CASE LAW PROMOTION OF ADMINISTRATIVE JUSTICE ACT 3 OF 2000 (PAJA)

Introduction

This issue of the PAJA Newsletter begins by highlighting an increasing and worrying trend in the adjudication of administrative disputes. Many courts have disposed of administrative challenges without making clear what the applicant's cause of action was. In many cases this has to do with poor pleading - with applicants not making their cause of action clear. However, the onus is then on the court to require an applicant to plead its case properly. Two cases illustrate this difficulty. The first is a case in the SCA where the court failed to make clear whether the issue was to be resolved on the basis of the doctrine of legality or the standards of review set by PAJA. That failure is however explained in part by the ambiguous precedent set by the Constitutional Court in the *New Clicks* matter. The second judgment is a judgment of the Constitutional Court making it clear that applicants for administrative review must make clear the cause of action, and equally, that courts must make the basis of their decisions in administrative matters clear.

In *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) (reported in the 5th Edition of the PAJA Newsletter), a question that arose was whether the making of regulations by a minister empowered by legislation to do so amounts to administrative action in terms of PAJA. The Constitutional Court was divided on the issue, five judges holding that ministerial regulation-making is administrative action as defined (Chaskalson CJ at paras 120-135 and Ngcobo at paras 439-480, Langa DCJ, O'Regan J and Van der Westhuizen J concurring), five judges holding that it was not necessary to decide the issue (Moseneke J at para 671, Madala J, Mokgoro J, Skweyiya J and Yacoob J concurring) , and one judge holding that in the circumstances of the case the making of some of the regulations amounted to administrative action (Sachs J at paras 580-610). There is thus no clear authority in South Africa on the question of whether the making of regulations amounts to 'administrative action' for the purposes of section 33 of the Constitution or section 1 of PAJA.

This uncertainty forms the background to the SCA's judgment in ***Private Security Industry Regulatory Authority v Anglo Platinum Management Services Ltd and others*** **[2007] 1 All SA 154 (SCA**) (see below under 'The principle of legality'). The case was an appeal against a decision of the Pretoria High Court relating to regulation 10(3) of the Regulations Relating to Appeals and Applications for Exemptions, 2003, promulgated by the Minister of Safety and Security in terms of the Private Security Industry Regulation Act 56 of 2001. The parties were in agreement that the effect of regulation 10(3) was to revoke two exemptions to the registration requirements of the Act. The respondents' security officers were carrying on their security functions in terms of the exemptions. The exemptions were granted by the Minister prior to the promulgation of the regulations, and were granted for an indefinite period. The respondents' challenge in the court a quo was that the Act did not confer on the Minister the power to alter or revoke exemptions by the introduction of regulations (para 15). Maya JA described the Minister's actions thus:

> 'The Minister has at no stage purported, in the exercise of his powers to administer the Act, to withdraw the exemptions that he granted in the exercise of those administrative powers. What he has purported to do instead is to make regulations, in the exercise of his regulatory powers, that have the effect of terminating all exemptions generally, including those that are now in issue.' (para 16)

The respondents' questioned the lawfulness of the regulations. Whether the Minister had the power to make the regulations he did was thus a question relating to the proper scope of the Act (para 17).

The prior question, however, is the standard against which the Minister's conduct in making the regulations was to be evaluated. If it amounted to 'administrative action' it would have to comply with the provisions of PAJA. In the court a quo Van Oosten J held that the Minister had acted procedurally unfairly in failing 'to conduct the public consideration process contemplated in sections 3 and 4(1) of

the Promotion of Administrative Justice Act 3 of 2000', and found the regulation invalid on this ground (para 15). Van Oosten J therefore assumed that PAJA was applicable to the process by which the regulations were made. In the SCA, however, Maya JA found the regulations to be unlawful and found it unnecessary to deal with the respondents' procedural fairness complaints (para 30). The SCA expressed no opinion as to whether the making of regulations was an administrative action in this case or not. Rather, although it does not explain its approach, the SCA preferred to consider whether the regulations were made in accordance with the principles of the doctrine of legality. The application the doctrine of legality, as the Constitutional Court has made clear, applies to all exercises of public power, and it need not be decided whether the action complained against is 'administrative' or not before it is scrutinised against the doctrine of legality (see especially *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC), para 59).

As far as it goes, then, the judgment cannot be faulted. However, a majority in the *New Clicks* judgment did make it clear that the question of whether PAJA applies must be engaged with in every case where administrative justice rights are relied on. In this case, the respondents, the applicants in the court a quo, had sought to assert administrative justice rights against the regulation-making process. It should thus have been expressly decided, or at least considered, whether PAJA applied or not. In circumstances where there is no clear authority as to whether PAJA applies or not, though, it is understandable that the SCA did not engage with this question, and since the SCA determined the issue before it on the basis of the doctrine of legality, this failure is not material to the outcome. Indeed, in cases where an applicant relies directly on the doctrine of legality to challenge the lawfulness of an act such as regulation-making, the question of PAJA's applicability need not arise.

In ***Fuel Retailers Association of Southern Africa v Director-General, Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others*** **(Unreported judgment of the Constitutional Court, CCT 67/06, 7 June 2007)** (see below under 'Section 6 - Grounds of review'), the applicant challenged a decision by which authorisation had been given in terms of the Environment Conservation Act 73 of 1989 (ECA) for the construction of a filling station. The basis of the complaint was that the decision-maker (effectively the first respondent) had failed to consider the 'socio-economic impact of constructing the proposed filling station' (para 5). In its founding affidavit in the courts below, the applicant had relied on the review procedures set out in section 36 of the ECA, alternatively the common law, alternatively PAJA. This confused approach led the Court, per Ngcobo J, to make the following criticism:

> 'Neither the Supreme Court of Appeal nor the High Court considered the proper cause of action. They approached the matter on the footing that there was an overlap in the grounds of review under the common law, ECA and PAJA. It is apparent that the decision of this Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004 (4) SA 490 (CC)] was not drawn to the attention of the courts below. By the time the matter reached this Court, however, the applicant had made up its mind; it relied on PAJA, in particular, on subsections 6(2)(b), 6(2)(e)(iii) and 6(2)(i). It is necessary to address this issue and put in context the provisions of section 36 of ECA which make provision for a person aggrieved by a decision made under ECA to approach a high court for review.
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> In *Bato Star* this Court held that "[t]he cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past." [para 25] Section 36 of ECA does no more than to provide for the review of decisions of environmental authorities. The grounds upon which decisions under ECA may be reviewed are those set out in PAJA. The clear purpose of PAJA is to codify the grounds of review of administrative action. The fact that section 36 of ECA allows a person whose interests are affected by a decision of an administrative body under ECA to approach the High Court for review, does not detract from this. The provisions of section 36 must therefore be read in conjunction with PAJA which sets out the grounds on which administrative action may now be reviewed.'(paras 36-37, footnotes omitted)

The Court noted that it was not in dispute that the decision constituted administrative action in terms of PAJA (para 38). It was therefore clear that the matter had to be adjudicated according to the provisions of PAJA.

Section 1 - Administrative action defined

***South African Heritage Resources Agency v Arniston Hotel Property (Pty) Ltd and Another* 2007 (2) SA 461 (C)** (see below under 'Section 3 - Procedural fairness in administrative action affecting individuals', 'Common-law review - Unlawfulness' and 'Common-law review - Rationality') concerned a collateral challenge raised by the respondents to a provisional protection order issued by the applicant in terms of the National Heritage Resources Act 25 of 1999. The order provided that no person could 'damage, deface, excavate, alter, remove from its original position, subdivide or change the planning status of a provisionally protected place or object' for a period of two years (para 6). A hotel owned and operated by the first and second respondents fell within the provisionally protected area. The respondents' plan to refurbish the Arniston Hotel had been approved by the local authority in terms of the National Building Regulations and Building Standards Act 103 of 1977. The applicant sought to interdict the respondents from continuing with building operations during the period of the provisional protection order.

In responding to the respondents' collateral challenge, the applicant resisted the conclusion that PAJA was applicable. It argued that the decision to make a provisional protection order did not have a 'direct external legal effect' on the respondents, and for this reason did not meet the definitional requirements of section 1 of PAJA. Cleaver J held otherwise:

> 'I also do not agree with the submission by counsel that PAJA did not apply because the decision taken by the executive committee was not one which has a direct, external legal effect. This submission is based on the definition of "administrative action" in PAJA which requires an administrative action, for the purposes of the Act, to be one of such a nature. In my view, the decision to freeze the area in question clearly has a direct, external legal effect on the respondents.' (para 24)

Central to the applicant's argument in this respect was the fact that the order preventing building was provisional. Cleaver J, however, made much of the fact that the two year period of operation of the freezing order would have a significant impact on the respondents (para 22).

***Sevilya and another v Nelson Mandela Metropolitan Municipality and another* [2007] 2 All SA 201 (SE)** (see below under 'Section 6 - Grounds of review', 'Section 8 - Remedies' and Miscellaneous') concerned the first respondent's granting of consent to the second respondent to construct buildings transgressing certain building restrictions stipulated in regulation 8.1 of the Port Elizabeth Zoning Scheme. Ndzondo AJ accepted that the council's decision was 'administrative action' on the basis of agreement between counsel on the point. He said:

> 'Counsel were in agreement that the first respondent's decision to grant consent to the second respondent to relax the building line is an administrative action.' (para 5)

However, even where parties make common cause that a decision is administrative action, it must nevertheless be decided whether the decision at issue is in fact an administrative action within the meaning of section 1 of PAJA. An agreement that an action is an 'administrative action' cannot make it an 'administrative action' for the purposes of PAJA if it fails to meet the definitional requirements set in section 1. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) the Constitutional Court investigated whether a decision was an administrative action even though the parties were agreed that it was (para 26). Similarly, 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) Jajbhay J confirmed that the parties' common cause view that a certain decision was not administrative action, rather than simply accepting it. Ndzondo AJ should therefore have given some consideration to whether the council's decision was an administrative action - although on the facts it would be hard to find that it was not an 'administrative action'.

***Chairperson's Association v Minister of Arts and Culture and Others* [2007] 2 All SA 582 (SCA)** (see below under 'Section 4 - Procedural fairness in administrative action affecting the public' and 'Section 6 - Grounds of review') was an appeal against a judgment of the Pretoria High Court in which an application to review the decision by which the name of the town Louis Trichardt was changed to Makhado.

The Pretoria High Court decision is reported as *Chairpersons' Association v Minister of Arts and Culture and Others* 2006 (2) SA 32 (T) and is noted in the 6th Edition of the PAJA Newsletter. One of the appellant's complaints against the decision was that in order for the Minister to approve a name change in terms of section 10(1) of the South African Geographical Council Act 118 of 1998, the South African Geographical Names Council had to make a recommendation to the Minister in terms of section 9(1)(d) of the Act, and that the Names Council had made no such recommendation (para 36). On the facts, it appears that the recommendation was in fact made by the Director-General of the Department of Arts and Culture. The respondents met this challenge on appeal by arguing that it was defective because the appellants had never sought the review of the proposal. Farlam JA, for a unanimous court, held that such a review application was never open to the appellants in the first place as it was not an administrative action:

> 'The proposal as such changed nothing: it did not adversely affect the rights of any person and had no direct, external legal effect and was accordingly not covered by the definition of "administrative action" in section 1 of PAJA. It was of no greater significance than any individual's proposal.' (para 44)

Section 3 - Procedural fairness in administrative action affecting individuals

In ***Stock and Another v Minister of Housing and Others* 2007 (2) SA 9 (C)** the applicants sought an interdict preventing the construction of a temporary residential area (TRA) on land adjacent to theirs, pending the outcome of an application to review and set aside the decision to authorise the construction of the TRA. In order to prove the requirement for interdictory relief that a clear right existed and that it was threatened or infringed by the respondent's actions, the applicants relied on section 3 of PAJA. They argued that they had a right in terms of section 3(2)(b)(ii) of PAJA to be consulted before the decision to construct the TRA was taken, and that they were never given an opportunity to exercise this right (at 14F-G). Davis J had little difficulty in accepting that the process by which the decision to construct the TRA had been made had failed to satisfy the requirement that the applicants be heard (15F-G). However, the prior question as to whether the applicants in fact had a right to be heard had still to be answered. Although the applicants had not been give an opportunity to be heard, they had to show that they had a right, in terms of PAJA, to be heard. The judge said in this regard:

> 'In terms of section 3(1) of PAJA, it is required that procedural fairness apply to administrative action which materially and adversely affects the rights or legitimate expectations of any person. … In this particular regard, some debate took place in this Court concerning the important Constitutional Court judgment of *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)* 2001 (3) SA 1151 (CC) (2001 (7) BCLR 652) in paras [98] - [100]. In that case the Court questioned whether any rights of property owners were affected by a transit camp on a neighbouring property. Without deciding the issue, it appeared that the Court accepted that "procedural fairness may be required for administrative decisions affecting material interest short of an enforceable or prospective right". (In para [100].)' (at 15I-16A)

Davis J concluded that the applicants, as neighbouring property owners, had a right to be properly consulted and to have their views considered before a decision that may affect their property rights was taken (at 16F-G). The failure to do so therefore satisfied the requirement that an applicant for interdictory relief demonstrate infringement of or a threat to a clear right. The application was ultimately dismissed on the exercise of the court's discretion whether to grant such relief or not.

