CASE LAW THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT (PAJA)

This edition of the PAJA Newsletter begins with general comments about two cases. The first, ***Vumazonke v MEC for Social Development, Eastern Cape, and three similar cases* 2005 (6) SA 229 (SE),** a judgment of the High Court in Port Elizabeth High Court is discussed in the body of the newsletter as well. It is mentioned at the head of the document in order to highlight its important comments about the state of public administration in the Eastern Cape. The second case, ***Steenkamp NO v Provincial tender Board, EC* [2006] 1 All SA 478 (SCA)** is reviewed at the outset because the case does not fit easily into the section into which the Newsletter is usually divided.

***Vumazonke v MEC for Social Development, Eastern Cape, and three similar cases* 2005 (6) SA 229 (SE)** (see below under section 6) was an application seeking to review the actions of the Eastern Cape MEC for Social development on the grounds that no decision in respect of the applicants' applications for social welfare grants had been taken. Plasket J began by expressing his extreme dissatisfaction with the sheer volume of applications complaining of maladministration in the Eastern Cape Department of Social Welfare. In November 2004, he said, the motion court of the division dealt with over 100 applications of this nature - and this was by no means a unique occurrence. He referred to a number of cases where judges of the high courts had expressed similar outrage at the inefficiency and ineptitude of the department. In *Somyani v MEC for Welfare, Eastern Cape and Another* (unreported case of the SECLD, case number1144/01) the situation had

> "proceeded to the point where the respondents were called upon to show cause why they should not be committed to prison for contempt of Court because of their failure to give heed to Court orders." (quoted at para 3)

In *Ndevu v MEC for Welfare, Eastern Cape and Another* (unreported, SECLD, case number 597/02), Erasmus J was faced with a similar avalanche of claims.

> "Erasmus J commented that the fact that the applicants in these matters 'found it necessary to turn to the court for assistance would indicate that the respondents and the public servants under their control have failed to perform their administrative duties properly and timeously'. It would, he said, be unrealistic to assume that 'this is the end of the sorry saga 'because there were a further 34 similar matters on the next Motion Court roll and, in view of the fact that many people do not have access to legal advice and representation, 'the matters that do come to court are probably but the tip of the iceberg'. This raised the 'disturbing likelihood that many persons in this province at this moment are suffering real hardship through the ineffectiveness of the public service at provincial level'." (at para 4, footnotes omitted)

The same disgust was expressed in two judgments handed down by Leach J:

> "In *Mbanga v MEC for Welfare, Eastern Cape, and Another,* [2002 (1) SA 359 (SE)] Leach J stated that while 'patience is a virtue, I venture to suggest that even the patience of Job would have been tested by the inefficiency of officialdom in this case as, notwithstanding regular enquiries being made to the office of the Department of Welfare in Port Elizabeth, time passed without any indication whether the applicant's application had been granted or refused'. And in *Mahambehlala v MEC for Welfare, Eastern Cape, and Another,* [2002 (1) SA 342 (SE)] he spoke of the 'administrative sloth and inefficiency which currently bedevils the Department of Welfare in the Eastern Cape'." (at para 6, footnotes omitted)

Cameron JA in the Supreme Court of Appeal entered the fray in *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others* 2001 (4) SA 1184 (SCA):

> "The papers before us recount a pitiable saga of correspondence, meetings, calls, appeals, entreaties, demands and pleas by public interest organisations, advice offices, district surgeons, public health and welfare organisations and branches of the African National Congress itself, which is the governing party in the Eastern Cape. The Legal Resources Centre played a central part in coordinating these entreaties and in the negotiations that resulted from them. But their efforts were unavailing. The response of the provincial authorities as reflected in the papers included unfulfilled undertakings, broken promises, missed meetings, administrative buck-passing, manifest

> lack of capacity and at times gross ineptitude." (at para 8, quoted at para 7)

The list goes on. What Plasket J makes clear in this judgment, though, is that judicial criticism of the department has had no effect. Since as far back as 2001 the courts of the South Eastern Cape have voiced telling criticisms of the ineptitude, inefficiency and general administrative disarray of the department - but the number of people suffering under the weight of this inefficiency has clearly not diminished. The challenge for the courts, then, is what to do to ensure that people's welfare rights do not continue to be systematically ignored:

> "Judges have criticised the performance of the Department of Social Development, not because they see themselves as super-ombudsmen or wish to involve themselves in politics, but because the administrative failings of the department have consequences that bring its performance within the heartland of the judicial function: those failings infringe or threaten the fundamental rights of large numbers of people to have access to social assistance, to just administrative action and to human dignity. When rights are infringed or threatened, the impugned conduct becomes very much the business of the judiciary: s 38, s 165 and s 172 of the Constitution of the Republic of South Africa, 1996 (the Constitution) make that abundantly clear, placing as they do a duty on the judiciary to remedy such infractions. The problem faced by the judiciary in the Eastern Cape in social assistance cases is, however, of a different order. It relates to the boundaries of the judicial function - to the limits of the institutional competence of the courts to engineer administrative efficiency." (at para 9, footnotes omitted)

As a final statement, Plasket J reminded the MEC for Welfare in the Eastern Cape that she bears the responsibility for ensuring that social welfare needs in her province are attended to fairly, efficiently and thoroughly, Her failure to ensure this amounts to nothing less than a direct breach on her part of a constitutional duty:

> "Two final points must be made before I proceed to deal with the individual cases before me. The first is that the time for talk and no action has long passed. Something drastic and concrete must be done to remedy a serious, systemic infringement of the Constitution and the law - and the principles of good administration - by the respondent's department. The second is that the Premier, as the person in whom executive authority in the province is vested, is ultimately responsible for the manner in which Members of the Executive Council and their departments perform. I make this point, not to tell the Premier what to do, but to state the obvious constitutional point that in terms of the Constitution, the buck stops with her: this is also made clear in the oath of office taken by Premiers (and Members of the Executive Council), in terms of which incumbents swear or affirm an oath to 'obey, respect and uphold the Constitution and all other law of the Republic'." (at para 22, footnotes omitted)

***Steenkamp NO v Provincial Tender Board, EC* [2006] 1 All SA 478 (SCA)** concerned an action for damages in delict by the appellant, the liquidator of Balraz Technologies (Pty) Ltd (Balraz). Balraz tendered successfully for a contract offered by the Eastern Cape government for the provision of automated cash payment systems for pensions and other social welfare grants. The award of this contract was challenged by Cash Paymaster Services (Pty) Ltd (*Cash Paymaster Services (Pty) Ltd v Eastern Cape Province and others* 1999 (1) SA 324 (CkH)). Balraz then went into liquidation. The appellant liquidator then approached the High Court seeking compensation for the expenses Balraz had incurred performing in terms of the contract before it was set aside on review. In the court a quo the questions of causation and loss were separated, and only the questions of negligence and wrongfulness were argued before the court. The application was dismissed, and the appellant approached the Supreme Court of Appeal (SCA). The essential question before the SCA was whether a breach of an administrative law duty can found delictual wrongfulness and a cause of action for damages in delict.

The appellant's case was that the Tender Board had acted wrongfully in respect of Balraz because it owed it a duty in law to (i) exercise its powers and perform its functions fairly, impartially and independently; (ii) take reasonable care in the evaluation and investigation of tenders; (iii) properly evaluate the tenders within the parameters imposed by the tender specifications; and (iv) ensure that the award of the tender was reasonable in the circumstances (at para 4). It was essentially the appellant's argument that since the Tender Board had made a decision that was reviewable, it had breached these four administrative law duties. Its conduct in awarding the tender to Balraz was therefore wrongful. As to the question of negligence, the appellant argued that because the Tender Board had failed to take reasonable

care in the evaluation of the tenders by disregarding the comments of two technical evaluation committees, failing to consider the actual costs of the tenders and instead considering unit-costs only; and over-emphasising the government's policy of transformation and development, the Tender Board had been negligent in the discharge of its duties (at para 5).

This is not the first case in our law dealing with a claim for damages from an initially successful tenderer. Similar claims were made in *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) and *Premier, Western Cape v Faircape Property Developers (Pty) Ltd* 2003 (6) SA 13 (SCA). In both those cases, though, the claims for damages we dismissed. The SCA began its consideration of the claim with this statement:

> "A useful starting point in considering the nature of the legal duty of the Board towards tenderers in general is to remind oneself a legal duty may have its origins in either statute law or the common law and that the breach of every legal duty, especially one imposed by administrative law, does not translate by necessity into the breach of delictual duty, ie a duty to compensate by mean of the payment of damages" (at para 19)

The SCA pointed out that one of the difficulties involved in basing a claim in delict on administrative law is that administrative law has its own range of remedies. A breach of an administrative law duty is primarily to be remedied by the application of these remedies rather than remedies found in other branches of the law. The SCA stated:

> "Since the adoption of the interim Constitution the common-law principles of administrative law have been subsumed by a constitutional dispensation and every failure of administrative justice amounts to a breach of a constitutional duty, which raises the question whether, under the Constitution, damages are an appropriate remedy. The problem becomes more complex since the adoption of [PAJA] (which does not govern this case) which sets out the remedies available for a failure of administrative justice. It may not be without significance that an award of damages is not one of them, although an award of 'compensation' in exceptional circumstances is possible. This could imply that remedies for administrative justice now have to be found within the four corners of its provisions and that a reliance on common-law principles might be out of place. One aspect must nevertheless be kept in mind. A failure of administrative justice is not per se unlawful (in the sense of being *contra legem*): it simply makes the decision or non-decision vulnerable to legal challenge and, until set aside, it is valid. The award of the tender in this case was not unlawful, it was merely vulnerable." (at para 24)

> "Subject to the duty of courts to develop the common law in accordance with constitutional principles, the general approach of our law towards the extension of the boundaries of delictual liability remains conservative. This is especially the case when dealing with liability for pure economic loss. And although organs of state and administrators have no delictual immunity, 'something more' than a mere negligent statutory breach and consequent economic loss is required to hold them delictually liable for the improper performance of an administrative function. Administrative law is a system that over centuries has developed its own remedies and, in general, delictual liability will not be imposed for a breach of its rules unless convincing policy considerations point in another direction." (at para 27, footnotes omitted)

The court then considered the statutory framework governing the process and concluded that it could not be inferred from that legislation that an action for damages as sought by the appellant was contemplated. Against the background of policy considerations pointing away from the recognition of such a claim at common law, the court held that the appellant's delictual action had to fail.

This matter was heard on appeal by the Constitutional Court in May of this year. Its decision will shed valuable light on the situation.

Section 1 - Administrative action defined

***Johannesburg Municipal Pension Fund and Others* v City of Johannesburg and Others 2005 (6) SA 273 (W)** involved the decision by the first respondent and its municipal entities ("UACs") to terminate the applicant pension funds. The case was argued and decided before the Constitutional Court handed down judgment in the matter of *Minister of Health and Another v New Clicks SA (Pty) Ltd and Others (Treatment Action Campaign and Innovative Medicines SA as Amici Curiae)* 2006 (1) BCLR 1 (CC) (reported in the June-September 2005 edition of this Newsletter). For this reason Malan J did not have the guidance of the Constitutional Court in respect of the relationship between section 1 of PAJA and section 33 of the Constitution. His comments in this regard must now be seen in the context of statements from the Constitutional Court that overrule him.

After finding that the action complained against (of which more below) did amount to administrative action in terms of the definition thereof in section 1 of PAJA, he went on:

> "However, even if I am wrong in holding that the city and UACs' decision constituted 'administrative action' as defined in PAJA, direct recourse to s 33 of the Constitution appears to be possible. Section 33 of the Constitution does not define 'administrative action' (on which see the judgment of Olivier JA in *Transnet Ltd v Goodman Brothers* (Pty) Ltd 2001 (1) SA 853 (SCA) (2001 (2) BCLR 176) in para [30]: '(c)onsistent with the object of the administrative law, the essential characteristics of the concept of administrative action are seen as the exercise of a public (ie governmental) function by a public authority or official affecting the rights of or legitimate expectations of or involving legal consequences to the individual').
>
> There appears to be merit in the applicants' contention that PAJA is not and cannot be exhaustive of the right to administrative justice. To hold otherwise would be subversive of the principle of constitutional supremacy." (at para 15)

In *New Clicks,* however, it was held that the law cannot be allowed to diverge into two separate streams of administrative law jurisprudence, one under PAJA and the other under the Constitution. There is only one system of administrative law, and that is founded on section 33 of the Constitution. PAJA was enacted to give practical effect to the rights of section 33, and the rights in section 33 cannot be accessed except through reliance on PAJA. To hold, as Malan J did, that PAJA confers a narrower range of administrative justice rights than section 33 implies that PAJA is unconstitutional. This may be the case; but in the absence of a challenge and a finding to that effect, it must be accepted that PAJA is co-extensive with section 33. PAJA in this sense is exhaustive of rights to administrative justice. The relevant passages in *New Clicks* are the following:

> "A litigant cannot avoid the provisions of PAJA by going behind it, and seeking to rely on section 33(1) of the Constitution or the common law. That would defeat the purpose of the Constitution in requiring the rights contained in section 33 to be given effect by means of national legislation." (per Chaskalson CJ at para 95)
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> "In my view, there is considerable force in the view expressed in *NAPTOSA [and Others v Minister of Education, Western Cape, and Others* 2001 (2) SA 112 (C)]. Our Constitution contemplates a single system of law which is shaped by the Constitution. To rely directly on section 33(1) of the Constitution and on common law when PAJA, which was enacted to give effect to section 33 is applicable, is in my view inappropriate. It will encourage the development of two parallel systems of law, one under PAJA and another under section 33 and the common law. Yet this Court has held that 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.'" (per Ngcobo J at para 436, footnotes omitted)

Malan J's remarks were obiter in any case. He did find that the action complained against constituted administrative action in terms of section 1:

> "In light of the constitutional and statutory framework, it follows that the decision to terminate the funds constitutes 'administrative action' in that the decision is one taken by an organ of State when exercising a power in terms of the Constitution; exercising a public power or performing a public function in terms of the Systems Act. In the public service employment context, it has been recognised that powers affecting the rights, property or legitimate expectations of workers are subject to administrative law." (at para 14)

The case was an application for interim relief pending a full review application on the merits. The Judge held that at least some prospects existed and granted the relief - but the judgment offers neither reasoning nor a final order on the merits and need not be considered further here.

***Mzamba Taxi Owners' Association and Another v Bizana Taxi Association and Others* 2006 (2) SA 154 (SCA)** involved the use of a taxi rank in Port Edward. The first two respondents, voluntary taxi associations, had concluded an agreement to share the taxi rank in question. The fifth and sixth respondents, the KwaZulu-Natal Provincial Taxi Registrar and the Eastern Cape Provincial Taxi Registrar, endorsed this agreement. The appellants, a voluntary not-for-gain taxi association and a taxi operator, challenged the endorsement as an irregular administrative act that, if implemented, would affect their members, mainly financially (at paras 1-3). In the court below, McLaren J held that although the signing of the agreement by the fifth and sixth respondents amounted to administrative action, the applicants had failed to prove on a balance of prob-

abilities that their rights would be adversely affected by the agreement or that the endorsement of it had a direct, external legal effect (at para 14). However, if the action did not have a direct, external legal effect and did not affect rights materially and adversely, that action would not meet the definitional requirements of administrative action in terms of PAJA.

