

THE OCTOBER/NOVEMBER 2013 EXAMINATION PAPER

Question 1

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

2.2 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

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 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.

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)).

HINT

Problem-type questions require students to apply their knowledge of the basic principles of administrative law to concrete factual situations. Many students merely write down the particular principle (provided they have recognised the principle!) only and leave it at that. A mere repetition of the relevant principles is inadequate, since it does not demonstrate to the examiner your ability to apply your knowledge to the particular legal problem. On the other hand, if you do not know the answer to the problem, you should at least indicate that you know the theory by writing it down. This will at least earn you some marks. Conversely, some students do not even write down the relevant theory at all, but start applying the theory to the facts at once. If you do this, you will lose valuable marks, since marks are allotted to the WHOLE principle, before you select that which is applicable to the particular facts. Do not start off by immediately answering “yes” or “no”. Before you select that which is applicable to a particular set of facts, First, write down the principle and the rules or requirements governing the principle, and then apply this to the set of facts. Your conclusion forms the second part of the answer.

QUESTION

The MEC for Roads and Transport, the appointed representative in control of the Department of Roads and Transport in the Gauteng Province, decides to close all taxi routes and the portion of the taxi ranks operated by the Witwatersrand African Taxi Owners Association (WATA). The MEC plans to introduce a new bus service system, commonly known as the Bus Rapid System (BRT).

The purpose of the BRT is to improve public transport in the Gauteng Province. WATA is aggrieved by the decision of the MEC and points out that the BRT can be implemented on other routes where no form of transport is available and, furthermore, that the consequence would be that its 1200 members would be without jobs. WATA has persistently tried to make these representations to the MEC. The MEC has refused to receive their representations and made no attempt to give reasons for the decision to close all taxi routes and the portion of the taxi ranks operated by WATA. WATA contacts you. Advise WATA on the following and give well-substantiated reasons for your answer.

Does the decision to close all taxi routes and the portion of the taxi ranks operated by WATA constitute procedurally fair administrative action in terms of PAJA?

[20marks]

SUGGESTED ANSWER

In terms of section 3(1) of PAJA, administrative action that materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. 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 that can reasonably be expected to continue. It does not mean that the person is guaranteed success, but only that he should receive a hearing. In this scenario, one could argue that WATA had a legitimate expectation that the MEC would receive its representations and that it would give reasons for its decision.

Fair administrative practice depends on the circumstances of each case (s 3(2)(a) of PAJA). Section 3(2)(b) of PAJA clearly states that the following mandatory requirements, which might seem like a codification of the rules of natural justice, must be complied with in order for the MEC’s decision to be procedurally fair:

- 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

One should also take note of the following discretionary requirements that the MEC can comply with (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

In terms of section 3(4) of PAJA, the requirements in section 3(2) of PAJA may be departed from only if it is reasonable and justifiable. This is determined by taking all relevant factors into account,

which include (s 3(4)(b) PAJA):

- 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

The administrator may also follow a different but fair procedure if the empowering provision authorises this (s 3(5) of PAJA).

WATA has not received procedurally fair treatment in terms of PAJA, because WATA was given neither an opportunity to make representations nor adequate notice to request reasons for the administrative action. Sections 3(4) and 3(5) of PAJA do not seem to be relevant for present purposes.

Question 1

“Organ of state” is defined in section ... of the Constitution.

1. 1
2. 33
3. 197

4. 239

Question 2

Which of the following is a characteristic of an administrative law relationship?

1. One of the legal subjects must be an official in one of the national departments.
2. The person in the subordinate position must have been treated unfairly.
- 3. The organ of state forces the subordinate party to act in a certain manner.**
4. The actions of the person clothed in state authority must have been unreasonable.

Question 3

Which one of the following is NOT an organ of state?

- 1. The Constitutional Court**
2. The Department of Basic Education
3. The municipal council of Madibeng
4. The President as head of the national executive

Question 4

Which one of the following is NOT a binding/authoritative source of administrative law?

