

May/June 2013

Ms REF Ugee is a citizen of a war-ravaged country in West Africa. She fled her country of birth, moving gradually southwards and entered South Africa after a long journey. Ms REF Ugee applies for asylum at the Department of Home Affairs in terms of section 21(1) of the Refugees Act 130 of 1998. Pending the outcome her application for asylum, she was granted an asylum seeker permit in terms of the Act, which allows her to stay temporarily in South Africa. Later, however, her application for asylum is rejected by the authorized refugee status determination officer without any input by Ms REF Ugee. No reasons were given, but it later transpired that the rejection was based on the informal notes of the refugee reception officer working in the refugee reception officer responsible for issuing her with the asylum seeker permit. From these notes the impression might be granted that the decision had been influenced by certain irrelevant factors suggesting bias on the part of the administrator. The Refugees Act makes provision for review by the Standing Committee and an appeal to the Appeal Board of a decision by a refugee status determination officer.

You are a legal advisor working at a non-governmental organization (NGO) called Consortium for Refugees and Migrants in South Africa (CRMSA). Ms Ugee approaches you for assistance on ways and means on how the NGO might be able to come to her assistance.

Answer the following questions and substantiate your answers.

Question 1

1.1 Briefly explain what an administrative-law relationship is. Do you think Ms REF Ugee is a subject of an administrative-law relationship? (6)

An administrative-law relationship is a relationship between two or more legal subjects in which one is a person or body who is clothed with state authority and is able to exercise the authority over the other. The exercise of power may affect the rights and/or interests of the person(s) in a subordinate position. It is therefore an unequal relationship. In a general administrative-law relationship the legal rules governing the relationship between the parties apply to all the subjects in a particular group. It is created by, changed and terminated by legislation. In an individual administrative-law relationship the rules apply personally and specifically between the parties. The relationship is created by individual administrative decisions.

In the set of facts, the individual administrative-law relationship is applicable since an individual relationship exists between Ms Ugee and the Department of Home Affairs.

1.2 Identify the administrative action in the in the set of facts. In your answer, you should give a full definition of the concept "administrative action" with reference to the provisions of the Promotion of Administrative Justice Act (PAJA) 3 of 2000. (13)

Section 1 of PAJA defines "administrative action" as any decision taken, or any failure to take a decision, by –

(a) an organ of state, when-

- (i) exercising a power in terms of the Constitution or a provincial constitution; or
- (ii) exercising a public power or performing a public function in terms of any legislation; or
- (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect.

There are exceptions to the definition. These exceptions are, however, not applicable to the given set of facts. The decision to reject Ms REF Ugee's application for asylum amounts to administrative action because it complies with the definition in that it involves a decision by an organ of state (the Department of Home Affairs, authorized refugee status determination officer in the Department of Home Affairs) exercising a public power or performing a public function in terms of any legislation which has adversely affected the rights of a person (Ms REF Ugee's) and which appears to have had a direct external legal effect.

1.3 Identify the organs of state in the given set of facts. Explain your answers with reference to the constitutional definition of organ of state. (6)

In terms of section 239 of the Constitution, the following are organs of state:

The Department of Home Affairs (any department of state or administration in the national, provincial or local sphere of government)

The authorized refugee status determination official who made the decision, the refugee reception officer, the Standing Committee and the Appeal Board in the Department of Home Affairs (any other functionary or institution (ii) exercising a public power or performing a public function in terms of any legislation)

Question 2

- 2.1.1 D
- 2.1.2 B
- 2.1.3 C
- 2.1.4 B
- 2.1.5 C

2.2 The set of rules clearly states that Ms Ugee's application for asylum was rejected by an authorized refugee status determination officer. Discuss the rules that apply when delegation of powers is permitted (in other words a particular task is performed by a duly authorized administrator). (5)

To "delegate" means to entrust a task, responsibility or power to somebody else – that is, to an agent of the original holder of the power. The purpose behind the delegation of powers is to facilitate the quick and efficient division of labour within the administration, since administrators and administrative bodies very often cannot cope with the exercise of all their administrative functions.

The following rules apply when delegation of powers is permitted:

- If the administrator is authorised to perform a particular action and this entails the exercise of discretion, the task concerned may not be delegated unless it is authorised by statute
- An administrator who exercises a discretionary power and makes a decision is not prevented from instructing a subordinate administrator merely to implement the decision
- An administrator must apply his/her mind to the matter when exercising discretion
- An administrator may appoint a fact-finding committee to assist, provided the actual discretion is ultimately exercised by the administrator

2.3 One of the rules of natural justice requires that the administrator should be impartial. Discuss the rule against bias with reference to the above set of facts. (7)

- Common-law rules of natural justice:

Audi alteram partem (to hear the other side before a decision is taken)

Nemo iudex in sua causa rule (no one should be judge in his own case – rule against bias/prejudice)

- The last rule is important in this context. In terms of this rule, the decision-maker must be, and must reasonably be perceived to be, impartial or unbiased. Rule against bias.

