

# AJA Newsletter

Issue 2

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As the first issue of the AJA Newsletter has been received so well last year, we felt encouraged to produce a second one which we are proud to present herewith. Most notably, this second issue of the AJA Newsletter includes the first pronouncement of the Constitutional Court of South Africa on the AJA in the case "**Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others**" handed down in March this year. Because of its particular relevance and significance, this case is summarised and discussed separately from the rest of the Newsletter at pages 20-24. The Constitutional Court in Bato Star made it clear that the courts' power to review administrative action no longer derives from the common law but from the Promotion of Administrative Justice Act and the Constitution. Therefore, education and training programs on the AJA remain highly important to follow the route pointed out by the Constitutional Court. We hope that the AJA Newsletter contributes to achieving this goal.

Claudia Lange, Thinus Rudolph and Jakkie Wessels

## CASE LAW

### THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT 3 OF 2000 (AJA)

#### SECTION 1 OF THE AJA – DEFINITION OF ADMINISTRATIVE ACTION

*Schoon v MEC, Department of Finance, Economic affairs and Tourism, Northern Province & another [2003] 9 BLLR 963 (T)*

(see the discussion under 'Section 3' below) concerned the refusal by the convener of a disciplinary hearing to allow the applicant legal representation.

The court quoted from s 1 of the AJA and held that '[t]he disciplinary enquiry, which the applicant is subject to, constitutes administrative action, as defined in section one of AJA' (para 21). The court referred to **Hamata & another v Chairperson, Peninsula Technikon Internal Disciplinary Committee & others 2002 (5) SA 449 (SCA)**. In that case, the court considered whether a disciplinary enquiry



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could be treated as administrative action under the Constitution (see para 22 in *Schoon*). The court in *Hamata* reached the conclusion that it was not necessary to decide this question because applying the pre-constitutional principles of the common law would bring about the same result.

The court in *Hamata* said the following (para 23):

'I am satisfied that an application of the principles of the common law in existence in the pre-constitutional era (...) require proceedings of a disciplinary nature to be procedurally fair, whether or not they can be characterised as administrative and whether or not an organ of State is involved (...). In short, the point of departure when interpreting the rules remains the same in this case, whether the procedural fairness of the proceedings of these particular disciplinary bodies is regulated by the Constitution or by the common law as subsumed under the Constitution.'

***Nephawe v Premier of Limpopo Province & another [2003] JOL 10972 (T)*** was noted in the edition of this newsletter covering January to August and has since been reported in 2003 (5) SA 245.

In ***Van Zyl v New National Party & others [2003] 3 All SA 737 (C); [2003] JOL 11360*** the applicant had been appointed to represent the New National Party in the National Council of Provinces. The leadership of the party, with the co-operation of the African National Congress, succeeded in tabling and passing a motion of no confidence in the applicant. The applicant requested that the motion be set aside by the court for a variety of reasons.

The court said the following about whether such a motion is reviewable in terms of the principles of administrative law (para 51):

'In my view, the introduction of reasonableness by the Constitution as a requirement of just administrative action

and the inclusion of reasonableness and rationality in the AJA, warrant the conclusion that for a decision to constitute administrative action in terms of the Constitution and the provisions of the AJA and be susceptible of review it should be capable of assessment against those criteria. In my view the acceptance of votes of no confidence (...) "admit no objective justification" as they cannot be subjected to an evaluation for reasonableness and rationality and accordingly are not appropriate for judicial review.'

Subsequent to the successful passage of the motion of no confidence, the leadership of the party passed a resolution calling for the applicant to be recalled from her position in the NCOP. The court turned to consider whether a resolution would be covered by s 1 of the AJA. The argument of the respondents was that a decision of a political party was not subject to review. To this the court said (para 70):

'The debate whether a political party is subject to the constitutional right of just administrative action (see: Lisa Thornton: "The Constitutional Right to Just Administrative Action – Are Political Parties Bound?" (1999) 15 *SAJHR* 351) has become a less contentious issue after the coming into operation of the AJA which in the definition of "administrative action" explicitly includes decisions of juristic persons when exercising a public power or performing a public function in terms of an empowering provision. Accordingly, any decision of a political party which is a juristic person, is amenable to review if the other elements of administrative action as defined in the AJA are present.'

The court concluded that the recall of the applicant amounted to an exercise of a public power as required for the purpose of s 1 of the AJA (paras 75—77) and then turned to the question whether the rights of



the applicant had been adversely affected (paras 79—82):

'The concept "rights" in section 1 of the AJA has not been defined and there does not seem to be any reported case law dealing with the meaning thereof (...) An instance where a court, in a constitutional context, applied the concept "right" in a sense wider than the correlative duty or an obligation is **Van Niekerk v Pretoria City Council** 1997 (3) SA 839 (T) in which Cameron J at 846J held that the right of access to information required for the exercise and protection of a person's rights in terms of section 23 of the interim Constitution included all and not only fundamental rights (...).

Is the concept "right" in section 1 of the AJA used in the sense of a legal right ie the correlative of a duty or obligation or in the wider sense? What is immediately evident is that the legislature used the concept "right" and not "legal rights" (...) As the AJA was enacted to give effect to the rights encompassed in sections 33(1) and (2) of the Constitution it must be construed and applied consistently therewith (...) I accordingly incline to the view that the term "rights" in the AJA is not used in the sense of the correlative of legal obligations and duties but in a wider sense that at least encompasses enforcement and prospective rights. That conclusion (...) may have the effect of broadening the scope of administrative review, but appears to be consonant with one of the stated purposes in the preamble to the AJA namely, to create a culture of accountability, openness and transparency.'

**Minister of Home Affairs v Eisenberg & Associates in re: Eisenberg & Associates v Minister of Home Affairs & others**, which was noted in the newsletter covering January to August, was reported in 2003 (5) SA 281 (CC).

In **Netherburn Engineering CC t/a Netherburn Ceramics v Mudau & others** (2003) 24 ILJ 1712 (LC) the applicant sought the review and setting aside of an order of the CCMA to reinstate its employee who had been dismissed for misconduct. At the hearing, the employer ('Netherburn') arrived with an attorney but, upon objection by the union representative of the employee, was not allowed to be represented at the hearing.

Section 140(1) of the Labour Relations Act 66 of 1995 provides that parties may not be represented by a lawyer at a hearing to determine the fairness of a dismissal unless the parties all agree or the commissioner is of the view that it would be unreasonable for either of the parties to be unrepresented, taking into account various factors. One of the grounds upon which the applicant relied in the review was that s 140 is inconsistent with s 33 of the Constitution of the Republic of South Africa, Act 108 of 1996.

In order to address the argument of the applicant, the court turned to the question whether a hearing at the CCMA amounts to administrative action. The court said as follows (at 1726G—1727B):

'Netherburn relies upon s 33(1) that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. I have noted that the CCMA is an organ of state. It is not a court of law. Undoubtedly the CCMA performs some functions that are of an administrative nature. But can its arbitration function be described as an administrative act or function? This question has arisen in the LAC in **Checkers**. A view was expressed about the nature of the CCMA arbitration in the context of the Promotion of Administrative Justice Act. In **Shoprite Checkers (Pty) Ltd v Ramdau NO & others** (2001) 22 ILJ 1603 (LAC) Zondo JP said the following:

“[29] A ‘decision’ is then defined as meaning ‘any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under any empowering provision, including a decision relating to, among others, (a) making, suspending, revoking, or refusing to make an order, award or determination’. Even though the view expressed by this court in **Carephone [(Pty) Ltd v Marcus NO & others** (1998) 19 ILJ 1425 (LAC)] that the making of an arbitration award by the CCMA commissioner constitutes an administrative action might not be correct, it seems to me that the definitions of ‘administrative action’ and of ‘decision’ in s 1 of the PAJA may be wide enough to include it. I say this despite the reference in the definition of ‘decision’ to a decision ‘of an administrative nature’. It is not necessary to express a final view on this issue in this matter. It is sufficient if it appears that the PAJA may well be applicable to the making of an arbitration award by the CCMA because the question that has arisen in this matter is whether or not there is a warrant to reconsider the decision of the court in **Carephone.**”

However, although the opinion of the LAC must carry weight, it was an obiter remark. I prefer the view expressed by Wallis AJ in **Shoprite Checkers (Pty) Ltd v Ramdaw NO & others** (2000) 21 ILJ 1232 (LC) at para 90 that arbitration is not administrative action. See also **Volkswagen SA (Pty) Ltd v Brand NO & others** (2001) 22 ILJ 993 (LC) at paras 58-59.’

As a result of the court’s finding that a decision of the CCMA does not amount to administrative action, this aspect of the applicant’s case was rejected.

In **Minister of Correctional Services v Tobani 2003 (5) SA 126 (E)** the appellant

appealed the award of damages by the court a quo to the respondent owing to his incarceration in gaol between July 1998 and February 1999. The respondent had been awaiting trial and was called by the prison authorities to attend court proceedings in July 1998. The respondent did not respond to these calls and remained in the prison, undetected, until he approached a warden in February 1999, whereupon he was released.