The SCA held that while the appellants may have had a case for review in terms of the legislative framework governing the taxi industry in KwaZulu Natal (The Road Transportation Act 56 of 1996 and the KwaZulu-Natal Interim Minibus Taxi Act 4 of 1998 and regulations promulgated in terms thereof), they had not brought their case on that basis. They could have argued, for example, that the public permits issued in terms of the Road Transportation Act allowing the first and second respondents to operate minibus taxis had been issued irregularly, or that the endorsement of the agreement by the fifth and sixth respondents was the result of a "request" by the registrar to conclude such an agreement in terms of regulation 18(3) of the regulations. In the absence of challenges of this nature, though, the SCA held that the appellants' challenge was misconceived. The SCA agreed with McLaren J that the application for review had to be dismissed, but made it clear that the action challenged did not amount to administrative action:

> "There was, therefore, no administrative action by the fifth respondent in terms of the regulation because there was no decision that amounted to such action as defined in s 1 of PAJA. The endorsement by the two registrars provided no further legal impetus to the agreement voluntarily concluded by Bambanani and BTA [the first and second respondents]. It did not confer the authority to operate the route. That was already in place by virtue of the public permits. There was thus no administrative action by either registrar which was open to challenge by the appellants, either in terms of PAJA or otherwise.
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> To prevent BTA members from using the Port Edward taxi rank would be to frustrate the rights acquired by them in terms of the relevant permits from the relevant road transportation boards, which are the primary regulators of minibus taxi operators. The regulatory statutes were never intended to frustrate lawful competition. On the contrary, they were designed to ensure safety, efficiency and lawful competition in the public interest." (at paras 28-29)

Law Society, Northern Provinces (Incorporated as The Law Society of The Transvaal) v Maseka and Another **2005 (6) SA 372 (BH)** concerned an application by the Law Society of the Northern Provinces for a mandamus against the first respondent compelling him to produce various records and books for inspection. The Law Society is authorised by section 70 of the Attorney's Act 53 of 1979 to inspect an attorney's records for the purposes of deciding if an enquiry in terms of section 71 should be held. The first respondent argued that the Law Society has an obligation, before deciding to hold an inspection, to afford attorneys - and the first respondent in this case - a hearing (at 378H-379C). The first respondent submitted in this regard that the actions taken by the Law Society towards performing an inspection of his records amounted to administrative action within the contemplation of section 1 of PAJA, and that he was therefore entitled to procedural fairness in terms of section 3 of PAJA. The judge held, though, that because an inspection would not have affected materially the rights of the first respondent, it did not constitute administrative action:

> "For a decision or conduct to be classified as administrative action and for a person to be entitled to the application of the principles of natural justice or to procedurally fair administrative action, the decision or conduct must at least materially and adversely affect that person's rights. See s 3(1) of the PAJA and *The Master v Deedat and Others 2000 (3) SA 1076 (N) and Gamevest (Pty) Ltd v Regional Land Claims Commissioner, Northern Province and Mpumalanga, and Others* 2003 (1) SA 373 (SCA). Where the decision does not materially and adversely affect a person's rights it is not a decision in the administrative justice sense. See *Deedat's* case (supra) at 1083G. Where a functionary merely performs an investigative function which does not materially and adversely affect a person's rights, he or she need not, unless a statute provides otherwise, observe the principles of natural justice. See *Van der Merwe and Others v Slabbert NO and Others* 1998 (3) SA 613 (N) at 624D - E." (at 382B-E)

For this reason the first respondent's defence based on PAJA had to fail.

In ***Phenithi v Minister of Education and others*** **[2006] 1 All SA 601 (SCA)** the appellant's employment with the education department of the Free State was terminated as a result of the application of section 14(1) of the Employment

of Educators Act 76 of 1998. That relevant parts of the section read:

> "(1) An educator appointed in a permanent capacity who-
> (a) is absent from work for a period exceeding 14 consecutive days without permission of the employer;
> . . .
> shall, unless the employer directs otherwise, be deemed to have been discharged from service on account of misconduct, in the circumstances where-
> (i) paragraph (a) or (b) is applicable, with effect from the day following immediately after the last day on which the educator was present at work". (quoted at para 2).

For various reasons that need not be gone into, the appellant was absent from work for a period of more than fourteen days without permission from her employer. It was common cause between the parties that she was dismissed "by operation of law" (at para 7), but it was the appellant's complaint that she had been dismissed without the opportunity of a hearing. Her dismissal, she contended, offended against principles of administrative justice, particularly the audi alteram partem rule. The first issue the court turned its attention to was whether the dismissal of the appellant amounted to "administrative action". This is surely the correct approach: the appellant would only have been entitled to procedural fairness and to demand a hearing if the action by which she was dismissed was administrative action. Section 33 of the Constitution and PAJA confer the right to procedurally fair *administrative action.* If the action was not administrative action properly defined, no complaint that principles of audi alteram partem had been violated could be made. Mpati DP, for the court, relied on an earlier judgment of Van Heerden JA dealing with comparable legislation to reach this conclusion:

> "Die beskouingsbepaling tree in werking indien 'n persoon soos die respondent (i) sonder die toestemming van 'die Onderwyshoof' (ii) vir 'n tydperk van meer as 30 opeenvolgende dae van sy diens afwesig is. Of hierdie vereistes bevredig is, is objektief vasstelbaar. Indien 'n persoon sou aanvoer dat hy byvoorbeeld wel die nodige toestemming gehad het, en dit betwis word, is die feitelike dispuut deur 'n hof beregbaar. Daar is dan geen sprake van 'n hersiening van 'n administratiewe besluit nie. Trouens, die al of nie inwerkingtreding van die beskouingsbepaling is nie van enige besluit afhanklik nie. Daar is dus geen ruimte nie vir 'n beroep op die audi-reël wat in sy klassieke formulering van toepassing is wanner 'n administratiewe - en diskresionêre - beslissing die regte, voorregte of vryheid van 'n persoon nadelig kan raak." (*Minister van Onderwys en Kultuur en Andere v Louw* 1995 (4) SA 383 (A) at 388G-H, translated and quoted by Mpati DP at para 9)

Holding that the case at hand and Louw's case were comparable, Mpati DP concluded that the appellant's dismissal was not the consequence of a discretionary decision, but merely the notification of a result which occurred by operation of law (at para 9). Consequently, in the absence of a "decision" and thus any "administrative action" capable of review the appellant's claim had to fail.

The court noted that section 14(2) of the Employment of Educators Act allows the reinstatement of an educator who has been dismissed in terms of section 14(1). It is at this stage that provision is made for a hearing. The court stated, though, that since the provisions of the section were not invoked it was not necessary to determine who should bear the onus of initiating such a hearing (at para 11). The court also noted that the appellant had not made an argument that the "decision" under review was the employer's decision not to reinstate her. The court did not therefore consider the argument.

Maleka v Health Professionals Council of SA and Another **[2005] 4 All SA 72 (E)** (see also sections 3 and 6 below) concerned the removal from the register of private medical practitioners of a medical practitioner previously licensed to practice as a private medical practitioner. The applicant had worked for some time as a medical practitioner for the Ciskei Department of Health until being issued with a licence to practice privately in 2001. The registrar of the Medical and Dental Professions Board, one of the boards of the first respondent, addressed a letter to the applicant informing him that he had been erroneously registered as a private medical practitioner as a result of a "faulty IT-system action" (at para 2). The applicant's registration as a public health practitioner was resuscitated. The applicant contended that the removal of his name from the register affected his rights adversely and was thus administrative action in terms of sec-

tion 1 of PAJA, and was conducted unfairly and should be set aside.

The first respondent argued on the other hand that since the removal of the applicant's name from the register was simply the correction of a computer error, it did not amount to administrative action in terms of PAJA (at para 4). The first respondent's case was that:

> "[O]ne of the duties of the registrar of the first respondent, in terms of sections 18(1) and (2) of the Health Professions Act 56 of 1974, is to keep the register of medical practitioners correctly, which implies the duty to correct inaccuracies. The registrar's case is that all that was done: he changed the entries when he realised that there had been a computer error. This, he argues was not administrative action. It was akin to correcting a clerical slip. The argument continues: administrative action within the meaning of the [PAJA] would only be done, in relation to a case such as the present, once the board had applied its mind to changing the registration of a medical practitioner whose name was on the register following an application for its registration which had been considered by the board; here the applicant's name had not been placed on the register as a result of an application to the board which had been considered; it had got there by computer error; it could therefore be taken off by clerical correction of the error." (at para 8).

Jones J found both factual and legal problems with this argument. In the first place, he held that no evidence had been presented to the court on the nature of the clerical slip. No explanation was provided as what the faulty IT action was or how it had occurred (at para 9). More fundamental, the judge went on, was the fact that a distinction must be drawn between clerical errors corrected before anyone's rights are affected and the correction of the error in this case. "As a result of the error", the judge stated, "the applicant was sent a card entitling him to practise as a private general practitioner" (at para 10). The judge concluded therefore that altering this state of affairs amounted to administrative action for purposes of PAJA:

> "I have no doubt whatever that in these circumstances the decision to cancel the applicant's registration as a private practitioner and to reinstate his registration as a public service general practitioner was administrative action. This, in the language of [PAJA] is any decision taken by a juristic person when performing a public function in terms of an empowering provision of a statute which adversely affects the rights of any person." (at para 10)

Jones J then went on to hold that the fact that the applicant may not in fact have had a right to appear on the register of private practitioners did not affect the conclusion that his rights had been adversely affected. He held that he did not have to "determine the substantive rights of the applicant in this application." Rather, he was concerned with the process by which a right was taken away. The facts show, he concluded, that the applicant had a legitimate expectation of notice of the removal of his name and a hearing prior to that happening (at para 11). Jones J's opinion here is that even though the applicant may not have properly been given a right to practise as a private practitioner in the first place, The fact was that he was granted that right. The removal of that right constituted administrative action susceptible of review under PAJA. Moreover, section 3 of PAJA entitles persons to fair administrative action where rights *or legitimate expectations* are materially and adversely affected. This case is therefore a good example of the definitional difficulties experienced in applying PAJA, since section 1 defines administrative action as action affecting *rights,* while section 3 applies explicitly to action affecting rights or legitimate expectations.

The applicants in ***Van Zyl and others v Government of RSA and Others*** **[2005] 4 All SA 96 (T)** (see below under the doctrine of legality) were natural and juristic persons involved in mining operations in the Kingdom of Lesotho. The applicants were all citizens of South Africa or companies registered and incorporated in South Africa. The applicants' cause of action was that their property rights in Lesotho were expropriated by the government of Lesotho for the purposes of the Lesotho Highlands Water Project without the payment of compensation. The applicants claimed this violated their constitutional rights under the South African Constitution, and sought protection of those rights through diplomatic efforts on the part of the South African government. The South African government chose not to engage the Lesotho government. It was this decision that the applicants sought to review. Patel J held, however, that executive action does not constitute administrative action within the meaning of section 33 of the Constitution (at para 46). After describing the executive powers sought to be reviewed, the judge went on:

> "The nature of these powers and acts performed are essentially executive and not administrative and, therefore, section 33 of the Constitution and concomitantly the provisions of [PAJA] are not the mechanisms of control regarding executive powers." (at para 50)

Patel J noted that a number of considerations are relevant to determining whether actions are executive or administrative in nature. These include the source of the power; the nature of the power; and its subject matter. The essential question, in his view, is whether the power involves the exercise of a public duty and if so, how closely that duty is related to policy matters on the one hand - which are not administrative - or the implementation of legislation on the other - which is administrative. Patel J concluded that the powers to conduct, and the functions of conducting foreign diplomatic relations are "by source, origin, nature and description essentially executive powers and intrinsically involved with foreign policy considerations" (at para 50). Patel J also remarked that PAJA expressly excludes the executive powers of the President of the Republic from its ambit. Section 85 of the Constitution sets out the powers of the President, and subsection (2)(e) confers on the President the power to perform "any other executive function provided for in the Constitution or national legislation." The definition of administrative action in section 1 excludes the powers listed in section 85(2)(e) from review. Patel J saw the formulation and pursuit of foreign policy as a presidential power covered by section 85(2)(e), and therefore held that PAJA did not apply to executive decisions involving foreign policy.

The respondents' decision was therefore not subject to review under the provisions of rights to administrative justice, although the decision nevertheless had to be taken within constitutional limits.

The case of ***Chairperson: Standing Tender Committee and others v JFE Sapela Electronics (Pty) Ltd and others*** **[2005] 4 All SA 487 (SCA)** (see below under section 3, section 1 of the Constitution - the doctrine of legality and common-law review - delay) is an appeal from a decision of the High Court. That decision was reported in the August and September 2004 issue of the PAJA Newsletter (the case is reported as *JFE Sapela Electronics (Pty) Ltd & another v Chairperson: Standing Tender Committee & others* [2004] 3 All SA 715 (C)). The decision of the SCA upheld the High Court decision, but varied the order in one respect. The case concerned an application seeking the review and setting aside of the award, by the Department of Public Works, of three tender contracts for the refurbishment of prisons to Nolitha Electrical and Construction (Pty) Ltd. The court, per Scott JA held: "It is well-established that a tender process implemented by an organ of state is an 'administrative action' within the meaning of [PAJA]" (at para 19).

Trend Finance (Pty) Ltd and another v Commissioner for SARS and another **[2005] 4 All SA 657 (C)** (see section 3, section 6, section 5 and section 7 below) concerned the seizure by the Controller of Customs (Cape Town) of goods sought to be imported by the applicants because they had failed to pay the correct duty amount. The applicants challenged this as unfair administrative action in terms of PAJA. Van Reenen J held, after referring to *Deacon v Controller of Customs and Excise* 1999 (2) SA 905 (SE) and *Henbase 3392 (Pty) Ltd v Commissioner, South African Revenue Service and Another* 2002 (2) SA 180 (T) that "the determination under consideration constituted administrative action within the meaning thereof in PAJA and accordingly, had to be procedurally fair if it were to pass muster" (at para 76).

The applicant and the first respondent in ***Sebenza Forwarding & Shipping Consultancy (Pty) Ltd v Petroleum Oil and Gas Corporation of SA (Pty) Ltd t/a Petro SA and Another*** **2006 (2) SA 52 (C)** (see below under section 1 of the Constitution - the doctrine of legality) were part to a contract in terms of which the applicant was to provide shipping and forwarding services to the first respondent, a wholly owned subsidiary of the state-owned CEF (Pty) Ltd. The latter was created in terms of the Central Energy Fund Act 38 of 1977 to finance and promote the state's oil or related energy products programme. The second respondent was the Minister of Mineral and Energy Affairs. The judgment is a judgment on an application to amend pleadings in order to bring a review against a decision of the Minister. The Minister opposed the amendment on the ground that no triable issue was raised.

In determining whether a triable issue was raised, the judgment considers whether the decision constitutes administrative action for the purposes of PAJA.

The applicant requested the Minister to investigate alleged irregularities in the contract, and, when the Minister decided not to conduct a formal enquiry, sought to have that decision reviewed. The question before the court therefore, was whether the Minister's decision was administrative action for the purposes of section 1 of PAJA. In considering this question, though, Bozalek J noted that since the applicant had not originally sought the review and sought the review only on an amendment to the papers, facts material to the determination of the review were not before the court:

> "Any final answer to these questions should ideally be given by the Court seized with the review. It is open to the Minister, if she considers that the amended relief sought has no foundation in either law or fact, to challenge the matter on the papers [as] they stand at the hearing of the main proceedings. I agree with the applicant's counsel's submissions that that court will be in the best position to determine the matter based on a complete conspectus of the facts on all the issues. I do not see the question of the reviewability of the Minister's decision as purely a matter of law. The questions concerning whether the Minister's decision falls within the bounds of the various definitions in the PAJA is properly determined in relation to all the facts of the matter which have not necessarily been placed before the Court. It would be unwise and unnecessary for this Court to seek to reach any final or firm conclusions on what may be incomplete facts. Each of these sub-questions can be the subject of a detailed analysis given the vagueness of some of the concepts involved and the various statutory definitions that come in to play. In this regard the criticisms expressed by Cora Hoexter of the statutory definition of administrative action in the PAJA as 'parsimonious, unnecessarily complicated and probably as unfriendly to users as it is possible to be' are by no means unfounded." (at para 21. The reference is to Cora Hoexter, "'Administrative action' in the courts", a paper unpublished at the time, delivered at the Comparative Administrative Justice Workshop, Cape Town 20-22 March 2005.)

Nevertheless, in order to determine whether the prayed for amendment raised a triable issue, the court considered whether the Minister's conduct might be administrative action in terms of PAJA. The judge noted that the outset of this investigation that a distinction is to be drawn between reviewable administrative action and non-reviewable executive action:

> "This aspect of the enquiry boils down, in my view to the question of whether the Minister's decision was executive action. In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* the Court held that the distinction between executive and administrative action came down to a distinction between the implementation of legislation, which is administrative action, and the formulation of policy which is not. Where this line is drawn, the Court stated further, will depend primarily upon the nature of the power and also upon other relevant factors including the source and nature of the power, its subject-matter, whether it involves the exercise of a public duty and whether it is related to policy matters or the implementation of legislation". (at para 22, footnotes omitted)

The first point considered was whether the Minister exercised a public power in terms of legislation in refusing to hold an inquiry. The judge held that if the Minister had decided to institute an inquiry she would have been exercising a public power in terms of section 1E(6) of the Central Energy Fund Act. It was at least arguable, then, that the refusal to conduct such an inquiry was a reviewable decision. The wide definition of decision in PAJA as "doing or refusing to do any other act or thing of an administrative nature" makes it arguable that the Minister's refusal was administrative action (at para 26). Turning to whether the Minister's decision adversely affected the applicant's rights and had a direct, external legal effect, Bozalek J held that although the applicant could not request an inquiry as of right, it was at least possible that it had a right to a hearing before the Minister refused the request.

> "Furthermore, at least in the sense that the Minister appears resolute in refusing to reconsider her decision to launch any such enquiry (after considering the applicant's side of the story), the Minister's decision has had a direct and actual impact on the applicant's rights or interests. This effect goes beyond a merely intra-departmental impact and in that sense the second leg of the requirement could be satisfied." (at para 28)

Holding that if PAJA was held to be applicable, the applicant would at least have a case that the decision had not complied with the requirements of section 3 of PAJA, the judge granted the amendment.