- The most common examples of bias are:

the presence of pecuniary/financial interest

the presence of personal interest – more evident in this set of facts

- In *Rose v Johannesburg Local Road Transportation Board* 1947 4 SA 272 (W), the chairman of the board responsible for the granting or refusal of transport licences was at the same time director of the three large taxi companies, and therefore biased. The court found that the reasonable person would realise that the chairman was indeed biased because of his financial interest in the taxi company.
- The test to determine bias was formulated by the Appellate Division in *BTR Industries SA v Metal and Allied Workers Union* 1992 3 SA 673 (A) as “the existence of a reasonable suspicion of bias satisfies the test and that an apprehension of the real likelihood that the decision maker will be biased is not a prerequisite for disqualifying bias”.
- In *SACCAWU v Irvin & Johnson* 1999 7 BCLR 725 (CC) the CC confirmed the correctness of the test in the BTR case. However, the CC decided to use the phrase “a reasonable apprehension of bias” rather than “a reasonable suspicion of bias”.
- The affected individual merely has to prove an appearance of bias rather than the existence of actual bias.
- In the given set of facts, one could argue that there was undoubtedly a reasonable apprehension of bias since the decision by the authorized refugee status determination officer was based on informal notes submitted by the refugee reception officer of the Department of Home Affairs.

2.4 PAJA gives effect to the right to reasonable administrative action by providing an individual the capacity under section 6(1) to institute judicial review proceedings on the ground that

The exercise of the power or performance of the function authorised by the empowering provision in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function (s 6(2)(h))

Discuss this ground of review.

(8)

The Constitutional Court gave meaning to the content of sec 6(2)(h) in the case of *Bato Star Fishing (Pty) Ltd v Minister of Environment Affairs* 2004 4 SA 490.

- O'Regan J emphasised the importance of reading section 6(2)(h) in line with the wording of section 33(1) of the Constitution.
- According to O'Regan J, the subsection must be construed consistently with the Constitution and in particular with section 33 which requires a simple test, namely that an administrative decision will be reviewable if it is one that a reasonable decision-maker could not reach. (also referred to in the study guide as the "simple" test)
- What constitutes a reasonable decision will depend on the circumstances of each case as it is context-based.
- O'Regan J proceeded to enumerate the following factors relevant to determining whether a decision is reasonable:
 - the nature of the decision
 - the identity and expertise of the decision-maker
 - the range of factors relevant to the decision
 - the reasons given for the decision
 - the nature of the competing interests involved
 - the impact of the decision on the lives and well-being of those affected

Question 3

3.1 Does the decision to reject the application by Ms Ugee for asylum constitute procedurally fair administrative action in terms of PAJA? (15)

Administrative action which materially and adversely affects the right or legitimate expectations of any person must be procedurally fair (s 3(1) of PAJA). Briefly, legitimate expectation means that the rules of fair procedure are extended to those cases where no vested right exists, but only a "legitimate expectation" of a benefit that may be granted or a benefit that will not be withdrawn before a hearing has occurred. This expectation is not merely a hope or wish, but based on something more concrete, such as an express promise, or a regular practice which can reasonably be expected to continue. It does not mean that the person is guaranteed success, but only that he should receive a hearing.

Fair administrative practice depends on the circumstances of each case (s 3(2)(a) of PAJA).

Mandatory requirements (these seem like a codification of rules of natural justice) (s 3(2)(b) of PAJA):

- Adequate notice of the nature and purpose of proposed action

- Reasonable opportunity to make representations
- Clear statement of administrative action
- Adequate notice of right of review or internal appeal
- Adequate notice of right to request reasons

Discretionary requirements (s 3(3) of PAJA):

- Opportunity to obtain assistance, even legal assistance in complex cases
- Opportunity to present and dispute information and arguments
- Opportunity to appear in person

Section 3(4) of PAJA states that the requirements in s 3(2) of PAJA may be departed from only if reasonable and justifiable. This is determined by taking all the relevant factors into account, which include:

- the objects of the empowering provision
- the nature and purpose of and need for the action
- the likely effect of the administrative action
- the urgency of the matter
- the need to promote efficient administration and good governance. (s 3(4)(b))

Section 3(5) of PAJA states that the administrator may also follow a different but fair procedure if the empowering provision authorises it.

Ms Ugee did not receive procedurally fair treatment in terms of PAJA because, inter alia, it was not given an opportunity to make representations, and was not given reasons for the administrative action. Sections 3(4) and 3(5) of PAJA do not seem to be relevant for present purposes.

3.2 Was Ms Ugee entitled to reasons for the decision to reject her application for asylum? Discuss fully with reference to PAJA. (10)

Yes PAJA provides the following on written reasons

- Section 5(1): requires the provision of written reasons at the request of any person whose rights have been materially and adversely affected by any admin action & who has not been given reasons
- Section 5(2): The administrator to whom the request is made must provide the person with adequate reasons in writing within 90 days of receiving the request
- Section 5(3): failure to provide adequate reasons in writing leads to adverse inference (action without good reason)
- Section 5(4): a refusal to furnish reasons must be reasonable and justifiable
- Section 5(5): provides for a procedure which is fair but different to that of subsection (2)
- Section 5(6): promoting efficient administration, the minister may at the request of the administrator, by notice in the Gazette, publish a list specifying any admin action, or a group/class of admin actions, in respect of which the administrator will automatically furnish reasons

Question 4

4.1 Discuss the powers of superior/senior administrators when exercising internal control. (5)

(1) The senior functionary or institution has the power to reconsider or re-examine – to “review” the decision and then to confirm it, set it aside or vary the decision. When a decision is varied the decision is substituted by another.

(2) The senior functionary or institution may consider the validity, desirability or efficacy of the administrative action in question. The controlling body may also take policy into consideration.

(3) Formal control is also exercised by examining the manner in which the decision was reached.

(4) Internal control, in the form of an internal appeal, does not give rise to a final and binding decision. As a result, the same matter may be raised again within the same departmental hierarchy.