During the course of the judgment, which did not directly engage administrative law or the AJA, the court quoted with approval the following extract from **Pharmaceutical Manufacturers Association of SA and Another; In re Ex parte President of the RSA & Others, 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (at 135E in Tobani, para 45 and 50 in Pharmaceutical Manufacturers):**

‘Whilst there is no bright line between public and private law, administrative law, which forms the core of public law, occupies a special place in our jurisprudence. It is an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government. It is built on constitutional principles which define the authority of each branch of government, their interrelationship and the boundaries between them (...)

What would have been ultra vires under the common law by reason of a function exceeding a statutory power is invalid under the Constitution according to the doctrine of legality. In this respect, at least, constitutional law and common law are intertwined and there can be no difference between them. The same is true of constitutional law and common law in respect of the validity of administrative decisions within the purview s 24 of the interim Constitution. What is ‘lawful administrative action’, ‘procedurally fair administrative action’ justifiable in relation to the reasons



given for it, 'cannot mean one thing under the Constitution, and another thing under the common law'."

The extract from para 50 of *Pharmaceutical Manufacturers* reproduced immediately above was also cited with approval in the minority judgment of Farlam and Navsa JJA in *Transnet Ltd t/a Metrorail & others v Rail Commuters Action Group & others* 2003 (6) SA 349 (SCA), para 69. The judgment did not refer to administrative law again.

*Patensie Sitrus Beherend Bpk v Competition Commission & others* 2003 (6) SA 474 (CAC) concerned an appeal of a decision of the Competition Tribunal, which held that the appellant's business operations were in contravention of the Competition Act 89 of 1998. Of interest to administrative law was the conclusion of the Competition Appeal Court that the decisions of the tribunal constitute administrative action (at 502A—B):

'The constitutional right is given effect to by the Promotion of Administrative Justice Act 3 of 2000. Section 3(1) of that Act provides that:

"Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair."

In terms of s 3(2)(b) the right to procedurally fair administrative action includes 'a reasonable opportunity to make representations'....)

The decisions of the tribunal are administrative decisions and fall within the definition of "administrative action" in the Promotion of Administrative Justice Act.'

### SECTION 3 – PROCEDURAL FAIRNESS

*Smith v Minister of Environmental Affairs & Tourism, RSA & another* [2003] 1 All SA



628 (C) was noted in the newsletter covering January to August. Smith successfully appealed the rejection of his application for a licence to fish rock lobster on the following basis (at 638i—j):

'Given the importance of procedural fairness as a constitutional value, a decision which refused to consider an application where the only defect was the omission of copies of the application form, cannot be justified as complying with a constitutionally mandated standard of fairness. In all the circumstances of this particular case, an inflexible policy offends the principle of procedural fairness.'

The appeal came before the Supreme Court of Appeal in *Minister of Environmental Affairs & another v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs & another v Smith* [2003] 4 All SA 1 (SCA); [2003] JOL 11448; 2004 (1) SA 308. The appeals were not consolidated but were argued together (para 1).

The application of Pepper Bay was refused because, owing to an administrative error, the necessary payment was late. When the Chief Director of Marine and Coastal Management realized this, he refused the application on the basis that the requirement of timeous payment was peremptory and failure to comply could not be condoned (para 15). The Minister of Environmental Affairs refused an appeal, agreeing with the interpretation of the Chief Director (ibid).

The facts concerning Smith's application were mentioned in the newsletter covering January to August. To remind the reader, the applicants submitted their forms late because they had arrived at the required place for handing in the forms only with the originals when two copies were also required. The Chief Director rejected the application on similar grounds to those applied to Pepper Bay.



The crux of the case, therefore, was the power of an administrator to condone non-compliance with peremptory requirements (para 31):

'As a general principle an administrative authority has no inherent power to condone failure to comply with a peremptory requirement. It only has such power if it has been afforded the discretion to do so (see e g **Le Roux and Another v Grigg-Spall** 1946 AD 244 252; **SA Co-operative Citrus Exchange Ltd v Director General Trade and Industry and Another** 1997 (3) SA 236 (SCA) 241). The Chief Director derives all his (delegated) powers and authority from the enactment constituted by the General Notice. If the General Notice therefore affords him no discretion, he has none. The question whether he had a discretion is therefore entirely dependent on a proper construction of the General Notice.'

Throughout the instructions the word 'must' was used to accompany each of the different requirements for a successful application. The court pointed out that '[t]he general principle is, of course, that language of a predominantly imperative nature such as "must" is to be construed as peremptory rather than directory unless there are other circumstances which negate this construction' (para 32). Furthermore, and in concluding that the provisions were peremptory, the court held (ibid):

'An even more significant indication that timeous payment of the application fee is peremptory is that the Invitation contains an explicit sanction for non-compliance with the provision – an application submitted without proof of proper and timeous payment will not be considered. There is also the more general consideration that where, as in the present case, a statute provides for the *acquisition* of a right or privilege – as opposed to the *infringement* of an *existing* right or privilege – compliance with formalities that are prescribed for

such acquisition, should be regarded as imperative.'

Before concluding, the court specifically addressed the remarks of Davis J in the **Smith** judgment, quoted at the beginning of this discussion above (para 37):

'From the learned Judge's reasons for this conclusion it is however not entirely clear to me where, in his view, the conflict with the constitutional value of administrative fairness lies. In the course of his reasoning he refers (at 636b-g), *inter alia*, to authorities supporting the proposition that an administrative body endowed with a discretionary power is not entitled to adopt a policy which allows it to dispose of a case without considering the merits of the particular case. That proposition is undoubtedly true but inapposite. Its whole underlying supposition is that the administrative authority has discretion. After all, any attempt at the exercise of an unauthorised discretion by an administrative authority would simply be *ultra vires* and invalid. Once it is found that the Chief Director was never afforded discretion, the stated proposition therefore does not apply.'

In **Metro Projects CC & another v Klerksdorp Local Municipality & others** [2004] 1 All SA 504 (SCA); [2003] JOL 11590; 2004 (1) SA 16 the appellants appealed the failure of the court a quo to set aside the awarding of a tender to the ninth respondent for the development of stands in a township.

As part of the tender, each applicant was to include the sizes of houses that it would be able to build on the stands that it would develop. The ninth respondent had stipulated a size that, with the exception of one other application, was the smallest of all those that tendered. However, instead of reflecting the size suggested by the ninth respondent, the civil engineer tasked with compiling the data of each applicant said

that the size of the ninth respondent's house would be determined after consultation with the community. This was a misrepresentation of the true facts (para 4). After various acts of deception to various committees charged with assessing the tenders, an increased size was submitted late, but the first respondent then accepted the tender of the ninth respondent.

The court said the following on the requirement that tender processes be fair (para 13):

**'In (...) *Logbro Properties [CC v Bedderson NO and Others 2003 (2) SA 460 (SCA)]* at 466H-467C Cameron JA referred to the "ever-flexible duty to act fairly" that rested on a provincial tender committee. Fairness must be decided on the circumstances of each case. It may in given circumstances be fair to ask a tenderer to explain an ambiguity in its tender; it may be fair to allow a tenderer to correct an obvious mistake; it may, particularly in a complex tender, be fair to ask for clarification or details required for its proper evaluation. Whatever is done may not cause the process to lose the attribute of fairness or, in the local government sphere, the attributes of transparency, competitiveness and cost-effectiveness.'**

In concluding that the tender process was not fair, the court said the following (para 14):

**'A high-ranking municipal official purported to give the ninth respondent an opportunity of augmenting its tender so that its offer might have a better chance of acceptance by the decision-making body. The augmented offer was at first concealed from and then represented to the mayoral committee as having been the tender offer. It was accepted on that basis. The deception stripped the tender process of an essential element of fairness: the equal evaluation of tenders. Where subterfuge and deceit subvert the essence of a**

**tender process, participation in it is prejudicial to every one of the competing tenderers whether it stood a chance of winning the tender or not.'**

In ***Schoon v MEC, Department of Finance, Economic affairs and Tourism, Northern Province & another [2003] 9 BLLR 963 (T)*** (see the discussion under 'Section 1' above) the applicant had been denied legal representation at a disciplinary hearing on charges of misconduct.

Clause 7.3(e) of the Disciplinary Code and Procedures for the Public Service reads: '[i]n a disciplinary hearing, neither the employer nor the employee may be represented by a legal practitioner'. Section 3 of the AJA describes procedurally fair administrative action. A person affected by administrative action must be given the opportunity to 'obtain assistance and, in serious or complex cases, legal representation' (s 3(3)(a)). The applicant argued and the court accepted that, unlike in the case of subsec (2), the administrator has no discretion to relax the requirements of s 3(3) (para 20).

