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1 Describing administrative law

2006 Oct exam: What is administrative law?

Administrative law is the sum total of legal rules that grant people, or bodies in authority, the power to take action; prescribe the procedures to be followed when taking such action; and ensure that such action is within the boundaries of the law. It also provides for control over such action.

2 The sources of administrative law

2.1 Sources

The sources of administrative law are the following:

Binding (authoritative) sources

CCCLAI

1. The Constitution (The Constitution of the Republic of South Africa 108 of 1996)
2. Legislation
3. Case law (judicial precedent)
4. Common law
5. Administrative practice (custom or usage)
6. International law

Persuasive sources

BPSF

7. Writings in books and journals expressing academic opinions
8. Policy documents such as Green and White Papers
9. Reports by "state institutions supporting constitutional democracy" such as reports of the Human Rights Commission
10. Foreign law (comparative law).

2.2 Binding (authoritative) sources

2.2.1 The Constitution

The Constitution is supreme and no other law may be in conflict with it: thus it is the most important and authoritative source of law in SA.

The Constitution sets the standard for all administrative conduct and the actions of every administrative functionary or institution in South Africa.

The Constitution guarantees justice for the individual by demanding that all the requirements for valid administrative action (lawfulness, reasonableness and procedural fairness) must be met.

2.2.2 Legislation

Legislation gives effect to constitutional provisions.

Most of our law is drafted in the form of legislation.

2.2.2.1 Original legislation

Original legislation is passed by:

1. Parliament in the national sphere of government:
 - a. The Promotion of Administrative Justice Act 3 of 2000 (PAJA)
 - b. The Promotion of Access to Information Act 2 of 2000
2. The nine provincial legislatures in the provincial sphere of government:
 - a. Gauteng Schools Education Act 6 of 1995
3. Elected local governments (municipal councils) in the local sphere of government

- a. By-laws

2.2.2.2 Subordinate legislation

Passed in terms of the original/enabling/empowering legislation: thus it must not conflict with the provisions in the enabling statute.

Subordinate legislation is passed by:

1. Functionaries in the national sphere of government:
 - a. Proclamations of the President issued in terms of the empowering statute
 - b. Regulations made by ministers in terms of an enabling statute
2. Provincial sphere of government:
 - a. Regulations issued in terms of the School Education Act 6 of 1995
3. Local sphere of government:
 - a. Regulations in terms of relevant by-laws

2.2.3 Case law (judicial precedent)

Past judgments are binding on other courts in subsequent cases (*stare decisis*).

2.2.4 Common law

Not an important source of South African administrative law.

Many common-law rules are now included in legislation.

Examples of common-law rules of English law origin:

1. the principle of ultra vires
2. the development of the rules of natural justice

2.2.5 Administrative practice (custom or usage)

Custom as a source of administrative law is the exception rather than the rule.

2.2.6 International law

Not an important source of South African administrative law.

Dealt with in sections 39, 231-233.

2.3 Persuasive sources

2.3.1 Writings in books and journals expressing academic opinions

Courts often refer to academic opinions expressed in law journals and books.

2.3.2 Policy documents such as Green and White Papers

Green Paper: consultative document.

White Paper: the blueprint of the government's policy on various matters (i.e. GEAR)

Both express current government policy.

2.3.3 Reports by "state institutions supporting constitutional democracy"

Institutions that report on administrative conduct and make recommendations to the legislature on how to cure any excess in the exercise of authoritative power.

2.3.4 Foreign Law

Courts may consider foreign law.

2.4 Where to find administrative law sources

Legislation:

1. Government Gazette
2. Butterworths
3. Internet

Case law:

1. South African Law Reports
2. Butterworths Constitutional Law Reports (BCLR)
3. decisions of the Constitutional Court (CC) and Supreme Court of Appeal (SCA):
<http://www.law.wits.ac.za>

Articles dealing with Administrative law topics:

1. South African Public Law (SAPR/PL),
2. South African Journal on Human Rights (SAJHR)

Policy documents and the reports of government institutions:

1. <http://www.polity.org.za>

3 The administrative law relationship

3.1 The characteristics of the administrative-law relationship

1. At least one of the legal subjects must be a person or body who exercises power.
2. More important, the position of power must be held by a person or body clothed with government (state) authority, and who is able to exercise that authority.

An administrative law relationship can exist between the person who exercises authority and:

1. a private individual in the subordinate position
2. a lower-ranking official in the same department.

