

## Question 1(a)

(7)

An administrative-law relationship exists between two parties in an **unequal relationship**. One of the subjects is a person or body clothed in **state authority** who is **able to exercise that authority** over a person or body in a **subordinate position** whose **rights are affected** by the action. WATA is a subject of an administrative-law relationship (an **individual administrative-law relationship** where **rules apply personally and specifically between the parties** and the relationship is **created by individual administrative decisions**).

## Question 1(b)

(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.**

The decision to close all taxi routes and the portion of the taxi ranks operated by WATA amounts to administrative action because it **complies with the definition in that it involves a decision by an organ of state** (the MEC for Roads and Transport, the appointed representative in control of the Department of Roads and Transport in the Gauteng Province) **exercising a power in terms of the Constitution** or a provincial which **has adversely affected the rights of a person** (WATA) and which appears to have had a **direct external legal effect**.

## Question 1(c)

(5)

In terms of **s 239 of the Constitution** the following are organs of state:

The Department of Roads and Transport in the Gauteng Province: (any **department of state or administration** in the national, provincial or local sphere of government);

The MEC for Roads and Transport, the appointed representative in control of the Department of Roads and Transport in the Gauteng Province (any **other functionary or institution** that (i) **exercises a power or performs a function in terms of the Constitution** or a provincial constitution).

## Question 2(a)

(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**

**S 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 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))

**Extra mark or two if above included.**

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

WATA has not had procedurally fair treatment in terms of PAJA because, inter alia, WATA was not given an opportunity to make representations; and was not given reasons for the administrative action. S 3(4) and S 3(5) of PAJA do not seem to be relevant for present purposes.

## **Question 2(b)**

**(10)**

The proportionality principle means that the harm to the individual should not be disproportionate to the benefit to the community. The principle of proportionality has three elements:

- **Suitability:** this requires the administrator taking the decision to use the most appropriate means available for achieving the purpose - a rational connection between the means and the end.
- **Necessity:** the administrator may take only those steps that are indispensable to achieve the purpose if it involves harm to the individual. In other words, choose the option that will cause the least prejudice.

- **Weighing up the advantages and disadvantages** (also known as "narrow proportionality"): this is self-explanatory and demands that the means must not be out of proportion to the end in balancing the outcome against possible harm caused.

The decision to close all taxi routes and the portion of the taxi ranks operated by WATA does not comply with the three elements of proportionality. There does not seem to be a rational connection between the decision (to close all taxi routes and the portion of the taxi ranks operated by WATA) and the improvement of public transport in Gauteng. The closing of all taxi routes and the portion of the taxi ranks operated by WATA does not seem to be indispensable steps to achieve the improvement of public transport in Gauteng. The disadvantages outweigh the advantages.

### Question 3(a)

(15)

S 5(1) of PAJA provides for the furnishing of reasons to anyone whose rights have been *materially and adversely* affected and who has requested reasons within 90 days of becoming aware of the decision. Section 5(2) provides that the administrator must give adequate reasons in writing within 90 days of the request.

PAJA also provides that a court may review the action if the action is itself not rationally *connected* to the reasons given (S 6(2)(f)(iii)(dd)). Reasons are also a requirement in terms of the rules of natural justice (*audi alteram partem*).

Failure to furnish reasons leads to the (rebuttable) presumption that the decision was taken without good reason (s 5(3)).

In terms of section 5(4) there may be a departure from this requirement only if it is reasonable and justifiable in the circumstances. All relevant factors to be considered before making this decision. The affected person must be informed immediately.

Section 5(5) makes provision for an administrator who is *empowered by an empowering provision* (this is important), to follow a fair, but different procedure.

Section 5(6) provides that the Minister, at the request of the administrator, may publish a notice in the *Gazette* giving a list which specifies any administrative action or group or class of such actions where reasons will automatically be furnished to persons whose rights are adversely affected by the actions without the need to request reasons.