In the light of this argument, the court said the following (para 23):

**'The provisions of clause 7.3(e) (...) deny[ing] legal representation, no matter what the circumstances may be, and even if they are such that a refusal might very well impair the fairness of the disciplinary proceedings, constitutes [sic] an inroad into the applicant's constitutional right to administrative action that is lawful, reasonable and procedurally fair, and must not be at variance with the spirit and tenor of section 3(3)(a) of PAJA. This subsection expressly grants legal representation in serious or complex cases.'**

In order to assess the relationship between clause 7.3(e) and s 3(3)(a) of the AJA, the court turned to the content of a serious and

complex case (para 27). It said the following:

**'[R]egard should be had to such factors as the nature of the charges brought, the degree of factual or legal complexity attendant upon considering them, the potential suitably qualified lawyers, the seriousness of the consequences of an adverse finding, the availability of the person who may well represent the applicant, the fact that there is a legally trained person presenting the case against the applicant, and any other fact relevant to the fairness or otherwise of confining the applicant to the kind of representation for which the representation rule expressly provides.'**

The court concluded that a disciplinary hearing for misconduct is analogous to a criminal trial where the accused is entitled to legal representation and that there should, therefore, be no reason to deny a person legal representation in this context (para 30).

***SA National Defence Union & another v Minister of Defence & others: In re SA National Defence Union v Minister of Defence & others [2003] JOL 11263 (T)*** was discussed in the edition of this newsletter covering January to August. It has since been reported in [2003] 9 BLLR 932; (2003) 24 ILJ 1495.

In ***Mhlambi v Matjhabeng Municipality & another 2003 (5) SA 89 (O)*** the applicant was charged with misconduct. He had formerly been the CEO of a council that had been absorbed into the first respondent and was charged with negligently losing computer equipment under his control and failing to write a particular letter that he was allegedly instructed to write. The applicant requested further particulars on both of the charges and was refused this request in respect of the first charge and ignored in respect of the second.

The applicant, and the court, referred broadly to the AJA and AIA as well as to the Constitution, but did not discuss specific

provisions within either of the Acts. The court pointed out that (para 15)

**'an applicant requesting further particulars for purposes of a disciplinary inquiry cannot proceed as if he or she is facing a criminal charge or a civil claim in a court of law and lengthy, voluminous requests for further particulars cannot be countenanced. This does not, however, mean that the whole request for further particulars must be ignored and a party in the position of the respondents can confine himself or herself to providing what is necessary.'**

The court found that the first charge was sufficiently vague as to require further particulars in order for the applicant to prepare for the hearing (paras 17—18).

***Ruyobeza & another v Minister of Home Affairs & others [2003] All SA 696 (C)*** was noted in the edition of this newsletter covering January to August. It has since been reported in 2003 (5) SA 51.

In ***Van Zyl v New National Party & others [2003] 3 All SA 737 (C); [2003] JOL 11360*** (see the discussions under 'Section 1', 'Section 7(2)' and 'Miscellaneous') it was common cause that the respondent did not comply with any of the provisions of s 3 of the AJA. The court said the following (para 96):

**'On my understanding thereof section 3 of the AJA prescribes two categories of measures to ensure procedural administrative fairness. The first, enumerated in subsection (2)(b), are compulsory. The second, enumerated in subsection (3), are dependant on the administrative decision-maker exercising his or her discretion whether or not to allow them. . . I am of the opinion that the legislature intended the measure enumerated in subsection 3(2)(b) and 3(3) to be complied with prior to an administrative decision being taken (...)**



Such an intention would accord with the general common-law practice that procedural justice must be observed before, rather than after, the taking of an administrative decision.'

**Boesak v Chairman, Legal Aid Board & others 2003 (6) SA 382 (T)**, although reported only in 2003, concerned the decision of the respondents in 1997 to withdraw legal assistance from the applicant. This case concerned the much-publicized trial of Dr Allan Boesak for fraud and theft. Dr Boesak had originally applied for and had been granted legal aid on the grounds that he was indigent and could not afford legal assistance. However, an anonymous donor came forward and offered R1 000 000 to Dr Boesak to assist in his defence. This donation was subject to various conditions. On hearing of this donation and following a hearing, the Legal Aid Board decided to terminate the applicant's legal aid.

Dr Boesak's main claim was in terms of s 35(3)(g) of the Constitution, which provides that '[e]very accused person has a right to a fair trial, which includes the right . . . to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly'. However, the applicant also based his claim on administrative law and argued that the hearing in which the decision was taken to withdraw his legal aid had been unfair. The crux of the applicant's complaint was that although the respondents now claimed that the decision to terminate the applicant's legal aid was owing to the conditions imposed by the donor and the respondents' suspicion of them, this was not made clear to the applicant before the hearing and, as such, he was not aware that he should have been present in order to be questioned about the donor.

The court said the following about the grounds of review upon which the applicant relied (at 401D—E):

'It was common cause that the applicant is not limited to the common law grounds of review set out by Corbett JA, as he then was, in **Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another** 1988 (3) SA 132 (A) at 252A - D and by Corbett CJ in **Hira and Another v Booyesen and Another** 1992 (4) SA 69 (A) at 93A - 94A but that the applicant is entitled to relief in terms of s 38 of the Constitution if he could show that his rights in terms of the Bill of Rights had been infringed: see **Fose v Minister of Safety and Security** 1997 (3) SA 786 (CC) (1997 (7) BCLR 851) and in particular the majority judgment of Ackermann J at para [69] and Kriegler J at paras [94] - [100].'

The court then turned to consider whether the decision to terminate the applicant's legal aid had been fair.

The hearing at which the decision to terminate the legal aid was taken was held on 25 October 1997. In their answering affidavit the respondents claimed that they had conducted the hearing in order to question the applicant about the conditions imposed by the donor relating to the R1 000 000. However, the applicant argued that this had never been made clear to him at the time. The applicant argued that had he been aware of this he would have attended the hearing in person, along with the donor, whereas neither of them attended. In upholding this claim, the court said as follows (at 402F—H):

'While it is clear that (...) the applicant was free to appear and make whatever representations he saw fit concerning whether or not legal aid granted to him should or should not be withdrawn, the contents of the letter dated 8 October 1997 addressed to [the applicant's lawyer] by the second respondent's attorney served to confuse rather than simplify the matter. Firstly, the letter indicated that the second respondent

was willing to receive representations in writing or by oral presentation, whichever the applicant preferred and, secondly, the letter indicated that the applicant need only address the Board on the three matters referred to. It was not stated expressly or even by implication that the second respondent questioned the authenticity of the donor's conditions and required that the applicant satisfy it that these conditions were genuine. But perhaps more importantly it was not required that the applicant or the donor appear so that they could answer questions on this issue. This is of particular importance when it is considered what happened at the hearing and the second respondent's present attitude.'

The court highlighted various problems with the attempt of the respondents to justify their decision to terminate the applicant's legal aid. The crux of the court's reasoning was that the respondents sought at the trial to justify their conclusion based on facts which had not been raised at the hearing and which were not brought to the attention of the applicant. The court said as follows (at 404B—C):

'Insofar as the first and second respondents now wish to rely on the failure of the applicant to establish the authenticity of the donor's conditions either at the hearing on 25 October 1997 or in these papers, I agree with Mr Maritz that they are not entitled to do so. This application is concerned with the validity of the decision taken at that meeting. The applicant had the right to a decision which was justifiable in relation to the reasons given. Obviously there had to be a rational connection between the facts established or accepted and the reasons given. As already mentioned the reasons given are not supported by the facts and in fact are contrary to the facts. The subsequent rejection of the authenticity of the conditions by the second respondent cannot be used to justify the

decision taken by the second respondent on 25 October 1997. That issue was not addressed on 25 October 1997 and remains unresolved.'

**Radio Pretoria v Chairman of ICASA & another [2003] JOL 10732 (T)** was noted in the newsletter covering January to August and is reported as 2003 (5) SA 451.

## SECTION 5 – REASONS FOR ADMINISTRATIVE ACTION

In **Minister of Environmental Affairs & Tourism & others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs & Tourism & others v Bato Star Fishing (Pty) Ltd 2003 (6) SA 407 (SCA); [2003] 2 All SA 616** (see the discussion under 'Section 6(2)(e)(iii)' for the facts and see the discussions under 'Section 6(2)(e)(vi)' and 'Legitimate Expectations' below) the court said as follows (paras 40—41):

'What constitutes adequate reasons has been aptly described by Woodward J, sitting in the Federal Court of Australia, in the case of **Ansett Transport Industries (Operations) Pty Ltd and Another v Wraith and Others** (1983) 48 ALR 500 at 507 (23-41), as follows:

"The passages from judgments which are conveniently brought together in **Re Palmer and Minister for the Capital Territory** (1978) 23 ALR 196 at 206-7; 1 ALD 183 at 193-4, serve to confirm my view that s 13(1) of the Judicial Review Act requires the decision-maker to explain his decision in a way which will enable a person aggrieved to say, in effect: 'Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging.'

This requires that the decision-maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute), and the reasoning processes which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation. The appropriate length of the statement covering such matters will depend upon considerations such as the nature and importance of the decision, its complexity and the time available to formulate the statement. Often those factors may suggest a brief statement of one or two pages only.”