In ***South African Heritage Resources Agency v Arniston Hotel Property (Pty) Ltd and Another* 2007 (2) SA 461 (C)** (see also under 'Section 1 - Administrative action defined' above and 'Common-law review - Unlawfulness' and 'Common-law review - Rationality' below) the respondents resisted the applicant's application for an interdict on the grounds that the administrative action on which the applicant based its motion was procedurally unfair. The applicant issued a provisional protection order in terms of the National Heritage Resources Act 25 of 1999 which 'froze' the area in which the respondents' hotel was situated. The order prevented alteration of property or objects within the protected area, and would have prevented the continuation of building operations refurbishing the respon-

dents' hotel. The respondents argued that they had not been consulted by the applicant prior to the making of the provisional protection order. The applicant pointed to the different procedures required by the National Heritage Resources Act in relation to investigating the desirability of declaring particular areas as national heritage sites, declaring such sites and provisionally protecting certain areas (para 20). The applicant contended that in terms of the Act, the respondents did not need to be afforded a hearing before the area was provisionally protected:

> 'Counsel [for the applicant] stressed the fact that since the provisional protection under s 29 is far lass drastic in scope and duration than the consequences of declaring an area a national heritage site, all that is necessary for the applicant to do is to notify the owner of the property in writing, in terms of s 29(4), of the proposed provisional protection prior to publishing the notice of provisional protection. The reason why the owner is not consulted in advance is because the protection is only provisional and may not be converted into final protection.' (para 20)

The judge agreed that this argument would have carried weight if the period of the provisional protection order had been shorter (para 20). Cleaver J quoted the often-quoted passage in *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (SCA) at 231H-232E, itself quoting the English House of Lords judgment in *Doody v Secretary for the Home Department and Other Appeals* [1993] 3 All ER 92 (HL). Both of those cases emphasise that procedural fairness depends in each case on the particular facts and circumstances. This is given effect to in section 3(2)(a) of PAJA which provides that fair administrative procedure 'depends on the circumstances of each case.' Taking various factors into consideration, Cleaver J found that the circumstances of the case were such that the respondents were entitled to be heard prior to the decision to provisionally protect the area was taken:

> 'It is, of course, so that it is not necessary to provide full scale hearings at every stage at which administrative decisions are taken when such decisions are taken in stages. It is said that, normally, a hearing would not be necessary when a decision is taken to carry out an investigation. The difficulty in this case is that, although the decision which was taken was to carry out an investigation, the duration of the provisional order becomes of great importance and is particularly prejudicial to the respondent.
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> I accordingly conclude that in the particular circumstances of this case, the respondents were entitled to a hearing before the decision provisionally to protect the area was made and that in not affording them that right, the decision was not prejudicially fair.' (paras 26-27)

The applicant in ***Robinson v Minister of Justice and Constitutional Development and Another* 2006 (6) SA 214 (C)** (see below under 'Section 5 - Reasons' and below under 'Section 6 - Grounds of review') was convicted in Canada of sexually assaulting a 14 year old girl. Before sentence, he fled to South Africa, and was sentenced in absentia to three years' imprisonment. The history of the case is long and complex, and is set out by Davis J in the opening pages of the judgment (at 217E-219A). It is sufficient to state simply that the applicant has been resisting extradition to Canada since November 2000 when the Canadian High Commission addressed a note to the Department of Foreign Affairs requesting the applicant's extradition to Canada (at 217I). On 30 August 2005 the Minister of Justice and Constitutional Development made a decision in terms of section 11(a) of the Extradition Act 67 of 1962 ordering the applicant to surrender himself to Canadian authorities in order to serve his sentence. It was this decision that the applicant sought to have reviewed and set aside. He complained that the Minister had acted unlawfully in that decision was effectively taken by a functionary in her department, that the decision had been procedurally unfair in that he had not been given an oral hearing before the decision was taken, and that the Minister's decisions was unreasonable.

In considering whether the Minister was obliged to afford the applicant a hearing before taking the decision to extradite him, Davis J stated that the question to be asked was simply 'Did procedural fairness require a formal hearing to be held?' (at 226H). Like Cleaver J in ***South African Heritage Resources Agency v Arniston Hotel Property (Pty) Ltd and Another* 2007 (2) SA 461 (C)** above, Davis J referred to the English House of Lords decision in *Doody v Secretary for the Home Department and Other Appeals* [1993] 3 All ER 92 (HL). The comments of Lord Mustill in that decision were quoted with approval by

Chaskalson CJ in M*inister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) at para 152:

> 'Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken or with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both.' (at 226E-F)

On the facts of the case, Davis J concluded that procedural fairness did not require that an oral hearing be afforded the applicant:

> 'It cannot, in my view, be considered to be unfair of first respondent to have refused to have granted applicant an oral hearing before having made a decision in the circumstances of this case. There has been no case made out to the effect that any further material would have been presented by applicant to first respondent. Other than the benefit of hearing applicant in person and gaining some personal insight into his or his wife's sincerity, no reason was proffered as to the justification for an oral hearing.' (at 227E)

City of Johannesburg v Rand Properties (Pty) Ltd and Others **[2007] 2 All SA 459 (SCA)** (see below under 'Section 6 - Grounds of review') was an appeal and cross appeal by the appellant and respondents against a decision of the Johannesburg High Court, reported as *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (1) SA 78 (W). The City of Johannesburg had acted in terms of section 12(4)(b) of the National Building Regulations and Building Standards Act 103 of 1977, issuing a notice ordering the occupiers of certain derelict buildings in the Johannesburg inner city to vacate the buildings. The section allows order of vacation to be given in respect of buildings occupancy of which is unsafe. It provides:

> 'If the local authority in question deems it necessary for the safety of any person, it may by notice in writing…order any person occupying or working or being for any other purpose in any building, to vacate such building immediately or within a period specified in such notice.'

The various occupiers refused to vacate the premises. The City applied for an order of court for their eviction, while the respondents, for their part, applied inter alia for the review of the section 12(4)(b) notices. In the High Court, the City's application was dismissed while the respondents' counter-application was partly successful. The High Court held that the City's housing programme failed to comply with the constitutional obligation to provide suitable relief for people in a crisis situation. The City was ordered to devise and implement a 'comprehensive and co-ordinated programme to progressively realise the right to adequate housing to people in the inner city of Johannesburg who are in a crisis situation', and was interdicted from seeking to evict the occupiers pending the implementation of such a programme (the order of the High Court is quoted by the SCA at para 15). Both partied were dissatisfied with the High Court's judgment, and filed an appeal and cross-appeal respectively to the SCA.

The SCA, per Harms ADP, overturned this judgment. The High Court had found it unnecessary to deal with the application for review, because it found in the respondents' favour on other bases. The SCA judgment however, deals with both the administrative and the constitutional law issues. The constitutional issues are briefly set out here, before the administrative law issues are engaged with.

<u>The constitutional issues and the SCA's findings</u>

The SCA disagreed with the High Court in finding that the City's actions did not infringe the occupiers' rights to have access to adequate housing, and that its housing programme was not unacceptable. The High Court's finding, Harms ADP held, depended on the finding that the City 'was not entitled to infringe the respondents' right to unsafe ("inadequate") housing.' (para 46) Harms ADP went on to hold that 'the contention that to deprive a person of unsafe housing denies him or her access to adequate housing is not correct. The corollary would be that to deny someone poisonous food is to deny that person food.' (para 46). Harms ADP therefore denied that the City's housing programme infringed the respondents' rights or that section 12(4)(b) offended section 26(3) of the Constitution prohibiting arbitrary evictions. Harms ADP did hold, however, that where people are evicted in terms of section 12(4)(b) the City bears an obligation to provide emergency and basic shelter to affected people (para 47).

The administrative law issues

The respondents challenged the City's actions on three grounds, one of which was that they had not been given an opportunity to be heard prior to the issue of the vacation order. Harms ADP held, however, that in emergency situations the right of a reasonable opportunity to be heard in section 3(2)(b)(ii) of PAJA can be circumvented, especially given the content of section 3(4) of PAJA, which allows an administrator to depart from the requirements of section 3(2) whether it is reasonable and justifiable in the circumstances to do so:

> 'The right to be heard has now been constitutionalised and has effectively been codified in s 3 of PAJA. It is not an absolute or immutable right. What is required is a fair administrative procedure and fairness depends on the circumstances of each case. As a general rule, the "administrator" must give the affected person the opportunity to make representations but if it is reasonable and justifiable in the circumstances the administrator may depart from this requirement (s 3(4) of PAJA). In this case the only issue on which the administrator might have been obliged to hear and consider representations was in relation to the question whether it was necessary for the safety of any person that the buildings be vacated. It is clearly desirable that there should be consultation in matters of this nature but this is not such a case. In cases of crisis the audi principle can hardly apply. There is no suggestion that the jurisdictional facts for the decision did not exist or that the respondents wished to make any representations in that regard. I have already mentioned the problem in establishing the number, apart from the identity, of occupiers of San Jose. I therefore conclude that, taking into account all relevant factors, the City was entitled to dispense with a prior hearing (see s 3(4)(b) of PAJA.).' (para 63, footnote omitted)

Section 4 - Procedural fairness in administrative action affecting the public

***Chairperson's Association v Minister of Arts and Culture and Others* [2007] 2 All SA 582 (SCA)** was an appeal against a judgment of the Pretoria High Court (see above under 'Section 1 - Administrative action defined' and below under 'Section 6 - Grounds of review'). The case concerned the Minister's decision to approve the proposal that the name of Louis Trichardt be changed to Makhado in terms of section 10(1) of the South African Geographical Council Act 118 of 1998. The appellant contended before the court a quo that although the Minister was not expressly required to consult the public in terms of the Act, the nature of the decision was such that consultation was required and the Minister should have ensured that the provisions of section 4(1) of PAJA had been complied with before he approved the proposal. Legodi J held in the court a quo that on the facts, the question of consultation had been considered by the respondents, and as section 4(1) of PAJA leaves it up to the decision-maker to decide how to give effect to the right to procedurally fair administrative action, section 4 had been substantially complied with.

The SCA, per Farlam JA, disagreed with Legodi J's conclusion. Section 9(1)(a) of the Act requires the Names Council established in terms of the Act to 'set guidelines for the operation of Provincial Geographical Names Committees', while section 9(1)(i) requires the names Council, in consultation with the Minister and the Provincial Geographical Names Committees, to 'formulate policies, principles and procedures' (para 6). It was common cause that the guidelines in terms of paragraph (a) and the policies, principles and procedures in terms of subsection (i) were to be found in a single document (para 10). This document states that the Names Council 'ensures that proper consultation has taken place' and that Provincial Geographical Names Committees are 'responsible for seeing that local communities and other stakeholders are adequately consulted' (para 11). Farlam JA held on the strength of these statements that in considering the question of how the right to procedural fairness should be realised, the Names Council had decided that consultation should take place before a name change is effected:

> 'In my opinion the statement in the guidelines that the Names Council "ensures that proper consultation has taken place" is akin to a promise made by a public authority to follow a certain procedure, about which the Privy Council said the following in *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 622 (PC) at 638E-F:
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> > "When a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and implement its promise, so long as implementation does not interfere with its statutory duty. The principle is also justified by the further consideration that, when the promise was made, the authority must have considered that it would be assisted in discharging its duty by ant representations from interested parties and as a general rule that is correct."

> The guideline is that before a proposal for a name change, even one of a transformatory nature, is considered, adequate consultation must take place. In all the circumstances I think it clear that this guideline should have been implemented in the case of the Louis Trichardt name change. It is clear from the summary of the facts set out above [at paras 12-35] that such consultation did not take place.' (paras 45-46)

The SCA therefore held that the decision to change the town's name was procedurally unfair.

Section 5 - Reasons

In ***Robinson v Minister of Justice and Constitutional Development and Another*** **2006 (6) SA 214 (C)** (see under 'Section 3 - Procedural fairness in administrative action affecting individuals and 'Section 6 - Grounds of review'), the court referred to the right in section 5 of PAJA to request reasons for an administrative action in the context of the applicant's complaint that the decision was unreasonable.

The matter concerned a challenge to the respondent Minister's decision to extradite the applicant to Canada in order to serve a sentence imposed on him following his conviction on a charge of sexual assault. Although the Minister prepared a memorandum in which she set out the considerations to be taken into account when deciding whether to order the extradition of the applicant, the applicant complained that this memorandum amounted to little more than bare conclusions. He relied on the following dictum in *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) (reported in the 5th Edition of the PAJA Newsletter):

> 'The statement of bare conclusions without the statement of reasons will always expose the tribunal to the suggestion that it has not given the matter close enough attention or that it has allowed extraneous matters to cloud its consideration.' (para 538, quoted at 227H-I)

Davis J agreed that the Minister had not offered any explanation as to how the various factors she considered had been weighted, for example, in order to conclude that it was in the interests of justice that the applicant be extradited (at 228D-E). However, Davis J then suggests that the applicant was at least partly to blame in this respect since he failed to make use of the right in section 5 of PAJA to request reasons for administrative action:

> 'These criticisms about the nature of first respondent's affidavit notwithstanding, the question arises as to whether, upon an examination of the documentation presented to first respondent, no reasonable decision-maker could have come to the conclusion to which she arrived and which is described in her answering affidavit. Significantly, applicant did not request any reasons from first respondent nor did he seek any order of Court compelling first respondent to provide reasons in this regard….The Act has no express provision requiring first respondent to provide applicant with reasons, but it was open to applicant to make a request in terms of s 5(1) of PAJA and, if need be, to seek an order of Court compelling first respondent to provide reasons. This was not done. Had it been done applicant may have gained some insight into the precise process by which first respondent evaluated the individual components of his case.' (228E-H)

This passage implies that where administrative action is to be challenged as unreasonable because the decision-maker has not supplied reasons for his or her decision, the onus is on the person seeking to challenge that administrative action to first request reasons in terms of section 5(1) of PAJA for the decision.

Section 6 - Grounds of review

Section 6(2)(a)(ii) - Unlawful delegation

In **Darson Construction (Pty) Ltd v City of Cape Town and another [2007] 1 All SA 393 (C)** (see below under 'Section 8 - Remedies'), the applicant sought the review of a decision taken by the first respondent's Supply Chain Management Committee to award a tender to the second respondent as well as the Committee's decision to re-award the tender to the second respondent after it was set aside on appeal to the Acting City Manager. The applicant complained that although the first respondent had delegated its authority to consider recommendations of the Goods, Services and Property Advisory Body and to act thereon to the 'Chief Financial Officer in consultation with the Director: Legal Services and an appointed member of staff' (at 398h-i), the decision was in

fact made by the Supply Chain Management Committee. Selikowitz J held that although the Chief Financial Officer was in fact the chairman of the Committee, and the other two members of the Committee were the Director: Legal Services and the appointed member of staff referred to in the delegation, the impugned decisions were made in each case by only two members of the Committee. Thus, a quorum of the Committee made the decision, rather than the Chief Financial Officer acting in consultation with the Director: Legal Services and the appointed member of staff. The judge therefore held that since the decision was taken by a functionary not authorised in terms of the delegation to take the decision, it fell to be set aside: 'Where an unauthorised "administrator" acts its actions are clearly reviewable and cannot be upheld.' (at 403d).