1. The Constitution
- 2. Foreign law**
3. Case law

Question 5

“Administrative action” is defined in section 1 of PAJA. Which one of the following examples complies with this definition?

1. The Minister of Police decides to continue prosecuting Mrs Radebe.
2. The municipal council of Diepsloot municipality fails to address the housing shortage.
3. Justice Naidoo holds the Minister of Home Affairs accountable for failing to issue Mr Viljoen’s passport.
- 4. An officer in the Department of Health decides to appoint Ms Fargan as the architect to design a new state hospital.**

Question 6

Just administrative action is regulated in section ...

1. 33 of PAJA.
2. 195(1) of PAJA.
3. 239 of the Constitution.

4. 33 of the Constitution.

Question 7

Deconcentration is a form of delegation. Which statement refers to this form of delegation?

- 1. This type of delegation takes place within an internal hierarchical system where we encounter different ranks of administrators.**
2. This type of delegation takes place when a senior administrator makes a decision and then instructs another administrator to implement the decision.
3. In this type of delegation, the delegator transfers certain powers and activities to an independent body.
4. An example of this type of delegation is when a minister appoints a board of experts to issue licenses.

Question 8

The courts have been hesitant to pronounce on the reasonableness or unreasonableness of administrative action through their powers of review. Judicial intervention was permitted only when the degree of unreasonableness was so gross that something else could be inferred from it. The following court decision illustrates/supports this view:

1. Standard Bank of Bophuthatswana Limited v Reynolds
- 2. National Transport Commission v Chetty’s Motor Transport**
3. Roman v Williams

4. Kotzé v Minister of Health

Question 9

The “rules of natural justice” is a collective term for a number of common law provisions applicable to administrative inquiries and hearings. All of the following form part of the rules of natural justice

EXCEPT:

1. The rule against bias or prejudice.
- 2. The doctrine of legitimate expectation.**
3. The individual must be given an opportunity to be heard on the matter.
4. Reasons must be given by the administrator for any decision taken.

Question 10

Any person whose rights have been materially and adversely affected by any administrative action may request written reasons. Which one of the following statements is correct?

1. The administrator has the discretion to provide the person affected with reasons.
2. The administrator is not obliged to provide the person with reasons if he/she acted in line with the Constitution.
3. The administrator must provide written reasons within 90 days of making his/her decision.
- 4. The administrator to whom the request is made is obliged to furnish adequate reasons.**

Question 11

Which one of the following is NOT an example of or a form of internal control?

1. The Public Protector
2. Parliamentary enquiries
- 3. Judicial review**
4. Chapter 9 (of the Constitution) institutions

Question 12

Which one of the following is NOT a ground for judicial review in terms of section 6 of PAJA?

1. The action was materially influenced by an error of law.
- 2. The administrator acted in accordance with provisions relating to time.**
3. The action was taken on account of unauthorised reasons.

4. The action contravenes the law.

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African Silver (Pty) Ltd is an established mining company that has successfully operated its business in the South African mining industry over the last five decades under the previous mining regime. South Africa is the world's biggest producer of platinum and African Silver (Pty) Ltd was the leading company extracting platinum in the Bushveld complex, the main platinum producing area in South Africa. African Silver (Pty) Ltd, as the leading company specializing in extracting and refining this metal, has spent years and millions of rands in order to improve its mining operations, specifically with relation to the extraction and refinement of platinum.

