tenderer. The SCA case of *Olitzki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA) held that an unsuccessful tenderer could not claim damages for the loss of profits occasioned by the decision of a tender board subsequently set aside on review. To allow such a claim, Cameron JA held in that case, would impose a double burden on the state:

> "Certainly the contention that it is just and reasonable, or in accord with the community's sense of justice, or assertive of the interim Constitution's fundamental values, to award an unsuccessful tenderer who can prove misfeasance in the actual award its lost profit does not strike me in this context as persuasive. As the plaintiff's claim, which amounts to more than R10 million, illustrates, the resultant imposition on the public purse could be very substantial, involving a double imposition on the State, which would have to pay the successful tenderer the tender amount in contract while paying the same sum in delict to the aggrieved plaintiff. As a matter of public policy the award of such an entitlement seems to me to be so subject to legitimate contention and debate as to impel the conclusion that the scheme of the interim Constitution envisaged that it should be a matter for decision by the bodies upon whom the legislative duties…were imposed [by relevant legislation]. In these circumstances to infer such a remedy judicially would be to venture far beyond the field of statutory construction or constitutional interpretation." (*Olitzki,* para 30 footnotes omitted)

Moseneke DCJ held in this case that

> "it is not justified to discriminate between tenderers only on the basis that they are either disappointed tenderers or initially successful tenderers. To do so is to allot different legal rights to parties to the same tender process. There is no justification for this distinction particularly because ordinarily both classes of tenderers are free to tender again should the initial tender be set aside." (para 54)

Accepting that *Olitzki* was correct and that an action for damages does not lie at the instance of an unsuccessful tenderer, Moseneke DCJ held that the same principles barred an action for damages at the instance of a successful tenderer.

The third reason given by Moseneke DCJ was essentially that Balraz was the author of its own loss. Had Balraz been more circumspect in its expenditure and more careful in crafting contractual safeguards against loss, Moseneke DCJ suggested, it would not have found itself facing irrecoverable out-of-pocket expense. He held:

> "On the facts, Balraz wasted no moment to accept the tender award. But once the order to supply goods and services was made by the Department, Balraz should have curbed its commercial enthusiasm as it was well within its right to require that its initial expenses not lead to its financial ruin should the award be nullified. Balraz unnecessarily chose the more hazardous course which is to incur mainly salary expenses of its directors without fashioning an appropriate safeguard. Its loss could have been easily curbed by prudent conduct and precaution." (para 52)

In concluding, Moseneke DCJ said:

> "In all the circumstances I am satisfied that in considering the tenders submitted by Balraz and others, the tender board did not owe Balraz a duty of care and therefore its conduct in [awarding] the tender was not wrongful. I cannot find public policy considerations and values of our Constitution which justify adapting or extending the common law of delict to recognise a private law right of action to an initially successful tenderer who has incurred a financial loss on the strength of the award which is subsequently upset on review by a court order." (para 56)

(ii) The dissenting judgment

A dissenting judgment written by O'Regan J and Langa CJ, concurred in by Mokgoro J, disagreed with Moseneke DCJ on each of the three reasons on which his judgment rested. The dissenting judges pointed out that there is indeed an important difference between a successful tenderer and an unsuccessful tenderer:

> "An unsuccessful tenderer who considers the tender award to have been unlawful or improper always has a remedy of judicial review to set aside the tender and thereafter to reapply if the tender is re-advertised. A successful tenderer, however, does not have this remedy and indeed is a bearer of obligations to comply with the contractual obligations it undertakes once the tender has been awarded." (para 80)

Until the initial award is set aside, the successful tenderer has no option but to fulfil the obligations imposed on it in terms of the contract. It cannot recover the expenses it incurs as a result of meeting these obligations through public law remedies. The judges went on to emphasise the difference between *Olitzki* and this case:

> "In our view, the notion that a successful tenderer should be entitled to recover for actual money spent in good faith by it in pursuance of contractual obligations is quite different to an unsuccessful tenderer being able to recover fully those profits it cannot realise as a result of an improper tender award. The former entitles an applicant to reimbursement for expenses it undertook for the benefit of the government. The latter does in a real sense constitute a 'windfall' claim, as the disappointed tenderer will not need to do anything other than litigate to put itself in the position it would have been in if it had performed the contract." (para 84)

On the basis of these differences, much of the reasoning of *Olitzki* would be irrelevant to this case.

> As to Moseneke DCJ's argument that the initially successful tenderer can simply submit a fresh tender if the initial award is set aside, O'Regan J and Langa CJ pointed out that doing so would in no way make good the loss of out of pocket expenses incurred in performance of the initial contract (para 88). Submitting a fresh tender is no remedy at all for the loss suffered as a result of the setting aside of the first contract.

Finally, O'Regan J and Langa CJ disagreed with Moseneke DCJ's suggestion that Balraz had to bear the consequences of its own commercial enthusiasm, and should have taken steps to ensure that it would be compensated for loss should the award of the contract by the respondent be set aside.

> "Underlying [this consideration] is the principle that it would be an undesirable consequence for the performance of government contracts, were successful tenderers to be anxiously looking over their shoulders in case their contract should subsequently be declared void. Moseneke DCJ impliedly criticises the applicant (it 'should have curbed its commercial enthusiasm') for being quick off the starting blocks in seeking to perform its contractual obligations. We cannot agree. In our view, it would be highly undesirable to suggest that a successful tender applicant should hesitate before performing in terms of the contract, in case a challenge to the tender award is successfully brought. Such a principle, in our view, would undermine the constitutional commitments to efficiency and the need for delivery which are of immense importance to both government and citizens alike." (para 83, footnotes omitted)

Similarly, the minority expressed scepticism as to whether a successful tenderer is in a position to demand from the government agency with which it contracts that its interests be protected in the event that the contract be set aside on review (para 89). In the absence of any evidence on this point, the minority did not accept Moseneke DCJ's view.

(iii) Sachs J's separate concurrence

Sachs J concurred in the judgment of Moseneke DCJ, but wrote a separate judgment explaining his view that PAJA was relevant to the determination of the dispute despite the fact that all events material to the case occurred prior to the coming into operation of PAJA. In section 8(1)(c)(ii)(bb) PAJA envisages that compensation may in exceptional circumstances be an appropriate remedy for a failure of administrative justice. Noting that PAJA is legislation giving effect to and concretising constitutional rights to administrative justice, Sachs J said that it has always been possible to award monetary compensation as a remedy for breaches of administrative justice:

> "The provision in PAJA to the effect that in special circumstances a court reviewing administrative action could award compensation, did not invent the public law remedy it articulates. On the contrary, it gave precise expression to a remedy already implicit in the interim Constitution and, later, in the final Constitution." (para 99)

The existence of a public law remedy capable of making good monetary loss, Sachs J said, renders it unnecessary to stretch the remedies of the private law of delict "beyond . . . traditional limits" (para 100). Sachs J concluded by lamenting the fact that this public law remedy was not pleaded in this case. Had it been he said, "the problems acknowledged in the minority and majority judgments could have been resolved in a fair, balanced and practical way." (para 101)

PROMOTION OF ADMINISTRATIVE JUSTICE ACT 3 OF 2000

Section 1 – Administrative action defined

In ***Platinum Asset Management (Pty) Ltd v Financial Services Board and Others; Anglo Rand Capital House (Pty) Ltd and Others v Financial Services Board and Others*** **2006 (4) SA 73 (W)** (see below under "Section 7 – Procedure on review", "Section 9 – Variation of time", "Common-law review" and "Section 1 of the Constitution – the doctrine of legality"), the applicants did not seek to rely on PAJA. Rather, they based their application for review directly on section 1(c) of the Constitution and the doctrine of the rule of law. The facts of the case are dense, and only key aspects of the factual matrix need to be extracted here. Section 3(1) of the Inspection of Financial Institutions Act 80 of 1998, read with section 445 of the Stock Exchange Control Act 1 of 1985 ("SECA") and section 26 of the Financial Markets Control Act 55 of 1989 ("FCMA") authorise the chief executive officer ("the CEO") of the Financial Services Board ("FSB") to authorise inspection of the affairs of a financial institution or associated institution. The applicants were companies believed to be carrying on operations buying and selling shares on behalf of paying clients on various international stock exchanges without the necessary approval in terms of SECA. On the basis of this belief, the CEO authorised inspections of the applicants, which inspections subsequently took place. The applicants sought the review and setting aside of the decision to authorise an inspection on the basis that: (i) the inspection was ultra vires the powers conferred in section 3(1) because the applicant companies were not "financial institutions" or "associated institutions" within the meaning of section 3(1); (ii) the authorisation made was vague and overbroad; (iii) the investigation was initiated at the behest of a foreign regulating authority and the purpose of the authorisation, in seeking to ensure compliance with the laws of that country, was ulterior; (iv) the inspectors responsible for carrying out the investigation were not independent; and (v) that the investigation was ultra vires because the FSB is empowered to investigate only contraventions of laws supervised by the FSB, namely laws relating to financial institutions. There are thus two sets of actions against which the applicants complain. The first is the decision of the CEO to authorise inspections; and the second relates to the actions of the inspections themselves. Jajbhay J recognised this distinction, and held that while the CEO's decision would not amount to administrative action within the meaning of section 1 of PAJA, whether the actions of the inspectors would was a separate inquiry.

> "It was common cause that the registrar's action contemplated in s 3(1) of the new Inspection Act in terms whereof the registrar may at any time instruct an inspector to carry out an inspection of the affairs or any part of the affairs of a financial institution or associated institution did not constitute an 'administrative action'. To my mind this view is a correct one. The reason being firstly, an inspector duly appointed has no power other than to investigate facts. Secondly, as far as the privacy rights are concerned, the instruction does not invade such rights because, as Mr Rogers [counsel for the first and third to eight respondents] correctly points out, the inspector might decide not to use s 4 [dealing with the powers of inspectors in relation to institutions] in the course of the inspection. Whether particular conduct constitutes 'administrative action' depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so. The conduct of the inspectors in carrying out their daily functions would translate into 'administrative action'.
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> The applicants contended that they did not rely on their challenge of the FSB respondents' decisions on PAJA, because they accepted that a decision in terms of s 3(1) of the new Inspection Act to appoint an inspector did not meet the definitional requirements of 'administrative action' as defined in s 1 of PAJA because it is not a decision 'which adversely affects the rights of any person and which has a

direct, external legal effect'. Accordingly, it was contended on behalf of the applicants that all the grounds of challenge brought by the applicants, as they go to the legality of the decision, can be brought directly under s 1(c) of the Constitution of the Republic of South Africa, 1996, even though the decision does not constitute 'administrative action' as defined in PAJA.

It is important to determine whether the actions of the inspectors constituted an 'administrative action'. Platinum's initial application was for the review of the registrar's decision to appoint the inspectors, as well as a constitutional attack of the impugned sections. Platinum's first attack on the actions of the inspectors was in terms of an amendment granted at the hearing on 14 November 2005. If the actions of the inspectors constituted an 'administrative action' then the time-periods contemplated by s 7(1) of PAJA had long expired, and the applicants were out of time. In addition, if the actions of the inspectors constituted an 'administrative action', then in terms of s 7(2) of PAJA the applicants failed to exhaust their internal remedies in the form of the appeal in terms of s 26(2) of the FSB Act." (paras 43-45)

As to the meaning of "administrative action" itself, Jajbhay J affirmed the comments made by the SCA in *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) (reported in the 5th edition of the PAJA Newsletter) that rights need only be affected, rather than affected adversely, in order to meet the definitional standards of section 1 of PAJA.

"In *Grey's Marine Hout Bay (Pty) Ltd* in para [23] Nugent JA stated:

'While PAJA's definition purports to restrict administrative action to decisions that, as a fact "adversely affect the rights of any person", I do not think that a literal meaning could have been intended. For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from the construction that has until now been placed on s 33 of the Constitution. Moreover, that literal construction would be inconsonant with s 3(1), which envisages that administrative action might or might not affect rights adversely. The qualification, particularly when seen in conjunction with the requirement that it must have a "direct and external legal effect", was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals.'" (para 47)

Jajbhay J concluded his discussion of the definition of administrative action by pointing out that there is no distinction in our law between "administrative action" as defined in PAJA and "administrative action" within the meaning of section 33 of the Constitution. An applicant for review, the judge held, cannot seek to circumvent the procedural hurdles of section 1 of PAJA by relying directly on the provisions of section 33 of the Constitution.

"The distinction which the applicants seek to draw between administrative action under PAJA and administrative action under the Constitution is an illusionary one. The applicants attempt to draw distinction between s 33 of the Constitution and PAJA simply to avoid the procedural requirements contemplated by PAJA. The exercise of their powers in terms of s 4 and s 5 of the new Inspection Act can be nothing other than an 'administrative action'. The inspectors are exercising their statutory powers that may well affect rights, interests or legitimate expectations of the applicants. See *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC) (2005 (4) BCLR 347) in para [99]: s 33 of the Constitution guarantees to everyone the right to administrative action that is lawful, reasonable and procedurally fair. PAJA was enacted to give effect to s 33 of the Constitution. PAJA cannot be used to evaluate a constitutional challenge; however, a constitutional challenge must be evaluated under s 33 of the Constitution. Accordingly, PAJA comes into the picture when an applicant seeks to review administrative action. A person contending to review any administrative action must now base the cause of action on PAJA. Statutes that authorise administrative action must be read together with PAJA, unless upon a proper construction, the provisions of the statutes in question are inconsistent with PAJA." (para 50)

Jajbhay J considered the definitional implications of PAJA only in order to address the respondents' point in limine that the applicants' review application should be non-suited for failing to comply with the section 7 procedures for review. He said at para 51, right after concluding that the inspectors' conduct was administrative action, that "It is for the above reasons that s 7(1) and 7(2) of PAJA find application in the present matter" (para 51). Jajbhay J did not, however, have regard to PAJA in deciding the merits of the matter. Instead, he seems to have accepted the applicants' reliance on section 1(c) of the Constitution and decided the matter on the basis of the broad principles of legality. Our courts have been clear in stating that if PAJA applies to a case, its provisions

must be determinative of the merits of the case (see *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC), at para 26, and *Minister of Health and Another v New Clicks SA (Pty) Ltd and Others (Treatment Action Campaign and Innovative Medicines SA as Amici Curiae)* 2006 (1) BCLR 1 (CC), per Chaskalson CJ at para 95, Ngcobo J at paras 436-6 and Sachs J at para 585). It is odd, then, that Jajbhay J applied section 7 of PAJA to the procedural aspects of the case without considering PAJA in determining the merits of the case.

***Klein v Dainfern College and Another* 2006 (3) SA 73 (T)** (see also under section "Common-law review – Procedural fairness" below) involved an application for review of disciplinary proceedings. The applicant was employed, by means of a contract of employment, by the first respondent, a private high school in Johannesburg. The contract of employment incorporated terms and conditions of service. These terms and conditions of service referred also to a certain "college disciplinary procedure and code" (para 2). The applicant sought to review a decision made by a disciplinary hearing constituted in terms of the college disciplinary code, by which she was found guilty of misconduct and given a formal written warning. In response to the applicant's argument that the court was not entitled to review a decision taken by a domestic tribunal created by contract, Claassen J said:

> "Where one deals with a domestic tribunal created by contract, the elementary principles of natural justice may still be applicable despite the advent of the constitutional era. It has been stated as far back as 1942 in *Jockey Club of South Africa and Others v Feldman* 1942 AD 340 at 351 that Courts can interfere in the decision of a domestic tribunal which has disregarded its own rules or the fundamental principles of fairness." (para 14)

The judge referred to *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) at 645H - 646B and *Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere* 1976 (2) SA 1 (A) at 21G-H, and stated that:

> "A compendium of grounds for review by a court of voluntary associations has been listed as: excess of power exercised by the tribunal; male fides; constitutional irregularity; violation of principles of natural justice, such as improper notice of the charge, lack of complying with audi alteram partem and bias and lack of applying its mind to the matter to be decided. The question in all instances is therefore to establish whether or not the contract incorporates the principles of natural justice." (para 18, footnotes omitted)

Although finding that the proceedings of the disciplinary enquiry would be subject to the principles of natural justice, Claassen J held that PAJA did not apply. The "decision of a domestic tribunal established in terms of a contract", he stated, "does not fall within the definition of 'administrative action' as contained in s 1 of PAJA." (para 29) Section 1 of PAJA defines an administrative action as a decision taken by an organ of state or a natural or juristic person other than an organ of state exercising a public power or function in terms of an empowering provision. Holding that the first respondent was clearly not an organ of state, the judge considered whether the first respondent could be considered to have exercised a public power in terms of an empowering provision:

> "One then has to look at what the definition is of 'an empowering provision'. This term is defined in s 1 of PAJA as meaning 'a law, a rule of common law, customary law, or an *agreement,* instrument or other document in terms of which an *administrative action* was purportedly taken'. The reference to 'an agreement' is governed by the words 'in terms of which an administrative action was purportedly taken'. An agreement or contract is only relevant insofar as it permits of an 'administrative action', which as shown above, refers to actions by an organ of state or natural or juristic persons performing public functions. None of these apply to the present case as neither the first nor the second respondents performed any public function. I therefore conclude that the review cannot be based upon the provisions of PAJA." (para 30)

***Max v Independent Democrats and Others* 2006 (3) SA 112 (C)** (see below under section "Common-law review – Procedural fairness ") concerned a similar question. The first respondent, a political party, expelled from its ranks the applicant, a member of the Western Cape Provincial Legislature, after a disciplinary enquiry found him guilty of certain charges. The disciplinary proceedings and the expulsion were in terms of the first respondent's code of conduct in respect of public representatives of the party (at 116B). The applicant noted an appeal against that decision in terms of the

code of conduct, and approached the court seeking to interdict the first respondent from acting on the outcome of the disciplinary proceedings until the internal appeal had been heard.