4.2 List the grounds of review relating to the decision-maker (administrator) (s 6(2)(a)(i)-(iii) of PAJA). (4)

- Action known as ultra vires action – when the administrator was not authorised to take the action
- The administrator lacked specified qualifications
- The administrator exceeded the geographical limits of the powers conferred
- The administrator did not act in accordance with provisions relating to time
- Administrative actions exceed the objectives / purpose of the empowering provisions
- Unauthorised delegation of power
- *Nemo iudex in sua causa* (the rule against bias) – when an administrator was biased

4.3 List and explain various forms of judicial control. (10)

Statutory appeal

- The courts may hear appeals only where this is provided for by statute.
- An appeal may be lodged against a final decision or final order only, and not against a provisional order.
- Details regarding the appeal will appear in the relevant statute.

Judicial review

- The courts have inherent review jurisdiction in terms of the common law.
- It entails reviewing the legality of a decision.
- Review in terms of the Constitution, section 6 of PAJA, the Supreme Court Act or in terms of the relevant legislation
- Grounds of review: infringement of a fundamental right or failure to comply with section 6 of PAJA (the requirements of valid administrative action)

Interdict

- If the applicant fears and can prove that an action or impending action by the administrator will affect his rights, he may apply for an interdict restraining the administrator from carrying out its action.
- It is aimed at preventing unlawful administrative action.

Mandamus

- compels the administrator to perform some or other statutory duty.
- *Mandamus* cannot stipulate how power should be exercised.

Declaratory order

- used when there is a clear legal dispute or legal uncertainty regarding the validity of administrative action.
- also used to determine whether actual or pending administrative action is lawful.

Defence in criminal proceedings

- Administrative action may be challenged by raising its invalidity as a defence in criminal law.

4.4 Can Ms Ugee apply for judicial control?

(6)

No. Because there are some preconditions that have to be met before one can turn to judicial control which are;

1. The affected person must have locus standi (legal standing)

It is the capacity of a person to bring a matter to court.

The Constitution lists the persons who may approach the court:

- (a) Anyone acting in their own interest
- (b) Anyone acting on behalf of another person who cannot act in their own name
- (c) Anyone acting as a member of, or in the interest of, a group/class of persons
- (d) Anyone acting in the public interest
- (e) An association acting in the interest of its members.

2. All internal remedies must first be exhausted.

Section 7(2) of PAJA

Mrs Ugee has the locus standi but must first exhaust all the internal remedies before turning to a court of law for an appropriate remedy. The forms of internal control are

- Control by superior/senior administrators or specially constituted bodies/institutions
- Parliamentary control
- Control by public bodies and commissions, such as the public protector and the auditor-general

Oct/ Nov 2013

Mr Nkosi is the proud owner of a wine farm (commonly known as Blue Hills), which is situated in Constantia. On 1 October 2013 Mr Nkosi received a notice of expropriation in terms of section 7 of the Expropriation Act 63 of 1975 from the Minister of Public Works stating the following:

- The whole of erven 711 (commonly referred to as Blue Hills) will be expropriated
- The proposed date of expropriation is 1 December 2013
- The offered amount of compensation is R500 000

Mr Nkosi is aware of the fact that the Minister of Public Works does have the power to expropriate his property – this is clear in terms of section 2 of the Expropriation of 63 of 1975 – which states that the Minister may expropriate property for public purposes. However, Mr Nkosi is unaware of the reasons for the proposed expropriation. He was also not informed why the whole of his property should be expropriated. In addition, the market value of Blue Hills was estimated in October 2013 to be R20 million.

Answer the following questions and substantiate your answers.

QUESTION 1

1.1 Define “organ of state” with reference to the Constitution. Is there an organ of state in the set of facts? Give a reason for your answer. (8)

Organ of state is defined in section 239 of the Constitution and includes (a) any department of state or administration in the national, provincial or local sphere of government; or any other functionary or institution that (i) exercises a power or performs a function in terms of the Constitution or a provincial constitution; or (ii) exercises a public power or performs a public function in terms of any legislation. However, a court or a judicial officer is not included.

Yes, the Minister is an organ of state, since he is an official acting on behalf of the Department of Public Works. He is exercising a public power in terms of legislation.

1.2 Is there a general administrative-law relationship present in the set of facts? Give a brief reason for your answer. (3)

No, there is an **individual** administrative-law relationship, because the Minister’s decision only applies to Mr Nkosi and the relationship was created by an individual administrative decision. In an individual administrative-law relationship legal rules apply personally and specifically between the parties. In other words, the legal rules apply to specifically identifiable legal subjects. The content of the individual relationship will vary from case to case. Individual relationships are created by individual administrative decisions. Furthermore, individual relationships are not affected by new general legislative provisions, unless the amending Act specifically states that it affects the relationship.

1.3 List two binding sources of administrative law. (2)

Any two of the following:

- The Constitution
- Legislation (PAJA)
- Case law
- Common law
- Administrative practice/custom or usage

1.4 Is administrative action in evidence in the set of facts? In your answer, you should give a full definition of the concept “administrative action” with reference to the provisions of the Promotion of Administrative Justice Act (PAJA) 3 of 2000. (12)

Section 1 of PAJA defines "administrative action" as any decision taken, or any failure to take a decision, by -

(a) an organ of state, when-

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect.

There are exceptions to the definition. These exceptions are, however, not applicable to the given set of facts. The decision to expropriate Mr Nkosi's property amounts to administrative action because it complies with the definition in that it involves a decision by an organ of state (the Minister, the appointed person in the Department of Public Works) exercising a public power or performing a public function in terms of any legislation which has adversely affected the rights of a person (Mr Nkosi) and which appears to have had a direct external legal effect.

QUESTION 2

2.1 Answer the following questions. Each question is provided with a number of options as possible answers. Only one option/statement in each question is correct. You must, therefore, identify the correct option and write down the number of the option that you have identified next to the question number.