In ***Dunn v Minister of Defence and Others*** **2006 (2) SA 107 (T)** (see below under section 6 and section 8) the applicant complained that the appointment of another person to the position as head of the newly-established anti-fraud division in the Department of Defence was reviewable as administrative action in terms of PAJA. Van Rooyen AJ agreed, and went on to assess whether the applicant's rights to procedurally fair administrative action had been infringed in the process by which the other person, one Coetzee, had been appointed. He held:

> "The Minister's appointment of Coetzee to the post falls within the definition of an 'administrative action' and of a 'decision' as contemplated in s 1 of PAJA. The Minister is empowered, in terms of s 11 of the Defence Act [42 of 2002], as well as the regulations promulgated in terms of s 87 thereof, to appoint officers in the SANDF. His acceptance and approval of the second respondent's recommendation on 13 September 2002 to appoint Coetzee constitutes a 'decision' as contemplated in s 1 of PAJA. In appointing Coetzee the Minister exercised a public power or function. The irregularity of the appointment of Coetzee has, according to Dunn and his counsel, Mr Dunn SC, materially and adversely affected his rights and/or legitimate expectations and it has had - and still has - a direct legal effect on his interests. (at para 5)

Section 3 - Procedural fairness in administrative action affecting individuals

In ***Maleka v Health Professionals Council of SA and Another*** **[2005] 4 All SA 72 (E)** (see section 1 above and section 6 below) the applicant was taken off the register of private medical practitioners by the registrar of the first respondent without prior notice or the opportunity to be heard prior to this happening. Jones J held that this amounted to unfair administrative action (at para 11). Although Jones J did not specifically mention the provisions of section 3, it is the case that section 3 provides the statutory framework for the decision he reached. Section 3(2)(b)(i) and (ii) state that fair administrative action requires an administrator to give a person adequate notice of the nature and purpose of the proposed administrative action and a reasonable opportunity to make representations to the administrator.

In ***Chairperson: Standing Tender Committee and others v JFE Sapela Electronics*** **(Pty) Ltd and others [2005] 4 All SA 487 (SCA)** (see above under section 1 and below under section 1 of the Constitution - the doctrine of legality and common-law review - delay), the award by the Department of Public Works of three tender contracts to Nolitha Electrical and Construction (Pty) Ltd for the refurbishment of prisons was challenged by two unsuccessful tenderers. An initial assessment of Nolitha's tender, however, revealed that it had not factored the cost of several items into its tender price. This mis-calculation was remedied at a later date, after the closing date for submission of tenders. This, the unsuccessful tenderers argued, was in breach of requirements of procedural fairness.

The court began its review of procedural fairness by noting that what is fair in the administrative process depends on the circumstances of each case (at para 19, referring to section 3(2)(a) of PAJA). The court went on:

> "In the present case, what in effect occurred is that Nolitha's tender, with the latter's written consent, was adjusted by the reallocation of an amount over-quoted for one, or rather two items, to 'most of the remaining maintenance items for Installations A-P' for which Nolitha had under-quoted. The effect was apparently to convert a tender from one regarded by the engineer as unbalanced and a financial risk to one which was acceptable. But the offer made by Nolitha, as embodied in its tender, was not the one ultimately accepted. What was accepted was in truth an offer made on 7 November 2003, some two months after the closing date for tenders. In my view this was enough to strip the tender process of the element of fairness which requires the equal evaluation of tenders. It follows that the acceptance of the Nolitha tender and the award of the contracts were correctly held by the court a quo to be reviewable." (at para 19)

Trend Finance (Pty) Ltd and another v Commissioner for SARS and another **[2005] 4 All SA 657 (C)** (see section 1 above, and section 5, section 6 and section 7 below) concerned the seizure of a shipment of shoes imported by the first and second applicants by the Commissioner for SARS and the Cape Town Controller of Customs (second respondent) for non-compliance with customs and duty requirements laid out in the Customs and Excise Act 91 of 1964. The applicants sought in prayer 1 of their notice of motion the review and setting aside of the respondents' decision in terms of section 65(6) of the Customs and Excise Act. That section allows a person seek-

ing to import goods to challenge the determination of the value of the goods, upon which determination duty payable is to be calculated. Van Reenen J found on the facts in this case that the applicants had not succeeded in showing that the Controller had erred in finding that the actual value of the items to be imported were higher than the value as contended by the applicants, and using this higher value to determine the duty fees payable (at para 65). The applicants sought review of the respondents' actions in the alternative on the basis of PAJA (see prayer 2 at para 10). Van Reenen J summarised the argument as follows:

> "The review of the determination is being sought on the following grounds:
>
> Firstly, that the respondents did not follow a fair procedure or afford the applicants a fair hearing before making the determination;
>
> Secondly, in the alternative, that the respondents did not afford them a fair hearing before demanding payment of an amount equal to the value thereof for duty purposes, namely R695 508; and
>
> Thirdly, that the determination was arbitrary and capricious as it was made on inadequate and insubstantial grounds." (at para 73)

Van Reenen J disposed quickly of the third ground. Having already found that the determination was the product of an objectively verifiable arithmetic calculation (at para 70), the judge held that it could not be claimed that the determination of the quantum to be paid as duty was made on inadequate and insubstantial grounds (at para 74).

Turning to the first two grounds of challenge, the judge began by noting that the challenge raised the requirements of procedural fairness set out in section 3of PAJA. It is to be noted in this respect that the judge considered the application on this ground even though the applicants "fell somewhat short" of the obligation to identify clearly on which sections of PAJA reliance is placed (at para 68). The judge stated:

> "Content is given to the concept 'procedurally fair administrative action' by section 3(2)(b) of PAJA which provides as follows:
> '(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)-
> (i) adequate notice of the nature and purpose of the proposed administrative action;
> (ii) a reasonable opportunity to make representations;
> (iii) a clear statement of the administrative action;
> (iv) adequate notice of any right of review or internal appeal, where applicable; and
> (v) adequate notice of the right to request reasons in terms of section 5.'
>
> Those five requirements, which are considered to constitute the core elements of procedural fairness, may be departed from in the circumstances set out section 3(4) which provides as follows:
> '(a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).
> (b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including-
> (i) the objects of the empowering provision;
> (ii) the nature and purpose of, and the need to take, the administrative action;
> (iii) the likely effect of the administrative action;
> (iv) the urgency of taking the administrative action or the urgency of the matter; and
> (v) the need to promote an efficient administration and good governance.'
>
> Section 3(3) of PAJA provides that an administrator, in order to give effect to the right of procedurally fair administrative action, in his discretion, may give the person whose rights or legitimate expectations are materially and adversely affected thereby an opportunity to:
> '(a) obtain assistance and, in serious or complex cases, legal representation;
> (b) present and dispute information and arguments; and
> (c) appear in person.'
>
> There is no evidence that the Controller, as delegate of the Commissioner, considered or was required to consider the discretion reposed in him by sections 3(3) and (4)." (at paras 77-78).

The judge then set out the facts relevant to the determination of whether the applicants had been subject to unfair administrative processes (at paras 80-81). He drew from this factual exposition that the Controller had failed to notify the applicants the he was intending to exercise his discretion against the applicants, and failed to afford them any opportunity to make representations to the Controller prior to the

exercise of that discretion. This, he concluded, "clearly offended against the mandatory requirements of subsections 3(2)(b)(i) and (ii) of PAJA" (at para 84).

Van Reenen J also considered the argument that the Controller had complied with the principles of procedural fairness after the action complained against had been taken. He relied on *Nortjé en 'n ander v Minister van Korrektiewe Dienste and andere* 2001 (3) SA 472 (SCA) for the proposition that "Although the general rule is that natural justice must be observed before a decision is taken, subsequent compliance may suffice in exceptional circumstances" (at para 82). The judge rejected this argument, holding that no exceptional circumstances had justified such a course:

> "[N]one of the considerations that are regarded as sufficient to justify the subsequent compliance with the requirements of just administrative action, such as urgency; impracticability because of the number of persons involved; the possibility that prior compliance will defeat the purposes of the action; and that the decision is merely provisional and relevant to the enquiry whether the requirements of procedural fairness have been complied with, are present in the communications enumerated in paragraph 81 above" (at para 82)

The failure to observe principles of procedural fairness could not therefore be remedied after the administrative action was taken.

The case of ***Seodin Primary School and others v MEC of Education, Northern Cape and others*** **[2006] 1 All SA 154 (NC)** (see below under section 6) concerned an application to set aside a decision by the first respondent that schools in the Northern Cape area using Afrikaans as the sole medium of instruction would be converted to dual-medium English and Afrikaans schools. The applicants claimed that the administrative action was procedurally unfair because the first respondent had not complied with the principle of audi alteram partem before making the decision under review. In assessing the factual material before the court in determining whether requirements of section 3 of PAJA had been met, Kgomo JP (for a unanimous court) considered the steps taken by the first respondent and the other respondents prior to the making of the decision. "This exercise", the court stated,

> "will go some way in answering the question whether or not the respondents observed the audi alteram partem rule in making their decisions or whether they went gung-ho to ride roughshod over the rights of the applicant-schools." (at para 17)

After reviewing the communications and discussions between the parties (at para 18), the court concluded that there had been discussions between the respondents and the applicant schools regarding the difficulties caused by single-medium schools and proposals to convert these schools to dual-medium schools. The court also noted that these discussions were not able to establish consensus between the parties on the way forward. The court stated:

> "Several functionaries based at Head Office and in the Kuruman region have deposed to the fact that there had been ongoing discussions and consultations with all schools in an attempt to persuade them to convert to dual-medium (English-Afrikaans) mode of instruction to cater for learners from disadvantaged backgrounds to ease the pressure on the overcrowded schools and alleviate the over-stretched situation at English-medium schools. The endeavours were without success." (at para 19).

It is to be noted in this respect that although the discussions were without success, the principles of audi alteram partem had been complied with: the principle requires only that parties affected by a decision be given an opportunity to present their point of view to the decision-maker; not that the decision-maker must adopt that point of view. The court therefore rejected the argument that the respondents had acted in breach of section 3 of PAJA.

In ***Dunn v Minister of Defence and Others*** **2006 (2) SA 107 (T)** (see above under section 1 and below under section 6 and section 8) the applicant had applied for a position as the head of the newly-established anti-fraud division of the Department of Defence. Another person, one Coetzee (the fourth respondent), was appointed in his place. Having held that this appointment did indeed constitute administrative action in terms of PAJA (see above), Van Rooyen AJ went on to hold that the applicant was entitled to procedural fairness in the appointment process and to review of that process where his rights to procedural fairness are infringed. After an extensive review of the facts (at paras 13-23). The judge stated:

"Section 3(1) of PAJA requires that administrative action, which materially and adversely affects the rights or legitimate expectations of any person, must be procedurally fair. The first question that arises in this regard is: which of Dunn's rights and/or legal expectations have been affected by the respondents' conduct? It is common cause that Dunn applied for the post and that the Minister decided to appoint Coetzee in the post. Since the respondents, for the purpose of selecting a suitable candidate, purportedly invoked the formal placement process in the Interim Measures, that decision in itself gave Dunn certain rights. Those rights were: the right to participate in the prescribed evaluation and selection process; the right that the procedure followed must be properly applied; the right to uniform treatment throughout the selection and evaluation process; the right that fully motivated submissions containing 'HR requirements and succession planning intentions of all structure managers' had to be submitted to and placed before the seminar for consideration; the right that a 'prescribed person profile' of each of the nominees should serve before the seminar and the right to be considered and evaluated for appointment by a formal seminar.

All these rights are granted in terms of the formal placement process and form part and parcel of Dunn's right to procedurally fair administrative action in terms of s 33 of the Constitution, as well as under s 3(1) of PAJA. The placement board invited Dunn to an interview. An attempt is made ex post facto in the reasons to try and avoid the consequences thereof by stating that the invitations were only invitations to *'possible interviews'*.

The procedure that was in fact followed, ie according to the reasons, deviated from both the formal and informal processes set out in the Interim Measures and materially and adversely affected Dunn's aforementioned rights. As stated above, the decision of the Minister is based on a multi-phased process, comprising a nomination phase, an evaluation and selection phase and finally the appointment phase. During the crucial evaluation phase, Dunn was deprived of the opportunity to enjoy any of the benefits attached to his aforementioned rights. This failure constitutes procedural unfairness as contemplated in s 3 of PAJA. The deprivation of such opportunities cannot be said to be immaterial. Self-evidently it also had an adverse effect on Dunn." (at paras 25-27)

Section 4 - Procedural fairness in administrative action affecting the public

***Chairpersons' Association v Minister of Arts and Culture and Others* 2006 (2) SA 32 (T)** (see below under common-law review - ultra vires) concerned the process by which the respondents effected the name-change of the town Louis Trichardt town to Makhado Town in terms of section 10 of South African Geographical Council Act 118 of 1998. The applicant's attack on the decision was based on the argument that although section 10 of the Act did not expressly require the decision-maker to consult with the public, the nature of the action taken was such that consultation should have occurred. It was further the applicant's argument that consultation did not occur and the decision should accordingly be set aside.

In responding to this argument counsel for the respondents submitted that because the applicant for the name change was a body constituted by councillors elected by and representing the people of the relevant geographical area, the first and second respondents could not have borne an obligation to consult. The judge, however, was "particularly unimpressed with this submission":

"Whilst the Act may not specifically state consultation as a requirement, the subject-matter, being the change of a town name, is a national and sensitive matter. Because of the nature of the subject-matter, I do not think, first, that the first respondent could or would have been expected to take such a decision without considering the issue of consultation. Secondly, in my view the same should be applicable when the application is laid before the second respondent for recommendation. Lastly, one would expect, at least that the first respondent be satisfied that consultation was conducted. Whilst the councillors of the third respondent might have been elected into office by the people, on a national issue like the change of name of a town, one would expect them to consider the sensitivity of the matter and to revert to those who had elected them into office for a proper mandate." (at para 23)

In this regard the judge considered provisions of section 4 of PAJA, holding that although an administrator taking administrative action affecting the public is entitled to decide on the steps to be taken to ensure procedural fairness, the provisions of the Act in this case required some sort of participation by the affected community:

"I may well add that in terms of s 4(1) of [PAJA] where an administrative action adversely affects the rights of the public, an administrator, being the first respondent in the instant case, in order to give effect to the right to procedurally fair administrative action, must decide, amongst other things, whether to hold a public inquiry in terms of ss 2 or to follow a notice and comment procedure in terms

> of ss (3) or where the administrator is empowered by any enabling provision to follow a procedure which is fair but different, to follow that procedure. However, because of the nature of the matter, in my view, the first respondent and correctly so, considered consultation. In a way, ss (3) and (4) of s 10 envisage some sort of participation by interested or aggrieved parties." (at para 24)

On the facts of this case, which need not be traversed here, the judge concluded that there had been substantial compliance with the obligation to consult, and that the application to review and set aside the decision effecting the name change accordingly had to fail (at para 37).

Section 5 - Reasons

Section 5(3) of PAJA established a presumption in favour of persons subject to administrative action. It states that where an administrator fails to furnish adequate reasons for an administrative action it must be presumed in the absence of proof to the contrary, that the administrative action was taken without good reason. This provision was considered by Van Reenen J in ***Trend Finance (Pty) Ltd and another v Commissioner for SARS and another*** **[2005] 4 All SA 657 (C)** (see above under section 1 and section 3, and below under section 6 and section 7). The applicants in the case had made provisional payments to remedy deficiencies in duty fees for goods they were seeking to import into South Africa. During the course of the dispute between the parties, the applicants' attorneys wrote to the respondents demanding the refund of the provisional payments, and in a subsequent letter demanding that written reasons be furnished in terms of section 5(2) of PAJA for the decision not to refund the amounts. Van Reenen J held that although the failure to provide written reasons usually leads presumptively to the conclusion that the decision was taken without good reason, the presumption does not operate where the decision complained against is impugned on grounds not related to administrative justice. The judge stated:

> "However, as the basis on which the applicants claimed to be entitled to a refund of the provisional payments is unrelated to any violation of their right to fair administrative action, the presumption in section 5(3) of PAJA is not of any assistance to them." (at para 98)

Section 6 - Grounds of review

In ***Maleka v Health Professionals Council of SA and Another*** **[2005] 4 All SA 72 (E)** (see sections 1 and 6 above) Jones J held that section 6 allows courts to review administrative action on the grounds set out in PAJA. This statement was made in the context of answering a defence that the court did not have jurisdiction to hear the case; but it is to be noted that section 6(2)(c) allows review of administrative action when it is procedurally unfair. The fact that the administrative action in this case was held to be unfair, therefore vested the court with jurisdiction to hear the matter. The defence relied on common-law grounds of jurisdiction, but in holding that PAJA vested the court with jurisdiction Jones J held that PAJA superseded the common-law rules relating to review jurisdiction (at para 12, relying on De Ville, *Judicial review of administrative action in South Africa* Butterworths, 2003 at 3). Jones J stated in this regard: "In my view the intention of [PAJA] is to give wide, not restricted, protection against unfair administrative action, which implies greater, not more restricted, jurisdiction." (at para 13)

In ***Hlaneki and others v Commission on Restitution of Land Rights and others*** **[2006] 1 All SA 633 (LCC)** a decision of the respondents rejecting the applicants' claim for restitution of land in terms of the Restitution of Land Rights Act 22 of 1994 was set aside on a number of grounds in section 6 of PAJA. The applicants' land claim was rejected by the respondents for the reasons that the claim did not meet the requirements of a number of sections of the Restitution of Land Rights Act. These reasons (at para 2) were that

1. The first applicant, Chief Hlaneki, had himself submitted the land claim on behalf of a number of people under his authority as a traditional leader without the necessary mandate. This was in breach of section 10(3) of the Restitution Act.
2. The land subject to the claim was nevertheless still being occupied by the claimants. No dispossession as required by section 2 of the Restitution Act had thus occurred.
3. The claim was rejected as "frivolous and vexatious" in terms of section 11(3) of the Restitution Act.