Section 6(2)(b) - Failure to comply with a mandatory or material procedures prescribed by an empowering provision

The overlap between the grounds of review set out in section 6(2)(b) and 6(2)(e)(iii) was highlighted in the Constitutional Court's decision in ***Fuel Retailers Association of Southern Africa v Director-General, Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others*** **(Unreported judgment of the Constitutional Court, CCT 67/06, 7 June 2007)** (see above under 'Introduction'). The case concerned a challenge to a decision by the Department of Agriculture, Conservation and Environment, Mpumalanga, to authorise the construction of a filling station in terms of section 22(1) of the Environment Conservation Act 72 of 1989 (ECA). That section forbids anyone from undertaking any activity that has been identified in terms of section 21(1) of the ECA as one that may have a substantial detrimental effect on the environment without the written authorisation of the competent environmental management authority (para 2). Although the applicant relied on a number of grounds to challenge the decision on the courts below, it relied on only one before the Constitutional Court. The terms of this challenge and the essence of the respondents' defence is set out in the majority judgment of Ngcobo J:

> '[T]he only ground that concerns us in this application is that the environmental authorities in Mpumalanga had not considered the socio-economic impact of constructing the proposed filling station, a matter which they were obliged to consider. In resisting the application on this ground the Department contended that need and desirability were considered by the local authority when it decided the rezoning application of the property for the purposes of constructing the proposed filling station. Therefore it did not have to reassess these considerations.' (para 5)

The applicant sought the review of the decision on the basis that the decision-maker failed to comply with a mandatory and material procedure set out in the ECA and thus fell foul of section 6(2)(b) of PAJA, that the decision-maker took into account irrelevant considerations and failed to consider relevant ones and was reviewable in terms of section 6(2)(e)(iii), and finally that the decision was otherwise unconstitutional or unlawful in terms of section 6(2)(i) (para 38). In considering the relationship between this three-pronged challenge, Ngcobo J said:

> 'There is a significant overlap in these grounds. In the course of oral argument it became clear that the main ground of attack was that the environmental authorities failed to consider the impact of the proposed filling station on socio-economic conditions, a matter which they were required to consider. The central question in this application therefore is whether the environmental authorities failed to take into consideration matters that they were required to consider prior to granting the authorisation under section 22(1) of ECA.' (para 39)

Ngcobo J then considered the implications of section 24 of the Constitution, entitling everyone to an environment that is not harmful to their health or well-being and to have the environment protected for the benefit of present and future generations, and the provisions of the National Environmental Management Act 107 of 1998 (NEMA) that give effect to section 24 of the Constitution in part by embracing the concept of sustainable development (paras 43 and 59). In light of these considerations Ngcobo J held that the Department was obliged to consider the impact of the proposed filling station on socio-economic conditions (para 62). It was common cause, however, that the environmental authorities did not themselves consider these socio-economic factors (para 84). The critical question was whether the Department, as the responsible environmental authority, was entitled to rely on a decision made by the local council to re-zone the

area for the construction of filling stations. The majority held that it was not:

> 'Need and desirability are factors that must be considered by the local authority in terms of the Ordinance. The local authority considers need and desirability from the perspective of town-planning and an environmental authority considers whether a town-planning scheme is environmentally justifiable. A proposed development may satisfy the need and desirability criteria from a town-planning perspective and yet fail from an environmental perspective. The local authority is not required to consider the social, economic and environmental impact of a proposed development as the environmental authorities are required to do by the provisions of NEMA. Nor is it required to identify the actual and potential impact of a proposed development on socio-economic conditions as NEMA requires the environmental authorities to do.' (para 85)

By their own admission, the Department admitted that it did not itself apply its mind to the sustainable development and other environmental factors implicated in the construction of the proposed filling station. Rather, it satisfied itself that these considerations had already been taken into account by the local council when it made the decision to re-zone the area. This failure, the majority held, was reviewable in terms of section 6(2)(b):

> 'It is clear that the environmental authorities misconstrued what was required of them by NEMA. They considered that they did not have to take into account socio-economic considerations as required by NEMA. NEMA required the environmental authorities to consider the impact of the proposed filling station on socio-economic conditions and thereafter to make a decision that is appropriate in the light of such a consideration. The mandatory nature and the materiality of the requirement is manifest. The conclusion that the environmental authorities failed to comply with a mandatory and material condition for the granting of authorisation is therefore inescapable. As a result, their decision falls to be reviewed under section 6(2)(b) of PAJA as they did not comply with a mandatory and material condition set by NEMA.' (para 89)

The majority added that even if the environmental authorities where entitled to rely on the earlier re-zoning, the facts of the case were such that the Department had to consider the issue afresh. The re-zoning had taken place eight years previously, and in the intervening period several new filling stations had been constructed. A significant change in the environment had taken place (para 96).

Sachs J filed a dissent. He disagreed with the conclusions of the majority on the basis that section 6(2)(b) of PAJA is grounds for review only where an administrator fails to comply with a mandatory and material procedure. He found that the obligation to consider sustainable development in the circumstances of this case was not material to the outcome of the decision:

> 'It seems to me that while the majority judgment did not find it necessary to evaluate the facts because a mandatory procedure was not complied with, if the evidence before the Court suggests that the failure was not of a material nature, it should not lead to the decision being set aside. In my view the facts in the present matter as available from the record do not establish that having a competitor to the filling stations owned by an Executive Member of the applicant[1] posed any measurable threat to the environment that needed to be considered. On the contrary, the facts reveal that all the ordinary environmental controls were in place and that any potential deleterious effect of possible over-trading was speculative and remote, in a word, makeweight.' (para 112)

Sachs J relies for support on Professor Hoexter's opinion in Administrative Law in South Africa (2007) at p 262 and Maharaj and Others v Rampersad 1964 (4) SA 638 (A) at 646C-E (para 111). However, these statements present the view that 'substantial' or 'adequate' compliance with a mandatory and material procedure may be sufficient for the purposes of administrative justice. A mandatory requirement need not be 'strictly' complied with. The statements to which Sachs J looks for support therefore say nothing about how courts are to assess the materiality of a mandatory procedure. Rather, they go to how courts are to assess whether a mandatory and material procedure has been complied with, and it is not clear that they offer support for Sachs J's minority view.

The facts of ***Darson Construction (Pty) Ltd v City of Cape Town and another*** **[2007] 1 All SA 393 (C)** (see below under 'Section 8 - Remedies') appear above. The decisions of the first respondent's Supply Chain Management Committee to award and re-award a tender to the second respondent were impugned in the basis that the Committee was not authorised to

[1] The Executive Member owns two filling stations in the White River area and had an interest in a third at the time of instituting proceedings in the High Court.

take the decision. Rather, the first respondent had delegated the decision to the 'Chief Financial Officer in consultation with the Director: Legal Services and an appointed member of staff' (at 398h-i). Although the three persons referred to in the delegation comprised the Committee, the Chairman of the Committee - who was also the Chief Financial Officer - did not act in consultation with both of the persons referred to. Selikowitz J therefore held that although the Chief Financial Officer was involved, he failed to comply with the mandatory and material provisions prescribed by the delegation of authority in terms of which he acted (at 403d).

The applicant also complained that the Committee awarded the tender contract to the second respondent, despite the fact that the applicant scored more favourably on the points system of tender-evaluation, because the Committee wished to spread tender contracts more equitably among various companies. The applicant complained that this reason for the Committee's decisions was not authorised by the empowering provision. The court did not find it necessary to consider this argument, though, given the conclusion that the decisions were reviewable for other reasons (at 403e).

In ***City of Johannesburg v Rand Properties (Pty) Ltd and Others*** **[2007] 2 All SA 459 (SCA)** (see above under 'Section 3 -Procedural fairness in administrative action affecting individuals), the respondents' argued in a cross-appeal against the judgment of the Johannesburg High Court that the City's decision to order the occupiers of certain derelict buildings to vacate the premises in terms of section 12(4)(b) of the National Building Regulations and Building Standards Act 103 of 1977 was unlawful because it failed to take relevant considerations into account (paras 62 and 64). However, as Harms ADP points out, this challenge was predicated on a presupposed relationship between the right to act in terms of section 12(4)(b) and the right to have access to adequate housing (para 64). The respondents' submission came down to an argument that finding adequate alternative housing is a prerequisite or jurisdictional fact of the power conferred by section 12(4)(b) - no power to order vacation in terms of section 12(4)(b) exists until the mandatory requirement to locate alternative housing is met. Harms ADP, for a unanimous court, rejected this argument as an incorrect reading of the statutory framework. He stated:

> 'The submission presupposes that the right to act under s 12(4)(b) and the right to access to adequate housing are reciprocal and that the former is dependent or conditional on the latter. There is in my view no merit in the submission.' (para 64)

The judge's comments relate to the respondents' submission that the discretion afforded to courts by the provisions of the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998 (PIE) should operate in this case. Section 6(3) of PIE provides that where an organ of state seeks the eviction of unlawful occupiers, it must have regard to among other things the availability of suitable alternative accommodation or land. In again rejecting the argument that finding alternative land was a jurisdictional fact for the exercise of the power under section 12(4)(b), Harms ADP said:

> 'The underlying hypothesis for the assumption that a court has an overriding discretion to refuse to enforce legislation appears to have been that the PIE discretion is to be read into s 12(4)(b) via the Constitution. That is not correct and is contrary to authority binding on that court.' (para 49)

Although the respondents cast the complaint as a failure to consider whether alternative accommodation was available before issuing the section 12(4)(b) notice, the course of the judgment reveals that the argument presupposed that securing alternative accommodation was a jurisdictional fact of the section 12(4)(b) power, or a mandatory condition prescribed by section 12(4)(b) as contemplated by section 6(2)(b) of PAJA.

Section 6(2)(e)(ii) - Action taken for an ulterior purpose or motive

City of Johannesburg v Rand Properties (Pty) Ltd and Others **[2007] 2 All SA 459 (SCA)** (see above under 'Section 3 - Procedural fairness in administrative action affecting individuals) concerned the City of Johannesburg's attempt to remove the respondents from certain derelict buildings in the Johannesburg inner city. It acted in terms of section 12(4)(b) of the National Building Regulations and Building Standards Act 103 of 1977, which allows local authorities to remove the occupants of buildings habitation of which

is unsafe. The City sought a court order evicting the respondents after they failed to comply with the section 12(4)(b) notice. The respondents objected, challenging the validity of the section 12(4)(b) notice on a number of grounds. One of these grounds was that the City had an ulterior purpose in seeking to remove them. It was not genuine concern for their safety and health or concern about fire risks that motivated the City, the respondents argued, but a desire to clean up the inner city in line with its urban renewal programme (paras 65-66). Harms ADP, for the court, rejected this argument on the facts:

> 'It is true that the vision that the City has for the inner city does not accommodate the poor but I do not think it follows that its present actions are directed by an ulterior motive. The evidence shows that many buildings in the inner city have reached such a state of decay that they pose a danger both to their occupants and to the public at large. The City cannot be faulted for undertaking its duty not to permit that state of affairs to persist. Once having acted to prevent that occurring the question necessarily arises what is to be done with the buildings concerned. The City has decided as a matter of policy that the buildings are to be rejuvenated in the interest of the economic health of the inner city, but I do not think that implies that the eradication of unsafe conditions is no more than a ploy. It seems to me that the two questions - what is to be done to avoid unsafe conditions and what is to be done with the buildings thereafter - are two unrelated questions, and the choice that has been made in relation to the latter does not imply that the decision in relation to the former was taken with an ulterior motive.' (para 67)

Section 6(2)(e)(iii) - Failure to take relevant considerations into account

Chairperson's Association v Minister of Arts and Culture and Others **[2007] 2 All SA 582 (SCA)** (see above under 'Section 1 - Administrative action defined' and 'Section 4 - Procedural fairness in administrative action affecting the public') concerned a challenge to the Minister's decision to approve the change of the town name Louis Trichardt to Makhado. The change was proposed to the Minister in terms of section 9(1)(d) of the South African Geographical Council Act 118 of 1998. The Minister approved the name change, but was materially influenced in doing so by the statement in a memorandum prepared by the Director-General in his department that proper consultation processes had taken place (para 47). The SCA found that such processes had not taken place (para 46), and that this statement was thus incorrect and amounted to a material mistake of fact that 'clearly influenced the first respondent in coming to the decision he did' (para 47). Section 6 of PAJA does not expressly provide for review of administrative actions on the basis of mistakes of fact, but the SCA, per Farlam JA, held that a mistake of fact can be accommodated by the ground of review set out in section 6(2)(e)(iii):

> Under the law as it was before PAJA it was held by this court in *Pepcor Retirement Fund v Financial Services Board* 2003 (6) SA 38 (SCA) at paras 47 and 48 that a material mistake of fact was a ground for judicial review, provided the fundamental distinction between appeal and review was not blurred or eliminated. Cloete JA said (at para 47) that the doctrine of legality requires that the power conferred on a functionary to make decisions in the public interest should be exercised properly, ie on the basis of the true facts. In the *Pepcor* case it was held that the distinction referred to was not blurred or eliminated because the Registrar of Pension Funds, whose decision was being reviewed and to whom material misstatements of fact had been made, was entitled to act on the assumption that the correct facts had been placed before him. In this case the first respondent was entitled to assume that the fact conveyed to him by the Director-General, viz that there had been proper consultation, was correct. In my opinion the legal position as set out in the *Pepcor* case based as it is on the principle of legality still applies under PAJA, s 6(2)(e)(iii) of which provides that administrative action taken because "irrelevant considerations were taken into account or relevant considerations were not considered" can be set aside on review. Where a decision is based on a material misstatement of fact it is clear that that subparagraph applies.
>
> It follows from what I have said that even if one accepts that the Names Council did recommend the name change to the first respondent (which I am prepared to assume for the purposes of this judgment) the first respondent's decision to approve the name change clearly cannot stand. This conclusion renders it unnecessary to decide whether the appellant's contention that the first respondent lacked the power to approve the name change because the Names Council had failed to make a recommendation in this regard is correct.' (paras 48-49)

See also in this regard ***Government Employees Pension Fund and another v Buitendag and others*** **[2007] 1 All SA 445 (SCA)** reported later in this edition of the PAJA Newsletter.