(The correct answers are marked in bold.)

2.1.1 The Minister's decision in the set of facts is an example of a...

(a) true administrative act.

(b) judicial administrative act.

(c) legislative administrative act.

(d) just administrative act.

2.1.2 Just administrative action is defined in section 33 of the Constitution. The term "... " can also be used to refer to just administrative action.

(a) proportionality.

(b) applying one's mind to the matter.

(c) reasonableness.

(d) fairness.

2.1.3 Consider the following statement: "Any administrator must act within the powers conferred on him or her by the empowering statute." Which requirement in section 33 of the Constitution resonates this statement?

(a) Procedural fairness

(b) Reasonableness

(c) Lawfulness

(d) Impartiality

2.1.4 The general rule regarding the delegation of powers is that the administrator who has authority to take administrative action must exercise that authority himself or herself. This principle was confirmed in the case of ... where Innes ACJ stated the following:

"Where the legislature places upon any official the responsibility of exercising a discretion which the nature of the subject-matter and the language of the section show can only be properly exercised in a judicial spirit, then that responsibility cannot be vicariously discharged."

(a) *University of Pretoria v Minister of Education* 1948 4 SA 79 (T)

(b) *SA Freight Consolidators (Pty) Ltd v Chairman, National Transport Commission* 1987 4 SA 155 (W)

(c) *Foster v Chairman, Commission for Administration* 1991 4 SA 403 (C)

(d) *Shidiack v Union Government* 1912 AD 642

2.1.5 Which of the following is **NOT** a form of abuse of power by an administrator?

(a) *audi alteram partem*

(b) *in fraudem legis*

(c) exercising power with an unauthorised purpose

(d) exercising power using an unauthorised procedure

2.2 Suppose the Minister's reason for the expropriation was that the Department of Public Works required Mr Nkosi's property in order to build a new house for the newly elected President of South Africa. Mention the three elements of "proportionality" and explain whether the Minister's decision to expropriate Mr Nkosi's property is reasonable (or not) with reference to these elements. (8)

The three elements are: suitability, necessity and weighing up advantages and disadvantages.

In accordance with the requirement of suitability, when exercising his or her powers, the administrator must choose only those means (from the variety of means available) that are most appropriate for achieving the desired end. In other words, there must be a rational connection between the end and the means. In the set of facts it is not clear whether the state really needs Mr Nkosi's property in order to build a new house for the President.

Necessity means that the administrator must take only such steps as are necessary if any prejudice to an individual is involved. In other words, the administrator must choose the action that causes least harm to those who will be affected by the measure. Mr Nkosi will lose his whole farm, it is not clear whether it is really necessary for the state to take his whole farm in order to build a house for the president.

Finally, weighing up the advantages and disadvantages is a very important requirement in that it requires weighing up the advantages and disadvantages, and considering the injury to the general public or the individual. The method or means must not be out of proportion to the advantages – the ends to the community. The disadvantage to Mr Nkosi is severe, he will lose his entire farm, while the state can build the house elsewhere.

2.3 PAJA gives effect to the right to reasonable administrative action. The Constitutional Court has given content to the relevant provision in PAJA that deals with reasonableness. Do you think Mr Nkosi's right to reasonable administrative action was infringed? Substantiate your answer with reference to PAJA and case law. (12)

PAJA gives effect to the right to reasonable administrative action by giving an individual the capacity under section 6(1) "to institute proceedings in a court or a tribunal for the judicial review of an administrative action" on the ground that:

- “the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is *so unreasonable that no reasonable person could have exercised the power or performed the function*” (section 6(2)(h))

The CC gave meaning to the content of sec 6(2)(h) in the case of *Bato Star Fishing (Pty) Ltd v Minister of Environment Affairs* 2004 4 SA 490. O’Regan J emphasised the importance of reading section 6(2)(h) in line with the wording of section 33(1) of the Constitution. According to O’Regan J, the subsection must be construed consistently with the Constitution and in particular section 33 which requires a simple test, namely that an administrative decision will be reviewable if it is one that a reasonable decision-maker could not reach. (also referred to in the study guide as the “simple” test)

What will constitute a reasonable decision will depend on the circumstances of each case as it is context-based.

O’Regan J proceeded to enumerate the factors relevant to determining whether a decision is reasonable. They include:

- the nature of the decision
- the identity and expertise of the decision-maker
- the range of factors relevant to the decision
- the reasons given for the decision
- the nature of the competing interests involved
- the impact of the decision on the lives and well-being of those affected

In this scenario one could argue that the Minister’s decision was not reasonable, since no reasons for the decision were given. The impact of decision also has a devastating effect on Mr Nkosi. The nature of the interests involved: Mr Nkosi’s house (personal property and livelihood), the building of a house for the President (no reason why it should be there). The impact: Mr Nkosi will lose his entire business.

QUESTION 3

3.1 Did the Minister comply with the mandatory requirements for procedural fairness? Explain the relevant provision in PAJA to substantiate your answer. (8)

Section 3(2)(b) of PAJA lists the mandatory requirements:

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

The Minister in the given set of facts only informed Mr Nkosi of the administrative action, ie that there will be an expropriation. The Minister did not comply with any of the other requirements.