Asked in 2006 & 2007 exam: Define an administrative-law relationship, including the concepts of general and individual administrative-law relationships.

A: An administrative relationship exists between **two** or more people where at least 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. It is an **unequal** relationship.

In a general administrative-law relationship the legal rules governing the relationship between the parties apply to all the subjects in a particular group. It is created by, changed and terminated by legislation.

An individual administrative-law relationship the rules apply personally and specifically between the parties. The relationship is created by individual administrative decisions.

3.2 The distinction between a general and an individual administrative-law relationship

3.2.1 The general (objective) relationship

The legal rules governing the relationship between the parties apply to all the subjects within a particular group.

The general relationship is created, changed or ended by legislation

3.2.2 The individual (or subjective) relationship

Legal rules governing the relationship between the parties apply personally and specifically between the parties.

The individual relationship is created by individual administrative decisions.

Individual relationships are not affected by new general legislative provisions, unless the amending Act specifically states that it affects the relationship.

4 The legal subjects of the administrative-law relationship

4.1 The identification of the authoritative party to/in the administrative-law relationship

Asked in 2007 Exam: What is an organ of state?

A:

Section 239 declares:

'organ of state' means –

- a. any department of state or administration in the national, provincial or local sphere of government; or
 - b. any other functionary or institution
 - i. exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
 - ii. exercising a public power or performing a public function in terms of any legislation,
- but does not include a court or a judicial officer.

4.1.1 Organ of State in terms of s 239(a)

Organ of state in terms of s 239(a) refers to the functionaries and institutions forming part of the public administration.

1. In the national sphere this refers to:
 - a. Departments of state or government departments, i.e. Department of Agriculture
 - b. May refer to an entire department and/or to its functionaries
 - c. Ministers & Deputy Ministers
 - d. President & Deputy President
2. In the provincial sphere this refers to:
 - a. Provincial departments of state
 - b. Premiers of provinces
 - c. Members of the Executive Councils (MECs)
3. In the local government sphere this refers to:
 - a. Municipalities
 - b. Municipal councils

4.1.2 Organ of State in terms of s 239(b)

Any functionary or institution that is not part of the public administration, but which either exercises power or performs functions in terms of the Constitution or a provincial constitution, or exercises public power or performs public functions in terms of legislation.

4.2 The role of associations, clubs and other “private” organisations

Voluntary organisations are non-statutory bodies which have traditionally had the common laws of administrative laws applied to them because the relationship between management and members is analogous to that of an administrative law relationship.

As voluntary associations are governed by their constitutions, the courts will interpret the powers of these associations strictly on the basis of the agreement between members and the associations as contained in their constitutions.

It is therefore **not clear** whether administrative law applies to these cases (*Mahlangu*).

4.3 The persons (natural or juristic) whose rights and interests are affected by the exercise of authority

The person affected could be a natural or juristic person, both inside and outside the public sphere.

4.4 Is the subordinate person “helpless” in the authoritative relationship?

Persons in the subordinate position are never stripped of their rights, privileges and interests when entering into such administrative-law relationships.

The person in the subordinate position is protected by the law in general and the Constitution in particular.

4.5 The object of the administrative-law relationship

The object of an administrative-law relationship is the reason why the legal subjects entered into a relationship. In other words, it is the issue which brings about the legal bond linking the two subjects.

5 Administrative Action

5.1 The need to establish whether administrative action is involved

We need to determine whether administrative action has been performed to determine whether the right to just administrative action is involved.

There are also exclusions to administrative actions.

5.2 The definition of administrative action

5.2.1 A broad description of administrative action

“Administrative action” can broadly be described as:

- any decision of an organ of state of an administrative nature made in terms of the prescriptions of empowering laws

- any decision of private persons when they exercise public power or perform public functions in terms of empowering laws.

2 leading decisions in determining whether administrative action took place:

President of the Republic of South Africa v South African Rugby Football Union 1999

Pharmaceutical Manufacturers Association of South Africa: In re: ex parte President of the Republic of South Africa 2000

5.2.2 Constitutional instructions relating to administrative action

Section 33(3) instructs parliament re administrative action that “National legislation must be enacted to give effect to these rights”.

Accordingly, parliament passed the Promotion of Administrative Justice Act 3 of 2000 (PAJA) which was promulgated on 3 February 2000 and came into operation on 30 November 2000.