In October 2002, the Minerals and Petroleum Resources Development Act 28 of 2002 (MPRDA) came into operation, which makes provision for equitable access to and sustainable development of the nation's mineral and petroleum resources. In terms of the MPRDA, African Silver (Pty) Ltd's limited real right to mine automatically ceased to exist on the date the Act came into operation. In consequence, African Silver (Pty) Ltd had to apply for "new order" mining rights to carry on with its business. On 16 January 2003, African Silver (Pty) Ltd applied for mining rights in the Bushveld complex. The application was summarily turned down by the Department of Minerals and Energy without giving any reasons to African Silver (Pty) Ltd. In the interim, mining rights pertaining to the Bushveld complex were granted to African Golden (Pty) Ltd. The official who turned down African Silver (Pty) Ltd's application is a shareholder in African Golden (Pty) Ltd.

Answer the following questions and substantiate your answers.

QUESTION 1

1.1 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 Minerals and Energy (any department of state or administration in the national, provincial or local sphere of government)

The official who made the decision in the Department of Minerals and Energy (any other functionary or institution (ii) exercising a public power or performing a public function in terms of any legislation)

1.2 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. (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 turn down African Silver (Pty) Ltd amounts to administrative action because it complies with the definition in that it involves a decision by an organ of state (the official, the appointed person in the Department of Minerals and Energy) exercising a public power or performing a public function in terms of any legislation which has adversely affected the rights of a person (African Silver (Pty) Ltd)) and which appears to have had a direct external legal effect.

1.3 Do the following actions constitute administrative action? Explain your answers.

(i) The enactment of the MPRDA **(2)**

No, it is excluded by section 1(b)(dd) of PAJA.

(ii) The decision of the Department of Minerals and Energy to grant African Golden (Pty)

Ltd the mineral rights. **(2)**

Yes, it has a direct negative external legal effect (on African Silver) and it was made by an organ of state.

(iii) The request for reasons by African Silver (Pty) Ltd **(2)**

No, the request for reasons is not a decision made by an organ of state.

[25]

QUESTION 2

2.1 What is the basis of administrative legality? (3)

□ A principle used by the courts to determine whether administrative action was not authorised by law only but also performed in accordance with the prescripts laid down by the law. The public administration must serve and promote the public interest, protect and respect fundamental/human rights.

2.2 Explain the principle of legality in the constitutional framework. (3)

□ The Constitution is the supreme law of the country and is elevated above all state legislation. Section 2 of the Constitution provides that any law or conduct that is not in line with the Constitution may be declared invalid by the court.

□ *Fedsure Life Assurance LTD v Greater Johannesburg* 1999 (1) SA 374 (CC): the executive “may exercise no power and perform no function beyond that conferred upon them by law.”

Section 8 of the Constitution provides that the Bill of Rights binds the executive authority – state administration in all spheres of government – and all organs of state. This means that organs of state and individuals exercising public power are bound by the law and not elevated above it.

2.3 In order to determine whether African Silver (Pty) Ltd’s right to reasonable administrative action was infringed, explain the Constitutional Court’s interpretation of the right to reasonable administrative action. In your answer, you should apply the Court’s interpretation to the given set of facts and refer to the relevant case law and provisions in PAJA. (14)

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 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 Discuss whether bias is in evidence in the set of facts. (10)

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

□□ 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 officer of the Department of Minerals and Energy is a shareholder in African Golden.

3.2 Discuss fully whether African Silver (Pty) Ltd received a procedurally fair treatment in terms of PAJA. (10)

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.

African Silver (Pty) Ltd 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.

3.3 Suppose the reasons given for the refusal of African Silver (Pty) Ltd's application are that it is not a BEE compliant company. Discuss whether this may be considered "adequate" reasons. (5)

- ☐ There must be a link between the administrative action and the reasons given.
- ☐ The reasons must "suit" the administrative action.
- ☐ 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.

□Application: Students could have argued whichever way and could have referred to *Ansett Transport Industries (Operations) Pty Ltd v Wraith* (1983) 48 ALR 500 where the court found that the applicant must understand the reasons given.

3.4 Explain in what circumstances a departure from the requirement to furnish written reasons might have been applicable. In your answer, you should refer to the relevant provisions in PAJA. (5)

□Section 5(4) of PAJA requires that any departure must be reasonable and justifiable in the circumstances.