Similar considerations were at play in ***Uthingo Management (Pty) Ltd v Minister of Trade and Industry and others*** **[2007] 2 All SA 649 (T).** The applicant objected to the Minister's decision in terms of section 13 of the Lotteries Act 57 of 1997 to award the operation of the national lottery to company known as Gidani, on the advice of the National Lotteries Board (second respondent) in terms of section 10 of the Act. The applicant argued that both the Board's recommendation and the Minister's decision were flawed because section 13(2)(b)(iv) of the Act requires the Minister to be satisfied that no political party or political office bearer has any financial interest in companies vying for the license to operate the national lottery (at 651e-f). The section provides:

> 'Before a licence is granted under this section the Minister shall be satisfied that no political party in the Republic or political office-bearer has any direct financial interest in the applicant or is a shareholder of the applicant.'

Subsection (3)(b) also requires the Minister to take into account whether any person likely to benefit from the business is a fit and proper person. Before the Minister made his decision he was supplied with a memorandum prepared by the Board identifying 'key individuals in each of the shareholders of the bidders' (at 664e). The Minister stated that he was 'satisfied' after considering the memorandum that none of the persons there listed were 'political office bearers' (at 664e). On the facts, however, there were several political party members and indeed political office bearers with financial interests in Gidani. Some of these political party members are listed in the judgment at 654g-I and 659a, and need not be mentioned here. On these facts Seriti J held that it could not be said that no political party member of political office bearer had financial interests in Gidani. The judge referred to this oversight as a material mistake of fact that undermined the validity of the decision, and quoted from the Pepcor judgment referred to in ***Chairperson's Association v Minister of Arts and Culture and Others*** above. In reaching his conclusion, the judge highlighted the overlap between the grounds of review of failing to comply with a mandatory and material requirement or procedure prescribed by legislation (section 6(2)(b)) and a material mistake of fact (section 6(2)(e)(iii)). He held:

> 'My view is that for the Minister of Trade and Industry to comply with the requirements of section 13(2)(b)iv) and (3)(b) of the Lotteries Act mentioned above, [he] must at least be aware or have had information about all the shareholders of the third respondent and all individual shareholders in the entities which constitute the third respondent. Failure to secure the said information will not enable the Minister to comply with the provisions of the Lotteries Act mentioned above.' (at 665c-d)
>
> 'There are serious shortcomings in the investigations of the Board carried out and consequently in the memorandum they presented to the Minister. The Board did not investigate and their memorandum does not contain information (which is material to the Minister and their recommendation) about the individual shareholders of the entities that constitute both the applicant and the third respondent.' (at 665f-g)
>
> 'The Minister and the National Lotteries Board failed to consider or take into account mandatory and material information prescribed by section 13 of the Lotteries Act, namely the shareholders in the entities which constitute the applicant.' (at 665h-i)
>
> 'This Court is entitled to set aside the decision of the Minister as provided for in section 6(2)(b) and (e)(iii) of the Promotion of Administrative Justice Act' (at 665i-j).

The facts of ***Robinson v Minister of Justice and Constitutional Development and Another*** **2006 (6) SA 214 (C)** are summarised above (see under 'Section 3 - Procedural fairness in administrative action affecting individuals and 'Section 5 - Reasons'). The applicant complained that the respondent Minister had failed to apply her mind in exercising her discretion to order the applicant's extradition to Canada in terms of section 11(a) of the Extradition Act 67 of 1962 (at 219E). The applicant's complaint was primarily that the Minister had relied on summaries of relevant information and had failed to consider all the documentation placed before her by the applicant. No reliance was placed directly on section 6(2)(e)(iii) of PAJA, however, although the complaint is made in its terms. In support of the submission the applicant argued that the respondent's decision was effectively but unlawfully exercised by functionaries in her department. This latter argument is in terms of section 6(2)(a)(ii) of PAJA, although again the applicant placed no express reliance on the section (see in this respect *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and*

Another 2005 (3) SA 156 (C) and *Minister of Environmental Affairs and Tourism and another v Scenematic Fourteen* (Pty) Ltd [2005] 2 All SA 239 (SCA), both reported in the 4th Edition of the PAJA Newsletter).

Referring to the *Earthlife Africa* case, Davis J noted that

> '"In some circumstances, it may suffice for a decision-maker to consider an accurate summary of the relevant evidence and submissions if the summary adequately discloses the evidence and submissions" (para [76]). Hence, an accurate account of the key points raised by the interested parties in respect of the decision may be sufficient material upon which a decision-maker can rely.' (at 224G-H)

Part of the applicant's justification for contending that he should not be extradited to Canada was his claim that the Canadian trial court had erred in convicting him. The information placed before the Minister by the applicant concerned his representations to this effect. In answering the question of whether the Minister was required to consider all of this documentation in order to assess the correctness of the trial court's findings, Davis J indicated that a court of review must adopt a realistic and pragmatic approach to the question of the adequacy of material to considered by a decision-maker. He continued:

> 'First respondent does not perform the role of an appeal Court which is required to trawl through an entire record in order to test the approach which has been adopted by the trial court. First respondent had to apprise herself of the representations which were made by applicant, ensuring that the representations considered were not mediated nor censured by way of departmental editing. Furthermore, first respondent had to ensure that the documentation considered by her was sufficient to grasp the essence of applicant's case and, if necessary, the nuances of his representations. To demand more, namely that a decision-maker such as first respondent was obliged to read an entire record of criminal proceedings, a CD-ROM containing a small library of judgments and all the details contained in the psychiatric reports, when the summary provided an accurate encapsulation of the recommendations of the psychiatric experts, is to place too onerous a demand on the decision-maker.' (at 225E-H)

The judge concluded that the 'carefully constructed, comprehensive representations by the applicant's attorneys' were sufficient for the Minister to fully understand the applicant's case (at 226C). There could be no complaint that the Minister had failed to take account of relevant considerations.

The applicant in ***Sevilya and another v Nelson Mandela Metropolitan Municipality and another*** **[2007] 2 All SA 201 (SE)** (see above under 'Section 1 - Administrative action defined' and below under 'Section 8 - Remedies' and 'Miscellaneous') sought the review of the respondent municipality's decision to grant the second respondent consent in terms of regulation 8.1(ii) of the Port Elizabeth Zoning Scheme to build a 'small study' on his property. Regulation 8.1 provides that no buildings or structures shall be erected closer than certain specified distances from property boundaries. In this case, the second respondent's building operations transgressed a 1,5 metre building line measured from the common boundary between the applicant's and second respondent's properties. Although regulation 8.1(ii) allows the municipal council to consent to the erection of buildings transgressing these building lines, the applicant argued that the municipality's decision to do so in this case was flawed. Regulation 8.1(ii) provides:

> '[T]he Council may consent to the erection of a building closer to the boundary than the specified distance if on account of the levels of the site, or of adjoining land, or the propinquity of buildings already in front of the building line, or any other special circumstances, compliance therewith would seriously hamper the development of the site provided that, subject to the provisions of Regulation 8.5, private garages may be erected within the street building line and/or side spaces, subject to:-
> 1. the width of the garage measured along the street boundary, not exceeding 7,0m;
> 2. the written consent of the owners of abutting erven in the case of a side space, and of abutting and opposite owners in the case of a street building line, being obtained;
> 3. gates and /or doors to control access to and from the garage not opening over the boundary lane, and
> 4. the design of the garage being aesthetically acceptable to the Council'. (para 7)

Consent can thus only be given by the municipal council in certain circumstances and if certain conditions are met. Ndzondo AJ held that 'the council would be acting improperly and therefore unlawfully if it ignore[d] these provisions when considering an application' to build over the specified building lines (para 10). The

applicant submitted that the council had acted improperly:

> 'He contended, *inter alia,* that the consent granted by the first respondent was materially influenced by an error of law, was granted for a reason not authorised by the empowering provision, that irrelevant considerations were taken into account and relevant consideration were not considered. In the alternative, he submitted that the decision was taken because of the unauthorised or unwarranted dictates of another person or body, in bad faith, capriciously and or arbitrarily and accordingly, so he argued, it falls to be reviewed and set aside by virtue of the provisions of section 6(2)*(a), (d)* and *(e)*'. (para 6)

The applicant thus relied on section 6(2)(d), (e)(i), (e)(iii), (e)(iv), (e)(v) and (e)(vi) of PAJA. As it turned out, the judge relied only on section 6(2)(e)(iii) in reaching the conclusion that the action fell to be set aside. The second respondent's main concern in seeking consent to transgress the building line, it seems, was cost. Ndzondo AJ held, however, that cost is an irrelevant consideration that has 'nothing to do with the requirements laid down by the regulation' (para 18). The judge went on to point out that the second respondent made no attempt to show that the requirements set by the regulation had been met:

> 'Secondly, nowhere in his affidavit does the second respondent deal pertinently with the requirements laid down by the regulation which must be present before the required consent can properly be granted. On the contrary when his attention is drawn to the fact that the construction of the small study could be effected elsewhere on his property without encroaching upon the building line his response is that the building costs would have been substantially more if he had done so. He does not plead any special circumstances or that consent was necessary otherwise development on his property could be "seriously hampered".' (para 19, footnote omitted)

The judge found that the municipal council's decision to grant the consent was unlawful:

> 'As a result of the aforegoing, I find that the administrative action of the first respondent falls to be reviewed and set aside on the grounds that it failed to apply its mind to the matter before it and took into account irrelevant factors, alternatively failed to take into account relevant factors when considering this matter'. (para 22)

Section 6(2)(f)(i) - Administrative action not authorised by empowering provision

Qualidental Laboratories (Pty) Ltd v Heritage Western Cape and another **[2007] 1 All SA 638 (C)** concerned the applicant's application to the first respondent (Heritage) to demolish certain buildings constructed on an erf it owned. Section 34(1) of the National Heritage Resources Act 25 of 1999 provides that no person may alter or demolish any structure older than 60 years without a permit issued by the relevant heritage resources authority. Section 48(1) of the Act provides that:

> 'A heritage resource authority may prescribe the manner in which an application is made to it for any permit in terms of this Act, other requirements or permit applications, including-
> (a)…
> (b)…
> (c)…
> (d)…'.

It was common cause in the case that the buildings sought to be demolished by the applicant were indeed older than 60 years and that Heritage, the first respondent, was the relevant heritage resources authority established by the Provincial Minister of Cultural Affairs, Sport and Tourism in terms of the section 23 of the Act. Heritage issued a demolition permit to the applicant, but attached certain conditions to that permit, including that the applicant's subsequent building plans be approved by Heritage. The applicant sought the review and correction of the permit by the deletion of this latter condition. The applicant's case was that since the property concerned enjoyed no formal protection in terms of the Act, either as a national or provincial heritage site, a designated protected area, a provisionally protected place or object, a declared heritage object or by listing in the heritage register, the first respondent's powers were limited to approving or declining the application to alter or demolish the structures on the property (at 644f-j). The imposition of conditions on the applicant was, the applicant argued, ultra vires the Act (at 645a-b). Although PAJA was not expressly relied on by the applicant, the applicant's challenge that the decision to impose conditions was not authorised by the empowering provision would comfortably have fitted into section 6(2)(f)(i) of PAJA.

Davis J held began his evaluation of the arguments by noting that

'The key question is whether conditions can be imposed upon an application or demolition or alteration, or whether section 34(1) envisages either a stark positive or a negative response to an application.' (at 646f)

Davis J gave three reasons for rejecting the restrictive interpretation offered by the applicant. First, there is nothing in the Act that suggests that conditions should not be imposed on permission to alter a building older than 60 years in terms of section 34(1) (at 646h-i). Indeed, the power to attach conditions to permission to alter is implicit in the power to approve of or reject proposed alterations. Second, section 48(2) contemplates that conditions can be attached to permission granted in terms of section 34(1), since it permits the heritage authority to require security from an applicant proposing demolition or alteration in terms of section 34(1) (at 464i-467a). Third, the purposes of the Act itself suggest expansive rather than restrictive interpretation of the powers of heritage authorities:

'A purposive interpretation which can be construed from these ambitious objectives supports a conclusion which would expand first respondent's powers rather than restrict them.' (at 467i)

Davis J held that the Act did authorise the first respondent's decision, and dismissed the application for review.