Davis J followed the same line of reasoning as Claassen J in the Klein case above, saying:

> "The rules of natural justice have long been applied to decisions of so-called domestic or administrative tribunals. See *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A); *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A). Professor Hoexter in her work *The New Constitutional and Administrative Law vol* 2 at 226 - 7 summarises the position thus:
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> > 'Contracts entered into by private (non-statutory) bodies are generally governed by the principles of private rather than public law, and there is no general presumption as such in favour of natural justice. However, the parties are free to include terms requiring the observance of natural justice; and our courts have often recognised implied terms to this effect, for instance in the important case of *Turner v Jockey Club of South Africa*. Furthermore, for well over a century they have been prepared to apply the requirements of natural justice or fairness in disciplinary settings founded on contract, irrespective of the "public" or "private" nature of the body concerned. Because of the propensity of disciplinary and punitive decisions to cause grave harm to people's reputations and livelihoods, natural justice has been held applicable to the disciplinary proceedings of churches, unions, professional associations (such as the Jockey Club) and other non-statutory bodies. The courts have, of course, recognised that the contract between the parties may exclude natural justice.
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> > As far as public bodies and their public powers are concerned, the common law allows that the contract may vary the usual requirements of fairness or indeed exclude them; but it seems clear that the existence of a contract does not in itself displace the need for fairness.'" (at 117C-H)

Davis J concluded that whether or not PAJA applied to the case would make little difference to the outcome of the case, and made no firm finding in this regard (at 118C-D).

See also the case of ***Diko and Others v Nobongoza and Others* 2006 (3) SA 126 (C)** where Davis J was seized with essentially the same question, and reached the same conclusions.

The definition of "public power" and "public function" were again at issue in ***Tirfu Raiders Rugby Club v SA Rugby Union and others* [2006] 2 All SA 549 (C)** (see below under "Section 3 – Procedural fairness" and "Section 6 – Grounds of review"). In that case, the applicant sought to have a decision of the first respondent reviewed and set aside on the basis that it was procedurally unfair, unlawful and irrational. The legal reasoning of the judgment depends heavily on the facts of the matter, which are set here out in some detail. The decision impugned was a decision taken in July and August 2005 to change the process by which the "top black [rugby] clubs" were selected to play in the Supersport Club Championship at the end of the rugby season each year (para 7.3). Black rugby clubs became eligible to compete in the same club championships as white clubs only in 1992 (para 7.3). Teams qualify to compete in the Supersport Club Championship by winning the competition league in their respective provincial unions. Until 2000, however, it was invariably the "traditionally white rugby clubs" that qualified to play in the Supersport Club Championship (paras 7.4-8). In 2000 a policy was introduced whereby the 6 top black clubs, determined with regard to their positions on their respective logs at the end of the rugby season, would participate with the top rugby teams from each of the fourteen provincial unions in the Club Championship. On 15 July 2005, however, it was decided by the Management Committee of the first respondent that only two black teams, outside of any black teams that qualified as the top teams in their respective provincial unions, would be selected to participate in the Club Championship along with the fourteen provincial club champions. These two teams would be the top black clubs from the North and from the South (paras 8 and 21). The decision was approved by the President's Council of the first respondent (a body made up of the presidents of the various rugby unions in the country) on 29 July 2005 and conveyed to the applicants and other affected parties on 2 August 2005 (paras 8, 9 and 15). The applicant's primary complaint was that the determination of the top black rugby clubs, in terms of the new system, would be made with reference to the log standing as at 1 August 2005. This was inconsistent with past practice whereby the determination was made with reference to the log standings at the end

of the rugby season in September. As it happened, the applicant was not the top black club in its union on 1 August 2005, and was not given an opportunity to compete in the Club Championship. The applicant nevertheless went on to finish as the top black club in its union at the end of the rugby season, as it had previously in all seasons since 2000.

The first definitional point Yekiso J turned his attention to was whether the first respondent exercised a "public power" or performed a "public function" in making the decision at issue (para 24). The judge started by noting that the rugby unions like the applicant are members of provincial rugby unions, which are in turn members of the first respondent. The first respondent exercises authority over its members in terms of its constitution. "The relationship of authority and subordination is clearly evident", Yekiso J held (para 27). The judge continued to say that the public interest in the organisation of rugby in the country is substantial:

> "The public interest in these organisations cannot be over emphasised. There is, in my view, a significant public interest element involved in these organisations to constitute a need to act in a manner that affects or concerns the public as observed by Van Reenen J in *Van Zyl v New National Party and others* [2003 (10) BCLR 1167 (C)]. I am making these observations mindful of what this Court said in *Marais v Democratic Alliance* 2002 (2) BCLR 171 (C) at paragraph 51 in which Van Zyl J made a point that mere public interest in a decision does not make it an exercise of public power or performance of a public function." (para 28)

Public interest was therefore not the determinative factor by which the judge decided the first respondent's actions amounted to the exercise of a public power. Rather, the judge referred to the fact that the first respondent exercised control over the affairs and business of the applicant:

> "The exercise of such power and the performance of such function did not relate to the internal affairs of the first respondent but was directed to the external, independent and autonomous bodies such as the Second, Third and fourth respondents. In my view the conduct of the first respondent complained of is sufficiently public in nature to warrant the application of the provisions of the Promotion of Administrative Justice Act." (para 29)

This case does bear some similarity to the recent Constitutional Court decision in *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and another* 2006 (11) BCLR 1255 (CC) (see below under "Section 1 of the Constitution – the doctrine of legality"). In that case the respondent was an organisation regulating the industry in which the applicant was involved. Although the Micro Finance Regulatory Council is a voluntary organisation, persons can not operate as providers of micro finance without adhering to the rules and conditions stipulated by the Council. The same is largely true in this case: the applicant would not be able to compete in rugby competitions organised by the first respondent and its various affiliated rugby unions without adhering to rules and conditions stipulated by the first respondent. In AAA this element of control was important in determining that the functions and powers of the Council were "public" for the purposes of administrative justice. That reasoning applies similarly to this case.

The second definitional aspect of the case related to whether the action was taken in terms of an "empowering provision". Yekiso J's conclusions in this regard are consistent with Claassen J's comments in ***Klein v Dainfern College and Another* 2006 (3) SA 73 (T) (above):**

> "The phrase 'empowering provision' is defined in section 1 of the Promotion of Administrative Justice Act to mean 'a law, a rule of common law, customary law, or an agreement, instrument, or other document in terms of which an administrative act was purportedly taken'. When the Management Committee determined specific clubs to participate in the play-off games, it purported to exercise a power or purported to perform a function in terms of the constitution of the first respondent. That the Management Committee exceeded its powers does not negate the fact that, in its ordinary day to day business, it derives power and authority from the constitution of the first respondent. It therefore follows, in my view, that the constitution of the first respondent very well constitutes the required empowering provision." (para 30)

The final aspect of the definition of administrative action relevant to the case was whether the applicant held a right that was adversely affected. Yekiso J's comments here illustrate the difficulties of the relationship between section 1 of PAJA and section 3 of PAJA. Section

1 of PAJA, in defining "administrative action", refers only to "the rights of any person". Section 3, however, states that "Administrative action which…affects the rights or legitimate expectations of any person must be procedurally fair". The applicant in this case relied only on a legitimate expectation that the determination of the top black rugby clubs would be made at the end of the season rather than in August. This was the past practice since 2000.

> "Consistent with the aforementioned practice, the applicant had every expectation in the world, as has always been the case in previous years, that the top black club would be determined on the basis of the log positions as at the end of the 2005 rugby season. The applicant, so it is further contended on its behalf, had expected that it would once again be adjudged a top black club at the end of the 2005 rugby season." (para 32)

The applicant therefore contended that "its right, in the form of a legitimate expectation, was adversely affected." (para 33) Yekiso J agreed with this submission:

> "In my view the applicant has succeeded to make out a case that its rights, in the form of legitimate expectation, were adversely affected by the decision of the Management Committee of the first respondent taken on 1 August 2005. In concluding this issue, I thus determine that the Management Committee of the first respondent, in taking the decision it did on 1 August 2005, exercised a public power and performed a public function as contemplated in the definition of "administrative action" as defined in section 1 of the Promotion of Administrative Justice Act." (para 36)

It is plain that section 3 of PAJA requires administrative action affecting rights or legitimate expectations to be procedurally fair. To this extent it must be accepted that Yekiso J's decision to apply section 3 of PAJA to the matter is correct. He said in this regard:

> "I further determine that the Management Committee, to the extent that the decision it took had a potential to affect the applicant's existing rights or a legitimate expectation, failed to afford the applicant an opportunity to make representations and, through this omission, the first respondent violated the provisions of section 3(1) of the Promotion of Administrative Justice Act." (para 37)

Yekiso J also applied the provisions of section 6 of PAJA to the case. Section 6, however, refers only to judicial review of "administrative action" as defined in section 1. On the face of it, there would seem to be no scope for judicial review of decisions that affect only legitimate expectations. This conclusion is complicated by the facts that section 6(2)(c) allows for review of administrative action that is procedurally unfair. Since procedural unfairness must be determined in the light of section 3 of PAJA, which requires administrative action affecting legitimate expectations to be fair, section 6(2)(c) at least contemplates judicial review of action affecting legitimate expectations alone. That conclusion, however, leads to an inescapable contradiction between section 6(2)(c) and the rest of section 6. Yekiso J's judgment evades this contradiction by reading "right" in section 1 widely enough to include legitimate expectations within its scope. This approach certainly avoids the problems created by the definitional inconsistencies of PAJA. Whether it is a reading of PAJA that was intended by the legislature, and whether it is the correct reading of PAJA, are questions that have not yet been answered.

Plasket J was confronted with an unusual argument relating to the public power element of administrative action in the case of ***Police and Prisons Civil Rights Union and others v Minister of Correctional Services and others* [2006] All SA 175 (E)** (see below under "Section 3 – Procedural fairness in administrative action affecting individuals" and "Section 6 – Grounds of review"). The case concerned an application to review a decision by which the second to 76th applicants, members of the first applicant, were dismissed from their employment with the Department of Correctional Services, as well as subsequent decisions confirming that decision. The respondents argued that the decisions did not amount to administrative action as defined in section 1 of PAJA, because they did not amount to an exercise of a public power:

> "It was not contended on behalf of the respondents that the decisions under challenge were not of an administrative nature, that they did not adversely affect rights, or that they did not have a direct, external legal effect. It was argued, however, that the decisions were not administrative actions as defined because they did not constitute the exercise of public power, and this was so because they did not affect the public as a whole. Reliance was placed, in this respect, on the judgment of Cloete JA in *Bullock NO and others v Provincial Government, North West Province and another* [2004 (5) SA 262 (SCA) at para 14], in

> which it was held that a decision by the Premier of the North-West Province to grant a servitude, in perpetuity, to one landowner over a portion of the foreshore of Hartebeespoort Dam, to the exclusion of the public, constituted the exercise of a public power because the dam was a 'valuable recreational resource available to the public at large'". (para 52, footnotes omitted)

Plasket J pointed out, however, that an impact on the public at large is not a necessary condition of an exercise of public power. Many administrative acts do not have a wide impact on the general public. Rather, what makes the power a "public power" is that "it has been vested in a public functionary who is required to exercise it in the public interest, and not in his or her own private interest or at his or her own whim." (para 53) On the facts of this case Plasket J concluded that:

> "In my view, the statutory basis of the power to employ and dismiss correctional officers, the subservience of the respondents to the Constitution generally and section 195 in particular, the public character of the Department and the pre-eminence of the public interest in the proper administration of prisons and the attainment of the purposes specified in section 2 of the Correctional Services Act all strengthen my view that the powers that are sought to be reviewed in this matter are public powers as envisaged by the common law, the Constitution and the PAJA." (para 54, footnotes omitted)

Plasket J also considered the argument that the principles of administrative justice do not apply to employment decisions such as a decision to dismiss employees. Plasket J dealt with two arguments in support of this proposition: first, that the Labour Relations Act 66 of 1995 has been extended to virtually all employment relationships and it is no longer necessary to rely on principles of administrative law in the field of employment in the public sector; and second, that labour law and administrative law may not overlap (para 58). In response, Plasket J said that both lines of argument rest on the fallacious assumption that "because the Constitution has entrenched a fundamental right to fair labour practices, this right trumps every other right, such as the right to just administrative action" (para 59). Whether dismissal decisions in the public sector should be governed exclusively by labour law and not administrative law, Plasket J said, is a matter that should be decided by the legislature rather than the courts:

> "It would have been easy enough for Parliament, when it enacted the PAJA, to include in the long list of exclusions from the definition of administrative action decisions taken by public officials to dismiss employees. It chose not to." (para 59)

As to the second line of argument, Plasket J said that the overlap of one or more branches of law is not unusual in our legal system (para 61). The operation of labour law and the application of the Labour Relations Act to a dispute do not for that very reason exclude the application of PAJA. Further, such a conclusion would be inconsistent with our approach to fundamental rights. Plasket J said:

> "There is nothing incongruous about individuals having more legal protection rather than less, or of more than one fundamental right applying to one act, or of more than one branch of law applying to the same set of facts. This also does not necessarily mean that there is a conflict between the PAJA and the Labour Relations Act which would mean that the latter trumps the former in terms of section 210 of the Labour Relations Act: in my view, the protections afforded by labour law and administrative law are complementary and cumulative, not destructive of each other simply because they are different. Once again, there is nothing incongruous about this." (para 60, footnotes omitted)

Finally, Plasket J noted that the Labour Relations Act itself contemplates that certain employment-related acts will also be administrative acts. Section 157(2) of the Act vests jurisdiction in the Labour Court concurrently with the jurisdiction of the High Court (para 62); and the case of *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA) points out that employment-related acts may give rise to more than one cause of action (para 63).

Bestbier v Chief Magistrate, Stellenbosch, and another **[2006] 2 All SA 598 (C)** (see below under "Section 6 – Grounds of review") concerned a decision by the first respondent to issue a subpoena against the appellant in terms of section 414(2) of the Companies Act 61 of 1973. The appellant sought the review of the decision in terms of section 151 of the Insolvency Act 24 of 1936. The question arose as to whether the decision by the first respondent to issue the subpoena was administrative action for the purposes of section 1 of PAJA. Moosa J, whose judgment was concurred in by Hlophe JP, referred to the case of *Jeeva and Others v Receiver of Revenue, Port Elizabeth*

and Others 1995 (2) SA 433 (SE) where it was held that the proceedings of creditors' meetings in terms of the Insolvency Act are administrative in nature. The judge also referred to the Constitutional Court decision of *Bernstein and Others v Bester and Others* NNO 1996 (2) SA 751 (CC) where the question whether such proceedings could be characterised as administrative was raised but not answered (para 11). The judge therefore chose not to make a formal finding that the first respondent's decision to issue the subpoena amounted to administrative action. The judge instead assumed in favour of the appellant that the impugned decision amounted to administrative action for the purpose of PAJA (para 12).

This finding was not supported by the minority judgment of Van Reenen J, however. He held that the word "review" is used in section 151 of the Insolvency Act in its widest sense to mean an appeal (para 3) "In an appeal of that nature", he went on, "a court of appeal's function is not to consider whether the decision of such an officer is reviewable but whether it is right or wrong" (para 3). For this reason, Van Reenen J found it unnecessary to decide or even consider whether the first respondent's decision amounted to administrative action or not. He said:

> "In the premises, I incline to the view that it is not necessary for the purposes of this appeal to consider whether the second respondent's decision to have authorised and issued the impugned subpoena constituted administrative action or whether the provisions of the Promotion of Administrative Justice Act 3 of 2000 find any application." (para 3)

To Van Reenen J's dissent must be added a further concern. Section 7(2)(a) of PAJA states that no court or tribunal shall review any administrative action in terms of PAJA unless any internal remedy provided for in any other law has first been exhausted. It seems that the review (or appeal) procedure set up by section 151 of the Insolvency Act is a remedy provided for by another law. The review should, it seems, proceed on the basis of that section, rather than on the basis of PAJA. The section 151 review cannot at the same time be governed by the review processes set up by PAJA. This view, however, was not expressed in either of the judgments.

Similar considerations were at play in ***De Beer v Raad vir Gesondheidsberoepe van Suid Afrika* [2006] 4 All SA 21 (SCA).** The appellant had been found guilty of misconduct by a disciplinary committee of the respondent. The committee then recommended to the respondent that it impose certain punishment on the appellant. The respondent, however, did not follow this recommendation and imposed further, more severe punishment on the appellant. The appellant argued that the respondent was bound by the recommendations of the disciplinary committee, and that it was not authorised to impose sanctions on the appellant not recommended by the committee. In not following the committee's recommendations, the appellant argued the respondent had misdirected itself (paras 27-28). The argument relied on by the appellant was that in relation to the disciplinary committee, the respondent occupied a position analogous to that of a court of review in relation to an administrative decision-maker. The respondent, the appellant argued, could disregard the recommendations of the committee only if the committee had misdirected itself or if the recommended sanction was entirely inappropriate (para 28). The court rejected this argument, finding that the committee had itself taken no decision as to the sanction to be imposed. The body responsible for the imposition of a sanction on the appellant was the respondent itself. It could not be said that the respondent was bound to act only as a review tribunal in regard to decisions taken by the committee.