3.2 If the Minister decides to depart from the requirements of fair procedure, as required by PAJA, section 3(4)(b) of PAJA lists certain factors to be considered to determine whether this decision to depart is reasonable and justifiable. List the factors as prescribed by section 3(4)(b). (5)

- the objects of the empowering provision
- the nature and purpose of and the need to take administrative action
- the likely effect of the administrative action
- the urgency of taking the administrative action or the urgency of the matter
- the need to promote an efficient administration and good governance

3.3 Suppose Mr Nkosi approached the Department of Public works and requested reasons for the Minister's decision. Would the Minister be obliged to provide Mr Nkosi with reasons? Substantiate your answer with reference to the relevant provisions in PAJA. (5)

Yes. Section 5(1) requires the provision of written reasons at the request of any person whose rights have been materially and adversely affected by any administrative action and who has not been given reasons for the action.

Section 5(1): Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.

The administrator (to whom the request is made) is obliged to give that person adequate reasons in writing within 90 days of receiving the request (s 5(2)). In other words, the administrator must provide adequate reasons.

3.4 Suppose the Minister responded to Mr Nkosi's request for reasons as follows: "The Department of Public Works requires the mentioned property in order to build a house." Do you think that this response provides an adequate reason? Substantiate your answer with reference to case law. (7)

- There must be a link between the administrative action and the reasons given.

- The reasons must “suit” the administrative action.
- What will constitute adequate reasons will depend on the circumstances of each and every case, that is, the context within which the decision is taken.
- In *Nomala v Permanent Secretary, Department of Welfare* 2001 8 BCLR 844 (E) the court found that the reasons given must be sufficient information for any disappointed applicant to prepare an appeal (the ticking of boxes in this instance disclose nothing of the reasoning process)
- In *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism v Bato Star Fishing (Pty) Ltd* [2003] 2 All Sa 616 (SCA) the court held that it is apparent that reasons are not really reasons unless they are properly informative. They must explain why action was taken or not taken, otherwise they are better described as findings or other information.
- In this scenario one could argue that the reason given by the Minister was vague and inappropriate, because it was insufficient. The reasons did also not suit the administrative decision.

QUESTION 4

4.1 Briefly explain the three forms of internal control. (6)

- control by superior/senior administrators or specially constituted bodies/institutions (a higher body/more senior person in the same department/office)
- parliamentary control (general administrative policy and matters of public concern may be questioned in Parliament)
- control by public bodies and commissions, such as the public protector and the auditor-general (Constitution has created a number of extrajudicial bodies/institutions that can assist in the creation of such awareness and knowledge and, therefore, in controlling state authority as well)

4.2 What are the powers of senior administrators when exercising internal control? (4)

- (1) The senior functionary or institution has the power to reconsider or re-examine – to “review” the decision and then to confirm it, set it aside or vary the decision. When a decision is varied the decision is substituted by another.
- (2) The senior functionary or institution may consider the validity, desirability or efficacy of the administrative action in question. The controlling body may also take policy into consideration.
- (3) Formal control is also exercised by examining the manner in which the decision was reached.

(4) Internal control, in the form of an internal appeal, does not give rise to a final and binding decision. As a result, the same matter may be raised again within the same departmental hierarchy.

4.3 Why should internal remedies first be exhausted before approaching a court of law? (2)

- It is unreasonable for a person to rush to court before his or her internal remedies have been exhausted.
- The internal remedies are usually cheaper and more expedient/easier to use.
- It helps to prevent the courts being overloaded with cases that may be more efficiently dealt with by the administration itself.

4.4 When would internal control not be the proper remedy? (7)

- (1) the case has already been prejudged by the administrator
- (2) the decision has been made in bad faith (*mala fide*), fraudulently or illegally, or has in effect not been made at all
- (3) the aggrieved party has an option whether to use the extrajudicial remedy or to proceed direct to judicial review (*Jockey Club of SA v Feldman* 1942 AD 340)
- (4) the administrative authority has come to an unacceptable decision as a result of an error of law (eg when the administrator by reason of "mistake of law" presumes that he or she has the authority to take action)
- (5) the administrative body concerned has agreed that judicial review proceedings may start immediately
- (6) the administrative body concerned has no authority to rectify the particular irregularity complained of
- (7) the internal remedy cannot provide the same protection as judicial review (For example, in *Msomi v Abrahams* 1981 (2) SA 256 (N) this was held to be a strong indication that internal remedies need not be exhausted.)

4.5 Would the judicial remedy of mandamus assist Mr Nkosi in this matter? Give reasons for your answer. (2)

No, an interdict would be better suited to stop the Minister from expropriating the land.

OR

Yes, to provide reasons.

4.6 List the orders that the court would be able to make in proceedings for judicial review with reference to PAJA. (4)

In terms of section 8(1)(a) the court may direct the administrator

- to give reasons, or
- to act in a required manner (mandamus)

In terms of section 8(1)(b) the court may make an order prohibiting the administrator from acting in a particular manner.

In terms of paragraph (c) the court may grant orders setting aside decisions of the administrator.

In terms of section 8(1)(d) the court can declare the rights of the parties involved.

The court can grant a temporary interdict (temporary relief): section 8(1)(e).

The court can make an order as to costs (section 8(1)(f)).

May/June 2014

Due to serious water shortages experienced during the past five years a local company in Sedgefield decides to build a factory for desalination of seawater. Erecting a desalination plant requires an environmental authorization by the Western Cape Department of Environmental Affairs and Development Planning in terms of the National Environmental Management Act (NEMA) 107 OF 1998 and an environmental impact assessment (EIA) in terms of the Environmental Impact Assessment Regulations of 2010 which, amongst others, provide for public participation (the giving of input and objections) by interested and affected parties. The relevant Department considers the EIA carried out and grants the authorization to build the facility for desalination of seawater. However, the local ratepayer's association is against the construction of the desalination plant because of the expensive infrastructure required and the negative impact on environment. The association alleges further that it was not asked for any input in the matter and the Department did not provide any reasons for their decision.

