The Promotion of Administrative Justice Act Benchbook **Update**

30 August 2002

(This update deals with significant decisions reported between July 2001 and July 2002)

 Thanks to Kate Hofmeyer and Andrew Smith for research assistance.

Ad Para 1.16 (Purposes of the AJA)

For a decision carefully balancing the procedural fairness and administrative efficiency goals of s 33, although not reliant on the AJA, see *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* 2001 (4) SA 661 (W*)* (although there is a constitutional obligation on the courts to foster a public administration that is efficient, effective and accountable to the broader public, to expect a municipality to afford its debtors a hearing prior to the employment of ordinary civil proceedings to enforce payment was unreasonable and created inefficiency).

Ad Para 1.25 (Private power)

In *Pennington v Friedgood* 2002 (1) SA 251 (C), the court held that the proceedings of an annual general meeting of a medical aid scheme, registered in terms of the Medical Schemes Act 131 of 1998, are not subject to review by the High Court since they do not constitute administrative action. The fact that a medical aid scheme is governed by legislation does not make its decisions an exercise of public power. Instead, such schemes remain subject to common-law review which now applies only in the very narrow field relating to private entities that are required in their domestic arrangements to observe the common law principles of administrative law.

Ad Para 2.2 (Administrative action in the Constitution)

In *Kolbatschenko v King NO* 2001 (4) SA 336 (C) 357, a Judge President in chambers, on the request of the National Director of Public Prosecutions in terms of s 2(2) of the International Co-operation in Criminal Matters Act 75 of 1996, granted an order that a letter of request be issued to a foreign government for assistance in obtaining certain information. Despite the foreign affairs context, this order was treated as justiciable administrative-decision making.

According to *Colonial Development (Pty) Ltd v Outer West Local Council* 2002 (2) SA 589 (N), a single administrative process may consist of distinct parts, the first of which constitutes administrative action, the second of which does not. The court held that the process by which a town and regional planning commission reached a decision whether or not to modify a development scheme, in terms of the Town Planning Ordinance 27 of 1949 (KZN), was

administrative action for purposes of the constitutional right to just administrative action. Once the commission had reached its decision, however, the administrative action ceased. The commission conveyed the decision to the local authority and what followed was deliberative legislative action by a local government in the sense that, if the local council accepted the modification decided by the commission, the scheme so modified became law. If the local authority did not accept the modification and its appeal to the Administrator was upheld, the original scheme would constitute law. On the authority of *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC), the exercise of original legislative authority by a local government did not constitute administrative action and was not subject to review in terms of s 33 of the Constitution.

In *Geuking v President of the Republic of South Africa* 2002 (1) SA 204 (C) the court held that the President's decision to give his consent to an extradition request in terms of s 3(2) of the Extradition Act 67 of 1962 constitutes administrative action for purposes of s 33 of the Constitution. The court went on to hold that it was clear from the Act that the President is not called upon to examine the merits of the extradition request. His decision merely classifies a person as a 'person liable to be surrendered'. Thus his decision, although of an administrative nature, cannot be assailed on the basis that he failed to take into consideration a relevant factor. Such factors are appropriately raised at the enquiry before the magistrate envisaged in terms of ss 9 and 10 of the Act.

The decisions of the Democratic Alliance's National Management Committee (NMC) were held not to constitute administrative action for the purposes of the AJA in the case of *Marais v Democratic Alliance* 2002 (2) BCLR 171 (C). According to the court, in order to establish whether or not any particular conduct constituted 'administrative action', the nature, source and subject matter of such conduct had to be considered. In addition to this, it would need to be determined whether or not it involved a public duty, and to what extent, if at all, it was related to the implementation of legislation. The court noted that there was growing academic support for the view that political parties may be bound to give effect to the right to just administrative action, especially where they functioned as organs of state or when the Constitution applied to them as juristic persons. The court held that a decision to remove a mayor of a large city from office did not necessarily constitute the exercise of public power or the performance of a public function in terms of an empowering provision. The court then relied on the fact that the actions of the respondent were *ultra vires* its own constitution to come to the conclusion that the decisions of the NMC cannot be regarded as administrative action. It is respectfully submitted that this reasoning is incorrect. The very requirements for establishing whether or not certain conduct amounts to administrative action outlined by the court do not seem to have been applied. Instead, the court relies on the invalidity of the decisions of the NMC to conclude that those decisions do not constitute administrative action. However, the question of whether or not the conduct constitutes administrative action must be answered before an evaluation of its validity is undertaken.