To the same effect, but more brief, is Hoexter *The New Constitutional and Administrative Law Vol 2* 244:

“[I]t is apparent that reasons are not really reasons unless they are properly informative. They must explain *why* action was taken or not taken; otherwise they are better described as findings or other information.”

See also ***Nkondo, Gumede and Others v Minister of Law and Order and Another*** 1986 (2) SA 756 (A) at 772I-773A.’

Applying these principles to the facts, the court found that adequate reasons had been given for the decision of the Chief Director to allocate a certain fishing quota to the respondents (para 44).

***Commissioner for the SAPS v Maimela & another*** [2003] 3 All SA 298 (T), which was noted in the edition of this newsletter covering January to August, was reported in 2004 (1) BCLR 47 and 2003 (5) SA 480.

***Lategan & others v Lategan NO & others*** [2003] 3 All SA 204 (D) which was noted in the edition of this newsletter covering

January to August, was reported in 2003 (6) SA 611.

## SECTION 6 – GROUNDS OF REVIEW

### SECTION 6 (2)(A)(III) – DECISION MADE WITH BIAS OR A REASONABLE SUSPICION THEREOF

***Ruyobeza & another v Minister of Home Affairs & others*** [2003] All SA 696 (C), which was noted in the newsletter covering January to August, was reported in [2003] JOL 11001.

### SECTION 6(2)(B) – MANDATORY AND MATERIAL PROCEDURE OR CONDITION NOT COMPLIED WITH

In ***Paola v Jeeva NO & others*** 2004 (1) SA 396 (SCA) the appellant had developed his property in a particular area with a magnificent view. The appellant had done so at a time when a house on the property of the first and second respondents had already been built. However, the first and second respondents sought to develop the house on their property in such a way that would significantly hamper the appellant's view.

According to the town-planning regulations in force in the area, when a local authority decides whether to permit building work it must appoint a person as a building control officer who must make recommendations regarding the proposed construction. The third respondent had made its decision without appointing a building control officer and had thus not received the requisite recommendations.

The court said the following (para 11):

‘[T]he appellant’s counsel submitted that the appointment of a building control officer and the recommendation by such officer to the local authority are necessary preconditions to the exercise



by the local authority of its powers to approve or reject building plans. They contended that each of these preconditions constitutes a jurisdictional fact, the existence of which is a necessary prerequisite to the exercise of the statutory power, and relied in this regard on the judgment of Corbett J in **South African Defence and Aid Fund and Another v Minister of Justice** 1967 (1) SA 31 (C), which, as the Constitutional Court pointed out in **President of the Republic of South Africa and Others v South African Rugby Football Union and Others** 2000 (1) SA 1 (CC) remains the leading case in our law on jurisdictional facts.'

Counsel for the third respondent attempted to argue that the failure to appoint the building control officer was 'a mere irregularity of no real consequence' (para 13). In rejecting this, the court said the following (para 16):

'The simple facts are that a power to approve plans was purportedly exercised, which, in the absence of the necessary jurisdictional facts, did not exist in law. There was therefore no valid approval.'

The appellant did not rely on the AJA and the court made no reference to it, but the failure to appoint the building control officer would be covered by s 6(2)(b) of the AJA (see Cora Hoexter *The New Constitutional and Administrative Law* II (2002) 139).

**Minister of Justice v Firstrand Bank Ltd & others 2003 (6) SA 636 (SCA)** concerned review proceedings of the decision of the Minister of Justice to appoint a certain provisional liquidator. The first respondent had obtained an order for the provisional liquidation of a certain company that was the first respondent's debtor. Four provisional liquidators were appointed. The Minister of Justice appointed a fifth liquidator, relying on s 371(3) of the Companies Act 61 of 1973. It was this decision that the first respondent

successfully applied to have set aside in the court a quo.

Section 371(3) of the Companies Act reads as follows:

"(3) The Minister may, after consideration of the reasons referred to in subsection (2) and any representations made in writing by the person who made the request referred to in subsection (1) and of all relevant documents, information or objections submitted to him or the Master by any interested person, confirm, uphold or set aside the appointment or the refusal by the Master and, in the event of the refusal by the Master being set aside, *direct the Master to accept the nomination of the liquidator concerned and to appoint him as liquidator of the company concerned.*" (Emphasis added.)

The court held that there was no nomination of the liquidator that the Minister had attempted to appoint and, as such, that 'the Minister's directive, and the appointment based on it, was not in conformity with the provisions of the Act. They were therefore invalid' (para 25). The court did not refer to the AJA and because it is not clear from the judgment when the cause of action arose, it is not possible to ascertain whether the reason for this was because the cause of action arose before November 2000 when the AJA came into force. The decision to set aside the appointment of the liquidator by the Minister would fall under s 6(2)(b) of the AJA.

## SECTION 6(2)(E)(III) – IRRELEVANT CONSIDERATIONS TAKEN INTO ACCOUNT/ RELEVANT CONSIDERATIONS NOT CONSIDERED

In *Stanfield v Minister of Correctional Services & others* [2003] 4 All SA 282 (C); 2003 (12) BCLR 1384 (see the discussion under 'Section 6(2)(f)(ii)' below, for the facts and the discussion under 'Miscellaneous'), the court said the following about administrators vested with a discretion (para 100):

'However wide such discretion may be, it is not unfettered (...) It requires a proper consideration and assessment of all the relevant facts and circumstances. If such facts are ignored or misconstrued, the discretion cannot be properly exercised. See *Pepkor Retirement Fund v Financial Services Board* [2003] 3 All SA 21 (SCA) [cited in the newsletter covering January to August] paragraphs 32, 45 and 47. In paragraph 47 Cloete JA said the following:

"[47] In my view 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."

It should be noted that the court in *Stanfield* did not refer to specific provisions of the AJA but said the following instead (para 96):

'As required by s 33(3) of the Constitution, national legislation has, in the meantime, been enacted to give effect to these rights. I speak of the [AJA], and more particularly to sections 3 and 6 thereof. See *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd* [2003] 2

All SA 616 (SCA) paragraphs 46 [sic], where Schutz JA opined that the common law and the said sections of PAJA give content to the standards required by s 33(1) of the Constitution for administrative action.'

In *Minister of Environmental Affairs & Tourism & others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs & Tourism & others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) (see the discussion under 'Section 5' above and the discussions under 'Section 6(2)(e)(vi)' and 'Legitimate Expectations' below) the respondents had successfully challenged in the court a quo the decision of the Chief Director of Marine Coastal Management (the Chief Director) to allocate a maximum amount of hake that they were permitted to catch, being less than what they had asked for.

Since 1978 there has been a maximum amount of hake allowed to be caught off South Africa's coast. This is known as the total allowable catch. In 1998 the Marine Living Resources Act 18 of 1998 (the MLRA) was passed to govern the allocation of fishing rights. In terms of s 2 of the MLRA, 'the Minister and any organ of State shall, in exercising any power under this Act, have regard to the following objectives and principles: (...) (j) the need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry.' The respondents were both companies of historically disadvantaged persons and argued that the Chief Director had failed to consider adequately the need for transformation when allocating less to them than they had requested. According to their argument, smaller quotas should have been given to companies that they characterized as 'white-owned'.

In rejecting the argument that the Chief Director failed to consider transformation, Schutz JA said as follows (paras 35—36):

'I have the Chief Director's word that he did have regard to the need for transformation. It would be difficult to believe that he did not. Moreover, the reasons given for the decisions on the various allotments demonstrate that he did (...) On a fair reading of these passages it is plain, in my opinion, that transformation was taken into account.'

## **SECTION 6(2)(D) – ACTIONS MATERIALLY INFLUENCED BY A MISTAKE OF LAW**

***Pepcor Retirement Fund & another v The Financial Services Board & another*** [2003] 3 All SA 21 (SCA), which was noted in the newsletter covering January to August, was reported in 2003 (6) SA 38.

## **SECTION 6(2)(F)(II) – RATIONAL DECISIONS**

The applicant in ***Stanfield v Minister of Correctional Services & others*** [2003] 4 All SA 282 (C); 2003 (12) BCLR 1384 (see the discussions under 'Section 6(2)(d)' and 'Section 6(2)(e)(iii) above and 'Miscellaneous' below) had been sentenced to six years imprisonment for fraud. Early in his sentence, the applicant was diagnosed with lung cancer, which required chemotherapy and for him to be kept in a sterile environment. The applicant applied for parole on medical grounds in terms of s 69 of the Correctional Services Act 8 of 1959. Various reports by medical experts indicated that it would be best for him to be paroled since continued imprisonment would not be conducive to his treatment. However, the acting chairperson of the parole board recommended the rejection of the request and the third respondent acted on this recommendation.

The applicant raised various grounds of review, which, according to the court, 'centred around one main ground, namely that the decision taken by the third

respondent was objectively so irrational and unreasonable that the inference was justified that he had failed to apply his mind to the matter' (para 72).

The court said the following with regard to the rationality of decisions (paras 98—99):

'The need for administrative action to be reasonable, in terms of section 33(1) of the Constitution, gives rise to what has probably become the essential standard of review, namely the rationality of the action, conduct or decision in question. This must be assessed objectively and dispassionately, since the counter-side of rationality is usually arbitrariness and even capriciousness justifying the review and setting aside of the administrative act in question.