Section 6(2)(g) and 6(3) - Failure to take a decision

The link between sections 6(2)(g) and 6(3) of PAJA is clear. The former provides that an administrative action is reviewable if the action complained against consists of a failure to take a decision, while the latter sets out the conditions under which a failure to take a decision will be reviewable. Further, section 6(3) refers directly to section 6(2)(g). ***Klein NO and Another v Minister of Trade and Industry and Another* 2007 (1) SA 218 (T) ([2007] 1 All SA 257 (T))** concerned a complaint that the respondent Minister had failed to release a report prepared in terms of section 261 of the Companies Act 63 of 1971 into the affairs of a company of which the applicants were the duly appointed liquidators. The applicants argued that in terms of section 261(2)(a) of the Companies Act the Minister was obliged to furnish the applicants with a copy of the report. Prinsloo J held that a proper interpretation of the relevant statutory provisions led to only one conclusion: 'the Minister is obliged to furnish the s 261 report to the company. He has no choice.' (para 29) The judge went on to agree with the submission by the applicant that the 'statutory injunction to the Minister, as well as hid direction to the Registrar [to furnish the affected company with a copy of the section 261 report], is in the nature of a "purely mechanical administrative action"' (para 37). Although the relief sought in the case was interdictory rather than administrative in nature, the judge nevertheless found that the underlying cause for complaint was a failure of administrative justice constituted by the Minister's failure to take a decision within a reasonable time:

'[72] Mr Vorster argued that, in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") and, in particular, s 6(3) thereof, an applicant attacking administrative action on the grounds of failure to take a decision on the part of the decision-maker, must make out a case for an unreasonable delay. It was argued that the applicant failed to do so. In my view, this argument does not come into play on my interpretation of s 261 that I have attempted to motivate.
[73] I am also of the opinion that the applicant has succeeded in proving that there has been an unreasonable delay on the part of the Minister in directing the Registrar to furnish the applicant with a copy of the report as intended by the requirements of s 261, on my interpretation thereof. As I have said, this case was also properly pleaded by the applicant in its founding affidavit.
[74] In my opinion, the cause of action to move this application was in existence by the time it was launched in view of what I consider to be the unreasonable delay on the part of the Minister to meet his obligations in terms of s 261.'

The judge therefore concluded that the requirements for interdictory relief had been satisfied by the Minister's failure to release the report within a reasonable time (para 82).

NOTE: Section 6(2)(b) of PAJA, although not mentioned in the judgment or relied on by the parties, is relevant to this case as well. It provides that an administrative action is reviewable if a mandatory and material procedure or condition prescribed by the empowering provision was not complied with. The Minister was obliged in terms of the Companies Act to furnish the applicants with a copy of the report, but failed to do so. This constitutes a ground of review under section 6(2)(b) of PAJA. Indeed,

in many cases a failure to take a decision where there is a duty to do so will be reviewable in terms of both sections 6(2)(b) and 6(2)(g).

Section 6(2)(h) - Reasonableness

The facts of ***Robinson v Minister of Justice and Constitutional Development and Another* 2006 (6) SA 214 (C)** are summarised above (see under 'Section 3 - Procedural fairness in administrative action affecting individuals and 'Section 5 - Reasons'). The applicant complained that the respondent Minister's decision in terms of section 11(a) of the Extradition Act 67 of 1962 to order the extradition of the applicant to Canada to serve a sentence imposed on him in absentia was 'so unreasonable that no reasonable decision-maker could have taken it' (at 219G). The applicant argued that three factors rendered the Minister's decision unreasonable: first, the Minister did not investigate whether it had been proven in the Canadian trial court that he was guilty beyond reasonable doubt; second, it is unreasonable to order extradition in order to serve a sentence imposed in absentia; and third, the applicant's ill health made any thought of extraditing him in order to serve a term of imprisonment unreasonable (at 228I-229A).

As to the first of these complaints, Davis J described the applicant's view of the Minister's role as one of an appeal court (at 230H). The judge stated:

> 'In examining the representations made by applicant with regard to whether his conviction was beyond a reasonable doubt, first respondent does not operate as a court of appeal in respect of the trial court. Clearly, if the trial took place in manifest breach of the principles of natural justice or the foundational values enshrined in the Constitution, this would be an important consideration of which first respondent should take account.' (at 230F-G)

To second-guess the Canadian trial court's findings, however, 'is beyond the scope required of a reasonable decision-maker in the position of the first respondent operating within the context of the present dispute.' (at 231E)

As to the complaint that the applicant was sentenced in absentia, the judge made much of the fact that the applicant had only himself to blame for the passing of sentence in his absence. Ultimately, the question came down to a consideration of whether the fact that the applicant was sentenced in absentia was given unreasonably little weight in the Ministers decision, when all other relevant factors were taken into the balance:

> '[T]he preferred approach to these questions is to ask whether a reasonable decision-maker in the position of first respondent would invariably have given greater weight to the argument about sentencing in absentia of a person who deliberately absconds from the country where he has enjoyed a procedurally fair trial and has been properly represented than to the other issues involved in the case, including the nature of the crime, and the interests of the requesting country.
>
> In my view it cannot be said that the process of sentencing in absentia would invariably lead to a decision in which such consideration trumps all other aspects which impact upon the interests of justice, thereby compelling first respondent to refuse to surrender applicant to the requesting State.' (at 233B-D)

In regard to the third argument Davis J relied on European precedent to conclude that a decision to order an extradition that is likely to cause deterioration in the extradited person's health is not for that reason unreasonable (at 233E-I, relying on *Warren (R) v Secretary of State for the Home Department* [2003] EWHC 1177 (Admin) at para 23).

The applicant raised a final argument that if extradited, he would be denied the right to appeal against his conviction and sentence since any such appeal would be out of time (at 233J). Davis J concluded that this fact could in no way render the Minister's decision to extradite him unreasonable, since, first, the applicant will nevertheless be able to apply for condonation of his late application to appeal, and second, his predicament is entirely of his own making (at 234A-D).

***Central Retirement Annuity Fund v Adjudicator of Pension Fund and another (Financial Services Board Intervening)* [2006] 4 All SA 251 (C),** although an appeal in terms of section 30P of the Pension Funds Act 24 of 1956, illustrates an important distinction between appeal and review. The applicant in the case appealed against a determination made by the first respondent on the basis of a complaint made to it by the second respondent, a member of the applicant pension fund.

The second respondent's complaint was that the annual pension amount to be paid to him by the applicant was significantly less than the amount of R24,883 the applicant originally promised the second respondent when he joined the pension fund in 1987. In considering the appeal, Davis J investigated the reasonableness of first respondent's decision. He held:

> '[A]fter a careful examination of all the evidence provided to first respondent and to this Court, I do not consider that the available evidence justifies the conclusion reached by first respondent, that there was no reasonable basis for a payment to second respondent of significantly less than R24,883.'

The judge's consideration of reasonableness on appeal is similar to the approach to reasonableness the courts have adopted on review in terms of PAJA and the common law (in this respect see *Bato Star (Pty) Ltd v Minister of Environmental Affairs and Tourism and Another* 2004 (4) SA 490 (CC) para 48 and *Carephone (Pty) Ltd v Marcus NO* 1998 (11) BCLR 1093 (LAC) para 32). However Davis J pointed out that in an appeal, a court is entitled to consider whether the decision is right or wrong, rather than simply whether it is justified by the available evidence. He relied on *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA) at 725I-726A:

> 'From the wording of it is clear that the appeal to the High Court contemplated is an appeal in the wide sense. The High Court is therefore not limited to a decision whether the adjudicator's determination was right or wrong. Neither is it confined to the evidence of the grounds upon which the adjudicator's determination was based. The Court can consider the matter afresh and make any order it deems fit. At the same time, however, the High Court's jurisdiction is limited by (P)(2) to a consideration of ?the merits of the complaint in question.' (at 257b-c)

Davis J found that the first respondent's adjudication was wrong because it could not be justified on the evidence, and substituted it a decision dismissing the second respondent's complaint (at 261g).

Section 8 - Remedies

In Darson Construction (Pty) Ltd v City of Cape Town and another **[2007] 1 All SA 393 (C)** Selikowitz J found that the decision to award a tender contract to the second respondent was unlawful (see above under 'Section 6 - Grounds of review'). The applicant sought relief in terms of section 8(1)(c)(ii)(aa) and (bb) of PAJA, declaring that the tender should have been awarded to the applicant and that the first respondent be ordered to pay compensation to the applicant for loss of profits and out of pocket expenses incurred as a result of the award to and subsequent performance of the tender contract to the second respondent. Although the judge characterised the first of these prayers as a prayer in terms of section 8(1)(d) of PAJA for a declaration of rights (at 397h), it emerges in the course of the judgment that this prayer is correctly considered as a prayer in terms of section 8(1)(c)(ii)(aa).

A court may substitute its own decision for that of an administrator and direct an administrator to pay compensation only in exceptional circumstances. In considering the meaning of this phrase Selikowitz J said that the general requirement in section 8(1) that courts grant orders that are just and equitable in the circumstances mat make the requirement of 'exceptional circumstances' superfluous (at 404i-405a). Wherever substitution or compensation is just and equitable in the circumstances, an order to that effect can be made, and although circumstances justifying those orders will be exceptional, if such an order is just and equitable the fact of exceptionality is immaterial.

The judge however refrained from declaring that the applicant was entitled to have been awarded the contract (at 405f-g). He stated:

> 'For this Court to substitute its decision for that of the delegated authority would, in my view be inappropriate and unnecessary. The award of the contract involved a value judgment by the delegated authority. The procedure involves input from officials who audit the tenders for compliance and calculate the points they have earned. The Goods, Services and Property Advisory Body meets to consider the tenders and then makes a recommendation. This is then considered by the delegated authority which decides to whom to award the contract or, indeed whether to award it. It cannot be suggested that the award is simply a matter of tallying the points. Indeed, the legislation makes provision for the lowest tenderer and/or the highest points scorer not to be the inevitable recipient of the contract. Concepts such as "equitable spread of work" may find resonance in sections

> 217(1) of the Constitution; "objective criteria" in section 5 of the PPPF Act may be relevant; "on reasonable and justifiable grounds" in regulation 9 of the regulations made pursuant to that Act as well as reservations in the tender documents all lead me to the view that it is inappropriate that I make the decision to award the contract to applicant. From the information contained in the record, this Court does not have the factual background nor the expertise to make that decision on behalf of first respondent.' (at 405g-406b)

As to the applicant's prayer for loss of profit amounting to over 1 million Rand, the judge relied heavily on the SCA's decision in *Olitzki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA). In that case it was held at para 30 that allowing a disappointed tenderer to claim for loss of profits would impose a significant double burden on the public purse - first in having to pay the successful tenderer in terms of the contract, and again in having to pay the unsuccessful tenderer(s) for the lost profit. Selikowitz J therefore held that it would not be 'just and equitable' in this case to award the applicant compensation for loss of profits (at 412e). The judge did, however, direct the first respondent to compensate the applicant for the out of pocket expenses incurred in preparing the tender (at 412e-g).

In ***Sevilya and another v Nelson Mandela Metropolitan Municipality and another*** **[2007] 2 All SA 201 (SE)** (see above under 'Section 1 - Administrative action defined' and 'Section 6 - Grounds of review', and below under 'Miscellaneous'), the applicant initially sought the payment of compensation in terms of section 8(1)(c)(ii)(bb) of PAJA as a remedy for an administratively flawed decision taken by the first respondent. The notice of motion was later amended, replacing this prayer with one for an order compelling the first respondent to comply with various statutory obligations (paras 1-2). Ultimately, the remedy granted was simply one in terms of section 8(1)(c)(i), remitting the matter back to the administrator

COMMON-LAW REVIEW

and ordering it to comply with obligations imposed on it.

Common-law review - Unlawfulness

Howick District Landowners Association v uMngeni Municipality and others **2007 (1) SA 206 (SCA) ([2007] 1 All SA 139 (SCA))** concerned a challenge to the imposition of rates on the properties of the applicant's members by the respondent Municipality. Much of the applicant's complaint revolved around the interaction between three pieces of legislation: the Local Government Transition Act 209 of 1993 (the LGTA), the Local Authorities Ordinance 25 of 1975 (Natal) (the Ordinance) and the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act). On 9 June 2004 the Municipality purported to rate the applicant's members' (the landowners') properties. In a first round of litigation Swain J declared the Municipality's actions unlawful because it had not complied with the procedures set out in the legislation in terms of which it had acted as it had failed to prepare a valuations roll prior to rating the properties, and the rates system established was arbitrary and unjust. The Municipality sought to rectify the errors identified by Swain J by preparing a valuations roll and replacing the ratings system. The latter it did in a notice on 10 December 2004.

The applicant challenged the lawfulness of two aspects the Municipality's action. The first challenge was that the Municipality had relied on the wrong legislative provision when it purported to rate the properties on 10 December. The 9 June resolution declared invalid by Swain J had referred to section 75A(3)(b) of the Systems Act, where it should have referred to section 10G(7) of the LTGA. The latter section applied at the relevant time and conferred rating power on the Municipality. The resolution of 10 December, the applicant pointed out, failed to amend this incorrect reference although it did amend a similar incorrect reference in a notice attached to the earlier resolution. The applicant argued that this error introduced confusion into the Municipality's legislative acts. The SCA however held that the Municipality's 'connected acts' had to be 'read cohesively' (para 15). The SCA went on:

> 'Though it is possible to cavil at the wording [of the 10 December resolution], the unmistakable intent conveyed is that both resolution and annexure were to be amended. This follows from the very problem the landowners invoke - for to read the notice as amended, without a correlative amendment to the resolution, introduces an incoherence that was clearly not contemplated. That the operative part of the amendment refers only to the

> notice makes no difference when the resolution, the previous resolution and the notice are read together. The resolution must, in my view, be read as replacing the reference to s 75A the previous resolution with a reference to s 10G(7). The argument that the council invoked the wrong provision is therefore without basis.' (para 16)

The SCA made an important observation on the point of law underlying the applicant's complaint: 'Even if, technically, the reference to the wrong provision stood unamended,' the SCA held, 'the authority the council intended to invoke was plain.' (para 18). The SCA then considered the principles enunciated in *Latib v The Administrator, Transvaal* 1969 (3) SA 186 (T), *Minister of Education v Harris* 2001 (4) SA 1297 (CC) and *Administrateur, Transvaal v Quid Pro Quo Eiendomsmaatskappy (Edms) Bpk* 1977 (4) SA 829 (A), and the relationship between those principles. The *Latib* doctrine is that where an enabling statute on which an administrator relies 'grants the power sought to be exercised, the fact that the decision-maker mentions the wrong provision does not invalidate the legislative or administrative act' (para 19). The *Quid Pro Quo* case, on the other hand, makes it clear that the doctrine does not validate action taken in deliberate reliance on a provision that does not authorise it - even where another provision may authorise it (para 22). Turning to the Constitutional Court's decision in *Harris,* the SCA said:

'In *Harris,* as in *Quid Pro Quo,* there was no question of a mere administrative error or oversight: the decision-maker deliberately chose to act in terms of a provision that did not authorise what was sought to be done. In dealing with an argument based on *Latib,* the CC pointed out that its applicability "must depend on the particular facts of each case, especially whether the functionary consciously elected to rely on the statutory provision subsequently found to be wanting". Applying *Quid Pro Quo,* the CC held that it was not open to the decision-maker now to rely on a different provision to validate what had been invalidly done under the provision invoked: the otherwise invalid notice could not be rescued by reference to powers the decision-maker might possibly have had but failed to exercise. I do not read *Harris* as putting *Latib* in doubt, but as confirming the proper scope of its application.' (para 22, footnotes omitted)

The Court concluded that on the facts of this case, the reference to the incorrect provision in the unamended resolution was nothing more than a slip-up of the sort to which the *Latib* doctrine applies (para 23).