Section 3 – Procedural fairness in administrative action affecting individuals

***Police and Prisons Civil Rights Union and others v Minister of Correctional Services and others* [2006] All SA 175 (E)** (see above under "Section 1 – Administrative action defined", "Section 6 – Grounds of review") concerned the failure of the Department of Correctional Services to adhere to procedures for dismissal established by collective agreement in the Departmental disciplinary code when dismissing the second to 76th applicants (members of the first applicant). Section 3(5) of PAJA was relevant to the case. It allows an administrator to act in accordance with a different procedure when he or she is empowered

by an empowering provision to follow a procedure which is "fair but different" to the procedural fairness requirements set up in section 3(2). Plasket J concluded that the respondents had violated the applicants' rights to procedural fairness by not adhering to the fair but different procedure. He considered an argument that where there is a "fair but different" procedure, the administrator may choose whether to follow these procedures or the "core, minimum requirements" of procedural fairness:

> "It may be suggested that the formulation of section 3(5) gives a decision-maker a choice as to whether to apply the fair but different procedure or the core, minimum procedure specified in section 3(2)(b). That interpretation would not, in my view, be correct. The use of the word 'may' in section 3(5) authorises and permits the utilisation of the fair but different procedure. An interpretation that would allow for a decision-maker to choose between a procedure that provides for extensive procedural rights, on the one hand, and the core, minimum rights to a fair hearing, on the other, and thus deprive affected individuals of procedural protections that they already had, could never have been intended and would not be consistent with the constitutional promise of a fundamental right to just administrative action. It would give the decision-maker a choice to comply with the empowering provision that prescribes the procedure to be followed, or to ignore it. I can see no warrant for such an interpretation." (para 71)

Even if the respondents' actions in this case were to be assessed against the core minimum content of the right to procedural fairness, Plasket J said, the respondents' actions would have violated the applicants' rights to procedural fairness:

> "[T]he notice of 48 hours cannot, by any stretch of the imagination, be said to be 'adequate notice of the nature and purpose of the proposed administrative action, as envisaged by section 3(2)(b)(i) of the PAJA, when it is considered that the purpose of this requirement is to give proper effect to the actual opportunity to be heard. In other words, this requirement does not serve an end in itself. Its purpose is to allow the affected person a proper opportunity to consider his or her position and prepare his or her defence. Similarly, the short period of notice cannot be said to be a 'reasonable opportunity to make representations', as envisaged by section 3(2)(b)(ii) of the PAJA. The notice that the applicants were given did not inform them of 'any right of review or internal appeal' as it was required to do in terms of section 3(2)(b)(iv) of the PAJA, and it also failed to inform them of their right to 'request reasons in terms of section 5' of the PAJA, as it was required to in terms of section 3(2)(b)(v) of the PAJA." (para 73, footnotes omitted)

The facts of ***Tirfu Raiders Rugby Club v SA Rugby Union and others*** **[2006] 2 All SA 549 (C)** (see above under "Section 1- Administrative action defined" and below under "Section 6 – Grounds of review") are set out above. The applicant complained that by not affording the applicants a hearing before the decision was made the first respondent had acted procedurally unfairly (para 16). Yekiso J upheld this submission (para 37).

Anglo Platinum Management Services (Pty) Ltd and others v Minister of Safety and Security and others **[2006] 4 All SA 30 (T)** (see below under "Section 1 of the Constitution – The doctrine of legality") concerned a challenge to the validity of certain regulations. The applicants, providers of private security services, were granted exemptions by the first respondent from requirements to register as security service providers in terms of the private Security Industry Regulation Act 56 of 2001. Regulations promulgated after the grant of the exemptions limited the period of validity of the exemptions. Van Oosten J held:

> "In the present matter it is common cause that no representations were invited prior to the promulgation of the regulations. The applicants, undoubtedly being entitled thereto, were therefore deprived of the opportunity to make representations or to be heard before the regulations were promulgated. The public consideration process as contemplated in section 4(1) of PAJA, was moreover not followed. The first respondent in order to pass constitutional scrutiny should at least have observed these requirements prior to promulgation of the regulations. The action taken by the first respondent clearly fails to pass this threshold which is fatal to the validity of the impugned regulations. I am accordingly of the view that the procedural unfairness in itself renders those regulations invalid." (para 26)

Section 6 – Grounds for review

Section 6(2)(a)(i) – administrator not authorised by empowering provision

Police and Prisons Civil Rights Union and others v Minister of Correctional Services and others **[2006] All SA 175 (E)** (see above under "Section 1 – Administrative action defined", "Section 3 – Procedural fairness in

administrative action affecting individuals" and further under this section) concerned the dismissal of the second to 76th applicants (the employee applicants), members of the first applicant, from the employ of the Department of Correctional Services. The employee applicants were dismissed following their refusal to report for duty over the Christmas and New Years' holidays. The primary complaint was that the procedure of their dismissals was inconsistent with the procedures established in the department's disciplinary code. These procedures were agreed upon by the Department and the first applicants and other trade unions as part of a collective agreement, and recorded in a resolution of the Departmental Bargaining Council (para 19). Plasket J concluded on the facts that the procedures set out in the code had been ignored in a number of ways:

> "First, the applicants were never informed of a formal investigation into their conduct, as they were entitled to be in terms of clause 7.1. Secondly, they were given 48 hours within which to make representations as to why they should not be dismissed, whereas clause 7.3.1 required the giving of at least seven working days notice of the hearing. Thirdly, they were never informed of the "date, time and venue of the hearing", as they were entitled to be in terms of clause 7.3.2 and neither did the notice take the form of annexure B, as it was required to do, in terms of the same section. They were not informed of their rights, which is a further requirement of clause 7.3.2. Fourthly, they were not furnished with summaries of the investigation report or copies of statements made by witnesses. Both are required in terms of clause 7.3.4 whenever there has been a formal investigation, as there should have been in this case as it involved serious allegations of misconduct. (Note, however, that when the applicants' representative complained of this on appeal, the initiator said that no investigation had been conducted and no statements had been taken from witnesses.)" (para 32)

PAJA defines an "empowering provision" as "a law, rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken". The procedure set out in the Department's disciplinary code is an empowering provision for the purposes of PAJA (para 65). Moreover, Plasket J noted, the Department was bound in law to adhere to the procedures set out, and in fact had no lawful authority to act in any way not authorised by the collective agreement:

> "Administrators may only exercise powers that have been lawfully reposed in them, and when they exercise such powers they are required to stay within the four corners of their empowerment. They have no free hand to stray outside of the boundaries of their empowerment. The fifth respondent only had power to discipline in terms of the prescribed procedure. He had no power to abandon it and discipline employees in terms of an ad hoc procedure that he decided was expedient in the circumstances. By doing so he violated the fundamental rights of the applicants to lawful administrative action because he was not authorised to take the administrative action that he did. The ground of review contained in section 6(2)(a)(i) of the PAJA has thus been established." (para 66)

Section 6(2)(b) – failure to comply with mandatory and material procedure or condition

In ***Police and Prisons Civil Rights Union and others v Minister of Correctional Services and others*** **[2006] All SA 175 (E)** (see above under "Section 1 – Administrative action defined", "Section 3 – Procedural fairness in administrative action affecting individuals", and above and below under this section) Plasket J defined the scope of section 6(2)(b) as follows:

> "It recognises as grounds of review: first, non-compliance with mandatory formalities such as the promulgation of subordinate legislation, which is a necessary precondition for its validity; secondly, failures to apply mandatory procedural rules such as time limits for lodging claims for export incentives, for instance; and thirdly, non-compliance with prescribed preconditions – or jurisdictional facts – which serve as the trigger for the exercise of a discretionary power." (para 67)

In this case several employees of the Department of Correctional Services had been dismissed, but the procedures for dismissal prescribed in the collective agreement between the Department and several trade unions including the first applicant had not been adhered to. Plasket J therefore concluded:

> "The law required him [the fifth respondent] to comply with the prescribed procedure: it was hence mandatory and material. His failure to comply with this procedural precondition of the power to discipline the applicants constituted a violation of their right to lawful administrative action, rendering the fifth respondent's decision to dismiss a nullity. Looked at from a different angle, the fifth respondent's decision was a nullity because he

> had no authority to discipline the applicants without, for instance, first giving them reasonable written notice of the disciplinary hearing of at least seven working days, and a statement of the alleged transgressor's procedural rights as well as a summary of the investigation report (in the event of a formal investigation) and a copy of the statements made by any witnesses if such statements exist). These procedural preconditions for the exercise of his power to dismiss were entirely absent." (para 68, footnote omitted)

The appeal process that followed the dismissal, in terms of the Departmental disciplinary code, was similarly "robbed of jurisdiction…because the preconditions for [the appeal tribunal's] jurisdiction were absent: a valid disciplinary hearing at first instance had not been held and for this reason no record of the evidence existed on which an appeal could be based." (para 69)

Self and others v Munisipaliteit van Mosselbaai and another **[2006] 2 All SA 518 (C**) (see further under this section and under "Section 8 – Remedies") concerned an application to set aside a decision of the first respondent approving the second respondent's plans for the construction of a residential buildings in the town of Tergniet. The first ground on which the applicants sought to impugn the first respondent's decision was that it had failed to comply with the mandatory and material conditions prescribed by the National Environment Management Act 107 of 1998 (para 8). Section 24(1) of the Act states:

> "(1) In order to give effect to the general objectives of integrated environmental management laid down in this Chapter, the potential impact on the environment of listed activities must be considered, investigated, assessed and reported on to the competent authority charged by this Act with granting the relevant environmental authorisation."

The applicant's complaint was that the first respondent, despite knowledge that the natural vegetation on the dunes at the site of the proposed construction might be threatened, did not carry out or require an environmental impact study to be carried out before approving the second respondent's plans (para 8). The respondents, however, put very little evidence before the court to show that they had had regard to the general objectives of integrated environmental management when making the decision (para 17). Blignault J held:

> "Word Van Eeden [first's respondent's director of technical services] (en dus Paxton [first respondent's building control official]) se redes betreffende die ekologiese oorwegings gemeet teen die kriteria wat in hierdie uitsprake gestel is, dan is dit myns insiens duidelik dat die redes nie toereikend is nie. Die redes maak dit glad nie duidelik welke feite in ag geneem is nie en dit meld ook nie waarom Paxton tot die betrokke gevolgtrekking gekom het nie." (para 19)

In the absence of sufficient reasons, the judge concluded that the first respondent had failed to take account of the imperatives of section 24 of the National Environment Management Act, and that the decision should be set aside for that reason.

Section 6(2)(c) – procedural fairness

In ***Police and Prisons Civil Rights Union and others v Minister of Correctional Services and others*** **[2006] All SA 175 (E)** (see above under "Section 1 – Administrative action defined", "Section 3 – Procedural fairness in administrative action affecting individuals", and above under this section) Plasket J held that section 6(2)(c) must always be read together with section 3 of PAJA:

> "By failing to apply a disciplinary procedure that was agreed upon – and was fair but different to the core, minimum procedural rights envisaged by section 3(2)(b) of the PAJA – the fifth respondent violated the applicants' rights to procedurally fair administrative action, as contemplated by section 6(2)(c) of the PAJA. This provision must be read with section 3, which defines with more precision what the right to a fair hearing means." (para 70)

Section 6(2)(f)(i) – decision not authorised by empowering provision

In ***Vorster and Another v Department of Economic Development, Environment and Tourism, Limpopo Province, and Others*** **2006 (5) SA 291 (T)** (see below under "Section 6(2)(e)(iii) – review for rationality"), the applicant complained that the conditions attached to the granting of a permit to hunt elephant were unlawful. The relevant statutory framework is established by the Limpopo Environment Law Management Act 7 of 2003 and the Convention on International Trade in Endangered Species (CITES). In terms of the Limpopo Act, hunting permits can be issued which allow the export of hunted species or trophies thereof. These are

known as "CITES permits". A permit that allows hunting of a species but does not allow the export of species or parts thereof is known as a "non-CITES permit". The applicant in this case was issued a non-Cites permit for the hunting of elephants that attached the condition that only local, and not foreign hunters, would be allowed to hunt for elephants (para 3). The applicant's objection was that CITES deals only with the removal from the country of hunting species or trophies, and that the issuing of a non-CITES permit did not require that only South African be allowed to hunt in terms of the permit (para 10). Further, he made it clear that no part of the hunted elephants would be exported (para 11). Fabricius AJ accepted the applicant's argument, holding that the Limpopo Act did not authorise the attachment of the condition that the hunter be a South African:

> "The envisaged hunt and the shooting of these elephants has nothing to do with ch 9 of the Act, which deals with the Convention and which clearly requires a so-called CITES permit only when such species is to be exported or removed from the province to a foreign country. It is, in my view, irrelevant whether a resident or non-resident person pulls the trigger. In my view, the respondents have misconceived their powers in this context and have imposed a condition that they are not lawfully entitled to impose". (para 17)

In ***Self and others v Munisipaliteit van Mosselbaai and another*** **[2006] 2 All SA 518 (C)** (see above under this section and under "Section 8 – Remedies") the court considered an argument that the first respondent's decision to approve the second respondent's building plans was unlawful because it conflicted with section 7(1)(b)(ii)(aa)(aaa), (bbb) and (ccc) of the National Building Regulations and Building Standards Act 103 of 1977 (para 25). Those sections requires a local authority from whom approval for construction is sought to refuse such approval where the proposed construction will "probably" disfigure the area, derogate from the value of nearby properties or be unsightly or objectionable. Evidence was led in respect of each of these three considerations, but Blignault J did not ultimately decide the issue on the evidence as presented. The determinative factor was that the administrative authority responsible for considering the application for approval had not supplied reasons sufficient to show that it had paid attention to the considerations:

> "Ek kan nie bloot op die eedsverklarings voor my bepaal of MacGregor of Swanepoel se waardebepaling aanvaar moet word nie. Die primêre vraag in hierdie verband is egter of Paxton behoorlike aandag aan hierdie aspek van die saak geskenk het toe hy die bouplanne goedgekeur het. Grondeienaars soos tweede en derde applikante is geregtig daarop dat 'n persoon in Paxton se posisie sy aandag eerlik en behoorlik aan hierdie vraag bestee. Ongelukkig, soos reeds gemeld, is die redes wat hy met betrekking tot hierdie aspek van die saak verskaf het, ook gebrekkig. Die afleiding is in die omstandighede onvermydelik dat hy dit ook nie behoorlik oorweeg het nie.
>
> Eerste respondent se goedkeuring van tweede respondente se bouplanne moet dus ook op hierdie tweede grond, die estetiese oorwegings, tersyde gestel word." (paras 32-3)

The applicants also argued that the first respondent's decision should be set aside because it was in contravention of section 7(1)(b)(ii)(bb) of the National Building Regulations And Building Standards Act, which requires a local authority to refuse approval if the proposed construction will probably be dangerous to life or property. Blignault J found in this respect, though, that the respondents had put enough evidence before the court to allow him to decide that the proposed construction posed no danger to life or property. The factual dispute could thus be decided on the *Plascon-Evans* rule (para 48, referring to *Plascon-Evans Paints Ltd v Van Riebeeck Paints* (Pty) Ltd 1984 (3) SA (A)).

In ***Tirfu Raiders Rugby Club v SA Rugby Union and others*** **[2006] 2 All SA 549 (C)** (see above under "Section 1- Administrative action defined", "Section 3 – Procedural fairness" and further under this section) the first respondent made a decision changing the system by which black rugby teams were chosen to participate in the Supersport Club Championship along with the fourteen provincial club champions. The system previously used selected the 6 top black teams based on their positions in their respective league logs at the end of the season. The new system, however, selected only two teams on the basis of log positions before the end of the season. Yekiso J held that the new system could be

reviewed on the basis of section 6(2)(f)(i) (para 39). Yekiso J also considered the argument that the Chief Operations Officer, an employee of the Management Committee of the first respondent, had determined the two clubs to be selected in terms of the new system; but that he was authorised by neither the Management Committee nor the President's Council (an organ of the first respondent) to do so (para 23). It is thus unclear whether the decision impugned as being ultra vires was the decision to adopt the new system, or the decision to determine the two top black rugby clubs in terms of the new system. At the end of the judgment, however, Yekiso J makes the finding that "the approach adopted by the Management Committee of the first respondent…constitutes a discriminatory and inappropriate approach, and is thus unconstitutional or unlawful as contemplated by section 6(2)[(f)](ii) of [PAJA]" (para 39). Yekiso J does not, however, indicate why the system is discriminatory or inappropriate, nor whether or how the decision to adopt the system exceeded the powers of the first respondent or contravened another law.

The case of ***MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and Another*** **[2006] 2 All SA 17 (SCA)** (see below under "Section 7 – procedure on review" and "Section 6(2)(f)(ii) – rationality review") concerned an appeal against a decision of the Johannesburg High Court setting aside the applicant's decision to refuse to grant an authorisation to the respondents for the construction of a filling station (the decision of the court a quo is reported as 2004 (5) SA 161 (W)). Authorisation is required by section 22(1) of the Environment Conservation Act 73 of 1989 in respect of any activity that he Minister has identified as potentially detrimental to the environment. The Minister identified by notice a range of activities that fall into this category, including, in item 1(c)(ii):

> "The construction, erection or upgrading of –
> . . .
> (c)
> with regard to any substance which is dangerous or hazardous and is controlled by national legislation–
> . . .
> (ii)
> manufacturing, storage, handling, treatment or processing facilities for any such substance". (para 9)

To assist the Department in the evaluation of applications for authorisation as well as applicants themselves, the Department drew up and published a set of guidelines. These guidelines indicated that authorisation for the construction of a filling station would not normally be granted where the proposed site is within 100 metres of residential areas or within 3 kilometres of another filling station (para 5). The respondents' argument before the court below had been that the guidelines issued by the Gauteng Department of Agriculture, Environment and Land Affairs were unlawful and that a decision made on the basis of the application of the guidelines would be tainted by this unlawfulness (para 8). In granting the review application, the court a quo said that the Department has the power to regulate only the environmental aspects of the storage and handling of petroleum products, rather than the commercial or general aspects of filling stations. The SCA's response, per Cachalia AJA, was to examine the legislative framework within which the guidelines were drawn up, in order to establish if they were within lawful bounds:

> "The first steps that were taken to protect the environment after the advent of the Constitution were the promulgation of regulations under section 21(1) of the ECA that listed the activities that are potentially detrimental to the environment and set out the rules regarding the compilation of environmental impact assessments relating to such activities. This was followed by the enactment of NEMA, which gives effect to section 24 of the Constitution. Of particular importance is NEMA's [National Environmental Management Act 107 of 1998] injunction that the interpretation of any law concerned with the protection and management of the environment must be guided by its principles. At the heart of these is the principle of 'sustainable development', which requires organs of state to evaluate the 'social, economic and environmental impacts of activities'. This is the broad context and framework within which item 1(c)(ii) is to be construed." (para 15, footnotes omitted)

The judge went on:

> "To attempt to separate the commercial aspects of a filling station from its essential features is not only impractical but makes little sense from an environmental perspective. It also flies in the face of the principle of sustainable development, which is referred to above. The adoption of such a restricted and literal approach, as contended for

> by the respondents would defeat the clear purpose of the enactment." (para 16)

The belief that the appellant and her department are empowered to consider only the strictly environmental aspects of proposed filling stations was held to erroneous, and the argument that the guidelines were unlawful, resting on this erroneous belief, was rejected.

Note: The judgment did not mention specifically the provisions of PAJA in respect of lawfulness, although it did mention PAJA in regard to complaints against the rationality of the appellant's decision. Given the facts of the case section 6(2)(e)(i) of PAJA, which allows for review for administrative action taken for a reason not authorised by the empowering provision, could also have been relied on.