In [***Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa*** 2000 (2) SA 674 (CC)]

Chaskalson P explained it in the following way (in paragraphs 85, 86 and 90):

"[85] It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.

[86] The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the



person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance, and undermine an important constitutional principle. [90] Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution, and therefore unlawful. The setting of this standard does not mean that the courts can or should substitute their opinions as to what is appropriate, for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it, or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made only rarely but if this does occur, a court has the power to intervene and set aside the irrational decision (...)."

On the facts, the court held that the physical condition of the applicant coupled with the failure of the third respondent to respect his inherent right to dignity meant that

'[t]he inevitable conclusion to which I must come is that the third respondent's decision to refuse the applicant parole on medical grounds was, objectively, so irrational and unreasonable that the inference must necessarily be drawn that he failed to apply his mind to the relevant facts and circumstances' (para 130).

## SECTION 6(2)(E)(VI) – ARBITRARY/ CAPRICIOUS DECISIONS

One of the grounds of review in *Minister of Environmental Affairs & Tourism & others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs & Tourism & others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA); [2003] 2 All SA 616 (see the discussion under 'Section 6(2)(e)(iii)' above for the facts and the discussions under 'Section 5' and 'Legitimate Expectations') was that the decision of the Chief Director was arbitrary and capricious. In its discussion of this ground of review, the court began as follows (para 46):

'Section 33(1) of the Constitution enjoins that all administrative action must be "lawful, reasonable and procedurally fair". The common law and sections 3 to 6 of PAJA elaborate and give content to these standards. They are not new. As was stated by Chaskalson CJ in *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* 2002 (3) SA 265 (CC) at 292, para [87]: "The role of the Courts has always been to ensure that the administrative process is conducted fairly and that decisions are taken in accordance with the law and consistently with the requirements of the controlling legislation."

The court continued to discuss the idea of deference and its role in judicial review (paras 47—50):

'[T]he Chief Director, as the delegate of the Minister, has a wide discretion to strike a balance, in furtherance of the objectives and principles of the Act. To a large extent he gives effect to government economic policies. In such a case a judicial review of the exercise of powers calls for deference, in the sense stated in *Logbro Properties CC v Bedderson NO and Others* 2003 (2)

SA 460 (SCA) at 471A-D paras [21] and [22], that:

“a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinize administrative action, but by a careful weighing up of the need for – and the consequences of – judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal.”

(This passage is a quotation from Hoexter’s *The Future of Judicial Review in South African Administrative Law* (2000) 117 SALJ 484 at 501-502.) . . . Judicial deference does not imply judicial timidity or an unreadiness to perform the judicial function. It simply manifests the recognition that the law itself places certain administrative actions in the hands of the executive, not the judiciary.’

In rejecting the argument of the respondents, the court made the following remarks (para 51—53):

‘The respondents’ complaint is that in reaching his decisions the Chief Director acted arbitrarily, capriciously or irrationally (...) The Chief-Director’s, decision is indeed a polycentric one. And in deciding whether his decision is reviewable it should be remembered that

even if the respondents had succeeded in proposing what to my mind would be a better solution than that adopted by him (they did not attempt to do so), it would not be open to me to adopt it (...).

During the course of the argument for Phambili we were frequently told that something that the Chief Director had done was ‘wrong’. This is the language of appeal, not review. I do not think that the word was misused, because time and again it appears that what is really under attack is the substance of the decision, not the procedure by means of which it was arrived at. That is not our job. I agree with what is said by Hoexter (op cit) at 185:

“The important thing is that judges should not use the opportunity of scrutiny to prefer their own views as to the correctness of the decision, and thus obliterate the distinction between review and appeal.”

Judicial deference is particularly appropriate where the subject matter of an administrative action is very technical or of a kind in which a court has no particular proficiency. We cannot even pretend to have the skills and access to knowledge that is available to the Chief Director. It is not our task to better his allocations, unless we should conclude that his decision cannot be sustained on rational grounds. That I cannot say. Accordingly I am of the view that the attack based on capriciousness must also fail.’

## SECTION 6(2)(F)(II) – RATIONAL DECISIONS

***Trinity Broadcasting, Ciskei v Independent Communications Authority of SA* [2003] 4 All SA 589 (SCA); [2003] JOL 12127** concerned the application for a licence to operate as a radio station. The application was granted, but not on the terms sought by the appellant and, in the



court a quo, an attempt to have the decision set aside was unsuccessful.

In the Supreme Court of Appeal Howie P, on behalf of a unanimous court, referred to s 33(1) of the Constitution, which affords everyone the right to administrative action that is lawful, reasonable and procedurally fair (para 19). He pointed out that legislation was required, in terms of s 33(3), to be enacted to give effect to this right and that the AJA was the Act in question (ibid). The court then quoted from s 6(2) of the AJA to the effect that there will be the power of administrative review if

- '(f) the action itself –
  - (i) . . .
  - (ii) is not rationally connected to
    - (aa) the purpose for which it was taken;
    - (bb) the purpose of the empowering provision;
    - (cc) the information before the administrator; or
    - (dd) the reasons given for it by the administrator;
  - (h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function'.

Howie P then continued (para 20):

'In requiring reasonable administrative action the Constitution does not, in my view, intend that such action must in review proceedings be tested against the reasonableness of the merits of the action in the same way as an appeal. In other words it is not required that the action must be substantively reasonable, in that sense, in order to withstand review. Apart from being too high a threshold, it would mean that all administrative action would be liable for correction on review if objectively

assessed as substantively unreasonable: cf **Bel Porto School Governing Body and other v Premier, Western Cape and another** [2002 (3) SA 265 (CC), para 46]. As made clear in **Bel Porto**, the review threshold is rationality. Again, this test is an objective one, it being immaterial if the functionary acted in the belief, in good faith, that the action was rational. Rationality is, as has been shown above, one of the criteria laid down in section 6(f)(ii) of the Promotion of Administrative Justice Act. Reasonableness can, of course, be a relevant factor but only where the question is whether the action is so unreasonable that no reasonable person would have resorted to it (see section 6(2)(h)).' (Footnotes omitted.)

Applying these dicta to the facts of the case the Supreme Court of Appeal found that the decision which was challenged as being irrational was in fact rational. The appellant did however succeed on other grounds of review not relevant to this discussion.

### **The interaction between ss 6(2)(f)(ii) and 6(2)(h)**

In **Trinity Broadcasting, Ciskei v Independent Communications Authority of SA** [2003] 4 All SA 589 (SCA) (see the discussion under 'Section 6(2)(f)(ii)' for the facts) the court made the following remarks about the appropriate standard of review under ss 6(2)(f)(ii) and 6(2)(h) of the AJA (para 21):

'We were invited by respondent's counsel to adopt, instead of rationality, the test of perversity in the sense, so suggested counsel, of utter irrationality. In this regard reliance was placed on the respective passages in **Attorney-General (on the relation of McWhirter) v Independent Broadcasting Authority** [1973] 1 All ER 689 (CA) at 706e and **R v Radio**

**Authority, Ex Parte Bull and another** [1997] 2 All ER 561 (CA) at 578a—b.

The first formulates the following test:

“(W)as [the authority’s] decision (...) one which no reasonable authority could have made? In simpler terms, did they make a perverse decision?”

The second reads

“The task of a supervisory court in a case of this kind is not to concern itself with the merits of the decision (...) unless that decision can be properly stigmatised as perverse or utterly irrational.”

A reading of those cases reveals that the review ground involved was that of unreasonableness, as developed and expounded in the leading English case of *Wednesday Corporation* [[1947] 2 All ER 680 (CA)].(...).

It is clear that the standard expressed in those cases approximates, to all intents and purposes, to the one constituted by section 6(2)(h) of the Promotion of Administrative Justice Act. The word ‘perversity’ may be appropriate (I need express no opinion on the subject) to the standard set by section 6(2)(h) and *Wednesday Corporation* but it has not bearing on the rationality test set by section 6(2)(f)(ii)’.

## **SECTION 6(3) – FAILURE TO TAKE A DECISION**

In ***Laerskool Gaffie Maree & another v Member of the Executive Council for Education, Training, Arts and Culture, Northern Cape, & others 2003 (5) SA 367 (NC)*** the applicants approached the court requesting that the third respondent be appointed headmaster of the first applicant having been recommended for that position by the second applicant, which was the governing body of the school. No appointment had been made yet and one of the arguments of the applicants was that the second respondent had refused to make a decision that it was obliged to make and this

was subject to challenge in terms of section 6(3)(a) of the AJA.

In the course of its judgment the court did not refer to the AJA again, but it did order that the matter be remitted to the second respondent coupled with a mandamus that it take the decision within a stipulated period (para 13).

