

Part 8

A practical example



This part of the Guide applies:

In a practical case which so far has been described in more general terms. It outlines the whole structure of a decision-making process from the application to the final decision. It concludes with a kind of template for decisions.

It shows:

- The AJA complements the provisions of particular administrative law as far as fair procedure is concerned;
- It gives helpful guidance for structuring efficient and lawful decision-making processes;
- It can be changed to fit other areas of particular administrative law so that organs of State can customize it to their particular needs.

An Example



Note

This example does not deal with all the details of the area of law used in the example or with the complex decision-making process. Instead, it focuses on the impact of the AJA on the decision-making process, which is:

- The application (or where you act on your own authority without receiving an application);
- Applying the law to the facts of the matter;
- Correspondence with the person who may be affected by a decision before the decision is taken. Then, re-applying the law to the facts in the light of the representation received;
- Taking and issuing of a clear decision;
- Giving reasons or informing the person of the right to reasons, and of any legal remedies, when the decision is negative or qualified.

You are an administrator in a provincial Department of Social Development. You are required to evaluate applications for social assistance grants. You have the authority to refuse the application or to grant it on behalf of the Director General.

Step 1: The Application

Ms Dube applies for an old age pension. She provides you with the following information:

- She is 70 years old and a widow;
- She is a South African citizen;
- She lives in Diepkloof; and
- She states that she has no assets.

All necessary forms have been completed, fingerprints taken and so on.



Procedure manual for Social Assistance

The national Department of Social Development has developed a 'Procedure Manual for Social Assistance'. This manual provides a useful insight into this specific area of public administration. However, it was developed before the AJA came into operation and the AJA must now be followed as well when making these decisions.

Step 2: Understanding the request and first identification of the problem

In our example this is easy to establish - Ms Dube is requesting an old age pension. She has submitted all relevant information. Ms Dube expects you to come up with a decision.

Sometimes it can be more difficult to understand the person's request. For example, the application may not be clear or the matter may be very complex.

Step 3: Identification of relevant legal provisions and helpful material

You will need to know the relevant law and any internal policies (including whether any powers have been delegated). You should look for material that may have been developed to make your work easier, such as manuals, forms and templates for decisions.

In our example, the most relevant law is the **Social Assistance Act 59 of 1992** (“the SAA”). However, it is in the **regulations** to this Act that you will find the detail on the procedures to be followed and on substantive matters like the required age, the amount of money to be paid and so on.

As mentioned, there is also a **manual** that gives additional guidance to administrators (see above).

Lastly, there are **forms** and even **software programmes** to assist you in making this kind of decision.

The following sets out the information you will need to find:

- Am I competent to take a decision? Has the authority to take the decision been delegated to me?
- Am I potentially biased?
- Are there procedural requirements?
- What are the substantive requirements?
- Are there any other issues?

Once you have the information you will need, the next step when applying the law is to get an understanding of the **purpose** of the empowering provision. With this knowledge, it will be possible to avoid a too rigid, too technical and sometimes even incorrect application of the law.

Step 4: Applying the law to the case or facts

You now need to apply the law to the facts.

a. The Law

- **Competency and delegation.** The SAA and other documents (regulations, delegations and so on) will say whether you are competent to make the decision. (The AJA itself does not deal with competency and similar issues in each case because the AJA is part of general administrative law).
- **Potentially biased.** Since you do not know the applicant, it is unlikely that you could be biased. However, as will be seen later, you **do** have certain information about Ms Dube that you might have to take into consideration and that will affect your decision.
- **Procedural requirements in the SAA.** You will need to consider whether the procedures (in the Act, in the regulations and in other policies) have been followed.

There may be some procedural steps that, if not followed, will not necessarily lead to an unlawful decision. These are procedures that have been put in place to ensure efficient internal operations. Examples are procedures on how to register an application, filing systems and so on.

- **Substantive requirements in the SAA** and the respective regulations. The SAA says the applicant (amongst other things) must be:
 - A certain minimum age (65 years for males and 60 years for females);
 - A South African Citizen;
 - Live in South Africa; and
 - In need of state support. The law sets out the monetary limits that a person who applies for a grant can earn or hold as assets. This calculation is rather complicated and changes from time to time. Let's presume for our case that the limit for assets is R5 000.00.



Note

The AJA focuses on fair procedures. Although decisions can be reviewed in terms of s 6 (2) of the AJA also because of the reasons you took into account (as opposed to the procedures you followed), this will really depend on whether you have properly applied the empowering provisions of the particular administrative law (here the SAA).

b. The Facts

What are the corresponding facts in our case?