Section 6(2)(f)(ii) – rationality review

In ***Vorster and Another v Department of Economic Development, Environment and Tourism, Limpopo Province, and Others*** **2006 (5) SA 291 (T)** (see above under "Section 6(2)(f)(i) – decision not authorised by empowering provision") it was argued that the decision under review was not rationally connected to the purposes of the empowering legislation. The case concerned a challenge to the conditions attached to a hunting permit granted to the applicant in terms of the Limpopo Environment Law Management Act 7 of 2003. The impugned condition was that only a local hunter be allowed to hunt the targeted species. Fabricius AJ said in this regard:

> "I fail to understand how the objectives of the Act, namely to manage and protect the environment in the province, in the given context, will be achieved if a resident hunter shoots the designated elephant." (para 11)

On this logic the decision would have fallen foul of section 6(2)(f)(ii)(bb) of PAJA, which states that administrative action is reviewable if it is not rationally connected to the purpose of the empowering provision. The judge did not, however, make any firm finding on the issue, preferring to decide the lis before him on the basis of unlawfulness. It appears in any case that the applicant relied instead on section 6(2)(f)(ii)(aa) of PAJA, submitting that the action was not rationally connected to the purpose for which it was taken:

> "It was accordingly submitted that the application of the so-called policy on the present facts, apart from not being authorised by the empowering provision, was also not rationally connected to the alleged purpose for which it was taken". (para 11)

In ***MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and Another*** **[2006] 2 All SA 17 (SCA)** (see below under "Section 7 – procedure on review" and above under "Section 6(2)(f)(i) – decision not authorised by empowering provision") the respondents argued in a cross appeal against a judgment granting them relief in their original application for review, that the guidelines according to which the impugned decision had been taken were too rigidly applied, and that decision was irrational as a result. The judgment refers generally to section 6(2)(f)(ii) rather than to its specific subparagraphs. The guidelines at issue required that certain distances between the site of a proposed filling station and residential areas and other filling stations be considered in the decision to grant an authorisation in terms of section 22(1) of the Environment Conservation Act 73 of 1989. The respondents' argument was that although the respondents' proposal did not meet the distance stipulations, the reasons for the refusal made no reference to the environmental impacts thereof. The guidelines were therefore rigidly and irrationally applied, they argued (para 20). The applicant met this submission with the following reply:

> "The distance stipulations . . .were the product of experience of, and research by, the Department and consultation with various stakeholders, including SASOL . . . (We) do not believe that (the Guidelines) should be applied inflexibly . . . The point I wish to stress is that the Department (and I) are open-minded as to whether, in a particular situation, good grounds may exist for permitting a filling station within less than 3 km of an existing filling station." (para 20)

The judge concluded that the respondents had failed to make out a case that adherence to rationally established guidelines produced an irrational result in this case:

> "In my view there is therefore no substance to the criticism that the guidelines were applied in a manner that affected the rationality of the decision. On the contrary, the reasons demonstrate the opposite. But in any event, as pointed out earlier, the respondents were thus required to demonstrate that there was something exceptional in their

> application that warranted a departure from the usual application of the guidelines. Filling stations bear a substantial resemblance to each other. The respondents advanced no argument that the guidelines for filling stations should be inapplicable to theirs." (para 22, footnotes omitted)

Tirfu Raiders Rugby Club v SA Rugby Union and others **[2006] 2 All SA 549 (C)** (see above under "Section 1- Administrative action defined", "Section 3 – Procedural fairness" and above under this section) concerned a challenge to a decision to alter the system by which black rugby clubs not finishing as the winners of their respective provincial club rugby leagues would be selected to play in the Supersport Club Championship. The new system selected two clubs on the basis of their log positions one month before the end of the rugby season, while the old systems had selected six clubs on the basis of log standings at the close of the season. Yekiso J accepted the applicant's argument that the decision adopting the new system was not rationally connected to the purpose for which it was taken, and thus reviewable in terms of section 6(2)(f)(ii)(aa):

> "[T]he decision of the Management Committee to determine the log position of clubs on 1 August 2005, as against at the end of the rugby season as has happened in previous years, was not rationally connected to the purpose sought to be achieved, being, the identification of the top black rugby club to participate in the Supersport Club Championship." (para 38)

In ***Bestbier v Chief Magistrate, Stellenbosch, and another*** **[2006] 2 All SA 598 (C)** (see above under "Section 1 – Administrative action defined"), the rationality of the first respondent's decision to issue a subpoena against the appellant was questioned. The court dismissed the appeal in separate concurring judgments, but for different reasons. What is of note in this case is not so much the judges' assessment of the rationality of the impugned decision itself, but the judges' different approach to the question of rationality. The judgment of Moosa J, concurred in by Hlophe JP, held that, "on the basis of the facts and information at the disposal of the first respondent", the decision to issue the subpoena was rational and justifiable (para 17). Van Reenen J instead adopted the approach that the court's role was not limited to review in its narrow sense, but, on an interpretation of section 151 of the Insolvency Act 24 of 1936, the statutory section in terms of which the challenge was brought, extended to appeal. He held that the rationality of the decision was thus not the court's primary concern:

> "Bearing in mind that, despite the fact that our Constitution has broadened the scope of the review of administrative action by having introduced what is sometimes referred to as a rationality review…our courts have continued to recognise the fundamental difference between appeal and review…and that, as was stated earlier, this courts' function is primarily that of a court of appeal, the question for decision is not whether the decision of the first respondent is rationally justifiable in relation to the material available to him and the reasons provided, but whether the conclusion arrived at by him was right or wrong." (para 15, footnotes and citations omitted)

For Van Reenen J the question was not whether the first respondent's decision could be rationally justified, but whether it was, in the circumstances, the correct the decision.

Section 7 – Procedure for review

In ***Platinum Asset Management (Pty) Ltd v Financial Services Board and Others; Anglo Rand Capital House (Pty) Ltd and Others v Financial Services Board and Others*** **2006 (4) SA 73 (W)** (see above under "Section 1 – Administrative action defined" and below under "Section 9 – Variation of time", "Common-law review" and "Section 1 of the Constitution – the doctrine of legality") the applicants had not complied with either section 7(1) or 7(2). The applicants had failed to avail themselves of internal appeal procedures established by the Financial Services Board Act 97 of 1990 as required by section 7(2), and had launched their appeal after the expiry of the 180 day period within which applications must be instituted in terms of section 7(1). Jajbhay J referred to Currie and Klaaren's *Promotion of Administrative Action Benchbook* and the SCA case of *Nichol and Another v Registrar of Pension Funds and Others* [2006] 1 All SA 589 (SCA) (reported in the 6th edition of this Newsletter) in stating that "by imposing a strict duty to exhaust domestic remedies PAJA has considerably reformed the common law." (para 52) The judge correctly pointed out that PAJA allows exemption from theses strict duties of time

and procedure in exceptional circumstances. He said in this respect:

> "Section 7(2)(c) of PAJA gives a Court the discretion to exempt the applicant from the obligation envisaged in s 7(1) and s 7(2)(a)." (para 58)

Section 7(2)(c) refers only to courts' powers to grant exemptions in respect of section 7(2). The power to grant exemptions in respect of section 7(1) appears rather in section 9 of PAJA. The reason this distinction should be kept clear is that section 7(2)(c) allows exemption from the requirements of section 7(2) by a court or tribunal "in exceptional circumstances…if the court or tribunal deems it in the interests of justice." Variation of the time limits by a court or tribunal in section 9, however, may be effected by the court or tribunal "where the interests of justice so require". An applicant need not show exceptional circumstances where only a variation of the time limits set by section 7(1) of PAJA is sought.

In any case, the judge found that exemption from both section 7(1) and 7(2) was in the interests of justice, and considered the circumstances in respect of both subsections exceptional:

> "In my view, there are the following factors that cumulatively would constitute exceptional circumstances:
>
> 59.1 When the search and seizure, ie the actual cause of the applicants complaint was carried out, the period in which to note an appeal had expired.
>
> 59.2 The applicants were unaware of any right of appeal until the point was raised in the respondent's notice on 14 December 2004, by which time the right to appeal had lapsed (this clearly distinguishes the present case from Nichol). This is not in dispute.
>
> 59.3 It is not clear whether the respondents notified the applicants of any right of appeal in terms of the FSB Act.
>
> 59.4 The present application concerns a consideration of the powers of the inspectors as contemplated in the new Inspection Act. These powers are utilised inter alia, by the registrar of Medical Schemes and the registrar of Banks.
>
> 59.5 It would be extremely unsatisfactory if a matter of this magnitude and importance had to be decided presently on a technical preliminary point, only to be resumed at a later stage on the merits.
>
> 59.6 A Court must strike a proper balance in exercising its discretion.
>
> [60] I find that there are exceptional circumstances present, which dictate that, in the interest of justice, I determine the remaining issues." (para 59-60)

MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and Another **[2006] 2 All SA 17 (SCA)** (see above under "Section 6(2)(f)(i) – decision not authorised by empowering provision" and "Section 6(2)(f)(ii) – rationality review") concerned an argument that "universal legislation" which derivers its force from the Constitution, such as PAJA, enjoys "formal superiority" over other Acts of Parliament. The Environment Conservation Act 73 of 1989 allows for appeals or reviews against decisions taken in its terms, and prescribes time limits within which these appeals or reviews must be brought (sections 35 and 36). These time periods differ from the time periods set in PAJA, and the court a quo found that "the 180-day period provided for in section 7(1) of PAJA prevails over section 36 of the ECA because it is 'universal legislation'" (para 29). The judge neither confirmed nor set aside this conclusion, holding that it was a question that need not be decided (para 29).

Section 8 – Remedies

In ***Littlewood and Others v Minister of Home Affairs and Another*** **2006(3) SA 474 (SCA)** (see below under "Common-law review – Unlawfulness") the question of whether PAJA applied or not was neither argued by the parties nor considered by the court. Nevertheless, it is apposite to consider the court's comments as to the appropriate remedy here. The facts of the matter are discussed below, and need not be repeated here. All that needs to be said at this stage is that the case concerned an application to review and set aside a refusal by the Minister of Home Affairs to exercise a discretion conferred upon him by the Aliens Control Act 96 of 1991 to exempt the applicants from the operation of certain provisions of the Act. After finding in favour of the applicants, the court said:

> "It is well established that only exceptionally will a court substitute its own decision for that of an official to whom the decision has been entrusted. It cannot be said in the present case that the proper decision is a foregone conclusion, nor that the Minister has disabled himself properly making it, nor are there any other grounds for substituting our decision for his. The proper course is to remit the matter for re-consideration by the Minister." (para 18)

A similar conclusion was reached in ***Self and others v Munisipaliteit van Mosselbaai and another*** **[2006] 2 All SA 518 (C)** (see above under "Section 6 – Grounds of review"). The applicants prayed that the court exercise its discretion in terms of section 8(1)(c)(ii) of PAJA, substitute its own decision for that of the first respondent and refuse to grant the authorisation. Blignault J stated that although the court has the capacity to grant such an order in exceptional cases, it would be premature to do so in this case (para 52). The decision was thus remitted to the first respondent for reconsideration.

Section 9 – Variation of time

The facts of ***Platinum Asset Management (Pty) Ltd v Financial Services Board and Others; Anglo Rand Capital House (Pty) Ltd and Others v Financial Services Board and Others*** **2006 (4) SA 73 (W)** appear above (see above under "Section 1 – Administrative action defined", "Section 7 – Procedure on review", and below under "Common-law review" and "Section 1 of the Constitution – the doctrine of legality"). In considering whether it would be in the interests of justice to grant a variation of the time periods set by section 7(1), the court took into account the prejudice that variation might cause to the respondents. Jajbhay J said:

> "Insofar as s 7(1) of PAJA is concerned, there is no requirement that an applicant for review should be non-suited by virtue of his failure to comply with the time period stipulated in this provision. A Court has the power to extend this period on application under s 9 of PAJA, where the interests of justice so require. To my mind, the respondents would not suffer any prejudice if such an extension were to be favourably considered in the present matter." (para 56)

COMMON LAW REVIEW

Common-law review – Delay

Gqwetha v Transkei development Corporation Ltd and Others **2006 (2) SA 603 (SCA)** dealt with a cause of action that occurred in 1995, and the matter was argued before the court of first instance in October 1997. PAJA came into force, without any retrospective application, in February 2000. The terms of PAJA therefore did not apply to this case. The appellant in the case initially sought the review of a decision by the first respondent terminating her employment with it. The appellant, however, delayed the launching of her appeal in the Transkei High Court for over fourteen months. The court of review, per Madlanga J, held that this delay was indeed unreasonable, but that that delay should could be condoned (at para 3). A full bench of the Transkei High Court disagreed, holding that although Madlanga J had been correct in finding that the delay was unreasonable, he failed to properly exercise his discretion as to whether the delay should be condoned. The appellant appealed to the SCA against the full bench decision.

The majority judgment was delivered by Nugent JA, while Mpati DP filed a separate dissent. Although divided as to outcome, the SCA was unanimous in holding that the delay of fourteen months had in the circumstances been unreasonable (at paras 8 and 30). The court was also unanimous in the approach to be adopted, and quoted extensively from *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA) (reported in the 5th edition of the PAJA Newsletter). Both judgments restated the reasons, explained in *Associated Institutions Pension Fund,* that courts will refuse to entertain review applications that are brought after an unreasonable delay. Mpati DP stated:

> "[T]he Courts have recognised that an aggrieved party's undue and unreasonable delay In initiating review proceedings may cause prejudice to other parties to the proceedings and that in such cases, therefore, a court should have the power to refuse to entertain the review…. The incidence of prejudice to the respondent and the extent thereof are thus relevant factors in considering whether or not

> unreasonable delay should be condoned; in certain circumstances prejudice may well be a decisive factor, particularly in cases of unduly long periods of delay….The court a quo was thus correct in holding that Madlanga J failed to properly exercise a judicial discretion. That leaves this Court at large to itself exercise the discretion." (at para 12)

Nugent JA pointed out the second reason for the delay rule:

> "Secondly, and in my view more importantly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions. As pointed out by Miller JA in *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 41E-F (my translation):
>
> > 'It is desirable and important that finality should be arrived at within a reasonable time in relation to judicial and administrative decisions or acts. It can be contrary to the administration of justice and the public interest to allow such decisions or acts to be set aside after an unreasonably long period of time has elapsed – *interest reipublicae ut sit finis litium*…Considerations of this kind undoubtedly constitute part of the underlying reasons for this rule.'" (at para 22)

It is indeed in the different emphases that the minority and majority placed on these two considerations that the reason for the disagreement arose. Mpati DP held that while the respondents raised the issue of unreasonable delay, they "made no mention whatsoever…that because of such delay the first respondent would be prejudiced in any way were the delay to be condoned." (para 14) Mpati DP went on:

> "What has just been said is not to be understood as meaning that the respondent bears the onus of proving absence of prejudice. I merely indicate that in certain circumstances and where the party whose decision is sought to be reviewed raises an unreasonable delay on the part of the applicant it may well have an evidentiary burden, at least, on whether it would be prejudiced were the delay to be condoned." (para 14)

The majority disagreed with this view, saying that the public interest basis for the delay rule means that "proof of actual prejudice to the respondent is not a precondition for refusing to entertain review proceedings by reason of delay." (para 23)

The majority also held that Madlanga J had failed to take into account the fact that even if the original inquiry was set aside, as prayed for by the appellant, there was no guarantee that the appellant's position with the first respondent would be restored. The absence, therefore, of a meaningful consequence to a successful review application was held to be important by the majority;

> "The first respondent would not be obliged to sweep under the carpet the serious allegations that led to the appellant's dismissal and to permit her employment to continue as before. It would be entitled to pursue its enquiry de novo (indeed it might be duty bound to do so before once again permitting the appellant to assume her position of trust) provided that the enquiry is not conducted irregularly. I see no reason for confidence that the setting aside of the decision to dismiss the appellant on the grounds that there were procedural irregularities will necessarily have a meaningful impact. As appears from the passages from *Wolgroeiers* to which I have referred, it is the prospect (or lack of it) of a meaningful consequence to the setting aside of an administrative decision, rather than merely the prospect of the administrative decision being set aside, that might be a relevant consideration to take into account, and in my view Madlanga J approached that issue too narrowly." (para 35)

Common-law review – Procedural fairness

In ***Klein v Dainfern College and Another* 2006 (3) SA 73 (T)** (see above under "Section 1 – Administrative action defined") the applicant complained of a number of procedural irregularities during the course of a disciplinary enquiry, and sought the review of the outcome of the enquiry on the basis that principles of natural justice had been violated. She complained that the chairperson of the disciplinary hearing had been biased against her or that there were grounds supporting a reasonable apprehension of bias, that she was given inadequate time to prepare and that the refusal of the tribunal to delay its proceedings was irregular. Claassen J rejected each of these complaints. He found no evidence to support an inference of bias (para 32) and found on the facts that the applicant had had adequate time to prepare her case:

> "[The applicant] has relied on the provision that a period of 7 - 14 working days should be afforded an accused prior to the hearing being commenced

> with. In my view, she was afforded this privilege. The first hearing commenced on 5 August during which the applicant requested a postponement in order to prepare her case. She was granted a postponement and the hearing was set down for 13 August 2004. She received the charge-sheet on 4 August and thus was afforded in total a period of nine days to prepare her case. In my view, no breach of natural justice was established in this regard." (para 33)

He also found no merit in the applicant's third ground of complaint:

> "It was also contended that the second respondent's refusal to grant a further postponement constituted some kind of irregularity. It has been authoritatively laid down that no violation of natural justice occurs when a tribunal refuses to delay its inquiry. [*Shadrach v Garment Workers Union of Cape Peninsula* 1946 CDP 906 at 916] No case has been made out by the applicant in this regard either." (para 34)

Claassen J did accept, however, that the applicant was prejudiced by the absence of clear charges made against her. Although charged with "Gross insolence", nowhere was the scope or extent of that infraction explained to the applicant. Referring to *Fisher v SA Bookmakers Association* 1940 WLD 88 at 91, he said:

> "It is a principle of natural justice that the accused is entitled to have the charge clearly formulated with sufficient particularity in such a manner as will leave him/her under no misapprehension as to the specific act or conduct proposed to be investigated. The charge-sheet must also clearly indicate the nature of the offence although it need not set out the same detail and precision as is required in a criminal indictment. (para 35)

On the facts of this case, the disciplinary code incorporated into the contract of employment made reference to a "table". The applicant never had sight of this table. And the judge therefore concluded:

> The fact of the matter is that the disciplinary code that forms part of the contract of employment specifically required the offence to be set out in a table. It therefore contemplated that the offence of gross insolence would have been defined in a separate table setting out what kind of conduct would be regarded as such. Without reference to such a definition one would not be able to establish the particular misconduct or offence for which the applicant was charged. That being the case, I am of the view that the applicant was materially prejudiced in not knowing the full extent and nature of the offence with which she was charged." (para 35)

An order setting aside the decision of the disciplinary proceeding was granted.