## **SECTION 7 – PROCEDURE FOR REVIEW**

### **SECTION 7 (2) – EXHAUSTION OF INTERNAL REMEDIES**

The applicant in ***Van Zyl v New National Party & others [2003] 3 All SA 737 (C)*** (see the discussions under ‘Section 1’, ‘Section 3’ and ‘Miscellaneous’ above) had lost a vote of no confidence in her capacity as a representative of the New National Party. As a consequence, the leadership of the party in the Western Cape passed a resolution recalling the applicant from her position. The applicant sought the review of this resolution.

The constitution of the NNP in the Western Cape contains a provision allowing appeals against decisions such as the resolution. The respondents argued, therefore, that the applicant had not exhausted internal remedies available to her.

The court distinguished between the common-law position and that under the AJA in this regard, as follows (para 56—57):

‘In terms of the common law the right to seek judicial review may be deferred until the aggrieved party has exhausted an extra-curial remedy created by governing legislation or the terms of an agreement between a voluntary association and a member. The right of review may be so deferred and any domestic remedy should first be exhausted if the obligation to do so is



clearly evident from such governing legislation or agreement.(...) Section 7(2) of the AJA (...) has modified the common law considerably *but* its ambit is limited to “any internal remedy provided for in any other law” (emphasis added). The emphasized word ‘but’ should probably have been ‘because’.

The court then turned to the meaning of s 7(2) and whether the respondents’ argument should succeed (paras 58—60):

‘Van Zyl J in *Marais v Democratic Alliance 2002 (2) BCLR 171 (C)* at 184B—E held that the concept “other law” in that phrase must be interpreted in accordance with its definition in section 2 of the Interpretation Act 33 of 1957, namely a law, proclamation, ordinance, Act of Parliament “or other enactment having the force of law” and that the constitution of a voluntary association is not encompassed therein (...)

To the extent that the common-law obligation to exhaust domestic remedies has survived the coming into operation of section 7(2) of the AJA – I express no firm views thereon – I am, on the basis of the interpretation thereof not satisfied that the right of review without first exhausting an appeal to the Legal Commission, is excluded by the NNPWC’s constitution. I say so because that section explicitly provides that (...) a member “may” appeal to the Legal Commission. There is no indication that that word, in the context, is used in a sense other than a permissible or empowering one, so that the applicant enjoyed a choice between an internal appeal and a right of review to this court.’

## SECTION 8 – REMEDIES IN PROCEEDINGS FOR JUDICIAL REVIEW

In *Mohammed v Minister of Correctional Services & others 2003 (6) SA 169*



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(**SEC&LD**) (see the discussion under ‘Miscellaneous’ below) the applicant was a prisoner who was serving a 12-year sentence. The prisoner had performed various acts that he alleged entitled him to remission of his sentence. He had assisted a fellow prisoner who had been choking on a chicken bone, he had, on various occasions, warned the authorities that a particular gate was left unlocked and he had provided information of an intended escape by another prisoner. In respect of the choking incident and the information of the intended escape, the applicant was granted no remission of his sentence and in respect of the unlocked gates he was given one-month remissions of sentence when he had previously been granted a three-month remission for the same act.

On the facts, the court held that in each instance the authorities had failed to apply their mind to the requests of the applicant. The incidents in question all occurred before 30 November 2000 and so the AJA could not govern the dispute. However, the court granted the same remedy as provided by s 8(1)(c)(i) of the AJA and remitted the matter to the authorities, directing them to reconsider each request (see 180C—D, 181C—E and 182G).

In *Silverstar Development Ltd v Gauteng Gambling Board & others 2004 (2) SA 289 (T)*; [2003] JOL 12033 the applicant sought the review of a particular decision of the first respondent. The simplified facts are that the first respondent had granted a casino licence to a competitor of the applicant. When conditions changed so that the competitor was unable to provide the services required of it, the first respondent allowed the competitor to amend the terms of its application. The first respondent granted the competitor’s application for a licence on the amended terms, but this decision was set aside. The applicant then asked the first respondent to grant it the licence that the competitor had failed to secure. The first respondent replied that it



intended to reopen the applications or not grant the licence at all, which was the subject of the present review proceedings.

During the course of the judgment, the court said the following about appropriate remedies in review proceedings (para 24):

**'It is, of course, also beyond question that a court can, in appropriate circumstances, substitute its own decision for that of the functionary who took the impugned decision. It is, however, also true that a court will normally not do so and will rather refer the matter back to the functionary for reconsideration'**

The court did not, however, refer to the AJA and did not give reasons for not doing so. On the facts the court held that since the competitor had disappeared from the scene, there was no reason not to grant the licence to the applicant because it was the only other applicant in the relevant area. There was no point in referring the matter back to the first respondent and the court therefore ordered that the applicant be granted the licence (para 45).

### ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others***

***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*** (CCT 27/03, 12 March 2004, unreported) is an appeal to the Constitutional Court of the decision in ***Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Ltd and another*** [2003] 2 All SA 616 (SCA); 2003 (6) SA 407 (see the discussion under 'Section 5', 'Section 6(2)(e)(iii) and 6(2)(e)(vi) above and 'Legitimate Expectations' below). The decision constitutes the first pronouncement of the Constitutional Court on the AJA. As such, the decision will be summarized separately from the rest of the newsletter.

For a detailed discussion of the facts see 'Section 6(2)(e)(iii)' above. For the purposes of this discussion it is important to note that Bato Star Fishing and Phambili Fisheries both appealed to the Supreme Court of Appeal against the decision of the High Court. However, only Bato Star persisted with the appeal against the decision of the Supreme Court of Appeal. In the Constitutional Court, O'Regan J outlined the bases for the appeal against the decision of the Supreme Court of Appeal (para 20):

**'The applicant relies on three grounds in its application for special leave to appeal to this Court: (a) that the SCA misconstrued the nature of the objectives in section 2 of the Act; (b) that the SCA incorrectly concluded that the Chief Director's decision should not be set aside on the ground that he failed to apply his mind to the quantum of hake applied for by the applicant and its ability to catch such quantum; and (c) that the SCA erred in finding that the alleged "undisclosed policy change" by the Department did not infringe the applicant's right to procedural fairness.'**

### **The interaction between the common law, the AJA and the Constitution**

The court began its legal analysis by pointing out that there are not two systems of administrative law, one founded on the Constitution and one founded on the common law (para 22). There is now one system of administrative law, founded in the Constitution and expressed in the AJA:

**'In *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others*, the question of the relationship between the common law grounds of review and the Constitution was considered by this Court. A unanimous Court held that under our new constitutional order the control of public power is always a constitutional matter. There are not two**

systems of law regulating administrative action — the common law and the Constitution — but only one system of law grounded in the Constitution. The courts' power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself. The grundnorm of administrative law is now to be found in the first place not in the doctrine of ultra vires, nor in the doctrine of parliamentary sovereignty, nor in the common law itself, but in the principles of our Constitution. The common law informs the provisions of PAJA and the Constitution, and derives its force from the latter. The extent to which the common law remains relevant to administrative review will have to be developed on a case-by-case basis as the courts interpret and apply the provisions of PAJA and the Constitution.'

### The application of the AJA to the case

O'Regan J pointed out the s 1 of the AJA defines the scope of administrative action. It was not necessary for the court to discuss s 1 any further because it was common cause that the decision of the Chief Director constituted administrative action (para 24). The court continued to discuss the importance of the AJA and the need to found challenges based on administrative review on the provisions of the Act (para 25):

'The provisions of section 6 divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past. And the authority of PAJA to ground such causes of action rests squarely on the Constitution.'

### Misconstruction of the empowering provisions

The applicant relied on various provisions of the AJA in their appeal. For the sake of convenience these will be discussed under the headings adopted by the court. The subsections of the AJA relevant to this discussion are 6 (2)(b), (d), (e)(iii), (f)(i) and (f)(ii)(bb). The applicant argued that the Chief Director did not pay sufficient attention to s 2(j) of the Act (see 'Section 6(2)(e)(iii) above). The court pointed out that the Chief Director was obliged simply to 'have regard' to the factors in s 2 of the MLRA but emphasized the special importance of transformation in the context of the Act (para 34). The court continued (para 40):

'There can be no doubt that the development objectives of the national government include transformation of the economy. On an overall reading of the provisions of the Act, decision-makers, in allocating fishing rights, must seek to give effect to the objectives of the Act and, in particular, must ensure that a process of transformation takes place. To meet the obligations imposed in this regard by subsections 2(d), (j) and 18(5), there must, in the first place, be recognition of the fact that Parliament required these needs to be fulfilled and that steps must be taken to ensure their fulfilment in time. At the very least, some practical steps must be taken in the process of the fulfilment of these needs each time allocations are made if possible. If no step is taken during a particular round of allocation, the decision-maker cannot be said to have paid due regard to these needs unless there is a reasonable explanation for the absence of such practical steps. A court will require such explanation and will evaluate it to determine whether or not it meets the obligations imposed on the Minister. But so long as the importance of the

practical fulfilment of these needs is recognised and a court is satisfied that the importance of the practical fulfilment of sections 2(j) and 18(5) has been heeded, the decision will not be reviewable.’