□The administrator must inform the applicant of the departure.

□This section is a limitation on the right to be given written reasons. This limitation must therefore be in accordance with section 36 of the Constitution.

□To determine whether this departure is reasonable and justifiable, the administrator must take the following factors (as set out in s 5(4)(b)) into account: The objects of the empowering provision

The nature, purpose and likely effect of the administrative action concerned

The nature and extent of the departure

The relation between the departure and the purpose

Importance of the purpose of the departure

The need to improve an efficient administration and good governance [30]

QUESTION 4

4.1 List the forms of internal control. (3)

□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

4.2 Mention the advantages of internal control. (5)

□Administrative decisions are thoroughly reevaluated through internal control.

□It is possible to bring inefficient administrators to the book.

□Through internal control, such administrators can be reprimanded or required to give reasons for their decisions.

□Internal control is also less expensive, less cumbersome and less time-consuming than judicial control.

4.3 List the exceptions to the general rule that internal remedies must be exhausted first.(7)

- ☐ The case has already been prejudged by the administrator.
- ☐ The decision has been made in bad faith (*mala fide*), fraudulently or illegally, or has in effect not been made at all.
- ☐ The aggrieved party has an option whether to use the extrajudicial remedy or to proceed direct to judicial review (*Jockey Club* case).
- ☐ The administrative authority has come to an unacceptable decision as a result of an error of law.
- ☐ The administrative body concerned has agreed that judicial review proceedings may start immediately.
- ☐ The administrative body concerned has no authority to rectify the particular irregularity complained of.
- ☐ The internal remedy cannot provide the same protection as judicial review.

4.4 Explain the 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.

QUESTION

You have applied for a passport and are informed by the official working for the Department of Home Affairs that your application was turned down.

(a) Does the turning down of your application constitute administrative action? In your answer, you should fully discuss the concept “administrative action” with reference to the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). (16)

SUGGESTED ANSWER

(a) Section 1 of PAJA defines administrative action as any decision taken or 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 of 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 this definition listed in section 1 of PAJA, for instance, the legislative functions of Parliament are excluded (s 1(b)(dd)).

The decision to turn down the application constitutes an administrative action, because the official working at the Department of Home Affairs is an organ of state (both the official and the Department are organs of state – as defined in section 239 of the Constitution) and the decision to turn down the application was made in terms of legislation. The decision adversely affected your rights and it had a direct, external legal effect.

(b) Explain why it is important to establish whether administrative action is involved. (2)

The main reason is that the application of the right to just administrative action (s 33 of the Constitution) depends on whether administrative action has been performed by either an organ of state or any other or any person exercising public power/performing a public function in terms of legislation. Stated differently, the existence of administrative action is the threshold requirement for the application of the right to just administrative action. One should also note that there is a list of exclusions to what constitutes administrative action.

(c) When will the decision by the relevant official of the Department take effect?

(2)

Section 1 of PAJA defines a decision as “any decision of an administrative nature made, proposed to be made, or required to be made under an empowering provision”. The Act also lists a number of examples that fall under the definition of a decision. 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 you are notified, the decision will take effect.

Question 1

- (a) Lawfulness is the only requirement for just administrative action.
 - (b) For administrative action to be “just” it need only be reasonable.
 - (c) Procedural fairness is the only requirement for just administrative action.
 - (d) Lawfulness, reasonableness and procedural fairness are requirements for just administrative action.
- 1. Only statement (a) is correct.
 - 2. All the statements are incorrect.
 - 3. Only statements (b) and (c) are correct.
 - 4. Only statement (d) is correct.**

Question 2

Section 195(1) of the Constitution, 1996

- (a) is found in Chapter 10 of the Constitution.
 - (b) requires the promotion of professional ethics in public administration.
 - (c) requires services to be provided impartially, fairly, equitably and without bias.
 - (d) requires public administration to be accountable.
- 1. All the statements are incorrect.
 - 2. Only statements (a) and (b) are correct.
 - 3. All the statements are correct.**
 - 4. Statement (d) is incorrect.