In ***Max v Independent Democrats and Others* 2006 (3) SA 112 (C)** (see above under "Section 1 – Administrative action defined") Davis J held that a decision of a political party to expel a public office-bearing member was subject to the common-law principles of natural justice. He said:

> "First respondent, viewed within the context of this dispute, has exercised a power which can be classified as one which is not only suitable, but which is essential to be rendered accountable to rational principles of the kind contained in the body of administrative law. For these reasons, the applicant must have a right to procedural fairness in regard to the disciplinary process instituted against him by first respondent, and the body of administrative law as it is developed under the common law at the very least is therefore applicable to the broad confines of this dispute." (at 118C-E)

The crisp question before the court, however, was whether the noting of an appeal against the decision in terms of the first respondent's constitution and code of conduct operated to automatically suspend the effect of the initial decision. The first respondent relied heavily on the case of *Dennis v Garment Workers' Union, Cape Peninsula* 1955 (3) SA 232 (C) at 238H-239C, in which disciplinary proceedings were conducted in terms of a contract. The court said in that judgment that since the contract contained no clause to the effect that a decision of the executive committee of the labour union would be suspended pending an appeal, the inference could not be drawn that a decision was not to be given effect to until appeal processes had been completed (referred to at 118J-119B). Davis J distinguished that case from the present matter, pointing out that that case was based entirely on the contract between the member and the organisation (at 122A). The judge instead accepted the principle relied on by the applicant that "the lodging of an appeal against an administrative decision suspends the effect of the decision being appealed against until such time as the decision is taken on appeal." (at 119H) Davis J went on:

> "In my view there are good reasons why the rule of automatic suspension ought to apply in this case. In the present dispute, there is nothing in the first respondent's code of conduct which suggests that it should not apply. In short, there is neither a legislative section nor a provision of the code which reverses the rule, which appears to be applied, at the very least, in practice. All the code says is that any representative who has been disciplined in terms of the code may appeal in writing to a special committee of the NEC within 14 days of the decision." (at 120G-H)

The judge mentioned two further reasons that the suspension rule should apply in this case. The first was that the consequences of implementing the decision would be the removal of the applicant from the provincial legislature. Removing him would not serve the principles of deliberative democracy, because although the party ultimately acts on behalf of the people, each member of a legislature serves the people in his or her individual capacity (at 121B-C). Second, if the applicant were to be removed from the provincial legislature, he would be replaced by another party member. Were the first respondent's initial decision to be reversed on appeal, there would be no constitutional way of permitting the applicant to regain his seat (at 121H-J). The judge therefore granted an order in the terms sought by the applicant.

Common-law review – Unlawfulness

The case of ***Littlewood and Others v Minister of Home Affairs and Another*** **2006(3) SA 474 (SCA)** (see above under "Section 8 – Remedies") concerned an application for a review of the first respondent's decision not to exercise a discretion granted to him by section 28(2) of the Aliens Control Act 96 of 1991. The Littlewood family, all British citizens, moved to South Africa in order to settle permanently in 1998. The company that the first applicant worked for in South Africa, a French company, had arranged for permanent residence permits and the necessary work permits allowing the family to stay and work in South Africa. When the first applicant took steps to renew his passport towards the end of 2000, he was informed that the residence permits on the strength of which he and his family resided in South Africa were not authentic. Section 23 of the Aliens Control Act prohibited the Littlewoods's presence in South Africa without valid residence permits; while the authorities would not entertain an application for permanent residence from inside the country. Section 28(2) of the Act, however, confers on the Minister a discretion to exempt any person from the provisions of section 23 "if there are special circumstances which justify his or her decision". The Littlewoods made an application to the Minister for an exemption in these terms, but the Minister refused their application in a letter to the applicants setting out the decision and the reasons for it. The court found, per Nugent JA, that the Minister's refusal to grant an exemption was unlawful in that he failed to apply his mind to the facts of the matter before him. The court therefore concluded:

> "The application was turned down for no reason but that the department of Home Affairs saw the possession of a fraudulent permit as a serious offence that had caused a predicament for which it was not responsible. But that begs the question whether the circumstances that had arisen – albeit that it was not attributable to fault on the part of the department – failed to apply his mind to that question at all.
>
> . . . .
>
> The Minister was not called upon to decide whether his department was at fault but rather whether 'special considerations' existed justifying an exemption. The effect of his failure to apply his mind to that question was that he failed to exercise the discretion conferred upon him by the Act and his decision must be set aside." (paras 16 and 17)

Note: The common-law ground of review of "failure to apply the mind" has now been subsumed in the grounds of review listed in PAJA. In particular, section 6(2)(e)(iii) allows administrative action to be reviewed where an administrator fails to take relevant considerations into account or attached too much weight to irrelevant considerations. The court did not consider in this case whether PAJA was applicable – it would seem that the applicants had placed no reliance on PAJA even though, from the facts, the cause of action arose after PAJA came into effect. Had the question of PAJA's applicability been answered by the court, it is likely that the application of section 6(2)(e)(iii) would have led the court to the same results.

Common-law review – Ultra vires

The facts of ***Platinum Asset Management (Pty) Ltd v Financial Services Board and Others; Anglo Rand Capital House (Pty) Ltd and Others v Financial Services Board and***

***Others* 2006 (4) SA 73 (W)** (see above under "Section 1 – Administrative action defined", "Section 7 – Procedure on review", "Section 9 – Variation of time", and below under "Section 1 of the Constitution – the doctrine of legality") appear above. The applicants were subject to an inspection authorised by the registrar in terms of the Inspection of Financial Institutions Act 80 of 1998. The relevant section authorises inspections of a "financial institution or associated institution". The applicants argued that the authorisation of an inspections was ultra vires the powers conferred on the registrar by the Act because the applicant companies were not "financial institutions" (paras 61 and 62). On a review of all the applicable legislation, however, Jajbhay J rejected this argument. He found that even if the applicants were not "financial institutions" as defined in the Inspection of Financial Institutions Act or the Financial Services Board Act 97 of 1990, provisions of the Stock Exchanges Control Act 1 of 1985 (SECA) and the Financial Markets Control Act 55 of 1989 (FMCA) permitted the appointment of an inspection in terms of the Inspection Act:

> "If the applicant is not a 'financial institution' as defined in the FSB [Financial Services Board Act 97 of 1990] and new Inspection Act, the inspection was nevertheless validly appointed in terms of s 45 of SECA and s 26 of the FMCA because these Acts permit the appointment, under s 3 of the new Inspection Act, of an inspection into the affairs of any institution approved under s 4(1) of SECA or s 5(1) of the FMCA, irrespective of whether or not the institution concerned is managing 'investments' within the meaning of the respective Acts." (para 68)

The applicants raised the alternative argument that the legislative scheme permitting the appointment of the inspection, as described in the judgment, had been impliedly repealed by the enactment of the Inspection Act in 1998 (referred to in the judgment as the "new Inspection Act") (para 75). The argument in this vein was that references in the SECA and FMCA to the inspection act were references to the inspection act that preceded the new act of 1998. Section 12(1) of the Interpretation Act 33 of 1957, Jajbhay J noted, creates a presumption that references in statute to a repealed or modified act must be seen as references to the new act or to the act as modified (para 75). The judge therefore concluded:

> "In the present case, there is no reason to assume that when enacting the new Inspection Act the Legislature intended to do away with every reference in other legislation to powers of inspection, specific to the institutions governed by the other legislation (such as SECA and FMCA). There can also be no basis for determining that the legislation, when enacting s 45 of SECA and s 26 of FMCA, intended to exclude the operation of s 12(1) of the Interpretation Act if the old Inspection Act should be repealed." (para 77)

This view is supported by the fact that the relevant sections of the SECA were repealed or altered by the Financial Advisory and Intermediary Services Act 37 of 2002, and came into effect only in September 2004 (para 79). At the time the inspections were authorised – whatever the position now may be – the registrar was authorised to act as he did.

The applicants raised another ultra vires point. They argued that since "the registrar" is defined in the Inspection Act as the CEO of the Financial Services Board, the powers of inspectors appointed by the registrar in terms of the Inspection Act should extend no further than investigating compliance with the laws supervised by the Financial Services Board in terms of the FSB Act. The judge disagreed with this point firstly on logical ground, saying that "the registrar is making the appointment under the new Inspection Act, not the FSB Act." (para 104) The judge also found on the facts that:

> "[T]he appointment was made in terms of s 45 of SECA and s 26 of the FMCA, and not directly in terms of s 3 of the new Inspection Act. Section 45(1)(c) of SECA makes it clear that the purpose of inspecting institutions referred to in s 45(1)(a) is not limited to statutory contraventions." (para 105)

Note: Section 6(2)(f)(i) of PAJA allows review of administrative action if it "contravenes a law or is not authorised by the empowering provision". This section, had it been applied in this case, would have led to the same result as the application of common-law principles of ultra vires. The judge held in this case, however, that the registrar's decision to appoint an inspection was not administrative action, while the actions of the inspectors could be administrative action. It was only the latter that could affect rights, since an inspector, duly appointed has no power but to investigate facts. On this reasoning the first ultra vires argument would

not have attracted the applicability of PAJA, while the second could have.

Common-law review – Ulterior purpose

In ***Platinum Asset Management (Pty) Ltd v Financial Services Board and Others; Anglo Rand Capital House (Pty) Ltd and Others v Financial Services Board and Others*** **2006 (4) SA 73 (W)** (see above under "Section 1 – Administrative action defined", "Section 7 – Procedure on review", "Section 9 – Variation of time", and below under "Section 1 of the Constitution – the doctrine of legality") it was contended that the "dominant purpose" of an inspection into the applicants' businesses in terms of the Inspection of Financial Institutions Act 80 of 1998 was to monitor compliance with UK law, and that the inspections could be impugned as motivated by an ulterior purpose. The argument was rejected, firstly, because it was raised by the applicants for the first time in their heads of argument, without the point being traversed in evidence. "Procedurally", the judge said,

> "an issue that has not been traversed in evidence should not be allowed the indulgence of being raised for the first time during argument. This would place an opponent in a tactically disadvantaged position." (para 96)

The judge said in any case that the legislative framework did authorise contact with foreign regulatory institutions: "Communications with foreign regulators are permissible in our law in terms of s 22(2)(a) of the FSB Act, read together with s 9(b)(vii) of the new Inspection Act." (para 97)

Note: PAJA provides for ulterior purpose as a ground of review in section 6(2)(e)(ii). Having held that the registrar's decision to appoint the inspection did not amount to administrative action, this section of PAJA could not have been applied in determining the issue.

Common-law review - Bias

It was argued in ***Platinum Asset Management (Pty) Ltd v Financial Services Board and Others; Anglo Rand Capital House (Pty) Ltd and Others v Financial Services Board and Others*** **2006 (4) SA 73 (W)** (see above under "Section 1 – Administrative action defined", "Section 7 – Procedure on review", "Section 9 – Variation of time", and below under "Section 1 of the Constitution – the doctrine of legality") that the inspectors appointed by the respondents to inspect the applicants' businesses were not impartial or independent, or at least that it was reasonable to suspect partiality on the part of the inspectors. The applicants, however, advanced no substantive basis on which this claim might rest: "Their suspicions were purely speculative." (para 102)

Note: Section 6(2)(a)(iii) of PAJA allows a court to review administrative action when the administrator who took it was biased or reasonably suspected of bias. Since it was the action so the inspectors themselves that was impugned here, PAJA should have been applied had the applicants raised a case on the facts.

ADMINISTRATIVE ACTION IN TERMS OF THE CONSTITUTION

Item 23(2)(b) of Schedule 6 to the Constitution

In ***Fetsha v Member of the Executive Council responsible for Education (Eastern Cape) and another*** **[2006] 3 All SA 542 (Ck)** the plaintiff complained that the first defendant had acted in error when it reduced his salary as an employee in the Eastern Cape Department of Education. The plaintiff was appointed as a level 4 educator, although for a number of years he was paid a salary commensurate with a level 6 educator. The reduction of the salary paid to the plaintiff took place in 1998. This is before the coming into operation of PAJA, and Van Zyl J accordingly held that the case was governed by the interim provisions of item 23(2)(b) of Schedule 6 to the Constitution (para 8).

The next question addressed by the judge was whether the reduction of the plaintiff's salary amounted to administrative action. If it did, the plaintiff argued that he was entitled to a hearing before the action was taken. Van Zyl J referred cases where, since an outcome or

result occurred simply by operation of law, no decision or action had been taken that could be classified as administrative (*Frans v Groot Brakrivierse Munisipaliteit en andere* 1998 (2) SA 770 (C) and *Minister van Onderwys en Kultuur & andere v Louw* 1995 (4) SA 383 (A), at paras 14 and 15). He said in regard to these cases:

> "It was held that the coming into operation of the deeming provision was not dependent upon any decision and that there was no room for any reliance on the *audi* principle which in its classic formulation is applicable when an administrative – and discretionary – decision detrimentally affect the rights, privileges or liberty of a person." (para 15)

Van Zyl then drew a distinction between these cases and the case at hand, saying that in terms of the empowering provision, a decision or action was nevertheless required to effect the reduction of the plaintiff's salary:

> "Regulation 13 quite clearly empowers the employer to perform a certain action, ie to reduce or increase an educator's salary. That the exercise of that power is subject to the existence or otherwise of a jurisdictional fact, namely a salary that was wrongly granted or awarded, does not detract from the fact that it is administrative action taken in terms of an empowering provision." (para 19)

The judge therefore held that the reduction of the plaintiff's salary did indeed amount to an action capable of being classified as administrative. The inquiry did not end there, however. Paragraph (b) of item 23(2)(b) states that everyone has the right to procedurally fair administrative action where any of their "rights or legitimate expectations is affected or threatened". Van Zyl J held:

> "The fact that he was paid more was due to an administrative error which could not and did not give him any right to the salary that was paid to him in error…. In the present matter…the plaintiff did not have any right to receive the incorrect salary. The plaintiff also did not claim that a legitimate expectation arose in terms of which the Department was obliged to give him an opportunity to be heard prior to reducing his salary." (para 25)

Van Zyl J did not deny the plaintiff access to the benefits of procedural fairness on this categorical basis, though. He referred to the "flexible" approach according to which the extent to which the right to procedural fairness applies in each case, rather than applying procedural fairness or not in each case depending on whether "rights" are affected or not (paras 26-29). In light of the fact that the empowering provision did not require the opinion, judgment or discretion of any officials of the first defendant to be brought to bear on the matter of the reduction of the plaintiff's salary, procedural fairness did not require that the plaintiff be given an opportunity to be heard before the reduction of his salary took place (para 31-32).

The relationship between administrative law and the Constitution

The case of ***Petro Props (Pty) Ltd v Barlow and Another* 2006 (5) SA 160 (W)** raised a novel question of law. The applicant was the owner of immovable property on which it intended to construct and operate a filling station. It had the backing of Sasol (Pty) Ltd, and certain agreements had been concluded with Sasol. The first respondent was the chairperson of the Libradene Wetland Association, the second respondent. The respondents are opposed to the development, fearing that a filling station in the proposed location will detrimentally affect the ecologically sensitive wetland area surrounding it (para 2). Despite these concerns, the applicant had been granted authorisation in terms of section 22 of the Environmental Conservation Act 73 of 1989 (the ECA) to undertake an activity "which will probably have a detrimental effect on the environment". The respondents, along with another concerned residents' organisation, the Save the Vlei Action Group, have nevertheless been involved in an ongoing campaign to "mobilise public opinion against the development and to challenge the approval process" (para 3). As a result of the campaign, the applicant averred, Sasol was on the brink of cancelling its contract with the applicant (para 40). The application was thus an application for an interdict prohibiting the respondents from continuing their campaign.

The respondents resisted the application for an interdict on the ground, inter alia, that the granting of an interdict would violate the constitutional right to freedom of expression. The applicant met this defence with the novel argument that the ECA itself limited reliance on constitutional rights. The ECA establishes internal

remedies of appeal and review in sections 35 and 36, and the applicant argued that the respondents could not seek the protection of the Constitution directly until they had availed themselves of the remedial procedures set up by the ECA (para 66). Tip AJ outlined the problem thus:

> "The question is whether the fact that those possibilities have been included in the ECA precludes the capacity of a person in the position of Ms Barlow from invoking the constitutional guarantee of freedom of expression." (para 67)

The applicant argued that sections 35 and 36 of the ECA operate as a limitation on the constitutional right to freedom of expression and that the limitation was justifiable in terms of section 36 of the Constitution (para 69). Tip AJ rejected this argument, holding that such a limitation on the rights in the Bill of Rights was not justifiable in terms of section 36. After a thorough analysis of the application of section 36 to the argument (para 73), he concluded:

> "The factors considered above must be evaluated as a whole against the criterion of proportionality in order to establish whether 'the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. In my judgment, for the reasons that have already been outlined and evaluated in this judgment, the limitation contended for by the applicant does not cross the required threshold. It follows that ss 35 and 36 of the ECA do not operate as exclusionary limitations of the right to freedom of expression in s 16(1) of the Constitution. Accordingly, those sections do not present the only avenues for protest against development in a regulated and ecologically sensitive area." (para 74)

This conclusion is certainly the correct one, but Tip AJ's reasoning in support of it, perhaps as a result of the way in which the case was pleaded, does not take account of an important consideration. All Tip AJ's judgment determines is that the limitation of rights proposed by the applicant is not a justifiable limitation in terms of the limitations clause. The judgment does not consider if the applicant's interpretation of the ECA, which imposes that limitation, should be accepted. It is an accepted rule of legislative interpretation that statutory interpretations that avoid limitations of rights should be preferred over interpretations that do limit rights (*Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others; In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) at para 23). The starting point of the investigation should have been whether an interpretation of the ECA which imposes a limitation on the rights in the Bill of Rights is the only possible interpretation, or if another less intrusive interpretation of the sections is possible. Indeed, the conclusion that Tip AJ's should have reached on the basis of the argument he presented is that section 35 and 36 of the ECA are unconstitutional to the extent that they limit reliance on constitutional rights. He found rather that because the limitation was not justifiable, that limitation should not be the interpretation attached to the ECA. Had Tip AJ found in the first place that the rights-limiting interpretation was not the interpretation to be attached to the sections, he would not have needed to engage questions of justifiability in terms of section 36.