Answer the following questions and substantiate your answers.

Question 1

1.1 Briefly explain what an administrative-law relationship is with reference to the given facts. (7)

An administrative-law relationship is a relationship between two or more legal subjects in which one is a person or body who is clothed with state authority and is able to exercise the authority over the other. The exercise of power may affect the rights and/or interests of the person(s) in a subordinate position. It is therefore an unequal relationship. In a general administrative-law relationship the legal rules governing the relationship between the parties apply to all the subjects in a particular group. It is created by, changed and terminated by legislation.

The general administrative-law relationship applies to the set of facts because the decision of the Western Cape Department of Environmental Affairs and Development Planning to authorize to build a factory of desalination of seawater in terms of NEMA affects the general public in Sedgefield

1.2 Identify the administrative action in the in the set of facts? In your answer, you should give a full definition of the concept "administrative action" with reference to the provisions of the Promotion of Administrative Justice Act (PAJA) 3 of 2000. (13)

Section 1 of PAJA defines "administrative action" as any decision taken, or any failure to take a decision, by –

(a) an organ of state, when-

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect.

There are exceptions to the definition. These exceptions are, however, not applicable to the given set of facts. The authorization by the Western Cape Department of Environmental Affairs and Development Planning amounts to an administrative action.

The Western Cape Department of Environmental Affairs and Development Planning is a state organ clothed with state authority and its decision in terms of legislation, materially and adversely affect the rights of the public and has a direct, external effect.

1.3 Identify the organs of state in the given set of facts and substantiate your answer with reference to the definition of “organ of state” as provided in section 239 of the Constitution (2)

Section 239 of the Constitution states:

“organ of state” means

a) any department of state or administration in the national, provincial or local sphere of government; or

b) any other functionary or institution

I. exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

II. exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.

In the given facts, The Western Cape Department of Environmental Affairs and Development Planning is an organ of state in terms of section 239(a) (any department of state or administration in the national, provincial or local sphere of government)

1.4 List the important statutory source of administrative law and explain why this is so. (3)

Legislation

It is the primary source of administrative power as it adds flesh to the bones of principles, norms and values - expressed in the Constitution.

Question 2

2.1.1 D

2.1.2 B

2.1.3 C

2.1.4 B

2.1.5 C

2.2 Explain what a legislative act is and indicate when such an action takes effect or becomes operative. (7)

Legislative acts involve the making and issuing of delegated legislation when authorized by enabling legislation. e.g. Regulations (subordinate legislation) in terms of empowering / original legislation. They have the following characteristics:

- Have a specific form and is published in the Government Gazette (e.g. the Refugees Act)
- General relations are created, varied and/or ended by admin legislative acts

- Specific rules apply to the adoption, repeal or amendment of all legislative admin acts
- The power to delegate a legislative power exists only when there is express statutory authority
- The regulations may not be in conflict with any statute or restrict the provisions of a statute and they may not be vague or unclear

Legislative admin acts takes effect an individual as soon as the regulation or proclamation has been promulgated and/or the stated date of commencement arrives

2.3 List and describe the different forms of delegation. (8)

Mandate

- Is an instruction or command to execute a decision. The senior administrator makes a decision and then hands it over to another administrator to implement or execute. There is no proper delegation of power.

Deconcentration

- is a division of labour and a quick and more efficient execution of a government function. The following rules apply;

1. The head of the administrative hierarchy may withdraw the power at any time
2. The delegate acts in the place of the delegator and the function is regarded as performed by the delegator.
3. The delegator still exercise control over the delegate and may intervene. The delegator is not *functio officio* until the conclusion of the matter
4. Authoritative functionaries within the same hierarchy cannot get involved in legal disputes with one another

Decentralisaton

- Here the delegator transfers certain powers and functions to an independent body. There is a complete delegation of power and the delegate becomes fully responsible for the exercise of the power. The delegator controls and supervises the delegate by way of;
- the appointment of the body's members; and
- appeal to or review by the delegator of the decisions made.

Question 3

3.1 Discuss the Constitutional Court's interpretation of the right to reasonable administrative action as set out in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490. (10)

- According to O'Regan J, the subsection must be construed consistently with the Constitution and in particular with section 33 which requires a simple test, namely that an administrative decision will be reviewable if it is one that a reasonable decision-maker could not reach. (also referred to as the "simple" test)

- What constitutes a reasonable decision will depend on the circumstances of each case as it is context-based.
- O'Regan J proceeded to enumerate the following factors relevant to determining whether a decision is reasonable:
 - the nature of the decision
 - the identity and expertise of the decision-maker
 - the range of factors relevant to the decision
 - the reasons given for the decision
 - the nature of the competing interests involved
 - the impact of the decision on the lives and well-being of those affected

3.2 Does the decision to grant the environmental authorization constitute procedurally fair administrative action in terms of PAJA? (15)

When administrative action adversely affects people generally, impersonally and non-specifically then one can safely assume that section 4 of PAJA will apply.

Mandatory requirements are as follows;

Section 4(2): The holding and procedure for a public enquiry

The administrator must conduct the public enquiry himself or appoint a suitably qualified person, or a panel of persons to do so. The administrator must set procedure in which the public enquiry must be conducted in accordance. A notice containing a brief summary of the report of the enquiry must be published in English and one other official language in the Gazette or relevant provincial Gazette.

Section 4(3): A notice and comment procedure

The administrator must;

- (1) take appropriate steps to communicate the administrative action to those likely to be materially and adversely affected by it and call for comments from them;
- (2) consider any comments received;
- (3) decide whether or not to take the administrative action, with or without changes; and
- (4) comply with the prescribed procedures relating to notice and comment procedures.