4. Notice of the claim was not published in the Government Gazette as required by section 11(1) of the Restitution Act (the court did not, however, deal directly with this last point in the judgment, no further comment will be made in this regard here).

Considering the first of these, Moloto J noted that although section 10(3) of the Restitution Act requires a "resolution or *document*" in support of a contention that a claimant represents a group of people,

> "[i]t is a well-known fact, which this Court can take judicial notice of, that chiefs act as representatives of their tribes. A document showing that the first applicant acts on behalf of the third applicant by virtue of the powers and jurisdiction he has over the third applicant is sufficient proof of this representative capacity without necessarily necessitating a special resolution authorising him to lodge the claim." (at para 8)

The judge found that the respondents' "high-handed" approach in finding against the applicants on the basis of non-compliance with section 10(3) was incorrect. He found that the applicants had complied with section 10(3), and held that the decision in this regard was reviewable in terms of sections 6(2)(d), (e)(iii) and (iv) and (f)(ii) of PAJA (at para 13).

Turning to section 2 of the Restitution Act, the respondents rejected the claim since the applicants were still occupying the land claimed. There could thus be no dispossession in terms of section 2. Moloto J held, however, that the definition of "dispossession" is wide enough to include the right to tenure security (at para 18). The decision was thus reviewable on the grounds set out in section 6(2)(d), (e)(iii) and (f)(ii) of PAJA (at para 26).

The respondents argued that the applicants' claim was frivolous and vexatious because the claim had little merit. In describing the applicant's claim, counsel for the respondent used terms like "patently bogus", "without substance", patently devoid of any merits or prospects of success", "ill-advised" and "fallacious" (at para 28). However, Moloto J pointed out that once the claim was found to have complied with the statutory requirements of the Restitution Act, the argument that the claim had no merit was substantially weakened (at para 27). Instead, it had to be recognised that the applicants in seeking to vindicate a constitutional right, had followed the statutorily prescribed procedures and were entitled to an investigation of their claim in a fair, objective and responsible manner (at para 30). Such an application cannot be considered frivolous or vexatious, and an investigation of such a claim is required whatever the prospects of success. The judge therefore found the respondents' decision to be flawed and reviewable on the basis of section 6(2)(d), (e)(ii), (iii), (v), (vi), (f)(ii) and (h). The respondents' decision was therefore set aside and remitted for reconsideration.

In ***Dunn v Minister of Defence and Others*** **2006 (2) SA 107 (T)** (see above under section 1 and section 3, and below under section 8) also, the court found that administrative action of the respondents was reviewable under a range of provisions of section 6(2). It is more convenient to approach the court's findings as a whole rather than to consider the challenges under each ground of review listed in section 6(2). The grounds on which the court did review the administrative action concerned were section 6(2)(a)(i), (b), (c), (f)(i) and (i).

The facts of the case are briefly that the applicant, Dunn, was not appointed to a post in the Department of Defence for which he had applied. The fourth respondent, one Coetzee, was appointed instead. The appointment process, it appears from the judgment, is set out in two documents: the "SMS-DODI" (the second part of this acronym stands for "Department of Defence Instruction; but it is not clear what the first part stands for. The document nevertheless has to do with the selection of senior management in the Department); and the Interim Measures for the appointment of top officers, approved by the second and third respondents on 1 July 2002. However, since the decision appointing Coetzee was ultimately taken by the Minister, the action was taken in terms of the Defence Act 42 of 2002 read together with the General Regulations for the South African Defence Force and the Reserve. Read together, this framework sets out the following requirements for the appointment of applicants to, for example, the position at issue in this case:

1. Applicants are entitled to a hearing before a formal seminar.

2. A "placement board" must be convened to consider each application. It must be convened in terms of the empowering provisions found in the Interim Measures.
3. The placement board's selection procedures were unfair in terms of the Interim Measures for the following reasons:

> "Dunn did not have the opportunity of appearing before the placement board. Given the fact that this was a new post and the difference of opinion on the separate placement board, Dunn was, to my mind, entitled to have been granted an interview. This did not happen. In fact, he was led to believe that an interview was to take place but, in the mean time, Coetzee had already been recommended for appointment. Mr Moosa argued that Dunn and Coetzee were so close that an appointment could have been made at the flip of a coin. From this contention it would seem to follow that an interview would not have assisted Dunn or Coetzee. However, it is this very alleged equality which, to my mind, contributed to making an interview imperative." (at para 28(4))

Van Rooyen AJ ultimately held that the first, second and third respondents, in not complying with the mandatory provisions of the legislative and regulative framework for the appointment of senior officers, had acted unfairly in the procedures by which they appointed Coetzee over the applicant. The judge relied on comments of the Constitutional Court and the SCA in prefacing his final evaluation of the evidence:

> "The rule of law is a founding value of our Constitution. All organs of State are bound by it. In *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) (2000 (3) BCLR 241) at para [17] Chaskalson P (now CJ) states that the exercise of public power is regulated by the Constitution: 'One of the constitutional controls referred to is that flowing from the doctrine of legality.' PAJA reflects the same values. The importance for an organ of State of acting within the powers granted is emphasised by Navsa JA in *Gerber and Others v Member of the Executive Council of Development and Planning and Local Government, Gauteng and Another* [2003 (2) SA 344 (SCA)]:
>
> > '[34] It is abundantly clear . . . that the council and the MEC failed to properly appreciate their functions and powers. The Council cannot be heard to say that the wrong reference to legislation is cured by the fact that it has original powers to impose property rates. The question is whether it had the power to act in the manner complained of and to impose the rates in question. See *Administrateur, Transvaal v Quid Pro Quo Eiendomsmaatskappy (Edms) Bpk* 1977 (4) SA 829 (A) at 841A - G and Minister of Education v Harris 2001 (4) SA 1297 (CC) para [17] . . . .
> >
> > [35] The Republic of South Africa is a constitutional State. Local authorities and other State institutions may act only in accordance with powers conferred on them by law. This is the principle of legality, an incident of the rule of law. See *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) (1998 (12) BCLR 1458) at para [56]. . . . See also *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) (2000 (3) BCLR 241) para [17]. . . .'" (at para 39, footnotes omitted)

The judge therefore concluded that the respondents' action could be reviewed for the following grounds found in section 6(2) (at para 40):

1. Section 6(2)(a)(i): The placement board was convened following an instruction from the second and third respondents. It was not convened in terms of the empowering provisions, found in the Interim Measures. The placement board's selection and recommendation of Coetzee was therefore not authorised by the empowering legislative framework
2. Section 6(2)(b): The provisions of the Interim Measures are mandatory: non-compliance with them is grounds for review. The placement board was not properly convened in terms of these mandatory requirements, and mandatory provisions were thereby not complied with.
3. Section 6(2)(c): The applicant was invited to an interview, but that interview was subsequently cancelled because Coetzee had already been selected by the placement board. This is in itself procedurally unfair; but more so in the circumstances of this case where the placement board was divided on the question of whether the applicant or Coetzee should be recommended to the Minister for appointment.
4. Section 6(2)(f)(i): Because the mandatory provisions of the Interim Measures were not complied with, and the Interim Measures make room for no other procedure, the procedure actually followed was not authorised by the empowering provisions.

5. Section 6(2)(i): Relying on *South African National Defence Force v Minister of Defence* 1999 20 ILJ 2265 (CC), the judge held that the action taken was "otherwise unconstitutional or unlawful" in that it violated rights to fair labour practices.

The judge concluded ultimately that the action was reviewable in terms of section 6 of PAJA, and went on to consider the applicant's prayer for compensation in terms of section 8(1) of PAJA (see below).

Section 6(2)(c) - procedural fairness

Trend Finance (Pty) Ltd and another v Commissioner for SARS and another **[2005] 4 All SA 657 (C)** (see above under section 1, section 3 and section 5, and below under section 7) concerned an application to review administrative action taken by the Controller of Customs. Cape Town, on the authority of the Commissioner for SARS. Van Reenen J summarised the applicants' complaints against the Controller's actions (at para 73, quoted above section 3) and then stated:

> "The first and second grounds undoubtedly fall within the compass of section 6(2)(c) of PAJA which provides that a court has the power to judicially review administrative action if it was procedurally unfair." (at para 75)

Van Reenen J then proceeded to review and set aside the action taken by the Controller on the grounds that it was not procedurally fair.

Section 6(2)(d) - error of law

The applicant sought the review of a decision of the first respondent in ***Jicama 17 (Pty) Ltd v West Coast District Municipality 2006*** **(1) SA 116 (C)** on the basis that it had been influenced by an error of law. The court agreed with this attack and the granted the application to set the decision aside, but did so, in a sense summarily, because the first respondent did not seek to defend the reason it had originally given for the decision. The applicant tendered successfully for a contract to collect arrear municipal service council levies and to attend to the registration of levy payers on behalf of the first respondent. After the first respondent had informed the applicant that it had been awarded the tender, it cancelled the award and issued a statement re-advertising the tender because the "requirement of functionality" had not been specified in the original tender. The applicant contended that the first respondent's cancellation of the contract for this reason was the result of its misunderstanding of the legislative framework set up by the Preferential Procurement Policy Framework Act 5 of 2000 and the Debt Collectors Act 114 of 1998. In court, however, the first respondent made no attempt to defend its decision to cancel the contract on the basis that the requirement of functionality should have been specified in the original tender document. Instead, it raised five new grounds of defence which, if accepted by the court, would constitute significant unfairness for the applicant:

> "Another reason the first respondent should not be allowed to supplement the reasons for its decision by reasons which were clearly taken ex post facto is that if it was allowed to do so, it would in effect be converting the applicant's application for review, which is being brought on narrow grounds, into a full-scale review of its own decision. This would be palpably unfair and in any event would be defective for the tender documents of the other tenderers are not before the Court." (at para 12)

Having upheld the review on this basis, Cleaver J nevertheless considered the merit of the defences raised by the first respondent. He held that there was no merit in these submissions.

Section 6(2)(e)(ii) and (v) -decisions taken in bad faith or for ulterior purposes

In ***Seodin Primary School and others v MEC of Education, Northern Cape and others*** **[2006] 1 All South Africa 154 (NC)** (see above under section 3 and below under common-law review - delay) the applicants challenged a decision of the first respondent to convert single-medium Afrikaans language schools to dual-medium Afrikaans/English language schools. Although not framed explicitly in terms of section 6(2)(e) of PAJA, the applicants claimed that the respondents had acted in bad faith and that the decision had been motivated by an ulterior motive (at paras 5.3.1 and 13). PAJA makes provision for the review of administrative action on both these grounds is subsections 6(2)(e)(ii) and (v). The ulterior motive behind the decision, the applicants alleged, was the "forced racial integration of the applicant schools which the MEC perceive[d] to be

a relic of apartheid and 'lily-white'." (at para 13). They based this allegation primarily on extracts from the budget speech given by the MEC on 1 May 2004. The relevant excerpt of the speech is quoted in the judgment at para 15, and it is true that the excerpt laments the racial exclusivity of certain schools in the Northern Cape, and does indeed describe these schools as "lily-white". The excerpt even contains statements that accuse schools of deliberately erecting policies designed to retain the racial exclusivity of the schools. The first comment made by the court is that if this is indeed so, there is certainly no problem with attempting to remedy the situation (at para 16). The desire to remedy that undesirable situation can hardly be described as an ulterior motive. The applicants argued however that the decision was not aimed only at remedying an undesirable situation but at subverting Afrikaans culture. The court responded to this deeper allegation by noting that the excerpt relied on by the applicants cannot be seen in isolation:

> "In order to make a pronouncement on the averment that the respondents has nothing but the forced racial-integration and the obliteration of Afrikaans and the cultural ethos of the applicant-schools as their objective, it is necessary for an examination of what the respondents did pursuant to the MEC's budget speech and what information was ostensibly available to him and his Department. The MEC, as we have noted, did not start on a clean canvas. He says he had regard to what his predecessor had done." (at para 17)

Referring to the facts of the case and applying to them the principles set out in *Pharmaceutical Manufacturers if South Africa: In re Ex parte President of the RSA* 2000 (2) South Africa 674 (CC) at paras 82-86, Kgomo JP held for that court that he could discern no evidence of mala fides or an ulterior motive in what the MEC or his functionaries had done (at para 20).

Section 6(2)(e)(iv) - decisions taken because of the unauthorised or unwarranted dictates of another person or body

The applicant in ***Lazarides v Chairman of the Firearms Appeal Board and others*** **[2006] 1 All SA 396 (T)** was refused a license to possess a certain rifle, a .50 calibre Browning Musgrave. He approached the court seeking to review the decision, and argued that PAJA governed the proceedings (at 402b-c). The applicant was a recognised collector of firearms, and owned a collection of 73 firearms. The reason given for the refusal of his application in respect of the Musgrave rifle by the Central Firearms Registry was "insufficient/lack of motivation and the firearm does not fit into your collection" (at 398b). The Firearms Appeal Board agreed (at 398g-i).

In correspondence that passed between the parties subsequently the respondent indicated to the applicant that the Deputy Minister for Safety and Security had in 2002 taken a policy decision that civilians should not be allowed to be in possession of rifles such as the .50 calibre Musgrave because it has an effective range of 1200m and is capable of piercing 40mm armour (at 399b). The applicant argued that in terms of the applicable legislation only the Minister, by the promulgation of regulations, or Parliament could outlaw possession of specific firearms (at 399d).

The judgment does not specifically refer to section 6(2)(e)(iv) of PAJA. Nor does it describe this challenge as a collateral challenge. A collateral challenge is made where a person subject to administrative action challenges the framework within which the administrative action was taken. It seems that the applicant's challenge would fit under either of these headings. If the reason for the respondent's decision was a rule that was established unlawfully, then there do appear to be grounds for setting it aside, either on the basis of a collateral challenge or section 6(2)(e)(iv) of PAJA. Ismail AJ suggests that investigating the lawfulness of the rule would have amounted to an interference in the domain of the administrator that the court was not competent to perform (at 399h-400h). The ratio for the rejection of this argument, however, was the finding that the respondent had not relied on the rule - whether established unlawfully or not. After reiterating the reasons communicated to the applicant by the Central Firearms registry for the refusal of the license, Ismail AJ held:

> "The refusal of the licence to the applicant was not based on the firearm being statutorily prohibited to individuals nor that the applicant was considered a person who was a threat or danger to the Republic of South Africa. The refusal was due to the above reasons." (at 401h-i)

Section 6(2)(e)(vi) - decisions taken arbitrarily or capriciously

In ***Lazarides v Chairman of the Firearms Appeal Board and others*** **[2006] 1 All SA 396 (T)** the applicant argued that the refusal of a firearms license by the respondent was an arbitrary and capricious decision because, as a firearms collector, he had already been granted a license to possess a firearm very similar to the one for which the application in this case was made (at 399e). The judge set out the applicant's argument:

> "Mr Snyman [applicant's counsel] submitted that the refusal did not make sense particularly in view of the fifth respondent approving and granting a licence for the .55 anti-tank rifle which was more powerful that the firearm applied for. This suggestion that the applicant was granted a more powerful firearm than the one applied for in my view does not hold any credence. On this logic it would imply that the Commissioner therefore is duty bound to issue every licence the applicant would apply for in view of him having been given a licence for a greater calibre firearm. Logic and common sense suggest that the Commissioner must apply his discretion to each *and every* application made a by a person whether that person applies for a license for his first gun or 74th license. The fact that a license was granted for an automatic weapon does not mean that the Commissioner must issue a licence where a person apples for his next or subsequent automatic weapon licence. If this were the criterion then the Commissioner once he has issued more than one licence to an applicant would merely be rubber stamping subsequent applications to possess firearms. In doing so he would not be applying his discretion and this in itself would be an irregularity or a possible dereliction of his duty." (at 400i-401c)

Section 6(2)(f)(ii) - review for rationality

Radio Pretoria (geregistreer ooreenkomstig artikel 21 van die Maatskappywet van SA van 1973 soos gewysig) v Voorsitter van die Onafhanklike Kmmunikasie-owerheid van SA en 'n ander **[2006] 1 All SA 143 (T)** (see below under section 8 - remedies) concerned an application by a non-profit organisation to the Independent Communications Authority of South Africa (ICASA, or OKOSA in Afrikaans) for a four-year community radio broadcasting licence. ICASA is authorised by national legislation to issue broadcasting licences. The applicant, Radio Pretoria, sough to have ICASA's decision refusing their application for a broadcasting license reviewed and set aside. ICASA gave four reasons for the refusal of the license. First, it found that the board of Radio Pretoria had not been democratically chosen from among members of the target audience in the broadcast area as required by section 32(4) of the Broadcasting Act 4 of 1999. Second, ICASA found that Radio Pretoria had not taken any steps towards ensuring that members of its policy-making structures were representative of the community which it would serve. Third, Radio Pretoria was found not to have made any effort to ensure that its support and management staff was representative of the racial and gender demographics of the community it would serve. Fourth, ICASA found that the broadcast interests that Radio Pretoria sought to serve were already met by other radio stations, and in particular Radio Sonder Grense (at 146h-147c).