The structure of the applicant's argument is clearly taken from section 7 of PAJA, which limits access to the right to have administrative action reviewed until internal appeal or review procedures have been exhausted. The difference between the right to administrative action and the other rights in the Bill of Rights is that PAJA explicitly places that limitation on access to the protection of section 33. The mere fact that alternative procedures exist does not create this limitation. There is no explicit limitation of this kind on the other rights in the Bill of Rights, and the fact that the ECA establishes internal review mechanisms cannot put the protections of unlimited rights in the Bill of Rights beyond the reach of the public.

Section 1 of the Constitution – the doctrine of legality

The Constitutional Court decision of ***AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2006 (11) BCLR 1255 (CC)** raised the question of whether a private and voluntary body with the power to make rules regulating the micro-loan industry nevertheless exercised public power when making rules. (The High Court and SCA judgments in this matter were reported in the 5th and 6th editions of this newsletter.) Section 15A of the Usury Act 73 of 1968 (now repealed

in terms of the National Credit Act 34 of 2005) gave to the Minister of Trade and Industry the power to exempt certain categories of money-lending, credit, or leasing transactions from the provisions of the Act. Following the first exemption notice in 1988, the micro-lending industry grew rapidly. People who previously had been unable to obtain loans from major financial institutions as a result of poor credit history, low income or an absence of securable assets were able to obtain loans from willing lenders. The industry grew in a largely uncontrolled way. A second exemption notice was therefore published in 1999. The new notice exempted transactions where the loan amount did not exceed R10 000 from the provisions of the Act, but required lending institutions involved in such transactions to register with a regulatory body approved by the Minister and comply with the rules annexed to the notice. The first respondent, the Micro-Finance Regulatory Council (the Council) was subsequently approved by the Minister as the regulatory body. The Council published its own set of rules to which lending institutions wishing to qualify for the exemption had to comply. The applicant challenged the Council's power to make these rules. It argued in the High Court that the Council, in making the rules, unlawfully and unconstitutionally assumed legislative power (para 21). The High Court upheld this argument (see the High Court judgment, reported as 2004 (6) SA 557 (T) at 565H-I and 567I). The SCA, on the other hand, held that the Council was not a "public regulator", but a "private regulator" of moneylenders who consent to its authority (para 24). Yacoob J, writing for the majority, paraphrased the reasoning and conclusions of the SCA's judgment as follows:

> "An important consequence of the reasoning of the SCA is that neither the rule of law and the principle of legality, nor the Bill of Rights had any application to the wide-ranging Rules made by the Council to regulate the micro-lending industry; Rules that had a profound effect on the activities of lenders and borrowers alike. The Council is, on the SCA judgment, free to make whatever rules it chooses consistently with its memorandum and articles of association." (para 24)

The administrative law issues that fell to the Court to determine were therefore:

(i) Whether the Council exercised public or private power in making the rules;

(ii) If the power exercised was a public power, whether the Council exercise legislative powers of the type exercised by Parliament, provincial legislatures and municipal councils; and

(iii) Whether the Council had the power to make the rules in terms of the exemption notice (para 25).

(i) Did the Council exercise public power?

The importance of the answer to thus first issue, highlighted by Yacoob J in the judgment, is that if the Council did exercise public power, its actions would be subject to the rules of law and the doctrine of legality:

> "The exercise of public power is always subject to constitutional control and to the rule of law or, to put it more specifically, the legality requirement of our Constitution. The Council would therefore be bound by this requirement if it exercised public power." (para 29, footnotes omitted)

Yacoob J pointed out that our Constitution does not allow government to avoid its rule of law obligations simply by delegating its regulatory functions to private bodies:

> "Our Constitution ensures, as in Canada and the United States, that government cannot be released from its human rights and rule of law obligations simply because it employs the strategy of delegating its functions to another entity.
>
> Our Constitution does not do this, however, by an expanded notion of the concept of government or the executive or by relying on concepts of agency or instrumentality. It does so by a relatively broad definition of an organ of state. This definition renders the legality principles and the Bill of Rights applicable to a wider category of function than the Charter does in Canada. An organ of state is, amongst other things, an entity that performs a public function in terms of national legislation. If the Council performs its functions in terms of national legislation, and these functions are public in character, it is subject to the legality principle…. In our constitutional structure, the Council or any other entity does not have to be part of government or the government itself to be bound by the Constitution as a whole." (paras 40-41, footnotes omitted)

Yacoob J disposed briefly of the question of whether the Council was an organ of state. The definition of "organ of state" in section 239 of the Constitution includes any body exercising power in terms of national legislation. National legislation is defined by the same section to

include subordinate legislation. The exemption notice is therefore national legislation, and the Council acts in terms of that legislation. Yacoob J therefore held the Council to be an organ of state (para 42). The next question was whether the power the Council exercised could be characterised as public. The answer is given by Yacoob J in the two paragraphs that follow:

> "Section 15A of the Act, in the process of granting the power to the Minister to exempt certain categories of lending transactions from the provisions of the Act, also empowered the Minister to determine the conditions upon which the exemption was to be made. The only purpose of empowering the Minister to determine conditions was to ensure that the activity of moneylending outside the terms of the Act did not go unregulated. The legislative purpose was therefore regulation by government or executive regulation of moneylending transactions that had been exempted from the provisions of the Act. The Minister decided to determine a regime that enabled the Council to regulate this sector of the moneylending industry. The fact that the Minister passed on the regulatory duty means that the function performed must at least be a public function.
>
> The extent of the control exercised by the Minister over the functioning of the Council also shows that the function is public rather than private. The Minister must determine how the Council was to be constituted: the Council was to have a 'Board of Directors which has, amongst other directors, equal and balanced representation between consumers and the moneylending industry'.
> The Minister also in effect decides what the criteria for registration would be. This is because he had to approve these criteria. Lenders who did not comply with these criteria could not be registered. The Minister on behalf of the government determined the tasks of the Council extensively and obliged it to have mechanisms to ensure that each of these tasks was properly performed. Finally the Minister determined certain minimal rules which the Council had to enforce. The Council was obliged to perform the functions necessitated by the ministerial Exemption Notice if it wished to remain a regulator. Any action of the Council inconsistent with the Notice would certainly fall to be declared invalid. The Minister controlled the Council and determined its functions almost exclusively. No function of the Council could fall outside the terms of the Exemption Notice." (paras 43-44, footnotes omitted)

Yacoob J concluded as follows in regard to the first issue:

> "I strain to find any characteristic of autonomy in the functions of the Council equivalent to that of an enterprise of a private nature. The Council regulates in the public interest and in the performance of a public duty. Its decisions and Rules are subject to constitutional control. The Council is subject to the principle of legality…. The SCA's decision therefore cannot be upheld." (para 45).

(ii) Did the Council exercise a legislative power?

In the High Court the argument was advanced that the Minister had no power to delegate rule-making authority to the Council. In the Constitutional Court, however, counsel for the applicant disavowed any reliance on this argument. Any argument that the minister had improperly delegated his powers would mean a challenge to the validity of the exemption notice itself. In the absence of such a challenge, the applicant did not pursue the unlawful delegation argument upheld by the High Court (paras 47-48). The delegation issue, however, was a point of difference between Yacoob J's majority judgment and the judgments of Langa CJ and O'Regan J.

As to the question of whether the Council unlawfully exercised legislative power, Yacoob J said:

> "Rules are not and do not purport to be national, provincial or local government legislation. They are binding Rules at what may be described as a secondary level. They derive their validity from the Exemption Notice.
> This judgment holds that the Council exercised public power in terms of the Exemption Notice. This is a rule-making power aimed at fulfilling the duties imposed by the Minister. They are legislative. But the Council does not, by making rules, or by exercising legislative power properly delegated to it, usurp national, provincial or municipal legislative power. It makes binding rules authorised by law and with the force of law in the fulfilment of a national legislative purpose as set out in section 15A." (para 49, footnotes omitted)

(iii) Did the Council have the power to make the rules?

The final argument made by the applicant against the validity of the Council's rules was that it had no power at all to make rules. It contended that the exemption notice did not empower the Council make rules beyond the rules annexed to the notice itself. The applicant contended that micro-lenders were bound only by the minister's rules (para 50). Part of the applicant's argument in this respect flowed from the absence of an express delegation of

rule-making authority on the Council. Yacoob J found, however, that despite this absence, "the authority to make Rules…is conferred by necessary implication" on the Council (para 54). In reaching this conclusion Yacoob J relied on the proposition that without the authority to make rules, the Council would not be able to fulfil its functions.

> "The Minister chose to exercise control over the industry through a regulatory institution with which all micro-lenders had to register. The Minister also made certain rules binding on lenders and then imposed upon the regulatory institution the duty to enforce the rules, the obligation to compel compliance with the registration criteria, and a number of regulatory tasks which the regulatory institution had to perform. It must be stressed that the Notice read together with the Minister's Rules did not put in place any mechanism or process that would facilitate the performance of these tasks or that had to be complied with in their performance.
>
> Now the Council, after it had been approved as a regulatory institution, became obliged to perform these functions. The obligation was consistent with the purpose of the legislation. But it could do nothing to compel compliance. It had been entrusted with a series of important tasks; tasks which could be performed only if a mechanism or set of rules was put in place to enable it to exercise its regulatory function over moneylenders and to exact compliance by sanction should this prove to be necessary." (paras 51-52)

The majority therefore held that the Council, although exercising a public, legislative power in making the rules, did not act unlawfully or unconstitutionally in making the rules.

The judgments of Langa CJ and O'Regan J agreed with Yacoob J that the making of the rules amounted to public and legislative power. Both judgments, however, focussed on the validity of the delegation of rule-making authority to the Council.

(iv) O'Regan J's judgment

O'Regan J's judgment, concurred in by Ngcobo J, begins by remarking that the SCA failed to pay due attention to the legislative framework when concluding that the Council regulated the micro-finance industry in a private capacity (para 121). O'Regan J said in regard to section 15A:

> "In my view, the broad language of section 15A clearly confers a regulatory power on the Minister which is the power he used when he issued the Exemption Notice. The power also permits the Minister to delegate the daily regulation of the exempted loans to an official or institution. It would be quite inappropriate for the Minister to be held personally responsible for the administration of the exemption system." (para 124, footnotes omitted)

Against this background O'Regan J turned to the exemption notice, with a view to determining if it did in fact confer regulatory rule-making power on the Council. On the basis of the role assigned to the regulatory body in the legislation, O'Regan J held that the notice must be interpreted to delegate this power to the Council:

> "It seems clear that, to the extent that the Council must register lenders, rules governing the process of registration and cancellation or termination of registration will need to be adopted. In my view, therefore, the Notice, properly construed, must permit the regulatory institutions to issue rules in relation to the performance of its functions." (para 131)

O'Regan J considered a counter-argument relied on by the High Court, and also mentioned by Langa CJ in his dissent. The counter-argument was that, since section 12 of the Act expressly conferred on the Registrar the power to delegate his or her powers in terms of the section, the absence of an express delegation in section 15A should be read to mean that delegation of the rule-making power is not authorised (para 133). The High Court relied here on the case of *Chairman, Board on Tariffs and Trade and Others v Teltron* (Pty) Ltd 1997 (2) SA 25 (A). O'Regan J dealt with the argument by distinguishing the two cases on the facts and pointing out the differences between the Minister of Trade and Industry and the Board on Trade and Tariffs:

> "The facts of this case are of course different. First, in this case, there is no provision regulating the question of whether the Minister may or may not delegate his powers under the statute. In assessing this, one must bear in mind that inevitably a Minister in the national Cabinet is a busy person who cannot be involved in the daily grant of exemptions. The office of Minister is quite different to an institution such as a Board of Trade and Tariffs set up specifically to monitor the implementation of legislation and the carrying out of administrative tasks. A power conferred upon a Minister to provide widely for exemptions must ordinarily be construed to permit the Minister to delegate any administrative functions in relation to those exemptions to an appropriate person or institution. It would be impractical to expect a

> Minister to carry out those tasks himself or herself. The fact that the Act does not expressly authorise the delegation of powers conferred upon the Minister, while it does in respect of powers conferred upon the Registrar, does not seem to me to support a conclusion that the Minister may not delegate those powers, and particularly the administrative implementation necessary for the powers to be fully exercised. Indeed, the converse would seem to me more likely. I cannot accept therefore that the Teltron case is weighty authority for the proposition that the Notice should be read in a manner which prohibits delegation of rule-making powers to the Council. Its facts are different and the functionary it is concerned with is different." (para 135)

O'Regan J therefore agreed with the majority that the appeal had to fail.

(v) Langa CJ's judgment

Langa CJ agreed with O'Regan J's view that the primary question was not whether the power exercised was public or legislative, but whether the power to make rules was properly delegated to the Council. He said in this regard:

> "The real question then is not whether the power was legislative or not, but whether it was validly delegated to the Council. On this my approach differs from that of Yacoob J, who proceeds on the basis that since there was no challenge to the validity of the Notice, the delegation in the Notice, if any, must be taken as valid." (para 71, footnotes omitted)

Langa CJ agreed with the majority that the creation of the Council as a regulatory body necessarily implied that the Council would have some power to make rules to fulfil its regulatory function (para 75). The point of disagreement with the majority was whether this rule-making power extended beyond rules necessary to implement and enforce the standards set by the Minister to setting the conditions for and extent of exemptions itself (para 76). The regulations contained no clue here, Langa CJ held, as the relevant regulations were ambiguous enough to be interpreted either way (para 77). Rather, what powers the Minister could validly delegate had to be found in a reading of section 15A of the Act (para 80). Similarly, the terms of the exemption notice could not be relied on to determine if the Minister was empowered to delegate rule-making power (para 81). After reproducing section 15A, Langa CJ said:

> "There is no express power for the Minister to delegate. A sub-delegation of the Minister's powers could only be justified if it is 'reasonably necessary' or, to put it differently, 'if effect cannot be given to the statute as it stands unless the provision sought to be implied is read into the statute.'" (para 82, footnotes omitted)

Langa CJ went on to emphasise that rules pertaining to the conditions and standards for exemption from the provisions of the Act are closely tied to policy, and courts should be slow to read an implied authority to delegate the power to make such rules:

> "While I agree with O'Regan J that Ministers will of necessity have to delegate their powers to other functionaries, this must, in my view, relate to a delegation to officials in the Minister's department, not to a Council which is a private body. It also relates only to powers that do not require the exercise of a political discretion. The powers given to the Minister in section 15 relate to the determination of policy. They are given to him because of his position as an accountable member of government. It seems to me that they should, to the extent that they involve the determination of policy, be exercised by him. The fact that sections 12 and 12A relate to the Registrar's powers also seems to indicate that his powers may be delegated, while the more policy-driven powers assigned to the Minister may not." (para 84)

Langa CJ then gave four reasons for his conclusion that the power to make rules setting conditions for exemption could not have been validly delegated to the Council. First, he noted that powers that involve a large degree of discretion or are legislative in nature are unlikely to admit of delegation. The power in this case, he continued, fit this category (para 86). Second, total delegation of power is less likely to be permitted than partial delegation, and the level of control exercised by the original functionary over the delegee is important. In this case, the level of control exercised by the Minister was very low:

> "In their submissions, both the Council and the Minister admit that the Council can take decisions contrary to those of the Minister. The power of the Minister is limited to a disapproval or cancellation of the decision after it has been made. What should also be kept in mind is that it would be extremely difficult for the Minister to remove the Council as a regulatory institution as he would have to find or create a replacement. Compared to the situation where the Minister delegates a power to a lower level functionary in his own department or even another department, the level of control or

> supervision in this case is substantially lower." (para 87)

Third, Langa CJ held that while an additional body other than the Minister was necessary to enforce the Minister's rules, it was not necessary to have another body to make the rules (para 88). Fourth, Langa CJ attached weigh to the fact that the Minister is an important member of government who is accountable both to the electorate and to the National Assembly. The Council, on the other hand, is a private company accountable to the public only through the limited control exercised by the Minister (para 90). In summary, Langa CJ described the differences between his view and that of O'Regan J on the matter of delegation:

> "The difference in our judgments is, to a great extent, one of emphasis rather than essence. We both agree that the Council can make rules but that particular rules may exceed that authority. The difference arises in the extent of the discretion we believe the Council has to determine how to fulfil its duties under the Notice. Some of the rules which have been challenged may be described as setting a condition rather than implementing the Minister's rules. That exceeds the scope of permissible delegation. O'Regan J on the other hand gives, in my view, too great a latitude to the Council to fulfil its regulatory purpose." (para 94)

Langa CJ then considered each of the Council's rules independently, holding that those rules that did set conditions for exemption beyond the conditions set by the Minister had to be set aside (paras 96-105).