Question 3

- (a) Delegation means entrusting a task or duty to someone else.
 - (b) It is a basic rule of administrative law that delegation is unlawful.
 - (c) There are no exceptions to the above rule.
 - (d) The rule rests on the principle that administrators have special qualifications, knowledge or expertise.
- 1. Statements (a), (b) and (c) are correct.
 - 2. Statements (b), (c) and (d) are correct.
 - 3. Statements (a), (c) and (d) are correct.
 - 4. Statements (a), (b) and (d) are correct.**

Question 4

- (a) The principle of proportionality consists of three elements.
 - (b) The principle of proportionality is considered in deciding the reasonableness of administrative action.
 - (c) The elements of the principle of proportionality are suitability, necessity and weighing up the advantages and disadvantages.
 - (d) The Constitution prescribes reasonableness as a requirement for a valid administrative action.
1. All the statements are incorrect.
 - 2. All the statements are correct.**
 3. Only statement (d) is correct.
 4. Statements (b) and (c) are incorrect.

Question 5

- (a) The *audi alteram partem* rule is one of the rules of natural justice.
 - (b) The rules of natural justice are aimed at the reasonableness of administrative action.
 - (c) The *nemo iudex in sua propria causa* rule is a rule of natural justice.
 - (d) The rules of natural justice regulate procedural fairness in the common law.
1. Statements (b) and (d) are correct.
 2. Statements (a) and (c) are incorrect.
 - 3. Statements (a), (c) and (d) are correct.**
 4. All the statements are incorrect.

Question 6

For administrative actions to be procedurally fair

- (a) a reasonable opportunity to make representations is a mandatory requirement of PAJA.
 - (b) PAJA requires no notice of the right to request reasons.
 - (c) legal representation is a mandatory requirement of PAJA in all cases.
 - (d) appearance in person at hearings is in the discretion of the administrator.
- 1. Statements (a) and (d) are correct.**
 2. Statements (a), (b) and (c) are correct.
 3. Statements (b), (c) and (d) are correct.
 4. Only statements ((b) and (c) are correct.

Question 7

- (a) Section 3 of PAJA deals with procedural fairness to the individual.
 - (b) Section 4 of PAJA deals with procedural fairness to the individual.
 - (c) Section 3 of PAJA deals with procedural fairness to the public.
 - (d) Section 4 of PAJA deals with procedural fairness to the public.
1. All the statements are correct.
 - 2. Statements (a) and (d) are correct.**
 3. Statements (b) and (c) are correct.

4. All the statements are incorrect.

Question 8

- (a) Failure to provide reasons in terms of section 5 of PAJA has no consequences.
- (b) The administrator has 120 days after a request within which to provide reasons.
- (c) The reasons must be **adequate**.
- (d) All the provisions of section 5 of PAJA may be ignored at will.

1. All the statements are correct.

2. Statement (c) is correct.

3. Statements (a) and (d) are correct.

4. Statement (b) is correct.

Question 9

- (a) Internal remedies must be exhausted before approaching a court.
- (b) There are no exceptions to this rule.
- (c) Internal remedies are usually cheaper to use.
- (d) Internal remedies are usually easier to use.

1. All the statements are incorrect.

2. Statements (b), (c) and (d) are correct.

3. Statements (a), (c) and (d) are correct.

4. Statement (b) is correct.

Question 10

- (a) There is no difference between appeal and review.
- (b) All High Courts have inherent powers of appeal.
- (c) All High Courts have inherent powers of review.
- (d) Both appeal and review may examine the merits of the decision.