The second argument advanced by the applicant was that the Municipality had not complied with the time periods prescribed by the Ordinance for the publication of a valuations roll. The SCA held, however, that the source of the rating power sought to be exercised by the Municipality was the LGTA, rather than the Ordinance. The Municipality was thus not obliged to follow the prescripts of the Ordinance (para 30). Even though the LGTA required the Municipality to follow 'all procedures prescribed by law' for the rating of properties, since the Ordinance never conferred a power to rate the properties in question it could not be said to prescribe procedures.

In another case dealing with municipal rating powers, ***Rates Action Group v City of Cape Town* [2007] 1 All SA 233 (SCA),** the SCA was called on to decide whether the local authority's levying and recovery of sewerage, water and electricity charges based solely on the value of ratepayers' property was authorised by the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act) (para 2). The applicant relied on section 74 of the Systems Act, especially section 74(2)(b) and (d) which require that the amounts individual users pay for services should 'be in proportion to their use of that service' and 'must reflect the costs reasonably associated with rendering the service' (para 15).

> 'The implication of these provisions, the appellant contends, is that charges for all municipal services must be based on use - actual consumption - and must be proportionate to the use. A rate, which is determined by the value of property, bears no relation to actual consumption, and thus cannot be levied for a service.' (para 17)

Lewis JA, for the Court, held that the Systems Act does not limit the rates that can be imposed on a property or require municipalities to levy consumption-based charges for services. She concluded:

> 'There is, however, no limitation to be found in section 74, or in any other part of the Systems Act, on the uses to which rates may be put nor on the number of rates that may be charged by a munic-

> ipality. There is nothing to preclude the levying of several rates in respect of a property. And the Systems Act does not oblige a municipality to charge for services in accordance with a tariff - it simply entitles it to do so provided that a tariff policy has been adopted and by-laws promulgated.' (para 19)

The municipality's actions were held to be within the scope of the power conferred by the Systems Act and lawful, and the appeal against the High Court judgment was dismissed.

In ***South African Heritage Resources Agency v Arniston Hotel Property (Pty) Ltd and Another*** **2007 (2) SA 461 (C)** (see above under 'Section 1 - Administrative action defined' and 'Section 3 - Procedural fairness in administrative action affecting individuals, and below under 'Common-law review - Rationality') the respondents met the applicant's application for an interdict with a collateral challenge to the administrative action on which the interdict application was based. The court was called upon to give an interpretation of the National Heritage Resources Act 25 of 1999, as this interpretation would determine whether the applicant's earlier administrative act was lawful or not. At issue was the question of whether the applicant's decision to 'freeze' an area by way of a provisional protection order in terms of section 29(10) of the National Heritage Resources Act could operate retroactively to prevent building operations already approved by the local authority in terms of the National Building Regulations and Building Standards Act 103 of 1977.

> 'The crux of the respondents' case on this score is that the approval of the local authority of the plans gave them the right to erect the third floor and that s 29(10) of the Act ought not to be construed as having taken away that right.' (para 12)

Cleaver J rejected this argument, but on the facts rather than on the strength of the argument itself. He held that whatever benefit accrued to the respondents from the approval of their building plans by the local authority, such benefits do not amount to vested rights (para 16). Moreover, the judge held that the objectives of the Act will on occasion make 'inroads into the sanctity of ownership' (para 16).

Harmony Gold Mining Co Ltd v Regional Director, Free State Department of Water Affairs and Forestry and others **[2006] 4 All SA 366 (W)** (see below under 'Common-law review - Procedural fairness') also involved the interpretation of legislation. The applicant objected to a directive issued by the first respondent in terms of section 19(3) of the National Water Act 36 of 1998 ordering the applicant and the fifth and sixth respondents share the costs of removing water from mine shafts located on the seventh and eighth respondents' land. The applicant's complaint was that the empowering provision did not authorise the directive in the terms in which it was issued, and that the first respondent's action in issuing the directive was unlawful or ultra vires. In deciding the issue Goldstein J referred to section 19(1) of the National Water Act:

> 'An owner of land, a person in control of land or a person who occupies or uses the land on which-
> (a) any activity or process is or was performed or undertaken; or
> (b) any other situation exists,
> which causes, has caused or is likely to cause pollution of a water resource, must take all reasonable measures to prevent any such pollution from occurring, continuing or recurring.'

Section 19(3), in terms of which the first respondent issued the directive at issue, provides:

> A catchment management agency may direct any person who fails to take the measures required under subsection (1) to-
> (a) commence taking specific measures before a given date;
> (b) diligently continue with those measures; and
> (c) complete them before a given date.'

In view of the facts and the legislative framework, Goldstein J held that the directive was lawfully issued. He stated:

> 'In my view a "situation exists" on the land of the applicant "which ..., is likely to cause pollution of a water resource". That situation arises from the position of the land, downstream from that of the seventh and eighth respondents, and furthermore from the applicant's mining activities on its land, which will result in pollution of any water which may reach the applicant's land.
>
> It follows that the application cannot succeed'. (at 368d-f)

Mpho v Sipho NO and others **[2006] 4 All SA 468 (W)** considered whether the Board of the

Railway Safety Regulator was empowered in terms of the Railway Safety Regulator Act 16 of 2002 to institute disciplinary proceedings against the applicant as the Chief Executive Officer of the Regulator. The answer to this question, Tsoka J held, depended on who the applicant's employer was. On a reading of the legislation he found that the Government of the Republic of South Africa is the employer of the applicant:

> 'The applicant is employed by the State as the CEO of the second respondent. It follows therefore that the second respondent [the Railway Safety Regulator] has no authority to institute disciplinary proceedings against the applicant. This is not authorised by the Act. The fourth respondent [the Minister of Transport] may discharge the applicant only in the circumstances set out in section 9(4) of the Act…. To argue as counsel for the first and second respondents does, that the first and second respondents are entitled to institute disciplinary proceedings with the power to impose any penalty less than the discharge and only to recommend the discharge to the fourth respondent is artificial. The power to discharge is that of the fourth respondent. Only the fourth respondent may discharge the applicant after having considered the charges, and having instituted disciplinary proceedings against the applicant. The fourth respondent must still consider the findings of the disciplinary enquiry before deciding to discharge the applicant or not. The first and second respondents cannot usurp this power and the discretion of the fourth respondent. In *Citimakers (Pty) Ltd v Sandton Town Council* 1977 (4) SA 959 (W) at 961A-C Mostert J said the following:
>
> > "In my view, the formation of an opinion on the value of the property in question is a matter which, in the absence of other legislative provisions, is entrusted solely to the council; it is in the nature of a judicial discretion with far-reaching consequences for both the township owners and the municipality.
> >
> > Where the exercise of a discretionary power is entrusted to a named body, another body cannot exercise that power in the absence of express statutory provision (see De Smith, *Judicial Review of Administrative Action,* 4th ed., pp. 269-270)."' (para 16)

In terms of the Act, then, only the Minister of Transport had the power to discipline and dismiss the applicant. The institution of disciplinary proceedings against the applicant by the first and second respondents was thus unlawful (para 19.1).

Note: The four cases reported immediately above ***(Rates Action Group v City of Cape Town; South African Heritage Resources Agency v Arniston Hotel Property (Pty) Ltd and Another; Harmony Gold Mining Co Ltd v Regional Director, Free State Department of Water Affairs and Forestry and others*** and ***Mpho v Sipho NO and others)*** could all have been decided in terms of **section 6(2)(f)(ii)** of PAJA, which states that an administrative act is reviewable if 'not authorised by the empowering provision'. In none of these case, however, was it pleaded by the parties or considered by the courts whether PAJA applied. The cases were therefore decided on the basis of common-law principles of unlawfulness.

In ***Solani v Liquor Board: NC and another*** **[2006] 4 All SA 628 (NC)** the applicant had been refused an application for a liquor licence in terms of the Liquor Act 27 of 1989 after she had initially been granted a conditional liquor licence. Her argument was that the Liquor Board's decision to 're-hear' the application for a licence was ultra vires the provisions of the Act, and she brought an application to review the decision in terms if Rule 53 of the Uniform Rules of Court (para 1). Alongside this argument the applicant argued that after issuing the licence in the first place, the Board was functus officio and was precluded from revisiting its earlier decision (para 5.2). The Board resisted this challenge, arguing that

> 'it was invoking its powers set out in of the Act to hear further representations and/or evidence and denied that it was *functus officio,* pointing out that the initial authority (of 23 February 2005) was "informal" and "conditional" and the subsequent hearing (of 14 April 2005) was "formal" and "final".' (para 7)

The applicant was forced to concede that since the licence issued by the Board was conditional and dependant on the fulfilment of certain conditions, the Board had not yet issued a final liquor licence (para 17). Kgomo JP agreed with the applicant that a 'rehearing of the matter on the same facts was impermissible' but pointed out that the facts considered at the second hearing were in fact new (para 17). The judge concluded that in terms of the legislation, the Board was 'not only entitled but in fact duty-bound…to convene the meeting of 14 April 2005 and to consider' the complaints emanating from the community (para 14). Kgomo JP concluded by noting that since the Board's ini-

tial decision had been taken in ignorance of these crucial facts, the Board's decision was vitiated by a material mistake of fact and was reviewable on the basis of the principle discussed in *Pepcor Retirement Fund v financial Services Board* 2003 (6) SA 38 (NC) (para 20 - see also ***Chairperson's Association v Minister of Arts and Culture and Others*** **[2007] 2 All SA 582 (SCA)** and ***Uthingo Management (Pty) Ltd v Minister of Trade and Industry and others*** **[2007] 2 All SA 649 (T)** discussed above).

Note: The above case could have been decided under section 6(2)(e)(iii) of PAJA, as the SCA has held that a material mistake of fact is a ground of review in terms of the section of PAJA (see above, ***Chairpersons Association v Minister if Arts and Culture and Others*** **[2007] 2 All SA 582 (SCA)).**

Travers v National Director of Public Prosecutions and Others **2007 (3) SA 242 (T)** is an interesting case since various decisions of the respondents were set aside by the court as unconstitutional and unlawful, although no mention is made of section 33 of the Constitution, PAJA, any of the common law relating to unlawfulness, nor indeed the unlawfulness of the decisions themselves. The applicant was a magistrate serving in the regional magistrates' court in Pretoria. Dissatisfied with the speed with which the applicant finalised cases before him, the National Director of Public Prosecutions, a senior state prosecutor at the Pretoria regional magistrates' court and the Director of Public Prosecutions for the Transvaal Provincial Division of the High Court (the first, second and third respondents) took various decisions to prevent any new matters being placed before or heard by the applicant (para 3). The applicant sought to review this decision (para 13). The primary complaint was that the practice in terms of which the prosecuting authorities controlled the allocation of trials to magistrates infringed on the independence of the judiciary (paras 18-19). After a review of the jurisprudence and the facts, Ismail J concluded that there had been interference in the independence of the judiciary (para 42). The respondents' decisions were therefore in breach of section 165 of the Constitution, which enshrines judicial independence. The judge also found, however, that the respondents had no authority to take any decision to prevent the applicant hearing new cases:

> 'As noble as the prosecuting authorities' intention may have been, be it to see that justice is seen to be done expeditiously, the decision to prevent new matters from being placed before the applicant was not theirs to make.' (para 22)

In the absence of any legal basis to make the decision they did, it must be said that the decision was unlawful, and would have fallen to be set aside on review even if the decision had not compromised the constitutionally enshrined principle of judicial independence.

Common-law review - Rationality

In ***South African Heritage Resources Agency v Arniston Hotel Property (Pty) Ltd and Another*** **2007 (2) SA 461 (C)** (see above under 'Section 1 - Administrative action defined', 'Section 3 - Procedural fairness in administrative action affecting individuals, and 'Common-law review - Unlawfulness'), the respondent met an application for an interdict with a complaint that the administrative action on which the application was based was, among other things, taken irrationally. The respondents argued that in making a provisional protection order for two years in terms of the National Heritage Act 25 of 1999, effectively preventing the respondents from carrying out building operations for the two year period, the applicant had failed to apply its mind to the question of whether the order should operate for a period shorter than two years (para 28). Cleaver J was not satisfied, on the evidence provided, that the applicant's executive committee had considered whether to provisionally protect the area for less than two years, and that the decision fell to be set aside for this reason.

Common-law review - Procedural fairness

In ***Harmony Gold Mining Co Ltd v Regional Director, Free State Department of Water Affairs and Forestry and others*** **[2006] 4 All SA 366 (W)** (see above under 'Common-law review - Unlawfulness') the applicant complained that the first respondent had issued a directive in terms of section 19(3) of the National Water Act 36 of 1998 without observing the audi alteram partem rule. Goldstein J refused to consider the complaint, however, on the basis that that point was taken in the

'briefest possible terms' (at 367h). Responding to the first and second respondents' objection to the point, the judge stated: 'I am by no means satisfied that the issues relating to the taking of the point have been fully canvassed on the papers.'