Ad Para 2.3 (Administrative action in the Constitution)

A number of 2001 cases affirm that exercises of public power need to respect the principle of legality. See e.g. *Minister of Public Works v Kyalami Ridge Ratepayer's Association* 2001 (3) SA 1151 (CC) (power to establish transit camps for those made homeless by floods derived from the state's legal rights as a landowner rather than from the legislative framework which did not cater for the emergency situation); *Kolbatschenko v King NO* 2001 (4) SA 336 (C) (all public power is subject to the Constitution, even the State prerogative (if it still exists)).

Ad Paras 2.11-2.12 (Administrative powers and functions described)

Shoprite Checkers (Pty) Ltd v Ramdaw NO 2001 (3) SA 68 (LAC) is a significant Labour Appeal Court case considering the definition of administrative action under the AJA. The case held that a CCMA arbitration award was administrative action. In doing so, the court downplayed the effect of the term 'of an administrative nature' in the definition of administrative action. Para 29. Furthermore, the court appeared to be of the view that the AJA definition of administrative action may be wider than the s 33 definition of administrative action. Para 29. The dictum to the effect that the classification of functions doctrine (with the unnecessary categories of judicial and quasi-judicial) should continue to be employed is unfortunate. Para 14.

Ad Para 2.19 (Executive powers or functions of a municipal council)

In *Steele v South Peninsula Municipal Council* 2001 (3) SA 640 (C) at 643-44, the Municipal Council passed a resolution to remove speed bumps from a certain area, after lengthy consultations. This was held not to be administrative action as "[i]t did not implement any particular law…It was not a decision taken by a functionary who could be expected to furnish reasons. It was a decision taken by a politically elected deliberative assembly whose individual members could not be asked to give reasons for the manner in which they had voted."

Ad Para 2.27 (Made by an organ of state or by a private person exercising public power)

See *Cronje v United Cricket Board of South Africa* 2001 (4) SA 1361 (T) (a life-time ban on a national sports player's participation in the sport by the governing body is merely the exercise of a private body's right to enforce its decision as to whom it will associate with).

Ad Para 2.28 (Exercise of common-law contractual powers by public bodies)

The principal case discussed has now been reported as *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC* 2001 (3) SA 1013 (SCA).

Ad Para 2.31 (Affects)

The decision in *Association of Chartered Certified Accountants v Chairman of the Public Accountants' and Auditors' Board* 2001 (2) SA 980 (W) seems to support the determination theory. According to the Court, "…the Board's decision has plainly affected the rights and interests of the applicant. It has determined its rights."

Ad Para 2.32 (Rights)

Additionally, rights would seem to include at the least prospective rights "such as applicants for licenses or pensions." See *Minister of Public Works v Kyalami Ridge Ratepayer's Association* 2001 (3) SA 1151 (CC) para 100 ("The question whether persons with interests other than 'legal rights' or legitimate expectations can claim the protection of the procedural fairness provisions of s 33 was left open by this Court in *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal.* It may well be that persons with prospective rights such as applicants for licences or pensions, are entitled to protection, but it is open to greater doubt whether this is so in the case of persons whose interests fall short of actual or prospective rights. It is not necessary, however, to decide these issues in the present case, and they can again be left open. I am willing to assume for the purposes of this judgement that procedural fairness may be required for administrative decisions affecting a material interest short of an enforceable or prospective right."

Ad Para 2.35 (Direct effect)

The issue of a court summons and, more importantly, the decision to recover payments for certain public services in *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* 2001 (4) SA 661 (W) paras 14-17 were not termed administrative action. The court's rationale was that the decision to recover payment was only a preliminary step and was not final. Moreover, the decision imposed only litigation costs on the defendant and furthered administrative efficiency. This court's judgement also clearly demonstrates how the issue of finality may be implicit in the element of 'adversely affecting rights'. Para 9.