An argument was raised in ***Platinum Asset Management (Pty) Ltd v Financial Services Board and Others; Anglo Rand Capital House (Pty) Ltd and Others v Financial Services Board and Others*** **2006 (4) SA 73 (W)** (see above under "Section 1 – Administrative action defined", "Section 7 – Procedure on review", "Section 9 – Variation of time", and "Common-law review – Ultra vires") that an authorisation of an inspection of the applicants' businesses by the registrar in terms of the Inspection of Financial Institutions Act 80 of 1998 was "overbroad, undefined and unspecified", and therefore in contravention of the principle of the rule of law and the doctrine of legality expressed in section 1(c) of the Constitution. The applicants relied on the authority of the cases *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at paras 46-47 and Janse van Rensburg NO and Another v Minister of Trade and Industry and Another NNO 2001 (1) SA 29 (CC) (2000 (11) BCLR 1235) at paras 24-25 for the proposition that "the absence of clear parameters in the letter of appointment renders the appointment overbroad and inconsistent with the rule-of-law principle entrenched by s 1(c) of the Constitution'" (para 86) Jajbhay J rejected this argument on two grounds. The first was that the case was distinguishable from the Dawood and Janse van Rensburg cases:

> "Those cases deal with legislation which authorise an invasion of rights. The principle expounded from those cases is that it may be inappropriate for a statute to authorise a discretionary power, the exercise of which may invade rights, without giving the official concerned guidelines about the exercise of the power to avoid unnecessary invasions." (para 87)

The complaint made by the applicants was that the registrar's authorisation of an inspection was overbroad and unguided; not that the legislation conferring the power on the registrar to authorise such inspections was overbroad. For this reason the cases relied on found no application.

The second point made by the judge was that on the facts of this matter, the registrar had developed guidelines for inspectors (para 88). In any case, the judge made the important point that inspections of the activities of financial institutions are by their nature specialised, and the subject of such an inspection cannot be told at the commencement of an inspection exactly what the scope, extent or target of the inspection is. Indeed, determining what documents or information is required is the very purpose of the exercise (para 92). On the facts, however, the judge found that

> "the applicants were informed on several occasions about the information, documentation, and other requirements that the inspectors intended investigating. The search was carried out because despite several requests the information was not forthcoming." (para 92).

There was no factual basis on which the applicant's reliance on section 1(c) of the

Constitution could be supported. It is not clear, moreover, that had the applicants been able to supply that factual basis the argument would have been upheld.

The case of ***Mgoqi v City of Cape Town and Another; City of Cape Town and Another v Mgoqi*** **2006 (4) SA 355 (C)** involved two applications in respect of the same set of facts. Dr Mgoqi acted as the municipal manager of the City of Cape Town in terms of contract of employment between him and the city council. The contract ran from 1 March 2003 to 28 February 2006. The former executive mayor of the City of Cape Town, alderman Mfeketo, altered the contract of employment to extend Dr Mgoqi's period of service as the municipal manager until 28 February 2007. Municipal elections were held on 1 March 2006, and a new mayor elected, during a meeting convened and presided over by Dr Mgoqi, on 15 March 2006. On 10 April 2006 a meeting of the city council was held at which the decision of the former mayor to extend Mgoqi's contract was reviewed and revoked. The first application, filed by Dr Mgoqi, sought an order that the decision taken by the speaker of the council on 6 April to call the meeting at which the former mayor's decision was revoked – which subsequently happened on 10 April – was inconsistent with the Constitution, unlawful and invalid (para 5). The second application, brought by the City of Cape Town, was for the review and setting aside of alderman Mfeketo's decision to extend Mgoqi's contract of employment (para 7).

The court, a full bench of the Cape High Court, dealt primarily with the second application. Van Zyl J, Blignault and Motala JJ concurring, dealt with the matter on the basis of the doctrine of legality. He said:

> "The central issue and primary dispute turns upon the validity of alderman Mfeketo's decision to extend Dr Mgoqi's employment agreement. The city attacks the decision on the basis that alderman Mfeketo did not have the power to take such decision. The attack is hence founded on the principle of legality." (para 100, referring to *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at para 58)

There were three grounds on which the City argued the former mayor's decision exceeded the powers conferred on her. An assessment of these challenges requires a summary of the steps by which the extension of Dr Mgoqi's contract was purportedly effected, as well as an account of the legal framework within which those steps were taken. Section 82(2) of the Local Government: Municipal Structure Act 117 of 1998 (the Structures Act) states that a municipal council must appoint a municipal manager. Section 59 of the Local Government: Municipal Systems Act 32 0f 2000 (the Systems Act) deals with delegations of power by municipal councils to organs or office-bearers within the council. Subsection (1) requires that municipal councils must develop a system of delegations "that will maximise administrative and operational efficiency and provide for adequate checks and balances". Section 60(1) sets out an explicit list of the powers that may be delegated to an executive committee or executive mayor. While paragraph (b) of that subsection allows delegation of the power to determine or alter the "remuneration, benefits or other conditions of service of the municipal manager", it is silent as to the appointment of a municipal manager. The city's system of delegations contains, in clause 4, a list of powers "reserved for council". Clause 4.1.17 provides that a municipal council: "Decides on the determination or alteration of the remuneration, benefits or other conditions of service of the municipal manager" (para 95). Clause 5 regulates the powers of, and delegation of powers to, the mayor, and clause 5.1.17 provides that the mayor "Recommends to council the appointment and determination of the conditions of service of the municipal manager" (para 96). Clause 5.2.10 is the crucial clause in this case. It reads:

> "When the council goes into recess, the executive mayor in *consultation with the municipal manager* takes decisions on behalf of the council or any of its committees, where the failure to exercise such delegated authority as a matter of urgency would, in the view of the executive mayor, prejudice the council and/or its services." (para 97, emphasis added)

In this case, the former mayor took a decision on behalf of the council in terms of clause 5.2.10, on the assumption or belief that the council was in recess at the time. The effect of this decision was to remove the phrase "in consultation with the municipal manager" from clause 5.2.10 in respect of decisions concerning the contract of employment of the municipal

manager (para 84). This decision was necessary because no decision in which the municipal manager has an interest can lawfully be taken in consultation with the municipal manager (para 27). The former mayor then took a decision, in terms of this amended clause 5.2.10, to amend Dr Mgoqi's contract of employment, extending it to 2007.

(i) The first ground or review

The first ground of review was that the statutory framework does not allow the delegation of the power to extend the municipal manager's contract to the mayor, and that the former mayor's unilateral exercise of this power could never have been lawful. The court accepted counsel for the city's submission that on a proper interpretation of section 82(1) of the Structures Act and section 59 and 60 of the Systems Act, "the power to appoint a municipal manager vests exclusively in the municipal council and is not capable of being delegated at all." (para 104) The judge went on:

> "In terms of s 60(1) of the Systems Act, the municipal council's power to deal with issues such as remuneration, benefits or other conditions of service of the appointee may be delegated to an executive mayor or executive committee only. Any such delegation must, however, be effected within a 'policy framework', a term which is not defined in the Systems Act, but which appears to be expressed in s 59(1) of such Act as 'a system of delegation that will maximise administrative and operational efficiency and provide for adequate checks and balances'. The absence of any reference in s 60(1) to the delegation of the decision regarding the appointment of a person to the position of municipal manager supports that construction.
>
> From a perusal of the relevant legislation, it would appear that there is no provision in terms of which the municipal council may delegate to the executive mayor the all-important power to appoint a municipal manager. This gives rise to the irresistible inference that it was never the intention of the Legislature to sanction such a delegation." (paras 104-5)

An important argument in support of this conclusion was that delegation of the power to the mayor would lead inevitably to the delegation of powers on the mayor greater than those held by the council. This anomalous situation is the result of section 30(5)(c) of the Structures Act, which requires the mayor to submit a report and recommendation regarding the appointment and conditions of service of the municipal manager.

> "An executive mayor clothed with the delegated power of making such appointment could, however, dispense with such requirement on the basis that he or she could not be expected to render a report or make a recommendation to himself or herself. This would amount to the municipal council delegating greater powers to the executive mayor than it itself possessed." (para 106)

(ii) The second ground of review

The form of the second ground of review is that same as the first. The city argued simply that its own system of delegation, like the statutory framework, does not allow the delegation of the power to appoint a municipal manager. The court held in this regard:

> "It is common cause that the system of delegations contains an exhaustive list of all relevant delegations made by the council. The appointment of a municipal manager is not one of them. By contrast, the power to appoint an acting municipal manager has been expressly delegated to the executive mayor in terms of clause 5.2.11 of the system of delegations. It may be noted, in this regard, that clause 4.1.17 of the city's system of delegations provides that any decision on the determination or alteration of the municipal manager's remuneration, benefits or other conditions of service, rests with the municipal council. Clause 5.1.17, in turn, stipulates that the executive mayor makes recommendations to the council on the appointment and determination of conditions of service of a municipal manager. This is in line with the duty resting on the executive mayor in terms of s 30(5)(c) of the Structures Act.
>
> For these reasons it must be held that the 'delegated authority' referred to in clause 5.2.10 of the system of delegations cannot include the power to appoint a municipal manager or, as was purportedly done in the present case, to extend his employment agreement." (paras 109-10)

(iii) The third ground of review

The city argued in the alternative to the first two grounds of review that even if the statutory and municipal system of delegation did allow the delegation of the power to the mayor, it was not properly done in this case. On the facts of this case, the council was, in the first place, not in recess at the moment when the former mayor purportedly exercised her recess powers in terms of clause 5.2.10 (para 112). In the second place, there had been no consultation with Dr Mgoqi when clause 5.2.10 was amended.

Rather, the former mayor's resolution was simply presented to Dr Mgoqi, who signed it "as a formality" (para 115).

On the basis of all three of these grounds, the court concluded that the former mayor's decision to extend Dr Mgoqi's contract was fatally flawed, unlawful and invalid (para 117). Van Zyl J's summary in this case is apt:

> "The reasons for this conclusion are threefold. In the first place, alderman Mfeketo clearly did not have the authority, whether in consultation with Dr Mgoqi or otherwise, to amend her own delegated power by removing a restriction which constituted a curb on the exercise of such power. Mr Binns-Ward [counsel for the city] suggested that so much was axiomatic. As a logical proposition it is, in my view, unassailable. Secondly, her purported exercise of that power in consultation with Dr Mgoqi was flawed for the same reason that she could not exercise her power to appoint Dr Mgoqi in consultation with him. His direct and personal interest in the subject-matter of the decision was an absolute bar to any involvement by him in the decision-making process. The situation was not ameliorated by the statement in the relevant resolution that the purported amendment of clause 5.2.10 was effected 'solely for the purpose of considering an amendment to the conditions of service of the municipal manager'. Whether the amendment was made for general purposes or for a single purpose only is immaterial. It is, and remains, unauthorised. Only the author or source of the limitation, being the council itself, would have any authority to remove or amend it. The person or party wielding delegated power has no such authority. Thirdly, despite the averment in the relevant resolution that the decision so to amend had been taken in consultation with the municipal manager, it is clear, as pointed out above, that no such consultation in fact took place between them." (para 116)

(iv) Dr Mgoqi's application

Van Zyl J held that the first application had to be dismissed. It is important that Dr Mgoqi sought no relief in the form of an order to set aside the resolution of 10 April 2006. He sought only an order that the speaker's decision on 6 April be set aside. Dr Mgoqi relied for this argument on section 30(5)(c) of the Structures Act, which requires that before a municipal council takes a decision on the appointment and conditions of service of the municipal manager it must first require its executive committee or executive mayor to submit to it a report and recommendation on the matter. The court held, however, that:

> "That section applies to the case where a municipal council proposes to appoint and to determine the conditions of service of a municipal manager in terms of s 82(1)(a) of the Structures Act. It cannot apply to a decision seeking to revoke a previous decision, even if such decision did relate, as in the present case, to the purported extension of a municipal manager's existing employment agreement." (para 98)

The court also held that the impugned decision fell foursquare within the purview of section 59(3)(a) of the Systems Act which requires a municipal council to review the decision of any of its political organs if at least a quarter of councillors make a written request to do so (para 98).

The rule of law was also the principle on which the judgment in the case of ***Anglo Platinum Management Services (Pty) Ltd and others v Minister of Safety and Security and others*** **[2006] 4 All SA 30 (T)** (see above under "Section 3 – Procedural fairness in administrative action affecting individuals) turned. The applicants were all security companies wholly owned by Anglo American platinum Corporation Ltd, and providing security services exclusively to entities comprising the Anglo Platinum Group. The private Security Industry Regulation Act 56 of 2001 came into operation on 14 February 2002. It required the registration of companies providing private security services before a certain date. Foreseeing that they would not be able to procure registration before the stipulated date the applicants addressed two letters to the first respondent seeking exemptions in terms of the Act. Two exemptions were subsequently granted and published in the *Government Gazette.* Neither of the exemption notices imposed any time limits. Subsequent to the grant of these exemptions, the respondent published new regulations. Regulation 10(3) stated that:

> "An exemption granted before the date of commencement of these regulations, lapses one year after such commencement, unless it has been renewed in terms of these regulations."

The applicants' essential complaint was that the regulations applied retrospectively to the exemption notices, and acted to limit the effect of the exemptions. In effect, the respondent amended the substance of the exemption notices by the promulgation of the regulations.

Van Oosten J began his consideration of the arguments by setting out the law in regard to the retrospective application of administrative decision:

> "The rule against retrospectivity has become firmly entrenched in administrative law. It is founded upon the principle of legal certainty which in turn is derived from the rule of law.
> Where the exercise of powers affects rights and/or legitimate expectations retrospectivity clearly undermines the constitutional principle of the rule of law." (para 20)

The judge did not, however, decide the case on the basis of this rule. He held rather that the process by which the regulations had been promulgated was unfair. He held that "procedural fairness in itself renders [the impugned] regulations invalid." (para 26).

PROMOTION OF ACCESS TO INFORMATION ACT 2 OF 2000 (PAIA)

Section 7 – Exclusion of operation of PAIA where information is sought criminal or civil proceedings

In ***MEC for Roads and Public Works, Eastern Cape, and Another v Intertrade Two (Pty) Ltd*** **2006 (5) SA 1 (SCA)** the respondent (Intertrade) brought an application in terms of PAIA for records relating to the appellants' tender adjudication process. Intertrade was an unsuccessful tenderer that had instituted review proceedings against the appellants. The appellants resisted Intertrade's application on the basis of section 7(1) of PAIA, which reads:

> "This Act does not apply to a record of a public body or a private body if–
> (a) that record is requested for the purpose of criminal or civil proceedings;
> (b) so requested after the commencement of such criminal or civil proceedings, as the case may be; and
> (c) the production of or access to that record for the purpose referred to in paragraph (a) is provided for in any other law."

The appellants contended that Intertrade's right to access the documents it sought lay in Rules 53 and 35(12) of the Uniform Rules of Court, and that the operation of PAIA was therefore excluded. Counsel for the appellants argued that:

> "Intertrade should first have requested a copy of the relevant record in terms of Rule 53. In the event that some of the documents sought fell outside the scope of the record envisaged in that Rule, Intertrade would then have to invoke the discovery procedure under Rule 35(12). If that process did not yield the desired results, Intertrade could then utilise PAIA to access the missing documents. Or it could, so the argument went, have reversed the process and brought a separate application in terms of PAIA before proceeding on review." (para 9)

Maya JA writing for a unanimous court held that the question formulated on appeal by the appellants did not need to be answered directly. She stated that the requirements of section 7 are cumulative: "all three must co-exist for the operation of the Act to be excluded." (para 12) It was common cause in the case that the request for documents had been made before the institution of action. The requirement of section 7(1)(b) was thus not met. The appellants attempted to draw a distinction between an informal request, which he argues was made in this case, and a formal request within the contemplation of section 7(1)(b). the appellants argued that only the demand for information I the notice of motion would satisfy the requirements of the section. The judge of appeal held:

> "No authority was cited to support this submission and I have not found any. In my view, there is no merit in the submission and I am satisfied that Intertrade did make a 'request' in terms of s 7(1)(b) before the institution of its application." (para 13)

Maya JA held therefore that it was not necessary to decide the arguments made in relation to section 7(1)(c) one way or the other (para 16). She also refrained from expressing an opinion on the question "whether or not the right to obtain information conferred by the Rules and PAIA can be invoked contemporaneously insofar as the documents sought fall outside the scope of the record envisaged in Rule 53(10)(b) and the documents covered by Rule 35(12)" (para 18). Maya JA therefore concluded:

> "The wording of s 7(1) is clear and must be given effect to. Whilst the jurisdictional requirement set out in ss (1)(a) has been established, that set out in ss (1)(b) has not been met in the present case. Section 7 cannot, therefore, operate as a bar to Intertrade's request. The appellants' reliance thereon was misplaced." (para 19

The judge of appeal remarked in obiter that there may be some documents sought by Intertrade in this case that would not be obtainable by means of either Rule 53 or Rule 35 (para 15). If this were the case then section 7(1)(c) could not be used to exclude the application of PAIA in respect of those documents.

Section 50 – Access to records of private bodies

In ***Unitas Hospital v Van Wyk and Another*** **2006 (4) SA 436 (SCA)** the respondent (applicant in the court a quo) brought an application seeking to compel the appellant to release to her a report compiled by a Dr Naude employed at the hospital. The report became known as the "Naude Report". The respondent's husband had been admitted to the hospital in May 2002, and died in the hospital in July 2002 as a result of aspirating his own vomit. The respondent sought to institute a claim for damages against the hospital on the grounds that nursing staff at the hospital had through their negligence caused the death of her husband. She brought the application for access to the Naude Report in the belief that it would strengthen her claim. The original application was upheld in the Pretoria High Court, but a majority of the judges of appeal (Brand JA, Cloete JA, Conradie JA and Harms JA) reversed the decision. Cameron JA dissented.

Four of the five judges of appeal who heard the matter filed judgments. The facts are set out in the judgment of Brand JA, who notes that during the course of the matter in the court below, the issues had narrowed to a single point. Section 50 of PAIA states that a requester is entitled to information from a private body if the information "is required for the exercise or protection of any rights", if the requester has complied with procedural requirements, and there are no grounds in PAIA on which to the body can refuse to provide the information. Only the first of these was at issue in the matter:

> "One of the objections initially raised by Unitas was that divulgence of the Naudé report would be contrary to s 63(1) of PAIA, in that it 'would involve the unreasonable disclosure of personal information about' members of Unitas's nursing staff who were criticised in the report by name. The cause for this objection was, however, removed when Mrs Van Wyk conceded that the copy of the report provided to her could be edited by blanking out the name of any third party whose privacy would otherwise be infringed by disclosure. This concession was, incidentally, given effect to in the order eventually granted by the Court a quo. In the result, Unitas no longer maintained that access to the Naudé report would be contrary to any of the provisions of ss 62 to 70. Nor was it contended that Mrs Van Wyk did not comply with any of the procedural requirements of the Act. Unitas's remaining ground of opposition was therefore that Mrs Van Wyk had failed to establish that she required the Naudé report for the exercise or protection of any right." (per Brand JA at para 5)

Brand JA's judgment followed two lines of reasoning. The first was that on the facts of the case it could not be said that the respondent "required" the information for the exercise or protection of any right. This necessarily involved some investigation of the meaning borne by the word "required" in PAIA. The second argument was a broader argument that PAIA does not entitle a would-be litigant to "pre-action discovery" (para 21).