In ***Mangena v Nelson Mandela Metropolitan Municipality and another*** **[2006] 4 All SA 589 (SE)** the applicant was suspended from his employment with the first respondent pending the outcome of an investigation of allegations of misconduct against him (para 1). The applicant sought the review and setting aside of the decision to suspend him on the grounds that fair procedure as laid out in the first respondent's disciplinary code was not followed (para 16). Clause 13 of the code provides:

> '13.1 The employer may at any time before or after an employee has been charged with misconduct, suspend the employee or utilise him temporarily in another capacity should the Municipal Manager be of the opinion that it would be detrimental to the interests of the employer if the employee remains in active service.
> 13.2 If the Municipal Manager intends to suspend an employee he shall give notice of such intention and afford the employee with an opportunity to make representation as to why he should not be suspended. The enquiry shall be done by means of the Summary Procedure as provided for herein.
> 13.3 The suspension or utilisation in another capacity shall be for a fixed and pre-determined period and at any rate shall not exceed a period of three (3) months. Any suspension effected shall be on full remuneration.' (para 35)

It was common cause that a hearing had been granted the applicant before he was suspended (para 17). The nub of the applicant's complaint, it seems, is that he was not provided with information necessary to prepare representations to the first respondent (paras 16(b) and 18). It was this failure, he argued, that compromised his rights to fair procedure. However, on the facts Sandi J found that the information required by the applicant, his contract of employment, was at all times in his possession. In light of this fact, he held that 'it can hardly lie in [the applicant's] mouth to say that the refusal to furnish him with the contract compromised his ability to make representations.' (para 20)

Note: This case could have been decided in terms of section 3 of PAJA. It appears that the applicant placed no reliance on PAJA, and PAJA was not referred to in the course of the judgment. Section 3 of PAJA deals with procedural fairness. Subsection (2) sets out certain basic requirements of procedural fairness, but subsection (5) provides for deviation from those procedures:

> 'Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure.'

The procedures set out in the first respondent's disciplinary code are 'fair but different' procedures contemplated by subsection (5). These procedures were complied with in this case, and the applicant would have no cause for complaint in terms of section 3 of PAJA had he relied thereon.

The relationship between administrative law and the Constitution

MEC for Local Government, Housing and Traditional Affairs v Utrecht Municipal Council and Others **2007 (3) SA 436 (N)** is at its simplest a case concerning the lawfulness of the applicant's decision to suspend the second and third respondents as councillors of the first respondent. The respondents argued that the applicant had no authority to suspend the second and third respondents, and that his decision in doing so was therefore unlawful and invalid. It was common cause that the applicant has no express powers to suspend municipal councillors in the circumstances of the case (para 8). The applicant however contended that he had implied powers to suspend councillors based on the Constitution and the Local Government: Municipal Systems Act 32 of 2000 (para 9). Moleko J summarised the applicant's case as follows:

> '[10] In respect of the general powers of the MEC, Mr Koen [counsel for the applicant] referred to:
> [10.1] The founding provisions of the Constitution, in particular s 1(d) which, inter alia, provides for the value "to ensure accountability, responsiveness and openness".
> [10.2] The provisions of s 151 of the Constitution dealing with the status of municipalities.
> [10.3] Section 151(3) which provides that:

"A municipality has the right to govern, on its own initiative, the local and governmental affairs of its community, subject to national and provincial legislation, as provided for in the Constitution."

[10.4] Section 151(4) which provides that"
"The national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and perform their functions."

[10.5] section 139 of the Constitution which provides that in extreme cases the provincial executive may even step in and take over the functions of a municipality in toto.

[10.6] That in terms of the Local Government: Municipal Structures Act 117 of 1998 it is the MEC who established a municipality in each municipal area which the Demarcation Board demarcates in the province in terms of the Local Government: Municipal Demarcation Act 27 of 1998.

[10.7] I now turn to the Systems Act. The applicant appointed an investigation in terms of s 106(1)(b) of the Systems Act. Section 106(1) provides:
"(1) If an MEC has reason to believe that a municipality in the province cannot or does not fulfil a statutory obligation binding on the municipality or that maladministration, fraud, corruption or any other serious malpractice has occurred or is occurring in a municipality in the province the MEC must -
(a)…
(b) if the MEC considers it necessary, designate a person or persons to investigate the matter."

[10.8] I am therefore required to determine whether the provisions of this section confer implied power on the applicant to suspend councillors.' (para 10)

Moleko J then referred to academic and judicial opinions as to when power may be held to have been impliedly conferred (paras 13-15, referring to Baxter *Administrative Law* at 404-5, Devenish *Interpretation of Statutes* at 86-8, *Lekhari v Johannesburg City Council* 1956 (1) SA 552 (A), *Jauka v Port Alfred Municipality* 1960 (4) SA 400 (D), *Middelburg Municipality v Gertzen* 1914 AD 544 and *Bloemfontein Town Council v Richter* 1938 AD 195). The principle to emerge from these authorities is that a power is impliedly conferred only where it is reasonably necessary for the exercise of expressly conferred powers. 'The test is not mere usefulness or convenience, but necessity' (para 15, quoting *Lekhari v Johannesburg City Council).* The test, Moleka J held, 'is whether the power to suspend councillors is reasonably necessary for the applicant to carry out the express function which is set out in the section enabling him to institute an investigation.' (para 16) The judge viewed the Constitution and the Systems Act as a whole as the background to the MEC's powers in this regard. The implication of the constitutional and statutory scheme was that certain powers were implied:

'In my opinion it is in the context of the Constitution that the MEC has the power to institute an investigation under s 106(1)(b) of the Systems Act where he/she has reason to believe that the municipality is not performing its function and/or there is maladministration. As indicated earlier, in my opinion an MEC in order to enable an investigation to be carried out properly without hindrance or being compromised, has implied powers to suspend a councillor or councillors where circumstances justify such action.' (para 26)

The judge confirmed the applicant's decision to suspend the second and third respondents as councillors (para 27).

ADMINISTRATIVE ACTION IN TERMS OF THE CONSTITUTION

The doctrine of legality

In ***Private Security Industry Regulatory Authority v Anglo Platinum Management Services Ltd and others*** **[2007] 1 All SA 154 (SCA)** (see above under 'Section 1 - Administrative action defined') the respondents (applicants in the court a quo) challenged the lawfulness of regulations made by the Minister of Safety and Security in terms of the Private Security Industry Regulation Act 56 of 2001. The effect of regulation 10(3), they argued, was to revoke certain exemptions to the requirements of the Act issued by the Minister prior to the promulgation of the regulations. The exemptions allowed the respondents to continue to provide security services without complying with certain formalities of the Act for an indefinite period. Two questions resolved themselves before the SCA for determination:

(i) Did the Act confer power on the Minister to

> issue exemptions that were of indefinite duration (which is what he purported to do)? This concerns the extent of the Minister's administrative power under the Act in implementing its provisions. (ii) If so, did the Act authorise the Minister to make regulations that terminated all exemptions generally (including those that are now in issue). This concerns the ambit of the Minister's regulatory powers - that is, his power to issue subordinate legislation - under the Act.' (para 17)

It is important to note in this case that the court did not consider whether the action impugned - the making of regulations - was 'administrative action' or not. The right to lawful administrative action conferred in section 33 of the Constitution and given effect to in PAJA extends only to 'administrative action'. It is by no means settled in South African law that ministerial regulation-making amounts to administrative action (see the discussion of this case above). The doctrine of legality, however, as expressed by the Constitutional Court in *Fedsure Life Assurance Ltd v Greater Johannesburg transitional Metropolitan Council* 1999 (1) SA 374 (CC), implies that a body exercising public power has to act within the powers lawfully conferred on it (para 59). If the regulations purportedly made by the Minister in this case exceeded the power conferred on him by the empowering legislation, those regulations would be inconsistent with the principle of legality and invalid. Although the SCA did not state expressly that the doctrine of legality provided the basis for its review of the Minister's regulations, it is clear from a reading of the judgment that this was the case. On a reading of the relevant legislation, the SCA, per Maya JA, held that regulation 10(3) did exceed the powers conferred on the Minister and was accordingly unlawful and invalid.

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

The respondents in ***Government Employees Pension Fund and another v Buitendag and others*** **[2007] 1 All SA 445 (SCA)** were the surviving adult children of a deceased employee of the Gauteng provincial government and member of the appellant Fund. When she (the employee) died, a gratuity became payable. Acting on information supplied to it by the provincial government, the Fund awarded the gratuity to the deceased's husband and stepson. The respondents were not awarded any part of the gratuity. When it made the award, the Board of the Fund was not aware of the existence of the children (para 2). The administrative question before the court was 'whether the fact that their existence was unknown to the Board when it exercised this discretion [as to which dependents should receive the gratuity], entitles a court to set the Board's decision aside.' (para 8)

Cloete JA began his consideration of this question by pointing out that at the time the impugned decision was made PAJA had not yet come into force. Item 23(2)(b) of Schedule 6 to the Constitution thus governed proceedings. The crucial part of the Item for the purposes of the case was the provision that every person has the right to 'lawful administrative action' (para 9).

In resisting the challenge to the Board's decision, the appellants argued that the decision was unassailable because it had been taken on the basis of facts available to it. The fact of the existence of the deceased's children was a material fact, and the Board's ignorance of that fact required attention (para 11). The judge went on to quote from the SCA's decision in *Pepcor Retirement Fund v Financial Services Board* 2003 (6) SA 38 (SCA) at para 47:

> '[A] material mistake of fact should be a basis upon which a Court can review an administrative decision. If legislation has empowered a functionary to make a decision, in the public interest, the decision should be made on the material facts which should have been available for the decision properly to be made. And if a decision has been made in ignorance of facts material to the decision and which therefore should have been before the functionary, the decision should (subject to what is said in para [10] above) be reviewable at the suit of, inter alios, the functionary who made it - even although the functionary may have been guilty of negligence and even where a person who is not guilty of fraudulent conduct has benefited by the decision. The doctrine of legality which was the basis of the decisions in *Fedsure [Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC)], *Sarfu [President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC)] and *Pharmaceutical Manufacturers [Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC)] requires that the power conferred on a functionary to make decisions in the public interest, should be exercised

> properly, ie on the basis of the true facts; it should not be confined to cases where the common law would categorise the decision as ultra vires.' (footnotes omitted, quoted at para 12)

Considering the factors relevant to the case, Cloete JA, for a majority of the Court, held that it would be a 'miscarriage of justice if the decision of the Board were not set aside' (para 14). Conradie JA filed a separate judgment concurring in the majority judgment. His judgment emphasised the fact that the Fund is 'an organ of state that performs an administrative function'. (para 25) The actions of the executrix in corresponding with the Fund, Conradie JA held, amounted to a request for a hearing prior to the Fund's determination of to whom the gratuity was to be paid (para 29). Conradie JA concluded:

> 'The natural justice principles underlying a fair hearing are very flexible. While the Fund may not be obliged to afford a hearing to every claimant, whatever the circumstances, it is obliged to do so when a hearing is requested. How easily might this litigation not have been avoided if someone had said, "from these documents it looks as if I may not have all the facts, let me pick up the telephone and make sure I have it right".' (para 30)

Conradie JA's judgment highlights the fact that in light of the Fund's administrative function, if the respondent children wanted a hearing with the fund before it performed its functions they should not have been denied one (para 24).

MISCELLANEOUS

***In Borman v Minister of Defence* 2007 (2) SA 388 (C)** the High Court was seized with the question of whether it has jurisdiction to review the proceedings of military courts. The appellant had been convicted in a military court of theft and sentenced to nine months imprisonment and an ignominious discharge from the South African National Defence Force. The conviction and sentence were upheld by a military appeal court acting in terms of section 34(2) of the Military Discipline Supplementary Measures Act 16 of 1999. In the Cape High Court, Van Reenen J relied on section 19(1)(a) of the Supreme Court Act 59 of 1959 which provides:

> 'A provincial or local division shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within its area of jurisdiction and all other matters of which it may according to law take cognizance, and shall, subject to the provisions of subsection (2), in addition to any powers or jurisdiction which may be vested in it by law, have power-
> (i) to hear and determine appeals from all inferior courts within its area of jurisdiction;
> (ii) to review the proceedings of all such courts;
> (iii) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.'

Relying on authority that military courts are inferior courts for the purposes of section 19(1)(a) of the Supreme Court Act (*Mbambo v Minister of Defence* 2005 (2) SA 225 (T) at 233A, *Tsoaeli and Five Others v Minister of Defence and Others; Kholomba v Minister of Defence and Others* 2005 JDR 0912 (T) at 8 and *S v Pennington and Another* 1997 (4) SA 1076 (CC) at para 20), Van Reenen J held that the proceedings of military courts of first instance and courts of military appeals are subject to review by High Courts (para 15). On the facts of this matter, however, Van Reenen J held, firstly, that section 19(1)(a)(ii) allows High Courts to review proceedings of courts within their jurisdiction. Since the seat of the military appeal court in this instance was not within the jurisdiction of the Cape High Court, its proceedings could not be reviewed. Second, in regard to the proceedings of the military court of first instance in this case, the judge held that the appellant had not made out a proper case for review on the facts (paras 18-19).

The case of ***De Gree and Another v Webb and Others (Centre for Child Law, University of Pretoria, Amicus Curiae)* 2006 (6) SA 51 (W)** concerned an application by an American couple for sole custody and guardianship of a minor child, with a view to taking the child with them to the United States and later adopting her in terms of US law. The Child Care Act 74 of 1983, however, sets out procedures for the adoption of South African children. Since section 18(4)(f) of the Act, which prevented inter-country adoption, was found to be unconstitutional by the Constitutional Court in *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC), the provisions of

the Act in regard to local adoptions have been applicable to inter-country adoptions also. The applicants, however noble their intentions and however suitable they might be as parents, have sought to bypass the procedures of the Child Care Act by approaching the High Court for the orders of sole custody and guardianship. Goldblatt J accepted the submission of amicus curiae in the case, the Child Law Centre, quoting among others the following paragraph from its argument:

> 'By failing to proceed in terms of the Child Care Act, the children's court is bypassed and South African children are removed from this country without a formal adoption having been sanctioned by the relevant local authorities. This places the children in a potentially vulnerable position, having left South Africa in terms of a guardianship and custody order granted in favour of potential foreign adoptive parents.' (at 60F-G)

The Child Care Act requires that adoptions be sanctioned if that is in the best interests of the child. Goldblatt J held that it was not for the High Court to decide what is in the best interests of the child, and that this task must rather be undertaken by the Children's Court in terms of the Child Care Act. To allow the application would therefore be unlawful.