See also *Carlson Investments Share Block (Pty) Ltd v Commissioner, South African Revenue Service* 2001 (3) SA 210 (W) (general principle of finality in administrative decisions could be overridden by express statutory power to revisit, especially where such power to revisit was in public interest).

Ad Para 2.38 (Rule-making)

In *Association of Chartered Certified Accountants v Chairman of the Public Accountants' and Auditors' Board* 2001 (2) SA 980 (W), the constitutional right to just administrative action was applied to a decision to refuse to prescribe an exemption in terms of s 13(1)(g) of the Public Accountants and Auditors Act 51 of 1951. While not precisely applying the s 33 right to a generally applicable rule, this decision did apply s 33 to the rule-making process, the

decision-making process by which the generally applicable prescription exempting certain persons could have been promulgated.

Another 2001 case goes so far as to subject the implementation of a departmental guideline to the constitutional right of just administrative action. In *Combrink v Minister of Correctional Services* 2001 (3) SA 338 (D), the Minster issued a departmental guideline in the form of a circular letter. The intention of this document was to establish uniformity throughout the country in matters of parole. Parole boards were obliged to consider the departmental guideline. The guideline changed the conditions for parole significantly. The applicants, prisoners serving long terms of imprisonment, contended that the new guideline restricted parole releases and that it was administrative action affecting their legitimate expectation of parole. The court held that the department guideline was administrative action and thus had to satisfy procedural fairness and reasonableness guarantees. Due to the retrospective alteration of the prisoners' expectation of parole and the rigid criteria laid down in the guideline itself, this action was unfair and violated prisoners' constitutional rights, especially s 33. The Department was ordered to consider the prisoners' parole application in terms of the pre-guideline criteria.

Ad Para 2.39 (Retrospective application of the AJA)

The AJA was enacted on 3 February 2000 but did not come into effect until 30 November 2000. *Minister of Public Works v Kyalami Ridge Ratepayer's Association* 2001 (3) SA 1151 (CC) was a case that considered administrative action that took place during June 2000. The Constitutional Court did not apply the s 33 right to just administrative action, but instead continued to deem s 33 to use the wording of the interim administrative justice clause as required by item 23 of the Sixth Schedule to the Constitution. (See para 52). Thus, it would appear that the interim administrative justice clause in item 23 and not s 33 was of direct application to administrative action taking place during this period.

See, contra, *Association of Chartered Certified Accountants v Chairman, Public Accountants' and Auditors' Board* 2001 (2) SA 980 (W) 996 (enactment of AJA brought s 33 into operation).

Ad Paras 3.2 and 3.3 (Procedural fairness under the Constitution)

A critical Constitutional Court case relating to the scope of procedural fairness is *Minister of Public Works v Kyalami Ridge Ratepayer's Association* 2001 (3) SA 1151 (CC). In this case, in relation to the contention that procedural fairness applied to the government's decision to establish an emergency transit camp, the Constitutional Court found no rights or legitimate expectations to be affected. In terms of the common-law framework of land rights, the use to which the government intended putting the land was not unreasonable, even assuming that the nearby property values would be reduced. Thus, even if the residents of the properties near the transit camp were prejudiced, they had "neither legal rights nor legitimate expectations that are affected by the decision". Para 99.

The Court stated that "[t]he question whether persons with interests other than 'legal rights' or legitimate expectations can claim the protection of the procedural fairness provisions of s 33 was left open by this Court in *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC). It may well be that persons with prospective rights such as applicants for licences or pensions, are entitled to protection, but it is open to greater doubt whether this is so in the case of persons whose interests fall short of actual or prospective rights. It is not necessary, however, to decide these issues in the present case, and they can again be left open. I am willing to assume for the purposes of this judgement that procedural fairness may be required for administrative decisions affecting a material interest short of an enforceable or prospective right." Para 100.