5.2.3 Administrative action as described in PAJA

Asked in 2006 & 2007 Exam: Define administrative action in terms of PAJA.

- A:** 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 definition in PAJA includes a list of exceptions to this general definition.

PAJA also defines "decision" as being of an administrative nature

5.3 Action that does not qualify as administrative action

Asked in 2007 exam: Give five examples of action expressly excluded from the definition of administrative action.

The following does not qualify as administrative action:

1. Executive powers or functions of the National Executive, Provincial Executive and municipal councils
2. The legislative functions of Parliament, a provincial legislature and municipal councils
3. The judicial functions of a judicial officer of a court
4. A decision to institute or continue a prosecution
5. A decision relating to any aspect regarding the appointment of a judicial officer, by the Judicial Service Commission
6. Any decision taken, or failure to take a decision in terms of any provision of the promotion of Access to Information Act, 2000;

Also: ceremonial actions performed by the president as per section 84(2) of the Constitution:

1. Calling a national referendum in terms of an Act of Parliament
2. Receiving and accrediting (recognising) foreign diplomatic and consular representatives and appointing ambassadors
3. Conferring honours
4. Appointing commissions of inquiry

5.4 The types of administrative action

1. Legislative administrative action
2. Judicial administrative action
3. "Purely" administrative action

Necessary to distinguish different types because the law attaches important consequences to the difference between these classes of administrative action

5.4.1 Separation of powers and three classes of administrative action

Classification of administrative action into three classes has its roots in the principle of separation of powers.

5.4.2 The three classes of administrative action and the distinctive features (characteristics) of each

5.4.2.1 Legislative administrative action

Characteristics of legislative administrative action:

1. The **making and issuing of delegated legislation** when authorised to do so by enabling legislation.
2. Most easily recognised action of the administration: has a **specific form and is published** in an official document, such as the Government Gazette.
3. **General relationships** are created/varied/ended by administrative legislative actions
4. **Specific requirements** apply to the adoption, repeal or amendment of all legislative administrative action
5. The power to delegate a legislative power exists only when there is **express statutory authority** for this.
6. Administrative legislative action must be **within the framework of the authority** given by the enabling Act.

5.4.2.2 Judicial administrative action

Action of an organ of state that is almost like that of the judicial authority in that legal rules are interpreted and applied to concrete situations.

Examples of organs of state that perform a purely judicial function:

1. Air pollution appeal board
2. The films and publications appeal board

Formal and material tests that are applied to determine whether a functionary or institution is a judicial administrative functionary or institution:

5.4.2.2.1 Material tests

1. Is there a legal dispute or uncertainty regarding rights, privileges, freedom, powers or duties?
2. Has there been a decision and application of the law regarding rights and duties?

5.4.2.2.2 Formal tests

1. Does the administrative institution possess similar attributes to those of the courts? Or does the institution form part of an existing judicial system?
2. Is the effect of the decision is final and binding?

Only if all formal and material tests are met, can we speak of a judicial administrative action.

5.4.2.3 "Purely" administrative action

Refers to administrative action where individual administrative law relationships are created or varied.

Divided into 2 broad categories based on the level of cooperation & agreement between the legal subjects:

1. consensual (multilateral) and
2. authoritative (unilateral) administrative actions

5.4.2.3.1 Consensual (multilateral) administrative action

Consensual administrative action requires the consent or cooperation of the person(s) affected within the particular administrative-law relationship, i.e. collective labour agreement.

5.4.2.3.2 Authoritative (unilateral) administrative action

Clearest example of “purely” administrative action: the administrative authority does not need the consent or cooperation of the other person to make the decision, i.e. granting of a license.

Authoritative (unilateral) administrative action is further subdivided into categories of administrative action:

1. mechanical action
2. discretionary action
3. action by the police
4. action relating to the internal/domestic functioning of the public administration

Mechanical administrative action

Refers to a strictly defined or circumscribed instruction to the authority to perform the duty: little or no element of choice, judgement or discretion involved.

Discretionary administrative action

Organ of state has a “discretion” about how the action is to be performed: thus has the power to make a choice between two or more alternatives.

Even though discretion involves a choice, the choice is always limited by legal rules and directives

Wide discretionary power: the law leaves a large measure of freedom to the decision-maker in his or her choice of options, i.e. grant or deny a license.