In assessing these reasons, Smit J said that it was important to bear in mind the principles against which the reviewability of administrative actions must be determined. He relied here on comments by Howie P in *Trinity Broadcasting (Ciskei) v Independent Broadcasting Authority of South Africa* 2004 (3) SA 346 (SCA):

> "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 in 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 that being too high a threshold, it would mean that all administrative action would be liable to correction on review if objectively assessed as substantively unreasonable: cf *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another*. As made clear in *Bel Porto,* the review threshold is rationality. Again, the 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 now laid down in s 6(2)(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 s 6(2)(h)).
>
> . . . .
>
> In the application of that test, the reviewing Court will ask: is there a rational objective basis justifying the connection made by the administrative

> decision-maker between the material made available and the conclusion arrived at?"(at paras 20-21, footnotes omitted, quoted by Smit J at 147f-h)

Applying these comments to the present matter, Smit J said:

> "By 'n toepassing van die beginsel in die onderhawige saak moet die vraag dus gestel word of daar 'n rasionele objektiewe basis bestaan wat die verbintenis gemaak deur Okasa tussen die feite tot sy beskikking en die gevolgtrekking waartoe gekom is, regvaardig." (at 147i-148a)

The judge was not able to identify a rational basis for ICASA's decision, and could not see a rational link between the reasons given for the decision and the decision itself. He held:

> "Hoe Okosa 'n verbintenis kan maak tussen hierdie feite and die gevolgtrekking waartoe gekom is, is vir my onverklaarbaar. Daar is na my mening geen rasionele objektiewe basis waarop so 'n gevolgtrekking ooit gemaak kan word nie. Die vereiste van rasionaliteit vereis tog immers dat daar in ooreenstemming met rede en ten volle uitrekenbaar opgetree word. Hierdie gevolgtrekking waartoe Okosa gekom het dat daar nie voldoende rede bestaan vir die diens wat applicant wil aanbied is, na my mening, geheel an al irrasioneel. Die feite toon immers onteenseglik aan dat daar 'n aansienlike groep luisteraars bestaan, inagnemende hul kulturele agtergrond, hul ouderdom en hul regmatige voorkeure, wat verkies en, myns insiens geregtig is om te vereis dat daar aan hul voorkeure oor 'n radiostasie gehoor gegee word en dat die invloede van ander radiostasies nie teen hul sin in hul kele afgedruk word nie." (at 148f-h)

Smit J concluded that there was no rational basis for ICASA's finding that there was no community interest and therefore no need for the applicant's proposed radio programming. The refusal of a broadcast licence could be reviewed and set aside on this basis (at 148h-i).

Section 6(2)(g) - failure to take a decision

In ***Vumazonke v MEC for Social Development, Eastern Cape, and three similar cases*** **2005 (6) SA 229 (SE)** (see introductory comments to this Newsletter) the applicants in four cases sought orders compelling the respondent to take a decision in respect of their applications for disability grants. In the first of these, Ms Vumazonke discovered for the first time after filing her papers that her application had been refused three years previously. The respondent, however, did not respond to her initial letter of demand and furnished her with the official letter refusing her application only after she had filed papers in court. She was for this reason entitled to receive her costs from the respondent. Plasket J also held that the 90-day period within which she could appeal this decision in terms of the Social Assistance Act 59 of 1992 and its regulations began to run only from the date on which she was informed of and given reasons for the decision. Since she had not yet been given reasons, that period had not yet begun to run and Plasket J held she could appeal the decision at any time. (at paras 31-33)

The applicants in the other cases similarly sought review of the respondent's action in terms of section 6(2)(g) for her failure to take a decision. Plasket J referred in this regard to section 6(3)(a) of PAJA which sets out more fully the grounds upon which the failure to take a decision can be reviewed. The subsection reads:

> "If any person relies on the ground of review referred to in subsection (2)(g), he or she may in respect of a failure to take a decision, where-
> (a) (i) an administrator has a duty to take a decision;
> (ii) there is no law that prescribes a period within which the administrator is required to take that decision; and
> (iii) the administrator has failed to take that decision,
> institute proceedings in a court or tribunal for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the decision".

Plasket J noted that the respondent or members of her department do indeed bear a duty to take a decision and that the failure to take a decision in this case had persisted over an unreasonable period:

> "In the present cases, the respondent or duly empowered officials in her department have a duty to take decisions in respect of the applicants' applications for disability grants. No law prescribes a time period within which such decisions have to be taken and those decisions have not been taken. In my view, there has, in these circumstances, been an unreasonable delay in taking the decisions. On the department's own terms, three months was the period within which it undertook to take the decisions. When consideration is given to this fact, the nature of the discretion to be exer-

> cised, the limited amount of information upon which the decisions would be based and the fact that most of the information is contained in the applications themselves, any delay beyond three months is unreasonable in the absence of special circumstances. It has, accordingly, been established that the applicants have established the ground of review envisaged by s 6(2)(g) of the PAJA. The applicants are consequently entitled to appropriate relief for this infringement of their fundamental right to lawful administrative action." (at para 39, footnotes omitted)

Section 6(2)(h) - review for reasonableness

In ***Compass Waste Services (Pty) Ltd v Northern Cape Tender Board and others*** **[2005] 4 All SA 425 (NC)** (see below under common-law review - delay) the Northern Cape Department of Health prepared tender specifications which the Northern Cape Tender Board - the first respondent - was to use in awarding a contract for waste removal services. The court in this case dismissed the application on the ground that it was moot (see below), but considered the arguments related to the tender specifications. The tender specifications drawn up by the Department of Health required waste to be disposed of by incineration. The applicant's tender, however, proposed that waste would be disposed by another method (autoclaving). Counsel for the respondents therefore submitted that the applicant's tender failed to meet the tender specifications, and the Tender Board was correct to award the contract to a different tenderer (at para 13).

Counsel for the applicant argued that the Tender Board was not bound to the tender specifications set by the Department and the fact that the applicant's proposed method of disposal was not incineration should not have been fatal to its tender (at para 15). The argument ultimately came down to a claim that in adhering to the Department's preferred method of incineration, the tender Board had acted unreasonably. In dealing with this argument the court, per Lacock J, held that the question was whether the Tender Board's decision to adhere to the tender specifications was "one that a reasonable decision-maker could not reach"? (at para 16, referring to *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) at 512H-513D).

The court characterised the test for unreasonableness in administrative decisions as follows:

> "The test is not whether this Court disagrees with the approach of the board, but rather whether the action of the Board was within its statutory power and whether it, viewed objectively, acted rationally or reasonably." At para 16.3)

Applying this test to the facts of the case, the court continued:

> "To have been guided by the Department in regard to its requirements is, to my mind, not unreasonable. By accepting that the Department would know best what is required, is not unreasonable. By accepting that incineration was a tried and tested method of healthcare waste disposal, known to the Northern Cape Department of Health, is not unreasonable. To have been hesitant to introduce an unknown and more recent method of waste disposal, is not unreasonable." (at para 16)

Because the tender was not in accordance with the tender specifications, and because the Tender board had not acted unreasonably in adhering to the tender specifications, the court held that the application for review had to fail.

The case of ***Foodcorp (Pty) Ltd v Deputy Director-General: Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management and others*** **[2006] 1 All SA 277 (C) (2006 (2) SA 199 (C))** has had an interesting history before our courts. The applicant is a company carrying on commercial fishing operations. It was awarded fishing rights for the 2002-05 seasons for pelagic fish; but dissatisfied with the tonnage of fish allocated to it, it approached the Cape High Court seeking the review of the allocation (*Foodcorp (Pty) Ltd v Deputy Director-General: Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management and others* 2004 (5) SA 91 (C). This decision is reported in the April-July 2004 issue of the PAJA Newsletter). The Cape High Court dismissed the application, but that judgment was overturned on appeal and the allocation set aside by the SCA on the grounds that it was unreasonable (*Foodcorp (Pty) Ltd v Deputy Director-General: Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management and others* [2005] 1 All SA 531 (SCA) - reported in the October 2004-May 2005 edition of the PAJA Newsletter). The respondent was directed to

consider the matter afresh and re-determine the tonnage that might be caught by the applicant. The decision that resulted from this fresh process, however, turned out to be little different from the allocation that was originally complained against. For this reason alone, counsel for the applicant submitted that the decision should be set aside on the basis that it is unreasonable (at 282e-f). The respondents countered, firstly, that the 2002 allocations had been made under a different policy regime (at 283b-c) and second, that the SCA judgment in respect of the previous allocation had considered only the results of the decision-making process and not the reasons and justifications for the decisions (at 285d-e). Davis J rejected both of these arguments. Although the challenge to the decision raised a number of provisions of PAJA - section 6(2)(e)(iii) and (vi), (f)(ii) and (h), the judgment is most appropriately considered under the heading of reasonableness.

Davis J began his assessment of the merits of the case by reiterating the caveat posted by the Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC):

> "If we are satisfied that the Chief Director did take into account all the factors, struck a reasonable equilibrium between them and selected reasonable means to pursue the identified legislative goal in the light of the facts before him, the applicant cannot succeed. The task of allocation of fishing quotas is a difficult one, intimately connected with complex policy decisions and requires ongoing supervision and management of that process by the departmental decision-makers who are experts in the field." (at para 50, quoted by Davis J at 287e)

Davis J held that this case is not a case where it could be said that the administrator has struck a reasonable balance or that the court should refrain from interfering in the discretionary decisions of an administrator. He stated:

> "In the present dispute, the interference by a court required by applicant does not breach the principle pf separation of powers. It is for the executive and/or Legislature to craft policy and for the executive to seek the most appropriate manner in which to implement such policy. However, policy needs to be implemented within the framework of our constitutional system. To the extent that the implementation of policy is irrational, inexplicable and unreasonable, a court must interfere to hold the executive accountable to proper compliance with the values of the Constitution; irrationality, inexplicability and unreasonableness (as defined in PAJA and interpreted in *Bato Star* at paragraphs 44-45) are three qualities which a decision cannot embrace if it is to be valid in a constitutional state. For this reason, the general position is that the second respondent is entitled to formulate and implement a policy for the allocation of valuable fishing rights and the courts should respect this role and their lack of institutional equipment to decide policy matters which relate to allocation of resources.
>
> In the present dispute, however, the results produced by the application of the formula developed by Prof Butterworth on behalf of the first ad second respondent has produced results, (marginal differences from the earlier application notwithstanding) which appear to be no less irrational, inexplicable and unreasonable than those which were considered by the SCA.
>
> On [counsel for the respondents]'s own test gleaned from the data of Harms JA [in] the SCA judgment, the results produced are not justifiable. Whether the formula or the information fed into the formula is the cause of the result produced is not the issue upon which a decision can be made based on these papers. The results produced…are so similar to those which were the subject of the first case that, based on the reasoning employed in that case, the legal consequences of an application of section 6(2)(h) of PAJA must be the same." (at 287h-288d)

Section 6(2)(i) - action otherwise unconstitutional or unlawful

The judgment in ***Kemp NO v Van Wyk* 2005 (6) SA 519 (SCA)** did not deal with the provisions of PAJA explicitly. The comments made, however, are usefully considered under this heading: classified under the common-law grounds for review, the complaint was that the decision-maker had failed to apply his mind to the issue before him and had not properly considered the appellant's application. This common-law ground could be captured under section 6(2)(e)(iii) or (vi), or even (h) - but the generality of the challenge in this case is such that it would fit most comfortably into subsection (2)(i).

The case involved an application by the appellant to import animals into South Africa from Zimbabwe. The Animal Diseases Act 35 of 1984 prohibits the importation of animals into South Africa without a permit issued by the

Director of Animal Health (the first respondent into the country in this case). The appellant had made an unsuccessful application to import 98 Sable antelope, and approached the Pretoria High Court to review the refusal of his application (at para 2). Material to the case is the fact that about a year before the appellant made the application, the Directorate of Animal Health took the policy decision to place an absolute embargo on the importation of animals to the country from Zimbabwe, because measures to control foot-and-mouth disease in that country had broken down (at para 3). The appellant's argument was essentially that in light of the existence of the embargo, the respondent had failed to consider the appellant's application on its merits. The application was thus not properly evaluated and the respondent's failure to properly consider the application before refusing it was unlawful as a result. The court considered and responded to the appellant's argument:

> "It was submitted that the first respondent's reliance upon the existence of the embargo in making his decision excluded the proper exercise of his discretion and for that reason he acted unlawfully. What he was required to do, so it was submitted, was to consider the proposals that were put forward by the appellants, in isolation of the existing embargo, and to refuse the application only if those proposals were demonstrably inadequate to obviate the risk of the disease being introduced. I do not think that is correct. That would suggest that the first respondent's function was limited to adjudicating upon the adequacy of preventative measures that were proposed by potential importers, and that he was not entitled to initiate, and then enforce, preventative measures devised by himself, which is manifestly not so.
>
> . . . .
>
> If the decision to impose the embargo was itself lawful (and there is no suggestion that it was not), I do not think the first respondent was called upon (though it was open for him to do so) to re-evaluate its imposition merely because he was presented with an alternative proposal that might have been equally effective. He was entitled to evaluate the application in the light of the directorate's existing policy and, provided that he was independently satisfied that the policy was appropriate to the particular case, and did not consider it to be a rule to which he was bound, I do not think it can be said that he failed to exercise his discretion." (at para 10)

Nugent JA, for the court, began his judgment by setting out the principles of administrative law applicable when a decision is made in the light of a policy decided upon by an organ of the executive:

> "A public official who is vested with a discretion must exercise it with an open mind but not necessarily a mind that is untrammelled by existing principles or policy. In some cases, the enabling statute may require that to be done, either expressly or by implication from the nature of the particular discretion, but, generally, there can be no objection to an official exercising a discretion in accordance with an existing policy if he or she is independently satisfied that the policy is appropriate to the circumstances of the particular case. What is required is only that he or she does not elevate principles or policies into rules that are considered to be binding with the result that no discretion is exercised at all. Those principles emerge from the decision of this Court in *Britten and Others* v Pope 1916 AD 150 and remain applicable today." (at para 1).

In light of these views, the appeal was dismissed.