The case is interesting for (at least) two reasons. First, the Court seems to indicate that applicants are likely to receive s 33 protection. See para 2.32 above. Second, if accepted and employed, the distinction between interests in prospective rights and other interests may mean that greater care will need to be given to interpretation of the statute at issue. Such interpretation will ascertain whether the zone of interests created by the statute – properly interpreted – encompasses persons such as the person seeking protection of the constitutional right of procedurally fair administrative action. In particular, there may be implications for the doctrine of standing.

See also *Sidorov v Minister of Home* Affairs 2001 (4) SA 202 (T) (where a temporary residence and business permit had been renewed regularly, the alien applicant had a legitimate expectation that this would continue).

See also *Nortje v Minister van Korrektiewe Dienste* 2001 (3) SA 472 (SCA) (the question is whether or not the person who is adversely affected by the decision had a just and fair opportunity to state their case; generally this should occur before the decision, but, exceptionally, it could occur after, if an earlier hearing was impossible).

Ad Para 3.5 (Structure of s 3)

While not interpreting the AJA itself, language of the Constitutional Court in *Minister of Public Works v Kyalami Ridge Ratepayer's Association* 2001 (3) SA 1151 (CC) confirms the circumstance-based approach to procedural fairness embodied in s 3(2)(a) of the AJA. According to the Court, where conflicting interests have to be reconciled, "proportionality, which is inherent in the Bill of Rights, is relevant to determining what fairness requires. Ultimately, procedural fairness depends in each case upon the balancing of various relevant factors including that nature of the decision, the 'rights' affected by it, the circumstances in which it is made, and the consequences resulting from it." Para 101. Here the application of the balancing approach favoured the government's decision to establish an emergency transit camp for flood victims due to the urgent nature of the case.

Ad Para 3.9 (Adequate notice)

Barkhuizen v Independent Communications Authority of SA [2002] 1 All SA 469 (E) indicates that the work load and time constraints on an administrative body such as the Independent Communications Authority of South Africa ('ICASA') cannot justify a failure to provide adequate notice to applicants of their right to address the body on a competitor's application. The court held that ICASA had not been sufficiently pro-active, and had underemphasized the importance of the applicant's rights to be informed of competing applications. Although this case dealt with s 33 of the Constitution, its dicta in relation to the requirements of adequate notice will no doubt have relevance for an interpretation of s3(2)(b)(i) of the AJA.

In *Hartebeespoort Plaaslike Raad v Munisipale Afbakeningsraad* [2002] 2 All SA 391 (T), the applicant sought an order reviewing and setting aside the decision of the first respondent regarding the demarcation of the municipal region into which the applicant would fall. s21 of the Municipal Boundaries Demarcation Act 27 of 1998 required that the first respondent publish its demarcation of boundaries in the relevant provincial newspaper. Any detractors were then required to lodge written objections within 30 days of publication. The first respondent was required to consider such objections and either confirm, amend or withdraw its demarcation. The question in the case was whether the requirement, in terms of the Act, that the respondent give notice of its decision was mandatory and had to be complied with for a new demarcation or re-determination to be made. The court held that the initial demarcation process had not been completed and thus the applicant's argument that the statutory requirements regarding new demarcations had not been satisfied, had no merit.

Ad Para 3.10 (A reasonable opportunity to make representations)

In *Bam-Mugwanya v Minister of Finance and Provincial Expenditure, Eastern Cape* 2001 (4) SA 120 (Ck), the court held that procedural fairness did not require that oral, in addition to written representations, be permitted. Here, the applicant had failed to recuse herself from a tender board which was considering extensions of bus services, despite having an interest in the industry. The applicant was a member of a CC directly interested in the industry and a consultant to numerous players in the industry. This refusal led to a sub-committee investigating the applicant. She submitted detailed written explanations to the sub-committee and subsequent oral representations. She asked to give further oral representations, but the Executive Council, acting on the report of the sub-committee, dismissed her request and dismissed her from employment.

Ad Para 3.20 (Procedural fairness – Departures)

Cooper NO v First National Bank of SA Ltd 2001 (3) SA 705 (SCA) might be read as support for an AJA departure. The Insolvency Act 24 of 1936 provided for the issuing of search warrants so that a trustee can take charge of all the assets of the insolvent estate. Generally, because of the invasion of

privacy the search and seizure would necessitate, notice of the action and an opportunity to be heard should be afforded. However, when seeking to recover concealed items belonging to an insolvent estate, prior notice and a hearing might defeat the purpose and object of the Act. In some instances, the court thus inferred that the legislature intended to exclude the *audi* principle. While this case considered only the interpretation of the common law and statute, it could be seen as analogous to an AJA departure inquiry.