Narrow (circumscribed) discretion: enabling provision may lay down a number of options which the organ of state must take into account before exercising its discretion.

Action by the police

Usually takes place on the spur of the moment and in an emergency situation.

Action relating to the internal/domestic functioning of the public administration

Relates to the internal or domestic organisation, division of labour and functions of the administration: thus “internal administrative action”.

May be of a legislative nature, of a judicial nature or unilateral administrative action.

5.5 The legal force of administrative action

5.5.1 When does administrative action take effect?

Necessary to determine when administrative action takes effect in order to determine the period within which an appeal to a higher domestic review tribunal or the courts may be lodged

5.5.1.1 Legislative administrative action

Affects an individual as soon as the regulation or proclamation has been promulgated and the stated date of commencement arrives.

Internal administration is bound by legislative action as soon as the legislation has been adopted.

5.5.1.2 Judicial administrative action

Usually takes effect as soon as the particular judicial institution gives its decision or delivers its judgment.

5.5.1.3 Purely administrative action

Will take effect upon the decision becoming known, either by publication (in the Government Gazette) or by individual notification.

5.5.2 Termination of the legal force of administrative action

Legal force of administrative action is terminated by

1. repeal
2. amendment
3. lapse of time
4. withdrawal of one of the subjects to the relationship or
5. by court order.

Functus officio: the organ of state cannot amend, repeal or alter its decision.

5.5.2.1 Legislative administrative action

Legislative organ may repeal or amend legislative administrative action at any time.

The power to repeal or amend legislative administrative action generally relates only to the future and may not have retrospective effect.

Where an individual has acquired rights as a result of the legislative action, the repeal or amendment does not affect these acquired rights.

5.5.2.2 Judicial administrative action

The organ of state is *functus officio* once it has made a decision, and it cannot alter or repeal the decision.

Judicial administrative action has the force of *res iudicata* and may consequently only be altered, rescinded or upheld by a higher judicial body – usually the High Court.

5.5.2.3 Purely administrative action

5.5.2.3.1 Invalid administrative action

Any invalid administrative action may be altered or withdrawn by the administrator.

However, if the affected person has questioned the validity of the administrative action before a court or a higher domestic tribunal, or if the individual has acquired rights and privileges as a result of such invalid administrative action, the action cannot be altered by the authority.

5.5.2.3.2 Valid administrative action

Valid **onerous administrative action** may be altered by the administrator.

Valid **beneficial administrative action** may be altered by the authority only where the power to do so has been conferred expressly or by necessary implication

If administrative action **affects the status** of an individual, the authority may not rescind or withdraw this decision unless the revocation is authorised expressly or by necessary implication.

6 Requirements for valid administrative action: just administrative action

Asked in 2007 Exam: List the requirements of just administrative action as set out in section 33 of the Constitution.

Section 33 represents the over-arching constitutional requirement that all administrative action must comply with if it is to be “just”. Such action must be:

1. lawful
2. reasonable
3. procedurally fair and
4. written reasons must be provided for any administrative action that adversely affects rights.

6.1 Explanation of the concept “just administrative action”

“Just administrative action” is an “umbrella” or overarching requirement that relates to ALL the requirements for valid administrative action. As an over-arching requirement “just administrative

action" determines the legal boundaries of any administrative action and ensures that administrative action is performed in accordance with all the relevant rules prescribed by law.

Just administrative action:

1. is aimed at **preventing public institutions** and functionaries from **abusing** or misusing their **power** in their dealings with an individual who is in a subordinate position
2. is directed at **protecting the individual** in any dealings with public institutions and functionaries.
3. demands the **promotion** and maintenance of **transparent, accountable and open administrative action** on the part of public institutions and functionaries

Just administrative action will ensure:

1. **increased participation** by the public in the exercise of public functions
2. that the administration will **weigh up their decisions against the values** enshrined in **the Constitution**
3. **administrative accountability**

Maybe section 195(1) of the Constitution? Not sure, but I don't think so.

6.2 Other over-arching (umbrella) terms used to refer to just administrative action

1. *intra vires / ultra vires*
2. administrative legality
3. applying one's mind to the matter

6.2.1 *Ultra vires/intra vires*

Ultra vires: "to act beyond one's powers"

Intra vires: "within the power"

Administrative action is invalid when the administrative body goes beyond the powers that have been conferred on it by law.

Wide approach to *ultra vires* requires that administrative action must comply with **all** the requirements set by the law; not only those prescribed by the enabling legislation.