Section 7 - Procedure for review

In ***Trend Finance (Pty) Ltd and another v Commissioner for SARS and another*** **[2005] 4 All SA 657 (C)** (see above section 3, section 5 and section 6) the respondents opposed the relief sought in terms of PAJA on the grounds that the applicants had failed to exhaust internal remedies as required by section 7(2)(a). The challenge was based on an allegation that the Controller for Customs, Cape Town (acting on the authority of the Commissioner for SARS) had erred in charging a certain amount of duty fees on goods the applicants were seeking to import into South Africa. The judge, Van Reenen J, dealt with this argument as follows:

> The respondents; counsel contended that this Court could not entertain granting prayer 2, because the first applicant had failed to comply with the provisions of section 7(2)(a) of PAJA which preclude a court from reviewing administrative action thereunder unless nay internal remedy provided for 'in any other law' has first been exhausted. They identified section 93(2) of the Customs [and Excise Act 91 of 1964] as such a remedy. The said subsection provides as follows:
>
> > 'The Commissioner may, on good cause shown mitigate or remit any penalty incurred under this Act on such conditions as the Commissioner may determine.'
>
> In my view, all that sub-section does is to confer a discretionary power on the Commissioner. It does not prescribe a specific remedy which an aggrieved party is obliged to invoke. Accordingly, such a party's choice of remedies remains unimpaired. The respondents' counsel, in my view correctly, did not identify the appeal procedure referred to in section 77B(1) of the Customs Act as

such a remedy as it clearly is merely a permitted alternative to the institution of proceedings eg a review. In the circumstances I incline to the view that the applicants are not precluded from seeking the relief claimed in prayer 2 of the notice of motion." (at para 69)

Nichol and another v Registrar of Pension Funds and others **[2006] 1 All SA 589 (SCA)** also concerned the application of section 7(2)(a) of PAJA. The first appellant had been a member of the Sage Schachat Pension Fund until it was merged with two other pension funds in 1998. The basis of the first appellant's complaint was that he and other members of the fund had not been consulted prior to the merger of the funds. Since the Sage Schachat fund was a smaller fund and in a more favourable surplus position than either of the other funds, the merger was prejudicial to his interests. The Sage Schachat fund surplus would "effectively be diluted by the cross-subsidisation of the other funds" (at para 4). Although the appellants did not mention PAJA in any of their papers, it was common cause between the parties that PAJA would apply (at para 8). The respondents argued that the application for review was rightly dismissed by the court a quo because the appellants had not exhausted all internal remedies as required by section 7(2)(a) of PAJA before approaching the court for relief: section 26 of the Financial Services Board Act 97 of 1990 establishes the Financial Services Appeal Board and regulates the circumstances under which parties may appeal against a decision in terms of the Act. Comparing the provisions of section 7(2)(a) to the common-law position, Van Heerden JA said:

"Under the common law, the mere existence of an internal remedy was not, by itself, sufficient to defer access to judicial review until the remedy had been exhausted. Judicial review would in general only be deferred where the relevant statutory or contractual provision, properly construed, required that the internal remedies first be exhausted. However, as pointed out by Iain Currie and Jonathan Klaaren [in *The Promotion of Administrative Justice Act Benchbook* at 182], 'by imposing a strict duty to exhaust domestic remedies, [PAJA] has considerably reformed the common law', It is now compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies unless exempted from doing so by way of a successful application under section 7(2)(c). Moreover, the person seeking exemption must satisfy the court of two matters: first, that there are exceptional circumstances and second, that it is the interests of justice that the exemption be given. (at para 15, footnotes omitted)

In considering the circumstances alleged by the appellant to be exceptional, the judge noted that a strong case on the merits, without more, does not constitute exceptional circumstances (at para 24). The appellant in this case had not relied on any facts other than those going to the merits of his case to allege exceptional circumstances. The court was not able to find exceptional circumstances for the purposes of section 7(2)(c), nor could it find that it was in the interests of justice for the court to determine the merits. The appeal was accordingly dismissed.

Section 8 - Remedies

In ***Foodcorp (Pty) Ltd v Deputy Director-General: Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management and others*** **[2006] 1 All SA 277 (C)** (see above under section 6) the court was seized with an application seeking the review and setting aside of a decision very similar to a decision taken by the same body involving the same applicant already set aside in a previous judgment. For this reason the court was urged to exercise the power conferred on it in section 8(i)(c)(ii) of PAJA and substitute the respondents' decision with its own. Despite recognising that there were indeed exceptional circumstance that might justify such a course the court declined to follow it, since its decision might affect other rights-holders involved prejudicially. Davis J held:

"I have arrived at this conclusion reluctantly because this is the second time in which the allocation by first and second respondent has been found to have been unreasonable. However, given the polycentric nature of this task, prudence and the limits of institutional competence dictate that this Court should not assume the role of a fish allocater." (at 289a-b)

In ***Radio Pretoria (geregistreer ooreenkomstig artikel 21 van die Maatskappywet van SA van 1973 soos gewysig) v Voorsitter van die Onafhanklike Kmmunikasie-owerheid van SA en 'n ander*** **[2006] 1 All SA 143 (T)** (see above under section 6), the applicant sought the review and setting aside of the first respondent's decision to refuse an application for a four-year community radio broadcasting licence. The applicant also prayed in its notice of motion that the court exercise its discretion

and make the decision it argued the first respondent should have made. The judge declined to do so, holding that a court of review will only adopt this course in exceptional circumstances:

> "Slegs in uitsonderlike gevalle waar 'n beslissing ter syde gestel is, soos op gronde van vooroordeel of erge onbevoegdheid aan die kant van die oorspronklike besluitnemer, sal die hersieningshof sy eie diskresie uitoefen om die aangevraagde bevel te verleen." (at 152d)

Although the judge did not refer explicitly to section 8 of PAJA in this regard, his comments mirror the position as set out in section 8(1)(c)(ii)(aa) of PAJA.

By contrast, the applicant in ***Dunn v Minister of Defence and Others*** **2006 (2) SA 107 (T)** (see above under section 1, section 3 and section 6) was successful in his claim for exceptional relief in terms of section 8. The case concerned a challenge to the process by which one Coetzee, the fourth respondent, had been appointed to a post in the Department of Defence for which the applicant had applied. Having held that the irregularities in the process were so serious and fundamental that they had to be regarded as fatal to the proceedings in which they occurred, Van Rooyen AJ continued that it would not be in the interests of justice that the appointment of Coetzee be set aside (at para 42). Section 8(1)(c)(ii)(bb) allows a court of review to direct the administrator who takes a reviewable decision to pay compensation to the aggrieved party in exceptional circumstances. The judge saw the following factors as relevant in his conclusion that the case presented exceptional circumstances:

> "The absence of respect for imperative procedure; the insouciance displayed towards mandatory departmental policy and procedure; the secretive manner in which Coetzee's selection and appointment took place; the selective manner in which the record was furnished; the disingenuous explanation for not proceeding with the interview to which Dunn was invited after the matter had already been decided upon; the various versions proffered for the procedure that was followed and the conflict between such versions and the documents pertaining to them; the prejudice which Dunn suffered." (at para 43)

The crisp reason for ordering the respondents to pay compensation to the applicant, however, was that there was no other relief available to him: he was the victim of procedurally unfair and unlawful administrative action, where it would be contrary to the interests of justice for that administrative action to be set aside and remitted to the administrator or reconsidered by the court itself (in terms of section 8(1)(c)(ii)(aa)). Compensation was the only means by which the applicant's rights could be vindicated.

MISCELLANEOUS

Section 1 of the Constitution - the doctrine of legality

In ***Van Zyl and others v Government of RSA and others*** **[2005] 4 All SA 96 (T)** (see above under section 1) the applicants sought the review and setting aside of a decision by the South African government not to engage in diplomatic relations with the government of Lesotho in order to protect the applicants' property rights and interests in that country. The facts and principles raised by the case are set out by Patel J:

> "The applicants requested the second respondent to afford diplomatic protection to them. The request was for the second respondent, in his executive capacity as the President to take diplomatic action on behalf of the Republic of South Africa against the Kingdom of Lesotho. It was argued by Mr Dugard that the President was under a duty towards the applicants on the basis alleged by them to extend 'effective' diplomatic protection…. The President dispatched a *Note Verbal* to the GoL [government of Lesotho] drawing its attention to the applicants' claim and in doing so he adopted a nuanced approach upon having considered the applicants' request and reacted appropriately. The government has a broad and extremely wide discretion, and how best to provide and in what form diplomatic protection it can offer. The choices and considerations open to the President were and are within the exclusive purview of foreign relations between the first respondent and the GoL. The exercise of the discretion is invariably influenced by political and economic considerations rather than the legal merits of the particular claim." (at para 44, referring to *Kaunda and Others v President of the RSA and Others* 2005 (4) SA 235 (CC))

The limits of the decision-making power held by the respondents in this case, are nevertheless set by the Constitution. Patel J held that the extent to which a court could interfere in the exercise of the respondents' discretion in this regard was determined by the following considerations:

> "*First,* it [the executive] must not infringe any provision in the Bill of Rights and *secondly,* it is clearly constrained by the principles of legality and *thirdly,*
>
> '…it is implicit in the Constitution, the President must act in good faith and must not misconstrue the powers.'" (at para 51, quoting *President of the Republic of SA v South African Rugby Football Union* 2000 (1 SA 1 (CC))

Patel J noted that there may be instances where the Constitution and the Bill of Rights do not provide for effective review of state actions, and that this will be the case where "the decision does not limit any fundamental rights and is concerned primarily with the conduct of foreign relations" (at para 54). The only basis for review, Patel J went on, lies in the principle of legality and the rule of law. In this case and cases like it, there is an extremely limited basis for review, since the courts "cannot assume the role of a super-executive in matters that are peculiarly and exclusively within the domain of the executive" (at para 57). Relying heavily on the Constitutional Court's decision in the *Kaunda* matter, Patel J concluded that the respondents' decision was rational in the circumstances, and could not be set aside as inconsistent with the principle of the rule of law:

> "[H]aving regard to the applicable policy considerations…the respondents rationally determined that they could not accede to the applicants' request for diplomatic protection as of right. Therefore, none of the grounds upon which the applicants seek to have the decisions of the respondents set aside as prayed for…and in seeking a declarator…can be sustained." (at para 70).

In ***Chairperson: Standing Tender Committee and others v JFE Sapela Electronics (Pty) Ltd and others*** **[2005] 4 All SA 487 (SCA)** (see above under section 1 and section 3) the Department of Public Works awarded three contracts for the refurbishment of prisons to Nolitha Electrical and Construction (Pty) Ltd, the second appellant. The award of the contracts was challenged by JFE Sapela Electronics (Pty) Ltd (the first respondent) and JFE Power Distribution (Pty) Ltd t/a JFE Reticulation (the second respondent). The salient facts are that in respect of all three contracts, Nolitha was able to offer a tender price substantially lower than competing tenders. This was due to certain assumptions on the part of Nolitha. The independent consultant assessing the tenders made this clear on two occasions. In regard to the tender price quoted for part of the work in one of the prisons, the consultant stated:

> "In our opinion the low rates are misleading or the tenderer used low rates to justify a low installation cost based on the speculation that electrical heaters will replace the entire steam installation." (at para 6)
>
> "Abnormally low rates; lower than market related prices appear in Installation A - Hot water Generation Systems. Average price for this installation is R194 000 (tenders 4 & 5) whilst Nolitha's price is R1 606. We are of the opinion that the reason for these low rates is due to the tenderer's speculation that some of these installations shall fall away or be part of a different [Department of Public Works] contract in the near future." (at para 10)

The court, per Scott JA, had regard to the requirements of the Preferential Procurement Policy Framework Act 5 of 2000 ("Preferential Act"). The Preferential Act sets out a system for the assessment of tenders. The crucial part of the Preferential Act for this case is that in order for a tender to eligible for consideration it must be "an acceptable tender". This is defined in section 1 as "any tender which, in all respects, complies with the specifications and conditions of tender as well as the tender document" (at para 11). The court also noted that the Preferential Act is legislation contemplated in section 217 of the Constitution, which reads:

> "(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
>
> (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for-
>
> (a) categories of preference in the allocation of contracts; and
>
> (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented."

The court went on to hold that the definition of "acceptable tender" has to be interpreted against the background of the principles and values underlying section 217. This section requires a system for procurement which is "fair, equitable, transparent, competitive and effective". The court stated:

> "In other words, whether 'the tender in all respects complies with the specifications and conditions of tender as set out in the contract documents' must be judged against these values. Merely because each item is priced does not mean that there was proper compliance. What the Preferential Act does not permit a tenderer to do is in effect omit from his tender a whole section of the work itemised in the bill of schedules and required to be performed. A tenderer who is permitted to do this has an unfair advantage over competing tenderers who base their tenders on the premise, inherent in the tender documents, that all the work itemised in the schedule of quantities is to be performed. Whether work may later be omitted is of no consequence. What is imperative is that all tenderers tender for the same thing. By tendering on the basis that certain work will not be required a tenderer is able to reduce his price to the detriment of other tenderers, and almost certainly also to the detriment of the public purse since he is likely to load other items to the detriment of the employer. Such a tender offends each of the core values which section 217(1) of the Constitution seeks to uphold. It would not be a tender which is acceptable within the meaning of the Preferential Act." (at para 14)

The court concluded that awarding the contract to what is in effect an unacceptable tender was in breach of the principle of legality:

> "It is well established that the Legislature and executive in all spheres are constrained by the principle that they may exercise no power and perform no function beyond those conferred on them by law. This is the doctrine of legality…. The acceptance by an organ of state of a tender which is not 'acceptable' within the meaning of the Preferential Act is therefore an invalid act and falls to be set aside." (at para 11)

[NOTE: This decision could have been reached had the court relied on section 6(2)(f)(i) of PAJA.]

***Sebenza Forwarding & Shipping Consultancy (Pty) Ltd v Petroleum Oil and Gas Corporation of SA (Pty) Ltd t/a Petro SA and Another* 2006 (2) SA 52 (C)** (see above under section 1) was judgment on an application to amend pleadings. The facts appear in the discussion of the case above. In considering whether the applicant had a triable issue, and therefore whether the amendment should be granted, the court considered whether a decision by the second respondent, the Minister of Mineral and Energy Affairs, was reviewable. The alleged decision was the decision not to institute an investigation in terms of section 1E(6) of the Central Energy Fund Act 38 of 1977 into alleged irregularities the contract between the applicant and the first respondent. Bozalek J held that there was at least a possibility that the decision would fit the definition of administrative action in section 1 of PAJA. If he was wrong on this point, however, he held that the decision nonetheless remained subject to review as an exercise of public power (at para 34, relying on *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) and *Pharmaceutical Manufacturer Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC)). Bozalek J said:

> "These cases, whilst observing a distinction between matters which are administrative and executive in nature, hold nevertheless that the labelling of a decision as 'executive' does not necessarily insulate it from judicial scrutiny. These remain exercises of political power which are reviewable if they fail to meet the standards of legality or rationality. There are indications, moreover, that these standards are by no means a numerus clausus. In *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC) (2004 (10) BCLR 1009) the Constitutional Court held, per Chaskalson CJ, as follows (at para [80]):
>
> 'If government refuses to consider a legitimate request, or deals with it in bad faith or irrationally, a court could require government to deal with the matter properly. Rationality and bad faith are illustrations of grounds on which a court may be persuaded to review a decision. There may possibly be other grounds as well and these illustrations should not be understood as a closed list.' (My emphasis.)
>
> [35] Currie and De Waal [*The Bill of Rights Handbook,* 5 ed at 13] relying on the decision in Pharmaceutical Manufacturers, state that:
>
> 'The rule of law therefore means more than the value neutral principle of legality. It also has implications for the content of law and govern-

> ment conduct. In this regard it has both procedural and substantive components. The procedural component forbids arbitrary decision-making. Not only the executive, but Parliament itself may not act capriciously or arbitrarily.'" (at paras 34-35, footnotes omitted)

An application for review would raise a triable issue in that a court seized with such an application would have to consider it on its merits. The amendment was therefore granted.

One final case deserves mention under this section. In ***Micro Finance Regulatory Council v AAA Investment (Pty) Ltd and Another*** **2006 (1) SA 27 (SCA)** (the High Court case from which this case was an appeal is reported in the October 2004-May 2005 edition of this Newsletter), the appellant appealed against a decision of the Pretoria High Court in which rules it had made in its function as the body authorised to regulate the micro-lending industry had been set aside. While the High Court held that the appellant, in making these rules, was exercising a public power that therefore had to conform to principles of administrative justice, the SCA held that the appellant is rather to be seen as a private company authorised to regulate the activities of those who choose to subject themselves to its authority. It is therefore not exercising a public power - but a private one:

> "The company is not, and does not purport to be, a public regulator with authority unilaterally to exercise powers over outside parties. It is a company that conducts business as a private regulator of lenders who choose to submit to its authority by agreement. In regulating micro-lenders who agree to such regulation, it does not purport to be exercising legislative or other public powers that require a constitutional or legislative source. It purports only to regulate those who are willing to submit to its regime and the source of its authority to do so is their consent." (at para 24)

The respondent appealed to the Constitutional Court in May of this year. Judgment has been reserved.

Common-law review - ultra vires

The first applicant in ***Hos+Med Medical Aid Scheme and Others v Kalipa and Others*** **[2005] 4 All SA 208 (T)** (see below under audi alteram partem) was a medical aid scheme registered in terms of the Medical Schemes Act 131 of 1998 ("MSA"). The second to seventh applicants were trustees of the scheme. They had been removed as trustees of the scheme by members of the scheme at an annual general meeting held on 13 August 2004. The first eight respondents were elected as "interim trustees" at the same AGM. The applicants challenged the validity of the decision by which they were removed as trustees.