Turning to the facts the court held that the Chief Director had indeed paid attention to the need to transform the fishing industry. This was evident in the policy guidelines published by the department, the evaluation process of the individual applicants and evidence that the department aimed to achieve transformation by focussing less on new entrants such as the applicant but on transforming those actors already in the industry (para 41).

### The ‘reasonableness’ of the Chief Director’s decision

The applicant challenged the decision of the Chief Director under s 6(2)(h) of the AJA which concerns decisions so unreasonable that no reasonable person could have taken them (para 42). When the Bato Star matter first came before the Constitutional Court, the applicant had relied mainly on the common law and s 33 of the Constitution, rather than the AJA. As such, the Chief Justice issued directions requesting the parties to file argument on whether the AJA applied to the matter and, if so, which provisions. In the judgment, under this heading, the court first addressed the applicant’s common law argument, which it had included in its original heads of argument (para 43):

‘In its original heads, the applicant based its argument on the judgment of Corbett JA in *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* [1988 (3) SA 132 (A) at 152A – D] where it was held that:

“Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the ‘behests of the statute and

the tenets of natural justice.’ [Citations omitted.] Such failure may be shown by proof, *inter alia*, that the decision was arrived at arbitrarily or capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforesaid.”

It is well known that the pre-constitutional jurisprudence failed to establish reasonableness or rationality as a free-standing ground of review. Simply put, unreasonableness was only considered to be a ground of review to the extent that it could be shown that a decision was so unreasonable as to lead to a conclusion that the official failed to apply his or her mind to the decision.’ (Footnotes removed.)

The court then turned to the meaning of s 6(2)(h) of the AJA and made the following important observations (para 44):

There was some debate in the supplementary heads filed by the parties as to the precise meaning of section 6(2)(h) of PAJA which provides that if a decision “is so unreasonable that no reasonable person could have so exercised the power”, it will be reviewable. This test draws directly on the language of the well-known decision of the English Court of Appeal in *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [[1948] 1 KB 223 (CA) at 233-4]. The repetitiousness of the test there established has been found to be unfortunate and confusing. As Lord



Cooke commented in ***R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd*** [[1999] 1 All ER 129 (HL) at 157]:

“It seems to me unfortunate that *Wednesbury* and some *Wednesbury* phrases have become established incantations in the courts of the United Kingdom and beyond.(...) When, in ***Secretary of State for Education and Science v Tameside Metropolitan Borough*** [1976] 3 All ER 665, [1977] AC 1014 the precise meaning of ‘unreasonably’ in an administrative context was crucial to the decision, the five speeches in the House of Lords, the three judgments in the Court of Appeal and the two judgments in the Divisional Court, all succeeded in avoiding needless complexity. The simple test used throughout was whether the decision in question was one which a reasonable authority could reach. The converse was described by Lord Diplock ([1976] 3 All ER 665 at 697, [1977] AC 1014 at 1064) as ‘conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt’. These unexaggerated criteria give the administrator ample and rightful rein, consistently with the constitutional separation of powers.(...) Whatever the rubric under which the case is placed, the question here reduces, as I see it, to whether the chief constable has struck a balance fairly and reasonably open to him.”

In determining the proper meaning of section 6(2)(h) of PAJA in the light of the overall constitutional obligation upon administrative decision-makers to act “reasonably”, the approach of Lord Cooke provides sound guidance. Even if it may be thought that the language of section 6(2)(h), if taken literally, might set a standard such that a decision

would rarely if ever be found unreasonable, that is not the proper constitutional meaning which should be attached to the subsection. The subsection must be construed consistently with the Constitution and in particular section 33 which requires administrative action to be “reasonable”. Section 6(2)(h) should then be understood to require a simple test, namely, that an administrative decision will be reviewable if, in Lord Cooke’s words, it is one that a reasonable decision-maker could not reach.’ (Footnotes omitted.)

The court then turned to the correct approach in determining whether a particular decision was reasonable (para 45):

‘What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.’ (Footnotes omitted.)

The court noted that judicial review of the reasonableness of a decision necessarily

engaged the concept of deference and made the following remarks on the meaning of deference and its relevance to this ground of review (para 48):

**'In treating the decisions of administrative agencies with the appropriate respect, a court is recognising the proper role of the executive within the Constitution. In doing so a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision-maker. This does not mean however that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision. A court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.'**

The court then turned to the facts of the case and pointed out that the factors listed in s 2 of the MLRA are such that there are tensions between them. This implied that parliament had conferred discretion on the

decision maker to establish an appropriate equilibrium between the factors when making his or her decision. As long as the court was of the view that the Chief Director had considered all the factors in an attempt to strike a reasonable balance between them, it could not find that the decision was unreasonable. The court found that the Chief Director had done so and, as such, the decision was reasonable. In reaching this conclusion the court made the following important point (para 54):

**'The Chief Director's decision may or may not have been the best decision in the circumstances, but that is not for this Court to consider. The Court must merely decide whether the decision struck a reasonable equilibrium between the principles and objectives set out in section 2 and section 18(5) in the context of the specific facts of the deep-sea hake trawl sector.'**

### **Failure to consider applicant's application on its merits**

The applicant argued that the Chief Director had failed to apply his mind to the amount of hake that it had asked to be allowed to catch and its ability to do so. The applicant relied on subsections 6(2)(e)(iii), (h) and (i) of the AJA. In rejecting this contention the court pointed out that the Chief Director was not obliged to apply his mind to the amount of hake that the applicant sought to be allowed to catch. The total amount of hake requested in all the applications before the Chief Director was nearly ten times the total allowable catch. The Chief Director was entitled, therefore, to consider all of the applications together and the ability of each applicant to ensure that its allocation was caught (para 59).

### **Undisclosed policy change**

Relying on s 6(2)(c) of the AJA, the applicant argued that the respondent changed the policy governing the allocation of quotas and did not provide notice of this

change. On the facts the court held that the respondent had complied with the guidelines that it had published and that the contention of the applicant was therefore factually inaccurate.

## MISCELLANEOUS

### The interaction between s 33 of the constitution and the AJA

The applicant in *Van Zyl v New National Party & others* [2003] 3 All SA 737 (C) (see the discussions under ‘Section 1 and ‘Section 7(2)’ above, for the facts) attempted to rely directly on s 33 of the Constitution, instead of asking for relief in terms of the AJA. The court rejected this approach as follows (paras 64—65):

‘Writers (...) seem to accept that a free-standing constitutional right to administrative justice survived the coming into operation of the AJA but that its ambit is limited and can be relied on either directly, to challenge the constitutionality of the AJA or legislation passed subsequent thereto or indirectly, namely to promote the terms of the former (see Iain Currie & Jonathan Klaaren: *The Promotion of Administrative Justice Handbook* (2001) paragraph 1.28; Cora Hoexter *The New Constitutional and Administrative Law, Vol 2; Administrative Law* page 88). The view that the provisions of section 33 of the Constitution could also be relied on directly in order to supplement the under-inclusiveness of the definition of administrative action in the AJA (see: Johan de Waal et al: *The Bill of Rights Handbook*, (4 ed) 496) is cogently criticized by Currie & Klaaren (op cit paragraph 1.28).(...)

The decisions that form the subject-matter of this application occurred after 30 November 2000 ie the date on which the provisions (other than sections 4 and 10) of the AJA had come into operation.

Accordingly the question of whether or not such decisions constituted just administrative action must, in addition to the constitutional-principle of legality, be considered in the light of the AJA which is now the principal source of and delineates the scope and content of administrative justice rights and remedies.’

### Legitimate expectations

The applicant in *Mohammed v Minister of Correctional Services & others* 2003 (6) SA 169 (SEC&LD) (see the discussion under ‘Section 8’ above) argued that his legitimate expectation to be considered for parole having served half of his sentence and having accumulated various credits for good behaviour was frustrated by a policy change of the respondents to consider paroling prisoners such as the applicant only after they had served three quarters of their sentences.

In finding for the applicant, the court quoted the following extract from *Combrinck & another v Minister of Correctional Services & another* 2001 (3) SA 338 (D), which concerned a similar question (at 188B in the *Mohammed* case):

‘It seems to me that the administrative action referred to in this judgment falls foul of s 33 of the Constitution and indeed infringes the applicant’s rights to fair, that is to say, procedurally fair, and reasonable administration. Prisoners incarcerated prior to 1998 had at least a legitimate expectation that, upon the happening of defined events such as having served half their sentence, their case for placement on parole would be considered and would be done in accordance with existing criteria and guidelines set out in the Act. The document [changing the policy] alters all this and does so retrospectively.’