See also *Mpande Foodliner CC v Commissioner South African Revenue Services* 2000 (4) SA 1048 (T) (a common law presumption that "whittles down" the principle of the duty to act fairly cannot trump the Constitution; only the limitation clause can). Paras 44-46.

Henbase 3392 (Pty) Ltd v Commissioner, South African Revenue Service 2002 (1) SA 180 (T), deals with a limitation to the right to procedural fairness. The applicant alleged that the conduct of the Commissioner (in terms of ss 87 and 88 of the Customs and Excise Act 91 of 1964) in seizing and detaining goods violated their constitutional right to fair administrative action. The applicant was not called on or given an opportunity to present their case prior to detention of their goods; nor were any reasons given. The court held that whereas the right to a hearing and to be given reasons had to be applicable in cases of seizure or forfeiture, the same was not necessarily true for mere detention. Detention was, in terms of ss 87 and 88, only the first step to set in motion a process of establishing whether forfeiture should take place. The court held the view that to require a hearing before detention would make little sense and was also impractical. Thus the court held that the Commissioner's decision to detain the goods was not a nullity and unlawful in constitutional terms.

Ad Para 5.6 (Duty to provide reasons)

King William's Town Transitional Local Council v Border Alliance Taxi Association (BATA) 2002 (4) SA 152 (E) deals with a situation in which reasons were requested after litigation between the parties had commenced. The court highlighted the fact that a request for reasons for administrative action should not be confused with the process of litigation, in which the validity of the action is challenged. However, that does not mean that once litigation has commenced, an aggrieved person is precluded from seeking reasons under the Constitution, and that he must content himself with the procedure of discovery. If such an aggrieved person does seek reasons after litigation has commenced, the request must be couched in such terms that it is clear to the administrative organ concerned that the request is not merely a procedural one in terms of the Uniform Rules of Court but rather one based on s33 of the Constitution. Failure to do so negates the claim the there has been a violation of the constitutional right to be furnished with reasons.

Ad Para 5.10 (Formal requirements for the request)

Reasons under s 33 require a clear request. In *King William's Town Transitional Local Council v Border Alliance Taxi Association (BATA)* 2000 (3)

BCLR 295 (E) the court held that the closing of a taxi rank by the applicant was administrative action that met the requirements of section 33. A request by BATA for reasons for the closing of a taxi rank after a court action had commenced was viewed by the Town Council as a means of discovery. Thus, use of the Rules of Court was called for. The court judged that BATA had failed to correct this impression, and thereby failed to clearly call for reasons in terms of section 33(2).

Ad Para 5.11 (Adequacy)

In *Nomala v Permanent Secretary, Department of Welfare* 2001 (8) BCLR 844 (E) at 855-56, standard forms used to give reasons for administrative action were found to be insufficient. Here, a reason for the revocation of a disability grant was indicated by a tick in one of five boxes, each stating a different reason. These were: "1. Not disabled. 2. Condition is treatable. 3. Specialists reports is required. 4. Medical form incomplete. 5. Not enough objective medical information." According to the court, this was inadequate. The reasons given "did not disclose anything of the reasoning process or the information upon which it is based." The reasons given included insufficient information for a disappointed applicant to prepare an appeal. The reasons given also did not aid in a new application, did not instil confidence in the process, and failed to improve the rational quality of the decisions reached.

Ad Para 5.14 (Linkage)

A lack of reasons suggests an irrational decision. In *Sidorov v Minister of Home Affairs* 2001 (4) SA 202 (T) it was held that because a temporary residence and business permit had been renewed regularly, the applicant had a legitimate expectation that temporary residence and business permits would continue to be renewed regularly. However, the permits were not renewed. After repeated attempts, the applicant was merely informed he was a threat to the security of the State. No evidence was led at all to back this up, even during the court proceedings. There was not enough information to work out the reasons, and this strongly suggested that it was an irrational decision motivated by unreasonable considerations.