Section 4(4): Allowing for a departure from the requirement of fair administrative procedure affecting the general public where it is reasonable and justifiable to do so.

From the set of facts the department did not comply with any of the above mandatory requirements for procedural fairness in terms of PAJA and therefore the decision does not constitute procedurally fair administrative action.

3.3 Was the Western Cape Department of Environmental Affairs and Development Planning obliged to give reasons for its decision in terms of PAJA? (5)

YES

PAJA on written reasons

- Section 5(1): requires the provision of written reasons at the request of any person whose rights have been materially and adversely affected by any admin action & who has not been given reasons
- Section 5(2): The administrator to whom the request is made must provide the person with adequate reasons in writing within 90 days of receiving the request
- Section 5(3): failure to provide adequate reasons in writing leads to adverse inference (action without good reason)
- Section 5(4): a refusal to furnish reasons must be reasonable and justifiable
- Section 5(5): provides for a procedure which is fair but different to that of subsection (2)
- Section 5(6): promoting efficient administration, the minister may at the request of the administrator, by notice in the Gazette, publish a list specifying any admin action, or a group/class of admin actions, in respect of which the administrator will automatically furnish reasons

Question 4

4.1 The Public Protector plays an important role in the control of administrative action. What are the powers of the Public Protector? (5)

The South African Public Protector has the following powers (s 182(1)):

- Investigate any conduct in state affairs, or in the public administration in any sphere of government that is alleged or suspected to be improper or to result in any impropriety or prejudice;
- To report on that conduct;
- To take appropriate remedial action
- Has additional powers and functions prescribed by national legislation.

4.2 List and discuss the prerequisites/preconditions set above an affected person may take administrative action on judicial review. (12)

The affected person must have locus standi (legal standing)

The capacity of a person to bring a matter to court.

The Constitution lists the persons who may approach the court:

- Anyone acting in their own interest
- Anyone acting on behalf of another person who cannot act in their own name
- Anyone acting as a member of, or in the interest of, a group/class of persons
- Anyone acting in the public interest
- An association acting in the interest of its members.

All internal remedies must first be exhausted.

Section 7(2) of PAJA

4.3 Name and discuss which form(s) of judicial control you would advise the local ratepayer's association to pursue in order to challenge the administrative action. (8)

Review

All higher courts have inherent review jurisdiction in terms of the common law. Ouster clauses are no longer constitutional in terms of s34 of the Constitution. Review may take place in terms of the Constitution, PAJA, specific statutes, Supreme Court Act (if review of lower courts' decisions).

The grounds of review must be stated and broadly rests on an infringement of a fundamental right or challenges the validity of administrative action. It only decides on the validity of the decision, but may go beyond the record

Interdict

An interdict is aimed at preventing unlawful administrative action which will prejudice the rights of the affected party. There must be a clear legal interest which is being threatened; No alternative satisfactory remedy available; The party will suffer irreparable damage or prejudice if the interdict is not granted.

Declaratory order

This remedy is applied for where there is a clear dispute or uncertainty about the validity or effect of administrative action, even where other remedies may also be relied on. The court will give a definitive answer to the question of what the legal position is regarding any particular person or a given state of affairs. It clarifies the 'status' of a matter

Oct/Nov 2014

Jetset Projects has lodged an application in terms of the Cape Land Use and Planning Ordinance 15 of 1985 for the rezoning of its property zoned for “residential purposes” to “business” to build a several story high boutique hotel on the Atlantic seaboard of Cape Town. The relevant department of the City of Cape Town considers the application and approves the application for rezoning. However, the local ratepayer’s association is against the construction of the hotel since not only will the building of the hotel take from them their beautiful sea-view and thus infringe their right to environment that is not harmful to their well-being but will also lead to huge traffic congestion since the road along the sea front and that the department did not provide any reasons for the decision.

Answer the following questions and substantiate your answers.

Question 1

1.1 Briefly define “state authority” (4)

This is the public power exercised by an organ of state or natural or juristic person over another person or body in a subordinate or subservient position. The exercise of such STATE authority could affect the rights or interests of the last-mentioned.

1.2 Give an example of a general administrative-law relationship. (2)

The relationship between refugees generally and the Department of Home Affairs.

1.3 Define “organ of state” with reference to the Constitution. Is there an organ of state in the set of facts? Give a reason for your answer. (7)

Organ of state is defined in section 239 of the Constitution and includes (a) any department of state or administration in the national, provincial or local sphere of government; or any other functionary or institution that (i) exercises a power or performs a function in terms of the Constitution or a provincial constitution; or (ii) exercises a public power or performs a public function in terms of any legislation. However, a court or a judicial officer is not included.

Yes, the City of Cape Town is an organ of state exercising a public power in terms of legislation.

1.4 Identify the administrative action in the in the set of facts? In your answer, you should give a full definition of the concept “administrative action” with reference to the provisions of the Promotion of Administrative Justice Act (PAJA) 3 of 2000. (13)

Section 1 of PAJA defines "administrative action" as any decision taken, or any failure to take a decision, by –

(a) an organ of state, when-

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect.