1. All the statements are incorrect.

2. Only statement (c) is correct.

3. All the statements are correct.

4. Only statement (d) is correct.

QUESTION

Mr J Warden is an employee of the Department of Correctional Services. He has applied for promotion in the department and meets all the minimum requirements. The relevant legislation prescribes that appointments and promotions in the department are made after applicants have attended a selection committee meeting. The selection committee should consist of the Commissioner of Correctional Services, the Head of the Human Resources division, and the Head of the division where the appointment/promotion is to be made. Mr Warden is notified to attend the meeting the day before it is to take place. He is interviewed by The Commissioner, a clerk in the

Human Resources Division, and the senior administration clerk in the local prison. Two weeks later he is informed that he has not been successful. The Commissioner's nephew (far less qualified) has been appointed to the post. He requests reasons for the decision, and is informed that his lack of success is regretted, but nothing more.

Answer the following questions. Give reasons for all your answers - a bare "yes" or "no" or reference to a case or provision is NOT enough.

QUESTION 1

(a) Define administrative action. Does the decision not to promote Mr Warden amount to administrative action? Substantiate your answer. (10)

In terms of **section 1 of PAJA** – administrative action means a **decision taken or failure to take a decision** by

(a) an **organ of state** in exercising a power **in terms of the Constitution or a provincial constitution**, or in exercising a **public power or performing a public function in terms of any legislation**; or

(b) a **natural or juristic person** which is not 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**.

The decision not to promote Mr Warden is administrative action because it complies with all the elements of the definition.

(There is a decision taken by and organ of state – the selection committee – exercising their power in terms of legislation which adversely affects the rights of Mr Warden and has direct external legal effect. The fact that the decision is invalid for various reasons is not relevant in deciding whether there is an administrative action or not.)

(b) What is an organ of state in terms of the Constitution of 1996? Name the organs of state in the set of facts. (10)

In terms of **s 239 of the Constitution** an organ of state includes:

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

(b) 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**. A court or a judicial officer is excluded.

The department of Correctional Services, the Commissioner of Correctional Services, The

Head of Human Resources, the Head of the Division where the appointment is to be made, the clerk in the HR Division, the senior administration clerk in the local prison are all organs of state in the set of facts (½ mark each).

(c) Name five (5) legally binding sources of administrative law. (5)

The Constitution
Legislation
Case law
Common law
Administrative practice
International Law

QUESTION 2

(a) Do the following actions constitute administrative action? Explain your answers.

(i) The power of the President to appoint a commission of enquiry. (2)

No. It is expressly excluded by the definition as presidential executive functions.

(ii) A request by Mr Warden for reasons for his failure. (2)

No. The subordinate person's decisions can never be administrative action.

(iii) Parliament's new Correctional Services legislation. (2)

No. It is expressly excluded in the definition as parliamentary legislative functions.

(iv) Mr Warden's decision to take the matter on review in the High Court. (2)

No. The subordinate person's decisions cannot be administrative action.

(v) The decision of the local municipality to increase rates. (2)

No, it is a **legislative** function of the municipal council which is expressly excluded.

(b) Would the selection committee be able to change its decision? Discuss with regard to the rules of the principle of *functus officio* (the task having been completed) (10)

This is a pure administrative action. Invalid administrative action may be altered/rectified by the administrator at any time unless it has been challenged before a court or higher tribunal, or if the affected individual has acquired rights or privileges as a result of the action.

Valid onerous administrative action may be altered at any stage. Own mistakes may be corrected. Valid beneficial administrative actions may only be altered where the authority has been given the power expressly or by necessary implication.

Administrative action affecting the status of a person may not be changed unless authorised expressly or by necessary implication.

In this case the action is invalid since the committee is invalid and the committee would be able to change its decision. If the correct committee had made the same decision, it would be an onerous action and the committee would also be able to change its decision.

(a) Explain whether the selection process of Mr J Warden was procedurally fair in terms of section 3 of PAJA? Include all aspects. (15)

Section 3 of PAJA applies to the **individual administrative-law relationship**.