Ad Para 6.1 (Judicial review of administrative action)

In *Bulk Deals Six CC v Chairperson, WC Liquor Board* 2002 (2) SA 99 (C) an urgent application was lodged for review of the respondents' decision to deny the applicant a restaurant liquor license. The court held that although s 131(a) of the Liquor Act 27 of 1989 made provision for a Court to review the decision of a Liquor Board it was appropriate that the matter be dealt with under s6(1) of the AJA which provides that any person may institute proceedings in a court or tribunal for the judicial review of administrative action.

The applicant alleged that the action of the board was materially influenced by an error of law (s6(2)(d) of the AJA) and that the action was taken because irrelevant considerations were taken into account or relevant considerations were not considered (s 6(2)(e)(iii) of the AJA). The court held that the board had overemphasised the interests of certain residents at the

expense of other factors and accordingly had misinterpreted the concept of 'public interest'. In addition to this, the court took the view that the board had taken irrelevant considerations into account when deciding to refuse the application for the licence. Thus on both counts, the court found that the actions of the Liquor board were in violation of the relevant provisions of s 6 of the AJA.

Ad Para 6.18 (s 6(2)(e)(iii)): irrelevant considerations)

In *Camps Bay Ratepayers and Residents Association v Minister of Planning, Culture and Administration, Western Cape* 2001 (4) SA 294 (C), the court found reviewable a failure by the provincial MEC to consider personally the objections to the Minister's removal of restrictions in title deeds on a property development. The rationale of this decision – based on the circumstances of the case -- should not be extended too far. Within a properly structured process, an elected official may be able to rely upon a summary of objections prepared by other officials rather than considering each and every objection personally.

Ad Para 6.23 (Rationality)

The interpretation of AJA s 6(2)(f)(ii)(dd) was considered in the Labour Appeal Court case of *Shoprite Checkers (Pty) Ltd v Ramdaw NO* 2001 (4) SA 1037 (LAC). Here, the Court, without expressly approving *Carephone (Pty) Ltd v Marcus NO* 1999 (3) SA 304 (LAC), essentially upheld it. More pertinently, the Court considered the issue before it if AJA s 6(2)(f)(ii)(dd) applied. The court read the content of s 6(2)(f)(ii)(dd) to be essentially the same as the justification or rationality standard applied in *Carephone*. Para 31. See *AJA Benchbook* para 6.25, n64.

See also *Derby-Lewis v Chairman, Amnesty Committee of the Truth and Reconciliation Commission* 2001 (3) SA 1033 (C) 1065 (rationality review is encapsulated in s 6(2)(f)(ii)(dd) of the AJA); *Durbsinvest (Pty) Ltd v Town and Regional Planning Commision, KwaZulu- Natal* 2001 (4) SA 103 (N) 108 ("It is the decision that must be justifiable in relation to the reasons; not ht reasons that must be correct.")

A potential distinction between AJA s 6(2)(f)(ii)(bb) and s 6(2)(f)(ii)(dd) is drawn in *Durbsinvest (Pty) Ltd v Town and Regional Planning Commision, KwaZulu- Natal* 2001 (4) SA 103 (N) 106-7.

Ad Para 6.25 (Reasonableness)

In *Ampofo v MEC for Education, Arts, Culture, Sports and Recreation, Northern Province* 2002 (2) SA 215 (T) it was held that the requirement of reasonableness cannot oblige a department to exercise its discretion in a particular manner merely because it had done so in the past. The concept of reasonable administrative action in s 33 of the Constitution and s6(2)(f)(ii) and s6(2)(h) of the AJA has been held to mean that a functionary (such as a department) is obliged to make decisions that are rationally justifiable. Thus

reasonable administrative action is achieved where a functionary exercises its discretion in a rational and unfettered fashion.