The question of estoppel arose in ***Sevilya and another v Nelson Mandela Metropolitan Municipality and another*** **[2007] 2 All SA 201 (SE)** (see above under 'Section 1 - Administrative action defined', 'Section 6 - Grounds of review' and 'Section 8 - Remedies'). The case concerned a challenge to the first respondent's decision to grant consent to the second respondent to construct certain buildings on its property. The second respondent submitted that since the applicant had not raised any objection to the proposed construction when called upon to do so, it was not open to the applicant at a later stage to challenge the first respondent's decision to allow the building, and should be estopped from doing so (paras 12-3). Ndzondo AJ gives two responses to this defence. One is that since the applicant's complaints against the administrative action had merit and should be upheld, it was unnecessary to consider the second respondent's estoppel defence. This response, however, cannot be accepted. The estoppel defence logically has to be considered prior to the merits of the administrative challenge. If the applicant should be estopped from pursuing its challenge, it does not matter that it has a valid complaint or that the administrative action challenged is actually flawed. The defence of estoppel, if upheld, prevents consideration of the applicant's case at all. Ndzondo AJ does, however, give a second response to the estoppel claim. After a review of the statutory framework, Ndzondo AJ held that the question of whether the applicant had consented to the second respondent's building or not was irrelevant (para 8). The applicant was not required to give or withhold consent in terms of the statutory framework, and the applicant's failure to object to the proposed construction at an early stage did not therefore affect any rights it enjoyed subsequently (para 14).

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

Claase v Information Officer of SAA (Pty) Ltd **[2006] JOL 18804 (SCA)** deals primarily with section 50 of PAIA. The appellant sought access in terms of PAIA to certain records of SAA in order to ascertain whether he should proceed with or abandon a claim against SAA for breach of contract. The Court, per Combrinck AJA relied on recent SCA cases dealing with the interpretation of section 50(1) which requires an applicant for access to information to prove that the records sought are 'required' for the exercise or protection of any right. In *Unitas Hospital v Van Wyk* 2006 (4) SA 436 (SCA) (reported in the 7th Edition of the PAJA Newsletter) the SCA held that the question of whether information is required for the exercise or protection of any right is 'inextricably bound up with the facts of that matter' (para 6, quoted at para 6). Further, in *Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA) (reported in the 5th Edition of the PAJA Newsletter) the SCA held that "'reasonably required" in the circumstances is about as precise a formulation as can be achieved, provide that it is understood to connote a substantial advantage or an element of need' (para 13, quoted at para 9). As the content of the records sought by the appellant would be decisive of the matter, the SCA held that the requirement of 'substantial advantage' had been met. Access to the information would 'bring a short sharp end to the

dispute' (para 9). The court further agreed with the appellant's suggestion that an applicant for information in terms of section 50 need only put up facts that 'prima facie, although open to some doubt, establish that he has a right which access to the record is required to exercise or protect.' (para 8)

The Court therefore granted the order sought. It is important to highlight, however, the SCA's displeasure with SAA's vigorous opposition to the matter. The SCA began its judgment by pointing out that SAA's response resulted in needless litigation and was in fact contrary to the whole spirit of PAIA:

> 'It is unfortunate that the Promotion of Access to Information Act 2 of 2000 ('the Act') which (as appears from the preamble) was intended to:
> "• foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information;
> • actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights,"
> should result in pre-trial litigation involving huge costs before the merits of the matter are aired in court. One of the objects of the legislation is to avoid litigation rather than propagate it. This is the fourth case in which information has been sought in terms of the Act that has in the past eighteen months required the attention of this court. I refer to *Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA), *Unitas Hospital v Van Wyk* 2006 (4) SA 436 (SCA) and *MEC for Roads and Public Works v Intertrade Two (Pty) Ltd* 2006 (5) SA 1 (SCA). The present appeal illustrates how a disregard of the aims of the Act and the absence of common sense and reasonableness has resulted in this court having to deal with a matter which should never have required litigation.' (para 1)

The Court considered whether a punitive costs order against SAA should be made. It referred in this regard to *MEC for Roads and Public Works, Eastern Cape, and Another v Intertrade Two (Pty) Ltd* 2006 (5) SA 1 (SCA) (reported in the 7th Edition of the PAJA Newsletter):

> 'In *MEC for Roads and Public Works (supra)* this court expressed the view that where a record of information is requested in terms of s 50 and the State body or private person or institution obdurately and unreasonably refuses to furnish it in circumstances where it obviously should have, the court may make a punitive award of costs to mark its displeasure (paras [20] and [21] of that judgment). The conduct of SAA in this case in my view warrants such an order. Section 9 of the Act states that one of the objects of the Act is:
>
> "(d) to establish voluntary and mandatory mechanisms or procedures to give effect to that right in a manner which enables persons to obtain access to records of public and private bodies as swiftly, inexpensively and effortlessly as reasonably possible;…"
>
> I emphasize the words "swiftly" and "effortlessly". How did SAA give effect to these objects? From the 25th August 2004 and until he launched the application in February 2005 the appellant by means of 10 e-mail letters requested the information referred to earlier in the judgment. He was variously told in return e-mails by SAA officials that they were unable to furnish the information, that for security reasons the information could not be given, that the official concerned was on leave and eventually he was told how many passengers went on board in business class and economy class on the particular flight - information which was of no assistance to him. Appellant in an e-mail dated 8th September 2004, in the prescribed form submitted on 21 November 2004 and again in his founding affidavit stated that the information on record he sought was on the computer of Brewis. As stated earlier, this was never disputed by SAA. By the simple expedient of furnishing appellant with the computer print-out this whole issue could have been resolved. Even if SAA's conduct in persistently refusing to make the record available was not intentionally vexatious, it had that effect. (*In Re Alluvial Creek Ltd* 1929 CPD 532 at 535.) As a mark of this court's displeasure at SAA's conduct a punitive costs order will be made in respect of the proceeding in the court below.' (para 11)

In a related development, the respondent in *Unitas Hospital v Van Wyk* 2006 (4) SA 436 (SCA) (reported in the 7th Edition of the PAJA Newsletter) sought leave to appeal against the SCA's judgment in the Constitutional Court. The case was however struck from the roll on 21 August 2007, as the applicant (respondent in the SCA) failed to make an appearance.

In ***Mittalsteel South Africa Ltd (formerly Iscor Ltd) v Hlatshwayo* 2007 (1) SA 66 (SCA) ([2007] 1 All SA 1 (SCA))** the SCA was called upon to consider the meaning of 'public body' in PAIA. The respondent sought certain information from Mittalsteel in order to complete a Master of Arts thesis in industrial sociology investigating labour relations in state corporations between 1965 and 1973. The Pretoria High Court granted the respondent's application, and it is that order that was appealed by Mittalsteel to the SCA. Although the SCA held that Mittalsteel (previously Iscor) has transformed from a public body to a private body, the question was whether the corporation was a public body at the time it produced the documents the respondent sought:

> 'The issue before us is therefore a crisp one: whether the appellant, at the relevant time and in creating the requested documents, was a "public body" as that term is to be understood in PAIA. If it was, then the respondent is entitled to the documents requested by it in terms of s 11 of PAIA. The section is headed "Right of access to records of public bodies". Subsection 11(1) provides that a "requester must be given access to a record of a public body if - " (emphasis added) (a) the requester complies with all the procedural requirements of the Act and (b) access to the record is not refused in terms of any ground set out in the provisions of PAIA dealing with the records of public bodies. None of these provisions is applicable to the respondent's request and compliance with procedural requirements is not in issue.' (para 3, footnote omitted)

The Court began by noting that the definition of 'public body' in PAIA is essentially the same as the definition of 'organ of state' in section 239 of the Constitution, the only difference being that the former definition does not exclude courts or judicial officers from its ambit. For this reason, Conradie JA stated, the criteria by which entities are determined to be 'organs of state' for the purposes of section 239 of the Constitution are useful in determining whether an entity is a 'public body' for the purposes of PAIA (para 8). Both of these definitions include within their ambit bodies 'exercising public powers or performing public functions in terms of any legislation'. The judge, writing for a unanimous court, noted that if the appellant performed a public function, it would fall within the definition of 'public body' for the purposes of PAIA. 'The only question is whether it created the record sought by the respondent in the performance of a public function in terms of any legislation.' (para 12)

Conradie JA then reviewed a number of cases decided prior to the enactment of either PAIA or PAJA that linked the determination of a body as an 'organ of state' to the control exercised over the body by the state (see *Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting, and Others* 1996 (3) SA 800 (T), *Mistry v Interim Medical and Dental Council of South Africa, and Others* 1998 (4) SA 1127 (CC), *Wittmann v Deutscher Schulverein, Pretoria, and Others* 1998 (4) SA 423 (T), *Goodman Bros (Pty) Ltd v Transnet* Ltd 1998 (4) SA 989 (W) and *Lebowa Mineral Trust v Lebowa Granite (Pty) Ltd* 2002 (3) SA 30 (T)). The Judge made it clear, referring to Greater Johannesburg Transitional Metropolitan Council v Eskom 2000 (1) SA 866 (SCA) that the control test is, although important, not decisive (para 18). What is of importance is whether the entity concerned carries out the 'functions of government'. This is important, Conradie JA pointed out, because of increasing privatisation of government functions:

> 'In an era in which privatisation of public services and utilities has become commonplace, bodies may perform what is traditionally a government function without being subject to control by any of the spheres of government and may therefore, despite their independence from control, properly be classified as public bodies.' (para 22)

Where the control test is decisive, however, is where the functions performed by an entity are not governmental in nature:

> 'The control test is useful in a situation when it is necessary to determine whether functions, which by their nature might as well be private functions, are performed under the control of the State and are thereby turned into public functions instead. This converts a body like a trading entity, normally a private body, into a public body for the time and to the extent that it carries out public functions.' (para 19)

Referring to the share structure of Mittalsteel (then Iscor) at the relevant time between 1965 and 1973, which ensured that the government retained control over the corporation, Conradie JA held that the corporation was 'without a doubt' subject to the State's control. It made no difference that this control was indirect (para 27). The appellant corporation was thus a public body at the relevant time, even though the functions it exercised at the time were not governmental.

ARTICLES AND REVIEWS

Richard Stacey, 'Substantive Protection of Legitimate Expectations in the Promotion of Administrative Justice Act: *Tirfu Raiders Rugby Club v SA Rugby Union' (2006) 22(4) South African Journal on Human Rights,* pp 664-672, investigates the relationship between the definition of 'administrative action' in section 1 of PAJA and section 3 of PAJA. While 'administrative action' as defined must affect rights, section 3 provides that any administra-

tive action that affects rights or legitimate expectations must be procedurally fair. Reading PAJA as a whole against section 33 of the Constitution, the article suggests that the definition in section 1 should be expanded to include action that affects legitimate expectations.

***Shannon Bosch,* 'IDASA v ANC -An Opportunity Lost for Truly Promoting Access to Information' (2006) 123(4) *South African Law Journal,* pp 615-625,** presents a critique of the judgment of Griesel J in Institute for Democracy in South Africa & others v African National Congress & others 2005 (5) SA 39 (C). The comment argues that the judgment, whilst technically sound, reveals some of the loopholes in the PAIA which may inhibit future courts in safeguarding transparency and good governance. The answer, the comment argues, is to follow a purposive interpretation of PAIA and give effect to the spirit of the constitutional right of access to information.

Sope Williams and Geo Quinot, 'Public procurement and corruption: the South African response' (2007) 124(2) *South African Law Journal,* pp 339-363. This article examines the measures that are used to address corruption in the public procurement context, especially those contained in the Prevention and Combating of Corrupt Activities Act 12 of 2004. The article proposes a definition of corruption and outlines the kinds of corrupt activity that takes place in public procurement and the range of measures that may be adopted. An important element of the legislative response in South Africa concerns the exclusion of persons who have been convicted of corruption offences, or who are in some way associated with or implicated in such offences, from obtaining public contracts. The article subjects the relevant provisions in the Act and accompanying regulations to detailed assessment, and raises questions regarding their utility, sufficiency and, to some extent, legality.

Lizette Brink and Willemien Du Plessis, 'The filling station saga : environmental or economic concerns?' (2007) 70(2) *Tydskrif vir die Suid Afrikaanse Reg,* pp 263-276. The last few years have witnessed several court decisions concerning environmental impact assessments and petrol stations. The question is how environmental, socio-economic and cultural circumstances must be interpreted by the courts. The article argues that neither legislation, departmental guidelines nor the courts themselves have established clear guidelines in this regard, and judgments have varied widely in their outcomes. The article attempts to determine what is to be understood by economic, socio-economic and cultural factors considerations.

Richard Stacey, 'Democratising review: Justifiability as the animating vision of administrative law' (2007) 1 *SA Public Law,* pp 80-104, investigates the theoretical question of when judicial intervention in administrative action is justified. The article suggests that basing the relationship between the three branches of government on a democratically defined principle of justifiability will help to ease the tension between courts of review and the executive branch. The Constitutional Court judgments in *Bato Star (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) and *Minister of Health NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as Amici Curiae)* 2006 (2) SA 311 (CC) are used as test cases for the theory.

Phoebe Bolton, 'The exclusion of contractors from government contract awards' (2006) 10(1) Law, Democracy and Development, p 25 and **'Scope for negotiating and/or varying the terms of government contracts awarded by way of a tender process' (2006) 17 *Stellenbosch Law Re-view,* p 266** investigate a range of administrative law and other legal issues raised by the processes by which government contracts are awarded, and the consequences of tender processes that result in the conclusion of contracts.