THE OCTOBER/NOVEMBER 2012 EXAMINATION PAPER

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 that extracted platinum in the Bushveld complex, the main producing area of this mineral in South Africa. African Silver (Pty) Ltd, as leading company that specialized in extracting and refining this metal, has spent years and millions of Rands in order to improve its mining operations, specifically related 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.

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 s 239 of the Constitution the following are organs of state:

a) The Department of Minerals and Energy (any department of state or administration in the national, provincial or local sphere of government);

b) 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.

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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 only authorised by law but also performed in accordance with the prescripts laid down by the law.
- That 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))

- 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

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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 has had 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

- 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*))

  Section 3(5) of PAJA states that the administrator may also follow a different but fair procedure if the empowering provision authorises this
- African Silver (Pty) Ltd has not had procedurally fair treatment in terms of PAJA because, inter alia,
- African Silver (Pty) Ltd 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.

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 would 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 from the student: can argue whichever way. Can refer 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.
- 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 accord with section 36 of the Constitution.
- To determine whether this departure is reasonable and justifiable, the administrator must take certain factors into account
- These factors are set out in section 5(4)(b):
  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

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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 re-evaluated 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 first be exhausted. **(7)**

- The case has already been prejudges 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, 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 sec 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
- Aimed at preventing unlawful administrative action

Mandamus

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

Declaratory order

- Used when there is a clear legal dispute or legal uncertainty regarding the validity of administrative action
- May also be 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

[25]

TOTAL :{100}