Ad Para 7.9 (Exhaustion of internal remedies)

In the case of *Marais v Democratic Alliance* 2002 (2) BCLR 171 (C) the applicant contended that the AJA did not apply to the dispute between the parties because s7(2)(a) of the AJA required that an internal remedy 'provided for in any other law' had to be exhausted before a court might be approached. The court held that the respondent's constitution did not qualify as 'other law' in terms of s7(2)(a) of the AJA. 'Law' had to be interpreted in accordance with its definition in s2 of the Interpretation Act 33 of 1957; it had to mean a law, proclamation, ordinance, or Act of Parliament or 'any other enactment having the force of law'. It could not include 'empowering provision' as defined in the AJA. Only if that were the case, would the respondent's constitution be included as 'law'.

See Clive Plasket's article entitled 'The Exhaustion of Internal Remedies and Section 7(2) of the Promotion of Administrative Justice Act 3 of 2000' (*SALJ* Vol 119 (p1 – 221) 2002) for an argument that s7(2) is an unconstitutional infringement of the right of access to court entrenched in s34 of the Constitution.

Ad Para 8.1 (Remedies in judicial review proceedings)

In South African constitutional law, a just and equitable order may potentially include an award of constitutional damages. However, South African courts have so far been reluctant to award Constitutional damages. Most pertinently, the Constitutional Court and the Supreme Court of Appeal have both rejected claims for such damages. *Fose v Minister for Safety and Security* 1997 (3) SA 786 (CC); *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA). Nonetheless, several 2001 High Court decisions in the Eastern Cape indicate a greater potential for damages awards to remedy violations of the right of administrative justice.

In *Mahabehlala v Member of the Executive Council for Welfare, Eastern Cape Provincial Government* 2001 (9) BCLR 899 (SE) a disabled person applied for a social grant under the Social Assistance Act 59 of 1992. The court found the failure to approve within a reasonable time to be unlawful and unreasonable administrative action violating s33. Although delictual remedies were available, the applicant was too poor to be able to use them, thus "constitutional relief" was called for. The court placed the applicant in the same position as if her right had not been infringed, by means of a just and equitable order (including interest on the amount from when it should have been awarded).

Similarly, in *Mbanga v Member of the Executive Council for Welfare, Eastern Cape,* the applicant had applied for a social grant. Two and a half years later, he instituted a *mandamus* to force a decision, and if it was approved, to order interest. A settlement was reached which left only the issue of whether

interest was due. Leach J, the same judge as for *Mahabehlala,* held that interest due from the Department being placed in *mora* was not possible as the amount was due and payable only when it was approved. However, the applicant's right to lawful and reasonable administrative action was violated due to the unreasonable delay. A reasonable time would have been 3 months. Appropriate relief under s38 (read with section 172(1)) required the applicant being placed in the position would have been in if s33 had been fulfilled and thus interest was awarded. See also *Nomala v Permanent Secretary, Department of Welfare* 2001 (8) BCLR 844 (SE) (interest on the amount owing to the applicant (after the revoking of a disability grant) was awarded as this was just and equitable (citing *Mbanga*).

What these three Eastern Cape cases hold open is the possibility that courts will interpret s 8(1) of the AJA to allow for awards of damages for violations of the AJA. The authority for such awards would come from the AJA itself. Such awards would thus be AJA damages and would not strictly speaking be a type of constitutional damages. Nonetheless, many of the same policy issues that counselled the Constitutional Court against damages awards in *Fose* and *Olitzki Property Holdings* would seem to apply as well in the AJA statutory damages context. That said, the careful extension of the Eastern Cape line of cases may provide a tool, appropriate in certain circumstances, to prod a reluctant administration into greater effectiveness.

Ad Para 8.5 (Remedies)

In *Bulk Deals Six CC v Chairperson, WC Liquor Board* 2002 (2) SA 99 (C), the court held that the matter before it constituted an exceptional case which justified the court substituting its own decision for that of the Liquor board. It was exceptional in that its resolution had been delayed for a very long time, the applicants were suffering losses occasioned by the delay, the matter had been fully canvassed and all the facts were before the Court, and the conditions normally attached to restaurant liquor licenses were standard. Thus the respondent's decision to refuse the application for a liquor licence by the applicant was set aside. The respondent was directed to grant the application subject to the general conditions normally imposed in the case of restaurant liquor licences and to certain further conditions.