Question 2

- 2.1.1 D
- 2.1.2 A
- 2.1.3 B
- 2.1.4 C
- 2.1.5 D

Question 3

3.1 What are the rules that apply when delegation of powers is permitted? (4)

- If the administrator is authorised to perform a particular action and this entails the exercise of discretion, the task concerned may not be delegated unless it is authorised by statute
- An administrator who exercises a discretionary power and makes a decision is not prevented from instructing a subordinate administrator merely to implement the decision
- An administrator must apply his/her mind to the matter when exercising discretion
- An administrator may appoint a fact-finding committee to assist, provided the actual discretion is ultimately exercised by the administrator

3.2 What are the forms of abuse of power by the administrator? (3)

- Unauthorised or ulterior purpose
- Exercising power using an unauthorised procedure
- Exercising power using ulterior motives (acting in *fraudem legis*)

3.3 Briefly explain how PAJA gives effect to the right to reasonable administrative action. (2)

PAJA gives effect to the right to reasonable administrative action by giving an individual the capacity under section 6(1) "to institute proceedings in a court or a tribunal for the judicial review of an administrative action" on the ground that:

- "the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have exercised the power or performed the function" (section 6(2)(h))

3.4 Briefly explain the application of the doctrine of legitimate expectation. (4)

Legitimate expectation means that the rules of fair procedure are extended to those cases where no vested right exists, but only a legitimate expectation of a benefit that may be granted or a benefit that will not be withdrawn before a hearing has occurred.

3.5 Does the department's decision to grant the application for rezoning comply with the mandatory requirements for procedural fairness? Explain your answer with reference to the relevant provision in PAJA and the requirements listed there. (6)

When administrative action adversely affects people generally, impersonally and non-specifically then one can safely assume that section 4 of PAJA will apply.

Mandatory requirements are as follows;

Section 4(2): The holding and procedure for a public enquiry

Section 4(3): A notice and comment procedure

Section 4(4): Allowing for a departure from the requirement of fair administrative procedure affecting the general public where it is reasonable and justifiable to do so.

From the set of facts the department did not comply with any of the above mandatory requirements for procedural fairness in terms of PAJA

3.6 Can the local ratepayer's association request for reasons for the department's decision to grant the application for rezoning and, if so would the department be required to give reasons in terms of PAJA? (6)

Section 5(1) of PAJA provides that;

Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.

The ratepayer's association met the requirements of section 5(1) since it is materially and adversely affected by the department's administrative action and therefore has the right to request for reasons. The department must provide adequate reasons in terms of section 5(2) or limit the ratepayer's right to request for reasons. The department may refuse to furnish reasons if it is reasonable and justifiable in terms of section 5(4).

3.7 What would the situation if the department fails to provide reasons? (4)

Failure to provide reasons leads to an adverse interference. Section 5(3) provides for a rebuttable presumption that where no reasons are given the administrative action was taken without good reason. The administrator will have the onus to prove that failure to provide reasons was in fact based on good reason or it was reasonable and justifiable in the circumstances.

Question 4

4.1 What is the difference between control and remedy? (4)

Control is a method of limiting, supervising or regulating something. To control administrative action is to ensure that it is valid. On the other hand a remedy is anything that serves to cure defects or improve conditions.

The difference between control and remedy is that control entails an enquiry into the legality of the administrative action and the specific remedy that is granted usually after a finding of illegality and can take various forms depending on the context.

4.2 The general rule is that internal remedies must be exhausted first before an aggrieved party can approach a court of law, but there are exceptions to this rule. When would internal control not be proper remedy? List these exceptions. (7)

- The case has already been prejudged by the administrator
- The decision has been made in bad faith, fraudulently or illegally – or has not been made at all
- The aggrieved party has an option whether to use the extrajudicial remedy or to proceed directly to judicial review
- The administrative authority has made an unacceptable decision as a result of an error of law
- The administrative body concerned has no authority to rectify the particular irregularity
- The internal remedy cannot provide the same protection as judicial review

4.3 List and briefly explain the forms of judicial control. (12)

Statutory appeal

None of the higher courts have inherent appeal jurisdiction - appeals are therefore only available when the relevant legislation makes provision for it. Subordinate legislation may only make such provision if authorised by the enabling legislation. Appeals lie only against final decisions. The court is restricted to the record, but rehears the merits of the decision

Review

All higher courts have inherent review jurisdiction in terms of the common law. Ouster clauses are no longer constitutional in terms of s34 of the Constitution. Review may take place in terms of the Constitution, PAJA, specific statutes, Supreme Court Act (if review of lower courts' decisions).

The grounds of review must be stated and broadly rests on an infringement of a fundamental right or challenges the validity of administrative action. It only decides on the validity of the decision, but may go beyond the record

Interdict

An interdict is aimed at preventing unlawful administrative action which will prejudice the rights of the affected party. There must be a clear legal interest which is being threatened; No alternative satisfactory remedy available; The party will suffer irreparable damage or prejudice if the interdict is not granted.

Mandamus

This remedy is used to compel an administrator to perform a statutory duty. It cannot however stipulate how the power should be exercised. PAJA eg provides that 'failure to make a decision' is a ground for review. The court can, however be approached to grant a mandamus in the event of a long delay to make a decision. It is the flip side of an interdict - unauthorised action is prevented by means of an interdict and compliance with a statutory duty is enforced by way of mandamus.

Declaratory order

This remedy is applied for where there is a clear dispute or uncertainty about the validity or effect of administrative action, even where other remedies may also be relied on. The court will give a definitive

answer to the question of what the legal position is regarding any particular person or a given state of affairs. It clarifies the 'status' of a matter.

Defence in criminal proceedings

If a person is charged with a criminal offence created by legislation (failing to comply with empowering legislation) the charge may be defended by challenging the validity of the administrative decision that is the subject of the dispute.

4.4 What is the purpose of section 8(1)(b) of PAJA?

(2)

Is to give power to the court may make an order prohibiting the administrator from acting in a particular manner.