Administrative action which **materially and adversely affects the right or legitimate expectations of any person must be procedurally fair**. The protection is extended beyond s 33 to include legitimate expectations. Briefly, legitimate expectation means that the rules of fair procedure are extended to those cases where there 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. The **Jenkins** case states that the doctrine has become part of our common law.

Section 3(2)(a) provides that fair administrative practice depends on the circumstances of each case.

Obligatory requirements: (seems like codification of rules of natural justice) (s 3(2)(b))

- **Adequate notice of nature and purpose of propose 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:

- **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)(a) provides that the requirements in S3(2) may be **departed from only if reasonable and justifiable**. Section 3(4)(b) provides that this is determined by taking all relevant factors into account:

- **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.**

Limitation must also comply with s 36 of the Constitution.

The administrator may also follow a different but fair procedure if empowering provision

authorises this. (s 3(5)).

Mr Warden was not given adequate notice of the action. There is no indication that he was given notice of his right to review or the right to reasons. There seems to be no reason that it could be reasonable and justifiable to depart from these requirements. As a further reason, the wrong people conducted the interview (no proper delegation). Therefore several requirements for a procedurally fair action were infringed.

(b) Was the reason given to Mr Warden “adequate”? (5)

In terms of *Moletsane v The Premier of the Free State* 1995 9 BCLR 1285 (O); 1996 2 SA 95 (O), adequate reasons mean that the administrative action must be justifiable in relation to the reasons given for it. “The more drastic the action taken, the more detailed the reasons which are advanced should be.” Adequate reasons mean that they should “fit” the action. The reasons (or lack thereof) given to Mr Warden do not satisfy any of these requirements.

(c) Briefly discuss the common law principle which is infringed by the appointment of the Commissioner’s nephew. (5)

The principle infringed is the rule of natural justice *nemo iudex in sua propria causa* (no-one may be a judge in his own cause). This is the rule against bias. Clearly in the set of facts the Commissioner had a personal interest in his nephew being promoted. In the *Liebenberg* case the mayor sat in on a liquor licencing meeting where his brother had applied for a licence. This was held to be bias.

QUESTION 4

(a) (i) Does Mr Warden have locus standi to take the matter to court? (2)

Yes, in terms of s 38(a) of the Constitution anyone who acts in his own interest.

(ii) Does Mr Warden’s wife have locus standi to take the matter to court? (2)

No, unless he cannot act on his own behalf (s 38(b)).

(iii) Would the Correctional Services Union have locus standi to act on behalf of Mr Warden? (2)

Yes, it is an association acting on behalf of its members (S 38(e)).

(b) What are the exceptions to the general rule that internal remedies should first be exhausted? (7)

1. The case has been pre-judged by the administrator. (This does not mean that the administrator has heard the matter already, but that he/she has a preconceived notion of the outcome.)
2. The decision was made in bad faith, fraudulently or illegally, or not made at all.
3. The aggrieved party has an option.
4. There has been an error of law.

5. There has been agreement between the parties.
6. The administrative body has no authority to rectify the problem.
7. The internal remedy does not provide the same protection as judicial review.

(c) Name the judicial remedies which are available to an aggrieved person and explain which remedy(ies) you would advise Mr Warden to pursue. (12)

Statutory appeal

Judicial review

Interdict

Mandamus

Declaratory order

Defence in criminal proceedings

Mr Warden should apply for **an interdict to stop the appointment of the Commissioner's nephew until the matter has been reviewed**, since the matter is **urgent**, he has a **clear legal interest**, there is **no other satisfactory remedy** and he 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 appointment. It will be permitted to go **outside the record of the proceedings** and will usually **refer the matter back** to the administrator to rectify the procedure