Sections 24(3)(a) and 24(6) of the MSA provide that members of the board of trustees of a medical aid scheme must be fit and proper persons to hold office as trustees. Section 29 of the MSA provides that the Registrar of Medical Schemes shall not register a medical aid scheme unless provision is made in the scheme's rules for the appointment of a board of trustees and the amendment of the rules in accordance with section 31 of the MSA (at paras 19-20). Rule 17 of the medical aid scheme's rules in this case governed the appointment and removal of trustees. The relevant parts of the Rule 17 were as follows:

> "17.11 A member of the Board of Trustees shall cease to hold office if…
> 17.11.4 He is removed by the Court from any office of trust on account of misconduct, or…
> 17.11.8 He is removed from office by the Council [for Medical Schemes] in terms of section 46 of the [MSA]." (quoted at para 22)

The second to seventh applicants were purportedly removed from office by the members of the scheme at the AGM in August 2004. At the same meeting, the first to eighth respondents were purportedly elected as a new board. This new board proceeded to approve a new rule for the medical aid scheme that allowed members of the scheme to remove trustees from office by resolution (at para 33). The applicants' argument was therefore that the there was no provision empowering the members of the scheme to remove the second to seventh applicants from office as trustees, and that the resolution purportedly doing so was ultra vires and unlawful (at para 29). Patel J upheld this argument, agreeing that the members did not have the power to remove trustees at an AGM by resolution (at para 31). The rules prevailing at the time of the AGM allowed the removal of trustees only on the grounds set out in rule 17. These rules did not

allow removal by resolution. Further, the "new rules" purportedly adopted at the AGM had neither been submitted to nor approved by the Council in terms of section 31 and were consequently not valid. In regard to the subsequent action of the new board of trustees approving the new rule, he held:

> "Mr Swart [for the applicants] rightly submitted that the respondents were aware of the illegality of their conduct that they sought albeit invalidly to introduce a rule in the Scheme's rules entitling members at a general meeting to remove a member of the board of trustees. This was indeed an impermissible and an unlawful conduct." (at para 35).

[NOTE: The judge in this case did not consider whether the challenged resolution by the scheme's members fell within the purview of PAJA. If it did, though, the resolution could have been impugned in terms of section 6(2)(f)(i).]

In ***Democratic Alliance Western Cape and others v Western Cape Minister of Local Government and another*** **[2006] 1 All SA 384 (C),** the applicant challenged the invocation by the first respondent of section 106(1)(b) of the Municipal Systems Act 32 of 2000. That section allows an MEC to institute an investigation against a municipality or members of a municipality if he or she has reason to believe that serious malpractice has occurred. The section reads:

> "If an MEC has reason to believe that a municipality in the province cannot or does not fulfil a statutory obligation binding on that municipality or that maladministration, fraud, corruption or any other serious malpractice has occurred or is occurring in a municipality in the province, the MEC must-
>
> . . . .
>
> (b) if the MEC considers it necessary, designate a person or persons to investigate the matter."

The facts of the case are easily set out. Schedule 6B of the Constitution makes provision for members of municipal councils to change their party allegiance without losing their membership during a floor crossing window of fourteen days in September. On the eve of this window in 2004, one Mr Carelse, at that time a DA councillor, deposed to an affidavit alleging that he had been intimidated by the DA, allegedly in an attempt to discourage his imminent defection to the ANC. The first respondent then instituted an investigation into the conduct of the applicant on the basis that Carelse's allegations gave him reason to believe that the applicant was guilty of malpractice. The question answered by the court was thus whether section 106(1)(b) had been properly invoked by the first respondent. Meer J indicated that in terms of the subsection, reason to believe there has been malpractice is a jurisdictional fact conferring the power to institute an investigation. Without such reason to believe, the MEC has no power to institute an investigation:

> "In order for the provisions of section 106(1)(b) to have been properly invoked, the first respondent, as the MEC or the member of the Western Cape Provincial Executive Council responsible for local government in the province, must have had *reason to believe* that a *serious malpractice* had occurred or was occurring". (at para 24)

The judge also made it clear that "reason to believe" is an objective term to be assessed from the perspective a reasonable person in the position of the decision-maker - the first respondent in this case:

> "It is accepted that the test as to whether there is 'reason to believe' is objectively determined and must be constituted by facts giving rise to such belief. The belief itself must be rational or reasonable and whilst it has been recognised that the phrase 'reason to believe' places a much lighter burden of proof on an applicant than the phrase *the Court is satisfied*, 'a blind belief, or a belief based on such information or hearsay evidence as a reasonable man ought or could not give credence to, does not suffice." (at para 25, footnotes omitted. Meer J referred here to the cases of *London Estates (Pty) Ltd v Nair* 1957 (3) SA 591 (D); *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A); *United Democratic Front and Another v Acting Chief Magistrate, Johannesburg* 1987 (1) SA 413 (W).)

On reviewing the facts of the matter Meer J found that it could not be said that objectively speaking, a reasonable person in the position of the MEC would have held the belief that serious malpractice had been or was being committed by the DA in the relevant municipality. At most, the judge held, it could be concluded that since Carelse had been facing disciplinary proceedings by the DA and had been asked to resign his position in the DA, he had felt intimidated (at para 40). Based on this conclusion it had to be found that the jurisdictional fact for

the exercise of the power in terms of section 106(1)(b) had not been established, that the MEC was not authorised to act in terms of that section and that institution of the investigation in terms of the section was ultra vires and unlawful, and had to be set aside.

A similar argument was raised in ***Chairpersons' Association v Minister of Arts and Culture and Others*** **2006 (2) SA 32 (T)** (see above under section 4). The respondents in this case effected the change of the name of the town Louis Trichardt to Makhado Town, purportedly in terms of the South African Geographical Council Act 118 of 1998. In terms of section 9(1)(d) of the Act, the second respondent - the Council - must recommend geographical name changes to the first respondent. It is within the competence of the first respondent to approve and thereby effect these changes. "In other words", Legodi J held, "for the first respondent to make a decision under section 10(1) there must have been a recommendation by the second respondent under section 9(1)(d)" (at para 20). In this case the applicant argued that there had been no such recommendation and that, in the absence, thereof, the first respondent had acted ultra vires and unlawfully in approving the name change.

On the papers the judge found that no recommendation had been made by the second respondent, but that a recommendation had been made by the Director-General of the Department of Arts and Culture. It was submitted that such a recommendation could not substitute a recommendation by the second respondent (at para 21). The judge, however, accepted that argument that the Act contemplated certain functions of the second respondent being fulfilled by the Director-General:

> "I was urged by counsel on behalf of the respondents to find that the Director-General's office is a secretarial office of the second respondent established in terms of s 6 of the Act. Subsection (1) thereof provides that the executive functions of the council, ie the second respondent, must be performed by a section established by the Director-General in terms of the Public Service Act. Subsection (2)(a) provides that the functions of the section are to perform the administrative and secretarial services. In my view therefore, the Director-General would have carried out the mandate of the second respondent in submitting the applications and expressing the mandate as he did. I am satisfied that the second respondent did make a recommendation to the first respondent in regard to the only name which was proposed in the application forms by the third respondent." (at para 22)

The court found that the first respondent was therefore competent to approve the name change.

In ***Minister of Trade and Industry of RSA v Farocean Marine (Pty) Ltd*** **[2006] 1 All SA 644 (C)** the plaintiff sought repayment with interest of an amount of R1 723 861 from the defendant. The amount was paid to the defendant in terms of the General Export Incentive Scheme (GEIS), but as a result of allegedly fraudulent representations made by the defendant to the plaintiff. The defendant raised a special plea of absence of locus standi in defence, arguing that in terms of the GEIS, only the Director-General of the Department of Trade and Industry can institute action to recover amounts paid in terms of the GEIS. The defendant argued that the Minister was therefore not authorised to institute action and had acted ultra vires in doing so in this case. The fact that the defendant relied on the GEIS - a policy document - raised interesting questions of administrative law for the court:

> "It is conceded by the plaintiff that the GEIS scheme as a policy document has pro tanto the force and effect of legislation. This being so, defendant argues, it must be interpreted as if it was a statute.
>
> If one equates policy to a statute, then in interpreting the policy, the courts are enjoined to apply the principles of administrative law. In terms of the basic principles of administrative law power may only be exercised by a person or body upon whom it is conferred by the enabling provision. Baxter Lawrence *Administrative Law* at 426 states:
>
> 'Power is not conferred upon "the administration" generally, and any power which is conferred may be exercised by the office holder or body upon which it was conferred alone. If someone else purports to exercise the power, the latter's act is simply *ultra* vires and invalid.'
>
> Following upon the above, defendant argues that as the Minister is not referred to in clause 3.11 of the GEIS guidelines and all the power specifically devolves upon the Director-General, the Minister has no locus standi to institute the action and its first special plea to that effect must accordingly be upheld. (at paras 10-11)

Waglay J held that although the GEIS lent itself to the interpretation contended for by the applicant, responsibility for administering funds lay with the Department as a whole. Relying on administrative law principles, he stated that the Minister, as the office ultimately responsible for the Department, has the authority to institute legal proceedings in this regard.

> "Although the GEIS scheme *has pro* tanto the force and effect of legislation, it is not legislation; it is implemented through guidelines directed at the Director-General, who, at all times acts as an officer of the Department. The Director-general initiates the investigation and determines whether recovery is necessary. Should the party concerned not be amenable to repaying the amount allegedly owed, the Department then takes the necessary legal action to recover. In this action the claimant is the Department, and there is nothing wrong if it is done as in the present instance with the Department being represented by the Minister.
>
> This is so since in any administrative hierarchy (such as a State department) there is deconcentration of powers and functions:
>
> '...because it becomes impossible for the principle organ in the hierarchy to exercise all powers and perform all functions. Often the exercise of the powers and the performance of the functions demand a special expertise which makes it essential that another body or organ within the same hierarchy should deal with the matter.'
>
> M Wiechers: *Administrative Law* 1985
>
> Notwithstanding the special expertise required, the ultimate responsibility for the exercise of power nonetheless rests, by virtue of the doctrine of Ministerial Responsibility, with the relevant Minister. Accordingly, defendant's first special plea is liable to be dismissed." (at paras 19-21)

In the case of ***Rates Action Group v City of Cape Town* 2006 (1) SA 496 (SCA),** the applicant, a voluntary association representing a number of ratepayers' associations in Cape Town, challenged the respondent's authority to impose a new systems of charging for municipal sewerage and refuse removal services. The new system, adopted towards the end of 2002, imposed a fee composed of two elements: the relevant component was a rate for services based on the value of the property. This made up about half of the fee (the other half was arrived at on the basis of a consumption-based tariff). Only about 20% of charges under the previous system were based on a value-based rate, and the new system thus meant a significant increase in service charges for property-owners whose property was valued at over R128 509,80 (at paras 6-7). The appellant's argument was that the relevant legislation in force at the time, the Local Government: Municipal Systems Act 32 of 2000 (Systems Act) does not confer authority on the respondent to charge a rate. (The court relied on *Gerber v Member of the Executive Council for Development Planning and Local Government, Gauteng* 2003 (2) SA 344 (SCA) to define "rate" as: "Assessment levied by local authorities for local purposes at so much per pound of assessed value of buildings and land owned.") The appellant argued that the respondent is entitled in terms of the legislation to charge a tariff only - the latter defined as a "table of charges for items and services" (at para 13). The appellant argued that the respondent's power to charge for services was set out in section 74 - headed "Tariff policy" - and section 75 - setting out the requirement to promulgate by-laws to give effect to tariff policy. The court said:

> "The appellant argues that all charges for services must be made in terms of these sections. Thus there must be a tariff, and, before that is adopted, there must be a tariff policy and by-laws promulgated. When the City imposed the sewerage-service and refuse-removal charges, no policy had been adopted and no by-laws passed. Accordingly, the argument goes, the charges based on the value of the property, rather than on use of the service, are not permitted in terms of the Systems Act. The appellant finds support for these contentions in s 74(2)(b), which requires that the amount paid for services by a user should 'generally be in proportion' to their use; and in s 74(2)(d), which requires that tariffs must reflect the costs 'reasonably associated' with rendering the service." (at para 16)

In the court a quo the appellant conceded that the Local Government Transition Act 209 of 1993 conferred the power on the relevant local authority to charge rates. Although the appellant contended in the court a quo that the Systems Act had impliedly repealed the relevant sections of the 1993 Act, the court a quo found that the sections had not been repealed and continued to exist alongside the Systems Act. By the time the case came before the SCA, however, section 179 of the Local Government: Municipal Finance Management Act 56 of 2003 had expressly repealed the relevant sections of the 1993 Act. The court

found, however, that the Systems Act contained no express prohibition on the charging of property value-based rates, and rejected the appellant's argument that the decision to do so was unlawful:

> "Counsel for the appellant conceded, however, that a municipality may use revenue accumulated through the collection of rates for general services - those to which all members of the public have access, such as the use of library facilities, or the maintenance of roads and pavements. Indeed, in *South African Municipal Workers Union v City of Cape Town* 2004 (1) SA 548 (SCA) ([2003] 4 All SA 348), this Court found that the use of some municipal services, such as a city police service, cannot be measured such that it can be charged to individuals. He conceded also that the Act does not preclude the use of rates for the purpose of subsidising households. He argued, however, that where consumption is attributable to a particular user, such as the use of electricity, water, sewerage services and refuse removal, the service charge must be based on use and determined in accordance with a tariff.
>
> There is, however, no limitation to be found in s 74, or in any other part of the Systems Act, on the uses to which rates may be put nor on the number of rates that may be charged by a municipality. There is nothing to preclude the levying of several rates in respect of a property. And the Systems Act does not oblige a municipality to charge for services in accordance with a tariff - it simply entitles it to do so provided that a tariff policy has been adopted and by-laws promulgated.
>
> In the circumstances the argument for the appellant that the City was not permitted to charge a rate for the sewerage services and refuse removal cannot succeed. Since this was the only issue argued on appeal, the appellant must fail." (at paras 18-20)

Common-law review - audi alteram partem

In ***Hos+Med Medical Aid Scheme and Others v Kalipa and Others*** **[2005] 4 All SA 208 (T)** (see above under ultra vires), the second to seventh applicants, members of the board of trustees of the first applicant, were held to be unlawfully removed from office by a resolution at an annual general meeting by the members of the first applicant. The resolution was thus set aside for want of lawfulness, since the action was not empowered either by the Medical Schemes Act 131 of 1998 or by the first applicant scheme's own rules. In relation to the requirements of procedural fairness, however, Patel J held that even if the members were empowered to remove the trustees by resolution, the trustees had not been given prior notice or an opportunity to respond to allegations of misconduct on which their removal was premised:

> "However, assuming that even if it is important that the Scheme's trustees could be removed by members at a general meeting then it is implicit that the trustees should have been afforded an opportunity to respond to any prejudicial allegations upon which their removal was based." (at para 34)

[NOTE: The judge in this case did not consider whether resolution removing the trustees fell within the purview of PAJA, and thus did not test the procedure by which the resolution was passed against the provisions of PAJA. If PAJA did apply to the resolution, though, the procedure would have had to comply with the requirements of section 3 of PAJA and could have been impugned in terms of section 6(2)(c) if it failed to meet those requirements.]

The applicant in ***Aol v Minister of Home Affairs and Others*** **2006 (2) SA 8 (D)** was an Ugandan national seeking refugee status in South Africa. Civil unrest in her own country, she claimed, had forced her to flee south to South Africa through Tanzania and Mozambique, eventually arriving in Durban. After applying to the Department of Home Affairs for refugee status in 2000, she was informed in 2002 that her application had been refused (at 9J-10C). She was advised that she could appeal against this decision to the fourth respondent, the Appeal Board. This she did, and was advised to appear before one Marobe - apparently a member of the Appeal Board. Marobe told the applicant that her meeting with her constituted a hearing before the Appeal Board, and also that she (Marobe) would submit her evidence to the Appeal Board for consideration. Some time later the applicant was informed that the Appeal Board had dismissed her appeal. Based on the applicant's pleadings, Swain J summarised the issues before the court as follows:

> "1. Whether, in the light of the contents of annexure A to the applicant's founding affidavit, a decision had ever been taken by the relevant refugee status determination officer (hereafter referred to as RSDO) to refuse the

applicant's application and if not, whether the Appeal Board therefore had jurisdiction to hear the appeal in terms of s 26(2) of the Act?