- **Competency and delegation.** You are an official of the competent provincial government department. You have delegated power to decide on the application.
- **Potentially biased.** You live in Ms Dube's neighbourhood and, by coincidence, a reliable person told you that Ms Dube was recently awarded R100 000.00 in an out of court settlement. The case involved an old dispute relating to the death of her husband 10 years ago as a result of vanadium poisoning at his former workplace. As this will most probably be a relevant fact to be considered, you have to be careful to avoid bias. But although you are Ms Dube's neighbour and you may want to take facts into consideration that came to your attention through rumours, this will not result in bias as long as you deal openly and fairly with these issues.
- **Procedural requirements in the SAA.** Let's presume that they are all complied with.

- **Substantive requirements in the SAA** and the respective regulations. Mr Dube is:
 - Within the age limit as she is 70 years old;
 - A South African citizen;
 - Has residence (lives) in South Africa; and
 - She says that she does not have any assets. However, you are not sure whether this statement is correct. As described above you live in Ms Dube's neighbourhood and you were told that she was recently awarded R100 000.00 in an out of court settlement.If Ms Dube has in fact got this amount of money she will not qualify for a state pension, not even a reduced one. In this case you would have to decline the application.

Now we can see the particular relevance of the AJA, because you may have to reject Ms Dube's application. Since this would **adversely affect her rights** and also have a **direct, external, legal effect**, the provisions of the AJA apply.

Your decision is clearly an administrative action (since it meets all the aspects of the definition of "administrative action" in the AJA). As a result, the AJA requires you to inform Ms Dube of your planned decision so that she can make representations (see section 3 of the AJA). The communication with Ms Dube can be done in writing, on the telephone, or by using any other appropriate communication channels. In most cases it is best to use written down procedures.



Notes

a. Positive decisions

At first sight, the AJA appears only to apply to 'negative' decisions (those which adversely affect rights). But, a too narrow understanding may lead to unlawful decisions even where you grant an application. For example, section 3 (2) (c) states that there must be a clear statement of the administrative action. So, even if you decide to approve Ms Dube's application, you have to inform her of this decision. Your letter must say that you have granted the pension and how much money she will receive. Otherwise, Ms Dube could sue you for failure to take a (clear) decision.

b. Temporary awards

In case of temporary awards (such as giving someone a disability grant for a fixed period), the AJA applies as well because this decision will affect the person's rights if they had applied for a permanent grant.

c. Acting out of your own authority

If you are not responding to an application but out of your own authority, you need to give 'adequate notice of the nature and purpose of the proposed administrative action' so that, again, the person can make representations. For example, if Ms Dube already had a pension and you found out she had received a huge out-of-court settlement, you have to withdraw her old age pension. In such a case, you need to give Ms Dube a chance to make representations.

Step 5: Communicating with the applicant – the Audi alteram partem rule

To make sure Ms Dube has a chance to explain her side of the story, you will probably need to write to her, explaining what you have found out and what decision you plan to take. The letter you write to her may look like this one:

Department of Social Development
Private Bag X 61
Johannesburg
0001
Tel.: 011/3227558

10 October 2001

Reference: 12345/01

By Registered Mail

Mrs A Dube
PO Box 123
Diepkloof, 0123

Dear Mrs Dube,

RE: Your application for a pension grant dated 20/09/2001

I refer to your application for an old age pension. Regulation 13 of the regulations to the Social Assistance Act 66 of 1992 says that a pension can only be given to a person who (amongst other things) does not have savings exceeding R5,000.00.

It has come to our knowledge that you have recently received an amount of R100,000.00 Rand as an out-of-court settlement relating to the death of your late husband 10 years ago. If this is so, you will not qualify for an old age pension.

Please let us know whether this in fact the case and, if it is, how much money you actually received. Please let us have your reply by 15 November 2001 or I will have to reject your application.

Sincerely

A Brooks
Deputy Director: Social Grants
dm

The Administrator's
address

Date

Reference number

Mailing instruction, if any

Recipient's name and
address.

Salutation

Subject

State the problem by
referring to explaining the
relevant legal provisions (in
as simple language as
possible).

State the corresponding
facts of the case as well as
your conclusions for the
possible decision.

Complimentary closing

Signature
Your name
Your job title and
department
There are no enclosures to
this letter – if there were,
you would indicate this here.
The writer's initials

Step 6: The decision with reasons and information on legal remedies

You have waited until 30 November 2001 without having receiving a response.

If you had no doubts that your understanding of the legal and factual issues on which you want to base your decision is correct, you could now come up with the final decision.