In regard to the first line of reasoning, Brand JA set out a number of relevant facts. After the death of her husband, the respondent directed a letter of complaint to the hospital detailing several objections relating to generally unhygienic conditions in the hospital, and unsympathetic, improperly trained, uncooperative and incompetent nursing staff (para 8). She substantially repeated these averments in founding papers to her action for damages. The respondent claimed in her founding papers that without access to the Naude report her right to claim damages from the hospital would be affected (para 11). The Naude report was a "general review of existing practices of nursing care", and "included an assessment of matters such as interpersonal problems and personality differences at the level of nursing management, and the ability, training and remuneration of the nursing staff." (para 10) Brand JA was of the view that these general matters were not of any relevance to the respondent's case:

> "It is not clear, however, how these general allegations are linked to her late husband's death. Her

> more pertinent complaint related to the incident on 1 June 2002 when the deceased suffered an attack of vomiting and aspirated. According to Mrs Van Wyk, this occurrence, which allegedly led to his death, happened because the deceased was given solid food to eat against the instructions of his doctor, and was not properly supervised."

The nub of Brand JA's judgment in this regard was that because the report was of a general nature, access to it would not improve the respondent's prospects of success in her primary claim, and that she had access to all the information necessary to her claim in any case. In reaching these conclusions Brand JA made important remarks on the meaning of the word "require" in the context of section 50. Case law so far, Brand JA noted, has been reluctant to "make any positive statement" as to what the term means:

> "The inclination is rather to define the expression in terms of what it does not mean. So, for example, it is said that it does not mean the subjective attitude of 'want' or 'desire' on the part of the requester; that, at the one end of the scale, 'useful' or 'relevant' for the exercise or protection of a right is not enough, but that, at the other end of the scale, the requester does not have to establish that the information is 'essential' or 'necessary' for the stated purpose. (para 16)

The judge of appeal then quoted with approval a passage from the SCA case of *Clutchco v Davis* 2005 (3) SA 486 (SCA) (reported in the 5th edition of this Newsletter):

> "I think that 'reasonably required' in the circumstances is about as precise a formulation as can be achieved, provided that it is understood to connote a substantial advantage or an element of need. It appears to me, with respect, that this interpretation correctly reflects the intention of the Legislature in s 50(1)(a)." (at para 17)

Brand JA went on to say that the question of whether information can be said to be required for the exercise or protection of any right depends on the facts of each case. Having regard to the facts of this case, Brand JA said that the respondent did not need the report in order to bring her claim for damages (para 19). Moreover, Brand JA found that the respondent's action would not be prejudiced by a denial of access to the report prior to the institution of action, because the rules of discovery provide for the disclosure of relevant documents between parties (para 19). The second line of reasoning followed by Brand JA was that PAIA should not be read to allow parties to litigation to force an advantage not contemplated by the ordinary rules of litigation:

> "I do not believe that open and democratic societies would encourage what is commonly referred to as 'fishing expeditions', which could well arise if s 50 is used to facilitate pre-action discovery as a general practice (see *Inkatha Freedom Party [and Another v Truth and Reconciliation Committee and Others* 2000 (3) SA 119 (C)] at 137C). Nor do I believe that such a society would require a potential defendant, as a general rule, to disclose his or her whole case before any action is launched. The deference shown by s 7 to the rules of discovery is, in my view, not without reason. These rules have served us well for many years. They have their own built-in measures of control to promote fairness and to avoid abuse. Documents are discoverable only if they are relevant to the litigation, while relevance is determined by the issues on the pleadings. The deference shown to discovery rules is a clear indication, I think, that the Legislature had no intention to allow prospective litigants to avoid these measures of control by compelling pre-action discovery under s 50 as a matter of course.
>
> I hasten to add that I am not suggesting that reliance on s 50 is automatically precluded merely because the information sought would eventually become accessible under the rules of discovery, after proceedings have been launched. What I do say is that pre-action discovery under s 50 must remain the exception rather than the rule; that it must be available only to a requester who has shown the 'element of need' or 'substantial advantage' of access to the requested information, referred to in Clutchco, at the pre-action stage….
>
> Though I think it is legitimate to use s 50 to identify the right defendant, I do not agree with the Court a quo's thesis that one is entitled, as a matter of course, to all information which will assist in evaluating your prospects of success against the only potential defendant. On that approach, the more you know, the better you will be able to evaluate your chances against your opponent. The corollary of this thesis therefore seems to be that the requester will, in effect, always be entitled to full pre-action discovery." (paras 21-22)

Cameron JA dissented from this view on three grounds. The first was that focussing on whether the respondent was capable of formulating a damages claim was too narrow an approach (para 31(a)). The difference between Cameron JA and the majority here lay in a differing view of the facts. Cameron JA saw the respondent's damages claim as resting on a an

allegation of general and systemic negligence, rather than a single isolated event:

> "If one views this claim as encompassing only the individual acts of negligence that the rules of pleading require her to set out in order to launch a viable action, it is possible to conclude that Mrs Van Wyk does not 'require' the Naudé report for the exercise and protection of her rights, and counsel for the hospital urged us to find that that the test was whether she was in a position to commence her action against the hospital without it. But this is far too narrow. And, in my view, it is, in any event, quite wrong to view Mrs Van Wyk's claim as encompassing only isolated or unconnected acts of negligence. She does not claim that an individual actor, negligent alone, caused her husband to die. What she claims is that an institution - the hospital - failed in its functioning in ways that gave rise to the individual acts of negligence that caused her husband to die. She claims that a systemic, not individual, failure caused her loss.
>
> To view her claim as traversing only the individual acts of negligence is to divorce those acts from the institutional setting that gave rise to them. It is to divorce them from the systems that she alleges not only permitted them to occur, but whose insufficiency she claims also lay at the heart of the individual acts of substandard nursing, that caused his death." (paras 35-36)

The report was thus central to the respondent's case, and would have afforded her a substantial advantage:

> "While Dr Naudé's report does not mention her husband's specific case or details, it is not hard to surmise, from the doctor's exposition of its contents, that its every part will bear on the background to and causes of the institutional and systemic failures she alleges were fatal - and which Dr Naudé was monitoring in the very days before his death. Having the Naudé report will therefore confer a substantial advantage on her. It will set out for her the very protocols and practices that were in place while her husband lay mortally ill; the problems - both in individual personality and in remuneration and training - that she claims contributed to the fatality; and the appointment procedures and standards whose existence permitted the fatal failures to occur. It will cast light on the very organisational issues that led to the malfunction that she claims caused her loss. By doing so, it will enable her not only to particularise her claim, but to assess its ambit and its viability.
>
> In my respectful view, Mrs Van Wyk established the requisite statutory element of need and is entitled to the report." (paras 38-39)

Conradie JA dealt in his judgment with this ground of Cameron JA's dissent. He agreed with Brand JA that whether information is required or not depends on the facts of the case and that the facts of the case should not be strayed from. He disagreed explicitly with Cameron JA's view of the facts, and reached a different conclusion on that basis:

> "If the deceased was not given the care that his condition demanded, it is from the plaintiff's perspective unimportant that the neglect to attend to him properly resulted from an institutional shortcoming or some systemic failure. The underlying cause for whatever shortcoming there was in the nursing care would be irrelevant to the plaintiff's cause of action, and would not impact upon her right to sue for damages. It could not serve as an excuse for negligence in the circumstances, and would therefore not need to be taken into account by the plaintiff in assessing her chances of success in the action, or in deciding on the wisdom of compromising her claim.
>
> I agree with Brand JA and Cloete JA that the Naudé report, containing, as it does, nothing about the deceased's treatment or the cause of his death, would have been of no use to the plaintiff in taking any necessary or prudent pre-trial decision. Since she could comfortably do without it, she cannot be said to have 'required' it within the meaning of that term (as interpreted by this Court and others) for the exercise or protection of her right to claim damages." (paras 63-63)

Cloete JA held the same view:

> "No attempt was made to controvert the allegation made in the answering affidavit delivered by Unitas that Mrs Van Wyk had all the information which her experts would require in order to advise her. In the circumstances, I respectfully agree with the conclusion of my Brother Brand JA that Mrs Van Wyk has not even established the threshold requirement that the report would be of assistance to her." (para 52)

The second ground on which Cameron JA relied for his dissent – although it was presented in the judgment as his third – was that although the provisions of PAIA do not overlap with the rules of pleading and discovery (para 43, referring to section 7 of PAIA), the provisions of PAIA should be read to allow a would-be litigant to evaluate a potential claim (para 47). Cameron JA agreed with Brand JA's comment that PAIA does not offer "untrammelled pre-action disclosure"; but found the thrust of Brand JA's approach to be too cloistered:

> "Pre-discovery disclosure is important and helpful in assisting a litigant - and, thereby, also the opponent - to determine whether litigation should commence at all, or whether it should proceed. PAIA recognises the importance of post-commencement access procedures; but its novel dimension lies in the fact that it creates pre-commencement access. We should not stifle this. Litigation involves massive costs, time, personnel, effort and risks. Where access to a document can assist in avoiding the initiation of litigation, or opposition to it, the objects of the statute suggest that access should be granted." (para 31(c))

Cloete JA supported the reasoning of Brand JA in disagreeing with this view. He said:

> "If access to a record such as the Naudé report would merely be relevant to or helpful in the evaluation of a potential claim, but without the prospect that the information (or lack of it) in the record could be decisive, as is the present case, access under PAIA should, in my view, be denied. To suggest, as my Brother Cameron JA does, that access should be granted where it 'can assist' in avoiding the initiation of litigation, or opposition to it, 10 is, in my respectful view, to give insufficient weight both to the word 'required' in s 50(1) and to one of the objects in the statute set out in s 9(b)(i), ie the reasonable protection of privacy and confidentiality." (para 54)

The final point relied on by Cameron JA, that the nature of the private body to which an application in terms of section 50 is made should be taken into account in evaluating the application, was explicitly disagreed with only by Cloete JA. Cameron JA argued that since the term "required" is a flexible one and must be applied in each case with reference to the particular facts, evaluating applications must consider the extent to which it is appropriate to give effect to the express statutory objectives of "transparency, accountability and effective governance" in private bodies (para 40).

> "This statutory purpose suggests that it is appropriate to differentiate between different kinds of private bodies. Some will be very private, like the small family enterprise in Clutchco. Effective governance and accountability, while important, will be of less public significance. Other entities, like the listed public companies that dominate the country's economic production and distribution, though not 'public bodies' under PAIA, should be treated as more amenable to the statutory purpose of promoting transparency, accountability and effective governance." (para 40)

Cameron JA concluded on the facts that since the hospital is a "rather public private body", it would not be in keeping with objectives of transparency, accountability and effective governance if the institutional weaknesses and failures of the hospital were to be shrouded from pre-trial scrutiny (para 42). Cloete JA did not agree with this interpretation of the statute:

> "Under PAIA a requester either has a right to know what is in a record or must demonstrate that the record is required. The distinction depends upon the nature of the body to which the request is addressed. If it is a public body, s 11 applies and access to a record must be given if the procedural requirements have been fulfilled, and if access is not refused on a recognised ground of refusal. If it is a private body, s 50(1) imposes a further requirement, namely, that the record is 'required for the exercise or protection of any rights'. The answer to the question whether the record is so required must be sought by having regard to the position of the requester; the answer does not depend, in any way, on the classification of the body to which the request is addressed. That classification determines whether the question has to be asked, not how it should be answered. Either a body is a public body or it is a private body as defined in the statute (or it is neither, in which case the statute finds no application) and there is, with respect, no warrant for describing a body as a 'rather public private body', nor is its size, or the type of trade, business or profession in which it is engaged, relevant. The stated objectives of the statute cannot be utilised selectively to erode the fundamental distinction that the provisions of the statute in terms establish. I say selectively, because one of the objects of PAIA (set out in s 9(b)(i)) is to give effect to the constitutional right of access, subject to justifiable limitations, including limitations aimed at the reasonable protection of privacy and confidentiality. Furthermore, s 32(1) of the Constitution itself draws a clear distinction between any information held by the State and any information that is held by another person." (para 51)

Harms JA concurred in the judgments of Conradie JA and Cloete JA, and along with Brand JA, these judges constituted the majority. The appeal was upheld and the order of the court below reversed.

ARTICLES AND REVIEWS

Nick de Villiers, "Procedural Fairness and Reasonable Administrative Action within the Social Assistance System: Implications of Some Settled Class Actions" (2006) 22(3) *South African Journal on Human Rights,* pp 405-437. This article discusses five High Court of South Africa class actions brought under the Social Assistance Act 59 of 1992, dealing with the rights to procedurally fair and reasonable administrative action under the Promotion of Administrative Justice Act 3 of 2000. The cases have contributed significantly to the shaping of the policies and practices of the administration of social assistance. However, because in each case the state consented to the terms of each court order, the orders have not been reported and are not widely known.

D M Davis, "Adjudicating the Socio-Economic Rights in the South African Constitution: Towards 'Deference Lite'?" (2006) 22(2) *South African Journal on Human Rights,* pp 301-327. The record of adjudicating the socio-economic rights in the Constitution of the Republic of South Africa, 1996 reveals a judicial and academic retreat into administrative law and the occasional, mechanistic application of international law. The Constitutional Court has been reluctant to impose additional policy burdens on government or exercise supervision over the executive. This approach has its source not only in the restrictive legal repertoire employed by the Court, but also in the political and economic context in which current legal practice is located. The Constitution invites a transformation of legal concepts. This requires breaking down the division between negative and positive rights, in addition to the adoption of different remedies. The focus should move from ss 26, 27 and 28 of the Constitution towards the distributional implications of all constitutional rights. There is already a small but significant body of decisions of the Court which support the development of more fused conception of rights, including the recognition that the concept of legality may impose positive obligations on the state.

Daniel Malan Pretorius "Freedom of Expression and the Regulation of Broadcasting" (2006) 22(1) *South African Journal on Human Rights,* pp 47-75. This article considers whether the statutory regulation of broadcasting infringes the right to freedom of expression in the South African Constitution. In particular, attention is given to the question whether the statutory prohibition on broadcasting except under a licence issued by the Independent Communications Authority of South Africa (ICASA) is a limitation of freedom of the media. It is concluded (with reference to English, European, Canadian, American and South African jurisprudence), that the right to freedom of expression does not confer an unqualified right to broadcast. It is also concluded that a decision by ICASA to turn down an application for a broadcasting licence does not limit the right to freedom of expression and need not be justified under s 36 of the Constitution. However, such a decision is subject to judicial review on administrative-law grounds.

Tracy-Lynn Field, "Sustainable Development v Environmentalism: Competing Paradigms for the South African EIA Regime" (2006) 123(3) *South African Law Journal,* pp 409-436. In South Africa, notwithstanding rhetorical commitment to sustainable development in policies and laws, there is still a widely held perception that social and economic development is pitted against environmental protection. This is apparent, for example, in the debate over the new environmental impact assessment (EIA) regulations and a suite of recent decisions concerning EIAs for the construction of filling stations. Contrasting "sustainable development" and "environmentalism" as competing paradigms, this article argues that the sustainable development paradigm transcends the dichotomization of socio-economic and environmental issues, and thus stands a better chance of protecting the natural environment in South Africa. The current South African EIA regime has, however, shifted toward an environmentalist paradigm. The implications of this shift for administrative and judicial decision-making are outlined, with the most important conclusion being that compliance with the current EIA regime is not in itself sufficient to secure sustainable development.

Carol Steinberg, "Can Reasonableness Protect the Poor? A Review of South Africa's Socio-economic Rights Jurisprudence" (2006) 123(2) *South African Law Journal,* pp 264-284. This paper argues that, contrary to criticism put forward by proponents of the minimum core approach to the interpretation of socio-economic rights, the Constitutional Court's reasonableness approach provides a good doctrinal basis for transformative interpretation of such rights. The argument is based on two legs. The first is that the minimum core approach under-accommodates the doctrine of separation of powers, and thereby gives rise to concern about the institutional appropriateness and effectiveness of socio-economic rights adjudication. It seeks to define the content of socio-economic rights and this necessarily and inevitably draws the courts into formulating, rather than evaluating, policy. The reasonableness approach, on the other hand, is a from of judicial minimalism that is likely to realise lasting social reform precisely because it avoids defining socio-economic rights. The second leg of the argument concerns the constitutional Court's definition of "reasonableness", and differentiates the use of reasonableness in socio-economic rights jurisprudence from its use in administrative law. The Constitutional Court has evolved a unique concept and standard of reasonableness in respect of socio-economic rights. Since reasonableness forms the basis of the standard of compliance against which government's obligations are measured, this is crucial to the judiciary's role in safeguarding the interests of the poor, even as it recognizes its limited role in the constitutional order.

Murdoch Watney, "Regulation of Internet pornography in South Africa" [in two parts] (2006) 69(2) and (3), *Tydskrif vir Hedendaagse Romeins-Hollandse Regulation.* A question that accompanies the growing ease with which vast amounts of information are accessed on the internet is whether access to this information should be regulated. This is especially so in the case of internet pornography, or cyber-porn. This article addresses whether cyber-porn should be regulated, and if so, to what extent that regulation should be allowed to infringe on constitutionally protected rights of privacy and freedom of expression. In turning to this question, the author suggests five issues to which the legislature and interpreters of legislation should bear in mind in regulating pornography: The existence of international treaties governing online pornography applicable to South Africa; the ambit of cyber crime in South Africa; the challenges facing the prosecution of cyber crime and whether the challenges facing the successful prosecution of online pornography are addressed by means of legislative regulation; the various forms of prohibited online pornography and the crimes that exist regarding online pornography; the criminalisation of various forms of online pornography vis-a-vis the infringement of guaranteed human rights.