2. Assuming that the hearing afforded to the applicant was purely an enquiry or investigation by the fourth respondent of its own accord in terms of s 26(3)(d) of the Act, whether the applicant was ever given any notice of the actual appeal hearing by the third or fourth respondents, and if not, whether the decision could stand?
3. Whether the fourth respondent was obliged to bring to the attention of the applicant, the prejudicial information contained in the said United Kingdom Country Information and Policy Unit Report and to afford the applicant an opportunity to deal with this information before making a formal decision?" (at 11G-I)

The judge considered each of these in turn. In regard to the first, he found that the evidence did not support a conclusion that a decision on the applicant's initial application had been properly taken in accordance with section 24 of the Refugee Act 130 of 1998:

> "It is common cause that the applicant was interviewed by a RSDO at the Durban regional office of the Department of Home Affairs. After an unexplained delay of two years the applicant was notified by way of annexure A of the rejection of her application. The notification is on the letterhead of the Department of Home Affairs and signed by an unidentified person on behalf of the Director-General of this Department. It states 'the Department of Home Affairs has come to the conclusion that your claim does not meet the refugee definition'. On the face of it the decision was taken by the Department and there is no evidence to indicate that the decision was taken by a RSDO, being the only person authorised to take such a decision in terms of the Act.
> When I raised this issue with Ms Singh, who appeared for the third respondent, she fairly conceded that there was no evidence on the papers to show that the decision had been taken by a RSDO, which is fatal to the jurisdiction of the Appeal Board to hear the appeal of the applicant." (at 12F-I)

Turning to the second issue, the judge found that if the interview with Marobe was a hearing of the Appeal Board the Appeal Board had not been properly constituted by a quorum of four members when it heard the appeal (at 11C). If the Appeal Board considered the matter at a later stage, however, the applicant had been denied the right to make representations to the Board:

> "[T] he applicant contends that the audience before Marobe was the appeal hearing, whereas the third respondent contends that this was purely a preliminary enquiry or investigation, with the appeal hearing having been held at a later stage. I must say I have serious reservations about the notice given to the applicant to make a personal appearance before the Appeal Board, being annexure B to applicant's founding affidavit, being consistent with what was purely a preliminary investigation. Be that as it may, I will assume without deciding in favour of the respondent that this was the case. The issue that then arises is what notice the applicant was given of the actual appeal hearing. There is no evidence of any notice being given to the applicant of the hearing. A cornerstone of the audi alteram partem rule is that an individual is granted a proper opportunity to present his case. Baxter Administrative Law at 545.
>
> Except where legislation prescribes otherwise, administrative bodies are at liberty to adopt whatever procedure is deemed appropriate, provided this does not defeat the purpose of the empowering legislation and provided that it is fair. The issue is whether the affected individual is entitled to be present at, and make representations to the Board in question. Although s 26(3)(e) provides that the Appeal Board has the power to require the applicant to appear before it and provide information, this does not in itself provide a right to the applicant to do so. Section 26(4) however provides as follows:
>
> 'The Appeal Board must allow legal representation upon the request of the applicant.'
>
> This provision in my view, carries two necessary implications:
>
> 1. The applicant is entitled to be present at the hearing. If not, why would provision be made for an entitlement to be legally represented at the hearing?
> 2. The applicant must be given notice of the hearing to be able to request and arrange legal representation at the hearing.
>
> When I put this aspect to Ms Singh she again fairly conceded that no notice was given to the applicant of the appeal hearing, and that this would be fatal to the proceedings of the Appeal Board." (at 12I-13F)

Finally, Swain J held that the applicant was never given an opportunity to respond to evidence - which the applicant herself had not put before the Board - on which the Board relied to make its decision. The judge held:

> "[I]n Kotze v Minister of Health 1996 (3) BCLR 417 (T) it was held that the Director-General's consideration of information which did not form part of the applicant's application, amounted to a denial of procedurally fair administrative action. The appli-

> cant should have been given an opportunity to deal with any information which did not form part of his application, and which was later taken into account when considering the application." (13J-14B)

The Appeal Board's decision was therefore set aside; but because the judge found that the original decision to refuse the applicant refugee status could not be said to have been properly made, the Appeal Board never had jurisdiction to consider an appeal. There was therefore no point in remitting the matter to the Appeal Board, and the judge ordered that the applicant be given an opportunity to re-apply for refugee status in terms of the Refugee Act (at 14E-H).

Common-law review - delay

Compass Waste Services (Pty) Ltd v Northern Cape Tender Board and others **[2005] 4 All SA 425 (NC)** (see above under section 6) concerned an application to review and set aside the award of a contract for waster disposal service in the Northern Cape. The applicant company was an unsuccessful tenderer for the contract. Before considering the merits of the application, the court, per Lacock J, applied itself to two preliminary issues flowing from the delay in instituting the motion for review. As to delay generally, the court held that

> "It is trite that an applicant who fails to bring a review application within a reasonable time may forfeit his right to have the administrative action complained of reviewed and set aside, unless the delay is satisfactorily explained." (at para 9.1)

In this case, the first respondent's decision to award the tender to the second respondent was communicated to the applicant on 29 October 2003. The application for review was filed only five months later, on 25 March 2004, and heard only on 18 April 2005 (at para 9.2). Although the court stated that on the face of it this would appear to be an unreasonably long delay, the explanation given was acceptable. It is unnecessary here to review precisely the explanation given by the applicant for its delay. It is enough to note that the court found that the delay had been due to no fault of the applicant, and the applicant should not forfeit his rights to administrative justice as a result of the delay (at para 9.4). **[NOTE: The application was not brought in terms of PAJA, and the time periods stipulated in PAJA within which an application for review must be brought were not considered by the court.]**

The court then considered whether the delay had nevertheless rendered any decision on the application of merely academic value. The court noted that a court will usually not entertain a dispute between parties to answer hypothetical, abstract or academic questions (at para 10). The court held in this case that the dispute had become moot, and no purpose would be served by considering the merits of the case. The contract awarded to the second respondent was for a period of 24 months. By the time the application was heard on 15 August 2005, there was barely two months left to run on the contract. The application fell to be dismissed on this basis alone for two reasons. First, if the applicant was successful and the matter was remitted to the first respondent, the probabilities of it properly considering all the tenders before the expiry of the contract were "for all practical purposes non-existent" (at para 10.2). Second, if the applicant's prayer compelling the first respondent to award the contract afresh for a further two years, the Northern Cape Department of Health - which had devised the tender specifications - would be compelled to accept services in terms of a contract it had devised two years previously (at para 10.4).

A similar comment was made by the SCA in the case of ***Chairperson: Standing Tender Committee and others v JFE Sapela Electronics (Pty) Ltd and others*** **[2005] 4 All SA 487 (SCA)** (see above under section 1, section 3 and section 1 of the Constitution - the doctrine of legality). The court held that although the award of the tender to one tenderer stood to be set aside, the effluxion of time had the effect that it was no longer practicable for the start tender process again for the outstanding work (at para 25). The court referred to *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) in stating that "In appropriate circumstances a court will decline, in the exercise of its discretion, to set aside an invalid administrative act" (at para 28). The court noted in this respect that section 7(1) of PAJA gives statutory recognition to the rule that inordinate delay will, in effect, "validate" what would otherwise be a nullity (at para 28).

In ***Seodin Primary School and others v MEC of Education, Northern Cape and others*** **[2006] 1 All South Africa 154 (NC)** (see above under section 3 and section 6), the court agreed with the principle that a court of review will not grant the relief claimed if such relief would be of no practical value to the parties and of academic value only. The court was not here concerned with the question of delay in proceedings specifically, although the case involved the interest that school children have in attending school - where a delay of a mere six months carries some weight. After holding that the relief sought by the applicants should be denied on the merits (see discussion above), the court, per Kgomo JP, went on to hold that even if they had been correct on the merits the court would have been slow to set aside the decision of the administrator:

> "I make bold to say that even if the applicants had made out a compelling case on the merits for the setting aside of the impugned decisions, which they have not moreover are not now asking for, I cannot fathom how we could have excluded the affected children from the schools without the intercession of a curator ad litem to independently and in an unbiased fashion see to the children's best interests. If need be we would have mero motu appointed a curator ad litem. See *Du Toit v Minister of Welfare and Population Development* 2003 (2) South Africa 198 (CC) at 201G-202A whereat the Court held:
>
> '(The children) enjoyed the support of Advocate Stais of the Johannesburg Bar, who was appointed by this Court to act as curator ad litem to represent the interests of the children who are the subject of this application and also other children born and unborn who may be affected by this Court's order. In matters where the interests of children are at stake, it is important that their interests are fully aired before the Court so as to avoid substantial injustice to them and possibly others. Where there is a risk of injustice, a court is obliged to appoint a curator to represent the interests of children. This obligation flows from the provisions of s 28(1)(h) of the Constitution which provides that:
>
> "Every child has the right-
>
> . . .
>
> (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result."
>
> Advocate Stais filed a thorough report concerning the welfare of the adoptive children of the second applicant and children generally. He also made submissions at the hearing of the matter'
>
> This is an authoritative statement which is binding on us." (at para 41, footnotes omitted)

The court concluded that because of the prejudice to the children's best interests contained in the setting aside of the respondents' decision, the court held that the decision could not have been set aside in any event. The remedy sought by the applicants, "innocuous" as it may have appeared, "harbours hidden prejudicial consequences for the unrepresented affected children. We cannot, in these circumstances come to the applicants' rescue." (at para 45).

THE PROMOTION OF ACCESS TO INFORMATION ACT (PAIA)

In ***Transnet Ltd and another v SA Metal Machinery Co (Pty) Ltd*** **[2006] 1 All SA 352 (SCA)** the respondent was an unsuccessful tenderer for a contract for the removal of galley wastes from ships in Cape Town Harbour. The respondent successfully sought from the Cape High Court an order directing the appellant to disclose certain information. The information sought was the tender document submitted by the successful tenderer, Inter Waste (Pty) Ltd. Inter Waste did not oppose the application, but the appellant did, and on appeal sought to rely on sections 36 and 37 of PAIA to resist disclosure of the information. Section 36 allows an organ of state to refuse a request for information on the grounds that it forms part of a third party's trade secrets, financial or technical data or information the disclosure of which would be prejudicial to that third party. The relevant parts of the section read:

> "Subject to subsection (2), the information officer of a public body must refuse a request for access to a record of the body if the record contains-
>
> (a) trade secrets of a third party;
>
> (b) financial, commercial, scientific or technical information, other than trade secrets, of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party; or
>
> (c) information supplied in confidence by a third party the disclosure of which could reasonably be expected-
>
> (i) to put that third party at a disadvantage in contractual or other negotiations; or

(ii) to prejudice that third party in commercial competition."

Section 37(1)(a) allows the refusal of a request if the disclosure of a third party's information might open the disclosing body up to an action based on a breach of confidence:

> "Subject to subsection (2), the information officer of a public body-
> (a) must refuse a request for access to a record of the body if the disclosure of the record would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement".

The court, per Howie P, held that PAIA is enacted to manage and balance the competing rights of members of the public. On the one hand, everyone has the right of access to any information held by the state in section 32(1) of the Constitution. On the other hand, the Constitution confers an entrenched right to privacy, and the Appellate Division has recognised that companies have a right to privacy in respect of sensitive and confidential information (at paras 8-9, referring to *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 451 (A)).

The court offered an interpretation of section 36(1) that focussed on the use of the term "likely" in paragraph (a) and "could reasonably be expected" in paragraph (c). It rejected Currie and Klaaren's view that the test in paragraph (c) is less stringent than that in paragraph (b). Howie P said in this regard:

> "In my view an interpretation that involves the use of degrees of probability creates the potential for confusion and could well lead to problems in the practical application of the legislation to concrete cases. 'Probable' is a word well known in the law. It should bear the same meaning in all situations absent indications to the contrary. The same considerations apply to the equivalents of 'probability'. 'likely' and 'likelihood'. The question remains whether the results specified in (c) were intended to be probable, not merely possible, consequences.
> . . . .
> What can be expected is accordingly the contemplation of something that will, not might, happen. If we say we are expecting somebody this evening we mean that we think the person will be coming, not merely might be.
>
> It follows that the difference between (b) and (c) of section 36(1) is to be measured not by degrees of probability. Both involve a result that is probable, objectively considered. The difference, in my view, is to be measured rather by degrees of expectation. In (b), that which is likely is something that is indeed expected. This necessarily includes, at least that which *would* reasonably be expected. By contrast, (c) speaks of that which '*could* reasonably be expected'. The results specified in (c) are therefore consequences (i) that could be expected as probable (ii) if reasonable grounds exist for that expectation." (at paras 40-42)

The appellant's contention was that based on the facts (set out by the court at paras 44-45), the disclosure of the information requested would give the respondents insight into the fruits of Inter Waste's research and enable the respondent to ride on Inter Waste's efforts by adjusting its business model accordingly (at para 46). The contested information was essentially the structure according to which Inter Waste had determined its rates for services tendered for. The court did not uphold the argument that disclosure of the information would lead to the adverse consequences set out in paragraphs (b) and (c) of section 36(1):

> "The first respondent's counsel countered [the appellant's] contention on a twofold basis. The first was that, as a matter of logic, it would be impossible to deduce Inter Waste's profit margin, for example, simply from knowing its rates. To do so necessitated knowing all the other variable and constant factors to which the appellant had referred and which it was not alleged the respondent had. On the assumption that all those factors comprised confidential information, the disclosure of which would later harm inter Waste, revealing the rates would not amount to such a disclosure in respect of any of the four items in question.
>
> As regards the price adjustment example based on reference to items 1 and 2, counsel argued that the rates would at most provide a rough indication of Inter Waste's prediction of the number of monthly removals. It could not lead to a precise enough answer to be useful to the respondent. It was submitted in the alternative, on the assumption that the rates could enable the respondent to make a precise deduction, the answer obtained could be of no use to the respondent either in respect of the tender in question or any tender called for in respect of a new contract from 2005 onwards." (at paras 47-48)

The appellant's argument based on section 37 was based on a clause in the contract concluded between the appellant and Inter Waste following the award of the tender. The relevant clause stated that the appellant would not "disclose the successful tenderer's tender price or

any other tendered prices as this is regarded as confidential information (at para 52). Disclosure of the information sought, the appellant argued, would breach this provision and expose the appellant to an action by Inter Waste (at para 53). The court took a different view, though. First, it held that the confidentiality clause referred only to the tender price and not the schedule of prices and quantities - the information actually sought by the respondent. In any case, Inter Waste had already consented to the disclosure of the tender price. The confidentiality clause was therefore no bar to disclosure of the tender price (at para 54). Second, the court held that the appellant bore a constitutional duty to conduct its operations transparently and accountably. Once it has entered into a commercial agreement, members of the public are entitled to know the expenditure such an agreement entails. The intention of the drafter of the confidentiality clause, as interpreted by the court, was that no competing tenderer should be entitled to know the tender prices of its competitors in the pre-award phase of the tender. It followed that once the contract was awarded,

> "the confidentiality clause, certainly insofar as the successful tenderer is concerned, was a spent force and offered Inter Waste no further protection from disclosure as regard its tender price"

The appeal was therefore dismissed.

ARTICLES AND REVIEWS

I M Rautenbach, "The limitation of rights and 'reasonableness' in the right to just administrative action and the rights to access to adequate housing, health services and social security" (2005) 4 *Tydskrif vir die Suid-Afrikaanse Reg,* 627. The article explores whether and to what extent the limitations clause in section 36 of the Constitution can be of use in determining the function of "reasonable" in sections 33, 26(2) and 27(2) of the Constitution.

Marinus Wiechers, "Quo vadis geregtelike hersiening van administratiewe handelinge?" (2005) 3 *Tydskrif vir die Suid-Afrikaanse Reg,* 469. The article traces the development of administrative law in South Africa from the pre-constitutional era to where it is today. It is argued that the new administrative law dispensation did not come out of the blue, but was the culmination of a project of reform and development that began even before the dawn of constitutional democracy in South Africa.

P J Visser, "Aspects of the application of the Private Security Industry Regulation Act 56 of 2001 outside South Africa" 134. With members of the South African private security industry active in countries beyond the borders of South Africa, questions are raised about the ability of our law to address the impact of these "international elements" on our security industry. The article identifies and evaluates the regulatory framework that applies outside the borders of South Africa.

P J Visser, "Regulation of the private security industry - scheme to avoid certain obligations in terms of the Private Security Industry Regulation Act 56 of 2001: *The Private Security Industry Regulatory Authority v The Association of Independent Contractors and Deyzel,* case no 127/2004 (SCA)" (2006) 69(1) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg,* 157. This is a review of a case concerned with the proper construction of legislation. The respondents to the case had attempted to avoid regulation as members of the private security industry, and argued that the legislation at issue did not apply to them.

Geo Quinot, "The regulation of in-flight films" (2005) 1 *Stellenbosch Law Review,* 45. The article examines the regulatory framework within which films are exhibited on board commercial airliners, and, by comparing it with the jurisdictional scheme within which airlines operate, attempts to establish the regulatory regime for in-flight films.