However, in our example your information is based on hearsay – that is, you have heard that Ms Dube has this money but you do not know this for sure yourself. News like this can sometimes be spread without any factual basis. Ms Dube lives in your neighbourhood. It should therefore be easy for you to contact her directly. As a good administrator, you may want to visit Ms Dube to remind her to answer your request for information. Even though the law does not require this, an administrator, in line with the Batho Pele principles that demand customer-oriented service delivery, sometimes should go the 'extra mile'.

However, even though you visited her house, she was not there. While talking to one of her neighbours, she tells you as well about the out-of-court settlement and the money Ms Dube received. As a result, and since Ms Dube has never written back to you, you decide to turn down her application.

This section explains:

- What your decision might look like;
- What should be included in your written reasons (or what information you should provide on the right to request reasons); and
- What the information on possible legal remedies should look like.

It provides a 'template' or structure for you to follow. You may want to change the template to suit your needs. For example, if you are not responding to an application but instead are acting on your own authority (perhaps by terminating an existing grant).

Often decisions are very simple and short. For example, there may be no cost order necessary or the decision itself was quite simple. The more difficult and complex a decision is, the greater the need for a more detailed and sophisticated decision and for more detailed reasons. In all cases though, you must comply with the following minimum requirements:

- A clear decision must be set out, which also includes your particulars;
- Adequate reasons must be given (or you must provide information on the right to request reasons); and
- You must provide information on any legal remedies available.

In general, the decision should include the following parts:

i. Address block

Make sure to include:

- Your address (which will usually be on the letterhead you use);
- The date of the letter;
- Your file reference number;
- Any special mailing instruction, if necessary (such as “By Registered Mail”; or “By Fax”);
- The name of the person to whom you are writing;
- Their address;
- The name of the particular person you want to see the letter if you are writing to a department or business (for example, “Attention: Ms P Ndlovu”);
- Your salutation (such as “Dear Ms Mkhize” or “Dear Sir”); and
- The subject of the letter (such as “RE: Your application for a liquor licence”).

ii. The problem

Re-state the purpose of the application and say why you are writing (for example, “I am writing in connection with your application for a pension grant”). This will indicate that you understood the nature of the proceedings.

iii. The decision

This is where you state exactly what decision has been taken without yet giving reasons for the decision:

1. State the main decision in one sentence only, but do not give any reasons for the decision here. The purpose of this sentence is for the recipient to get a clear and simple answer to the question: “Did I succeed in my application?” or “What does the Department want from me?”

Where you are acting on your own authority (and where you can't refer to an application), you can test whether your decision is clear and complete by checking to see that it answers the question: Who has to do what, when and where?

2. State all the subordinate decisions. Every subordinate decision must be stated in one sentence only, without giving any reasons for it. Remember that you are only allowed to make subordinate decisions if the empowering provision allows it. Subordinate decisions include:
 - a. Conditions attached to the main decision.
 - b. Time limits attached to the main decision.
 - c. Exceptions attached to the main decision.
 - d. Exemptions to the main decision.

3. Make a cost order, if the empowering provision allows or requires it. State the amount that must be paid, who must pay it, and by what date the amount should be paid. If you have to issue an assessment before the amount can be paid, attach the assessment as an enclosure.

iv. Reasons for the decision (and any subordinate decisions)

1. For the main decision:

- a. State the jurisdiction or authority of the decision-maker. That is, say why you have authority to make this particular decision (in simple cases, where there is no dispute about your authority, it may not be necessary to elaborate on this requirement).

- b. State the facts of the matter. Two sets of facts are important:

- i. The **history** of the matter.

1. If the matter arose from an application by someone, say who applied for what and when.

In some cases, you may have given other people a chance to comment or make representations before taking your decision. If this is the case, you must say who you informed and what their responses were.

If you have already sent these responses to the original applicant and they have replied to them, you must also mention this.

2. If the State initiated the matter, say why your Department decided to start an investigation. Set out who was informed of the investigation and what their responses were.

- ii. List all the **facts on which the decision is based**.

- c. Give the reference of the empowering provision – that is, say what provision covers decisions on these types of facts.
- d. State the purpose of the empowering provision. List the conditions that must be met before an administrator may exercise the powers in the empowering provision. If you rely on a Court's interpretation of the section, give the reference of the case and explain what impact this decision has had on the section.
- e. Apply the law to the facts listed.

2. Repeat the process for each of the subordinate decisions **and** any cost order.



Note

This structure sets out all the elements of a sound motivation for a decision. Of course, as in our example, you can keep it short and simple in clear cases. This applies in particular to situations where, after having read the party's representations, you know that the actual dispute focuses on one very specific issue. In such a case, it is important to address this topic and keep the rest very brief.