In *Minister of Environmental Affairs & Tourism & others v Phambili Fisheries*

**(Pty) Ltd; Minister of Environmental Affairs & Tourism & others v Bato Star Fishing (Pty) Ltd 2003 (6) SA 407 (SCA); [2003] 2 All SA 616** (see the discussion under ‘Section 6(2)(e)(iii)’ for the facts and the discussions under ‘Section 5’ and ‘Section 6(2)(e)(vi)’ one of the respondents argued that it had a legitimate expectation that its fishing quota would be increased. The court began by setting out the prevailing approach to legitimate expectations (para 65):

‘[T]he test to be applied has recently been restated in this court in **South African Veterinary Council and Another v Szymanski** . . . para 19:

“The requirements relating to the legitimacy of the expectation upon which an applicant may seek to rely have been most pertinently drawn together by Heher J in **National Director of Public Prosecutions v Phillips and Others** 2002 (4) SA 60 (W) para 28. He said:

“The law does not protect every expectation but only those which are ‘legitimate’. The requirements for legitimacy of the expectation, include the following:

(i) The representation underlying the expectation must be ‘clear, unambiguous and devoid of relevant qualification’: De Smith, Woolf and Jowell (op cit [*Judicial Review of Administrative Action 5<sup>th</sup> ed*] at 425 para 8-055). The requirement is a sensible one. It accords with the principle of fairness in public administration, fairness both to the administration and the subject. It protects public officials against the risk that their unwitting ambiguous statements may create legitimate expectations. It is also not unfair to those who choose to rely on such statements. It is always open to them to seek clarification before they do so, failing which they act at their peril.

(ii) The expectation must be reasonable: **Administrator, Transvaal v Traub** (supra [1989 (4) SA 731 (A)] at 756I-757B); **De Smith, Woolf and Jowell** (supra at 417 para 8-037).

(iii) The representation must have been induced by the decision-maker: **De Smith, Woolf and Jowell** (op cit at 422 para 8-050); **Attorney-General of Hong Kong v Ng Yuen Shiu** [1983] 2 All ER 346 (PC) at 350h-j.

(iv) The representation must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate: **Hauptfleisch v Caledon Divisional Council** 1963 (4) SA 53 (C) at 59E-G.”’

On the facts the court held that ‘numerous and disparate statements by different persons’ could not be considered a ‘representation that was “clear, unambiguous and devoid of relevant qualification”’ (para 66), but that even if they were, it would not have been reasonable for the respondent to have relied on them (para 68).

### Partially reviewable decisions

In **Stanfield v Minister of Correctional Services & others** [2003] 4 All SA 282 (C); 2003 (12) BCLR 1384 (see the discussion under ‘Section 6(2)(d)’ above and ‘Section 6(2)(f)(ii)’ for a discussion of the facts) the court addressed the question whether to set aside a decision that was ‘partly good and partly bad’ (para 101). The court said the following (paras 101—102):

‘Should the reasoning of the decision-maker, in exercising his discretion, be partly good and partly bad, the degree of the bad reasoning must be determined. If it has been material and substantial, the decision will fall to be

set aside on review. Should it be impossible to determine this, the court would be constrained to set the decision aside.(...) See also De Smith, Woolf & Jowell *Judicial Review of Administrative Action* (1995).(…) In paragraph 6-086 the learned authors say:

“If the influence of irrelevant factors is established, it does not appear to be necessary to prove that they were the sole or even the dominant influence. As a general rule it is enough to prove that their influence was material or substantial.(…)“

I respectfully associate myself with this pragmatic approach, particularly in view thereof that no administrative decision would, generally speaking, be wholly good or wholly bad. The truth will more often than not lie somewhere in between. If the decision in question points, on balance, to bad or flawed reasoning and such reasoning was of material or substantial significance in prompting the decision-maker to come to his decision, the decision would be invalid and liable to be set aside on review. This would, in my view, be consonant with the well-established values of justice, fairness and reasonableness.’

### **Retrospective operation of the AJA**

***In Mohammed v Minister of Correctional Services & others 2003 (6) SA 169 (SEC&LD)*** (see the discussions under ‘Legitimate expectations’ and ‘Section 8’ above, for the facts) the applicant relied on the AJA in circumstances where the cause of action arose before the Act came into operation. The court said the following (at 176G):

‘In my view, there is no provision in the Act which would justify a finding that the provisions of the Act have either retrospective or retroactive effect, although some assistance may be available from those provisions in interpreting the right to administrative

action as it was applicable to the disputes raised in this application which arose [before the Act came into force] – see Currie and Klaaren *The Promotion of Administrative Justice Benchbook* para [2.39] at 84—6.’

## **PROMOTION OF ACCESS TO INFORMATION ACT (AIA)**

### **SECTION 50(1)(A) – RIGHT OF ACCESS TO RECORDS OF PRIVATE BODIES**

In *Davis v Clutcho (Pty) Ltd [2003] JOL 11220 (C); [2003] 3 All SA 561; 2004 (1) SA 75* (see the discussion under ‘Section 68’ below), the applicant had bought 30 per cent of the respondent company, which was a family business, and had become its director. In 2002, the applicant was fired as director and excluded from the place of business, after a fight with his brother. The applicant sought to sell his shares in the business and the valuation of the respondent was R100 000. The applicant was not satisfied with this amount and requested certain records of the company, which were denied him. The applicant sought an order of court, made in terms of s 50(1)(a) of the AIA, compelling the respondent to give him access to the documents.

Section 50(1)(a) says that ‘a requester must be given access to any record of a private body if (a) that record is required for the exercise or protection of any rights’. The respondent argued that in order to use this section, an applicant must have an antecedent right to the information he sought (at 14 of 11220). There is no right of an ordinary shareholder to inspect the

records of a company and, therefore, the applicant had no right to do so.

To this argument, the court said the following (at 16 of 11220):

'The Companies Act cannot, contrary to section 36(2) of the Constitution, limit the right of access to information at section 32 of the Constitution, and mirrored in the Act, nor can it be interpreted to exclude such right, which would thus be contrary to the spirit of the Bill of Rights. To the extent that the Companies Act does not provide for access to information, section 32 of the Constitution, and the Act, must be read into the Companies Act. It could never have been the intention of the legislature that a shareholder aggrieved by financial statements, as in this case, should be barred from access to the information required to shed light on such statements in order to exercise his rights to sell shares or even prosecute a case against the company'.

## **SECTION 68 – COMMERCIAL INFORMATION OF A PRIVATE BODY**

In *Davis v Clutcho (Pty) Ltd* [2003] JOL 11220 (C); [2003] 3 All SA 561; 2004 (1) SA 75 (see the discussion under 'Section 50(1)(a)' above) the respondent said that it refused the applicant access to its records because it was no longer interested in buying his shares, the reason he had given for requesting access. The respondent subsequently provided additional reasons (at 10 of 11220):

'The reasons (...) are that the records are highly relevant to the respondent's financial viability. Access to them would enable the applicant to have detailed insight into the respondent's margins, customer lists, financial planning and profit margins. Disclosure of the information would therefore be likely to cause harm to the commercial and financial interests of the respondent, more particularly, because the applicant

may use the information to set himself up in business in competition with the respondent.'

Section 68(1) of the AIA provides that: 'the head of a private body may refuse a request for access to the record of a body if the record –

- (a) contains trade secrets of the private body;
- (b) contains financial, commercial, scientific or technical information, other than trade secrets of the private body, the disclosure of which would be likely to cause harm to the commercial interests of the body;
- (c) contains information, the disclosure of which could reasonably be expected –
  - (i) to put the private body at a disadvantage in contractual or other negotiations;
  - (ii) or prejudice the body in commercial competition'.

The court held that the respondent had not shown that the information was covered by s 68(1) because '[i]t was not sufficient for respondent simply to claim that the disclosure of its margins disintitiled applicant to the relief he seeks' (at 21 of 11220).

## NOTES AND ARTICLES

In 'Administrative justice and social assistance' (2003) 120 SALJ 494, Clive Plasket discusses the system of social assistance that provides for pensions, disability grants etc. He looks at the Social Assistance Act 59 of 1992 and the cases that have interpreted and applied it and assesses 'those cases in the light of the development of the particular administrative law that may be called social assistance law, as well as their impact on general administrative law and the developing constitutional jurisprudence of the democratic South Africa' (at 495).

***Laerskool Middelburg en 'n ander v Departementshoof, Mpumalanga Department van Onderwys, en andere 2003 (4) SA 160 (T)***, which was noted in the newsletter covering January to August, is discussed in September 2003 *De Rebus* 32 by Heinrich Schuke in 'The law reports'.

***Hayes & another v Minister of Finance & Development Planning, Western Cape & others 2003 (4) SA 598 (C)***, which was noted in the edition of this newsletter covering January to August, is discussed by David Matlala in his summary of the law reports in October (2003) *De Rebus* 39, as is ***MEC, Public Works, Roads and Transport, Free State & another v Morning Star Minibus Hiring Services (Pty) Ltd & others 2003 (4) SA 429 (O)***, which was also noted in the newsletter covering January to August.

Nomthandazo Ntlama ('The effectiveness of the Promotion of Access to Information Act 2 of 2000 for the Protection of Socio-Economic Rights' 2003 (2) *Stell LR* 273) discusses the provisions of the AIA in the light of his submission that access to information can assist in claiming more efficient delivery and to lobby for higher budget allocations for the disadvantaged. He critically discusses the provisions of the AIA to determine to what

extent they can be used to advance socio-economic rights in South Africa.

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