Question 1

- (a) The administrative law relationship can be a general relationship.
 - (b) The administrative law relationship can be an individual relationship.
 - (c) The general administrative law relationship is regulated by legislation.
 - (d) The individual administrative law relationship is created by a decision.
1. Only statements (a) and (c) are correct.
 2. Only statements (b) and (d) are correct.
 3. Only statements (a) and (b) are correct.
 - 4. All the statements are correct.**

Question 2

- (a) There are six binding sources of administrative law.
 - (b) All the sources of administrative law are persuasive.
 - (c) Case law plays no role as a source of administrative law.
 - (d) Green and White Papers are the most important sources of administrative law.
1. All the statements are incorrect.
 - 2. Only statement (a) is correct.**
 3. Only statements (c) and (d) are correct.

Question 3

- (a) A state department is an organ of state.
 - (b) The Chief Justice is an organ of state.
 - (c) The roads department of the Johannesburg City Council is an organ of state.
 - (d) The official issuing car licences is an organ of state.
1. All the statements are correct.
 2. Only statements (b) and (d) are correct.
 3. All the statements are incorrect.
 - 4. Only statements (a), (c) and (d) are correct.**

Question 4

- (a) The University of South Africa is an organ of state.
 - (b) The South African Football Association is an organ of state.
 - (c) The Post Office is an organ of state.
 - (d) The Department of Foreign Affairs is not an organ of state.
1. Only statement (a) is correct.
 2. Statements (a), (b) and (d) are incorrect.
 - 3. Statements (a) and (c) are correct.**
 4. Only statement (d) is correct.

Question 5

- (a) Section 32 of the Constitution, 1996 defines “just administrative action”.
 - (b) Section 33 of the Constitution, 1996 defines “just administrative action”.
 - (c) Section 34 of the Constitution, 1996 defines “just administrative action”.
1. Statements (a) and (c) are correct.
 2. All the statements are correct.
 3. Only statement (a) is correct.
 - 4. Only statement (b) is correct.**

Question 6

- (a) An administrative action is a decision.
 - (b) An administrative action is a failure to take a decision.
 - (c) An administrative action is an organ of state.
 - (d) An administrative action is a refusal to take a decision.
- 1. Statements (a), (b) and (d) are correct.**
 2. Statements (a), (b) and (c) are correct.
 3. All the statements are correct.
 4. Only statements (a) and (b) are correct.

Question 7

- (a) The decision can be taken by an organ of state.
- (b) The decision can be taken by a natural person.
- (c) The decision can be taken by a juristic person.

(d) The decision must be taken in terms of legislation.

1. All the statements are incorrect.

2. All the statements are correct.

3. Only statements (a), (b) and (c) are correct.

4. Only statements (a), (b) and (d) are correct.

Question 8

(a) A decision to have a notice and comment procedure in terms of section 4(1) of PAJA (The

Promotion of Administrative Justice Act 3 of 2000) is “administrative action.

(b) A decision by the Judicial Service Commission not to make any judicial appointments is “administrative action”.

(c) The decision to stop the prosecution of a person charged with drunken driving is “administrative action”.

1. All the statements are correct.

2. Only statements (a) and (c) are correct.

3. Only statement (b) is correct.

4. All the statements are incorrect.

Question 9

(a) No police action can be unlawful.

(b) Legislative administrative action is terminated by repeal.

(c) Judicial administrative action takes effect when the tribunal convenes.

(d) Individual administrative action will take effect by individual notification.

1. Only statements (b) and (d) are correct.

2. Only statement (c) is correct.

3. All the statements are correct.

4. Statements (a), (b) and (d) are correct.

Question 10

(a) A valid beneficial administrative action may never be altered.

(b) A valid beneficial administrative action may be altered if such power is expressly conferred.

(c) A valid onerous administrative action may be changed at any stage.

(d) An invalid administrative action may not be altered.

1. All the statements are correct.

2. Only statement (d) is correct.
- 3. Statements (b) and (c) are correct.**
4. Statement (a) and (c) are incorrect.