The importance of reasons is that it demonstrates how the administrative body functioned when the decision was taken – whether it acted lawfully or unlawfully, rationally or arbitrarily, reasonably or unreasonably. If reasons are lacking affected persons would be at a great disadvantage to challenge the action. This requirement is a safeguard against any arbitrary or unreasonable administrative decision making. Currie & De Waal ("Just administrative action" in Currie & De Waal *The Bill of Rights Handbook* (2005)) suggest that the main purpose of requiring reasons is to justify administrative action. It promotes fairness and correct administrative behaviour since bad reasons or no reasons may lead to review proceedings. It also ensures openness, accountability and transparency in public administration and reflects the values of an open and democratic society. If no information is available to the person, issues such as the failure of the administrator to apply his mind to the matter, unauthorised purpose, *mala fides* would be difficult to prove. It would be difficult to find a basis for the appeal or review.

Also see the minority judgment of Mokgoro and Sachs JJ in *Bel Porto School Governing Body v Premier of the Western Cape* 2002 9 BCLR (CC); 2002 3 SA 265 (CC) as quoted in the study guide (p 174).

Clearly WATA satisfies the requirement of s 33(2) of the Constitution and needs to go through the various steps in section 5 of PAJA to obtain these.

Question 3(b)

(3)

Administrative acts take effect upon the **decision becoming known**, either by publication or announcement such as the *Government Gazette* or by individual notification (letter etc). Once WATA is notified in this manner the decision of the MEC takes effect.

Question 3(c)

(7)

An administrator is said to be *functus officio* (roughly translated it means “**having completed the task/duty; no longer functioning**”) when the administrator **cannot amend, repeal/revoke or vary its decision**.

In this instance we are dealing with an **invalid administrative action (procedurally unfair/unreasonable)**. Any invalid administrative action (ie invalid decision) **may be altered or withdrawn by the administrator**. The administrator **can rectify a decision which was defective in the first place**. If the affected person has **questioned or challenged** the validity of the administrative act before a court or higher domestic tribunal, the **act cannot be altered** by the administrator.

In this instance WATA **has not challenged** the invalid decision and the **MEC can therefore rectify** the defective decision.

Question 4(a)

(7)

- Control by superior/senior administrators/specially constituted bodies or institutions.
- Parliamentary control
- Control by public bodies (the Public Protector; the Auditor-General) and commissions

Advantages:

- Administrative decisions are thoroughly re-evaluated.
- Possible to bring inefficient administrators to book/reprimanded etc.
- Less expensive, less cumbersome and less time-consuming than judicial control.

Question 4(b)

(3)

In terms of **section 38 of the Constitution** an **association acting in the interest of its members** has *locus standi*. Therefore WATA **has locus standi** to represent its members.

Question 4(c)

(8)

WATA should apply for an **interdict to stop the closure of all taxi routes and the taxi ranks operated by WATA until the matter has been reviewed**, since the matter is **urgent**, it has a **clear legal interest**, there is **no other satisfactory remedy** and it will suffer **irreparable prejudice if the interdict is not granted**. An appeal may only be lodged if the particular legislation provides for it. The High Court has inherent review jurisdiction. In a review the **court will consider the**

**procedural fairness** of the withdrawal. It will be permitted to go **outside the record of the proceedings**.

**Question 4(d)**

**(7)**

S 8(1)(a): the court may direct the administrator to give reasons, or to act in a required manner.

S 8(1)(b): the court may make an order prohibiting the administrator from acting in a particular manner. This paragraph thus makes provision for a prohibitory interdict.

S 8(1)(c): the court may grant orders setting aside decisions of the administrator. In the main, however, the court would set aside a decision by the administrator under the circumstances laid down in section 8(1)(c) and send it back to the original decision maker.

S 8(1)(d): the court is empowered to declare the rights of the parties.

S 8(1)(e): provides for the granting of a temporary interdict or other temporary relief.

s 8(1)(f): a court may make an order as to costs.