What to do if you are not allowed to give reasons

In some cases, the policy of a particular department or organ of State may be not to give reasons automatically with the decision. In such a case, the AJA requires you to inform the person of the right to request reasons afterwards. The draft regulations describe the formal requirements of a request as well as the corresponding duties of an administrator.

In such a case you will therefore have to include a paragraph where you explain the right to request reasons. This should be done before you explain the person's rights to legal remedies.



Example

A person makes an application to your department. You decide to reject the application, but your department's policy is not to give reasons unless these are requested from you. After your actual statement of the decision you should now add a paragraph such as the following:

'As set out in section 3 (2) (e) of the Promotion of Administrative Justice Act 3 of 2000 (and its regulations) you can request reasons for this decision within 90 days of receiving this letter.

If you would like reasons for this decision, please send your request to the above-mentioned address. In your letter, please refer to this decision. You must also tell us which of your rights, in your opinion, have been adversely affected. You must also provide us with your full name, postal address and, if available, a telephone and fax number where you can be contacted.'

v. Advice on legal remedies

- a. If there is an internal appeal available:
 1. Give the contact details of the person responsible for the internal appeal (including their name, physical address, fax number and telephone number);
 2. Set out the period of time that they have to lodge the appeal or the date by which it must be lodged; and
 3. Explain any prescribed or special forms that must be used for the internal appeal. Attach copies of these forms as an enclosure.

- b. If there is no internal appeal:
 1. Say which Court has jurisdiction to hear a review; and
 2. State the time limit within which the review has to be lodged.

vi. Ending off

- Write a complimentary closing (such as “Yours sincerely”);
- Sign the letter;
- Write your name and job title **clearly** underneath your signature;
- Say what department you are from;
- If you will be sending enclosures, say how many there are (for example, “Encl. (3)”);
- Include the writer’s initials (if the letter is typed on your behalf); and
- Indicate who complimentary copies will be sent to (for example, “CC: Dr P D Smith”)

Remember to include:

- Your assessment for any fees payable; and
- An internal appeal form (if prescribed).

AN EXAMPLE OF SUCH A LETTER AND EXPLANATORY NOTES

APPEARS ON THE FOLLOWING PAGE

Department of Social Development
Private Bag X 61
Johannesburg
0001
Tel.: 011/3227558

1 December 2001

Reference: 12345/01

CERTIFIED MAIL

Mrs Dube
PO Box 123
Diepkloof, 0123
ID. Number:

Dear Mrs Dube,

RE: Your application dated 20/09/2001

You have applied for an old age pension.

Decision:

Your application for an old age pension dated 20/09/01 has been rejected.

Reasons:

In your application for an old age pension, you stated that you do not have any assets.

Our decision is based on the following facts and legal opinion:

It has come to our knowledge that you have recently received R100 000.00 in an out-of-court settlement relating to the death of your late husband 10 years ago. On 10 October 2001, we wrote to you asking whether or not this was true and, if so, how much money you received. You have not responded to this letter. One of our officers tried in vain to contact you at your house on 25 and 30 November to discuss the matter with you. On one of these occasions, one of your neighbours confirmed our information with regard to the above stated out-of-court settlement.

Amongst other conditions, regulation 13 of the regulations to the Social Assistance Act 66 of 1992 says that your assets may not exceed an amount of R5 000.00. Since your assets are around R100 000.00, you do not qualify for a pension grant or for a reduced grant.

Based on these facts and the relevant legal provisions your application had to be rejected.

Advice regarding legal remedies:

Under section 10 of the Social Assistance Act, you have the right to appeal against this decision. It must be done in writing within ninety (90) days of receiving this letter. The appeal may be lodged at your nearest District/Service Office.

Sincerely



A Brooks
DIRECTOR GENERAL, DEPARTMENT OF SOCIAL SERVICE
dm

The Administrator's address

Date

Reference number

Mailing instruction

Recipient's name
and
address.

Salutation

Subject

State the purpose of the
application

The main decision in one
sentence, without reasons. (In
this example, there are no
subordinate decisions)
State the authority of the
decision-maker (not necessary
in our case as this is not a
problem).

The history (facts) of the matter.
Since no third party was
involved in this example, there
is no need to inform anyone
else of the application.

The facts on which the decision
is based.

The empowering provision; if
unclear or relevant to avoid
dispute, state the reason for the
empowering provision.
Apply the law to the facts.

Advice on any legal remedies
available.

Complimentary closing

Signature
Your name, job title,
department
(There are no enclosures to this
letter – if there were, you would
indicate this here.)
The writers/ initials