When we refer to *intra vires* administrative action, the administrative action is valid in terms of

- the Constitution
- PAJA
- legislation
- common law
- case law

Intra vires (in the wide sense) is also an umbrella concept, because it encapsulates/includes all the requirements for valid administrative action.

6.2.2 Administrative legality

Basis of administrative legality is that the public administration must

1. serve and promote the public interest
2. protect and respect fundamental (human) rights

Administrative legality requires that any administrative action should be in accordance with **all** the requirements of the law. Administrative legality should therefore be regarded as the basis of all administrative action.

6.2.3 Applying one's mind to the matter

The public functionary has "applied his mind to the matter" when all the requirements of the law have been met.

"Applying one's mind" is not an independent requirement for validity. However, like just administrative action, *intra vires* (in the wide sense) and the principle of administrative legality it is an over-arching concept that incorporates all the requirements for valid administrative action.

7 The right to lawful administrative action as requirement for validity

7.1 Concept of lawfulness

7.1.1 The meaning of "lawful" in the context of or in relation to a right to lawful administrative action in section 33(1)

Section 33 of the Constitution guarantees everyone the right to administrative action that is lawful.

Reasons why lawful administrative action has been expressly guaranteed by the Constitution:

1. To prevent the adoption of any laws that will exclude judicial control over administrative action: restricts the application of ouster laws.
2. Entrenches the principle of legality, which demands compliance with all law.

7.1.2 Lawfulness as reflected in other provisions of the Constitution

Section 2: Constitution is the supreme law and any law or conduct inconsistent with the Constitution is invalid.

Bill of Rights: protects everyone's identified rights against violation and constitutes the most important check on or restriction of the possible abuse of public power.

Section 7: the state must respect, protect, promote and fulfil the rights in the Bill of Rights. This includes the right to just administrative action

Section 8: Bill of Rights applies to all law.

Section 36: must be taken into account when limiting a right through administrative action.

Considerations when limiting a right under section 36:

1. Must be "reasonable and justifiable" in an:
 - a. open and democratic society based on
 - b. human dignity,
 - c. equality and
 - d. freedom

Considerations when determining proportionality (limitation of the right and the purpose for which the right is being limited) of right being limited under section 36:

1. the nature of the right
2. the importance of the purpose of the limitation
3. the nature and extent of the limitation
4. the relation between the limitation and its purpose
5. less restrictive means of achieving the purpose.

Section 39: contains prescripts for the interpretation of the Bill of Rights.

Chapter 10 (s 195): Basic values and principles governing public administration.

7.1.3 PAJA and lawful administrative action

1. Provides for the judicial review of any administrative action.
2. Includes unlawful administrative action as a general ground among the grounds for judicial review.

7.1.4 Lawfulness and the enabling or empowering statute

Enabling statute can prescribe the following with regards to lawfulness:

1. Instructions relating to the scope and content or nature of administrative power.
2. Directives requiring the administrator exercising the power to possess specific knowledge, experience or other qualifications
3. Specific procedures to be followed.

Administrator must always act within the powers conferred to him by the empowering statute.

7.1.5 Other legislation

May have a direct or indirect effect on determining the lawfulness of administrative action.

7.2 Provisions dealing with the administrator

Enabling statute defines:

1. the qualifications of the administrator
2. the place where the administrator must perform administrative action
3. the time at or within which the action must be performed
4. the subject matter of the administrative action
5. the scope of the administrator's authority and power

7.2.1 Who is the administrator?

Public functionary or institution performing administrative action.

Administrator is always:

1. an administrative functionary
2. an organ of state as described in section 239 of the Constitution

Administrator is always:

1. clothed with authority
2. has legal power of discretion (wide or narrow)

7.2.2 Qualifications of the administrator prescribed by the act

If the administrator does not have necessary qualifications (i.e. status, qualifications, attributes, experience or knowledge) as defined by the Act, he cannot perform a valid administrative act.

Statute could require **specific professional qualifications**.

Empowering Act often assumes the existence of a particular **status** before powers or rights are conferred.

7.2.3 The rule against delegation

Delegation is unlawful unless certain requirements have been met (*delegatus delegare non potest*).

Administrator who was granted a discretionary power due to qualifications, knowledge or expertise must perform the administrative action personally.

Delegation of powers would undermine the requirement that the power(s) must be exercised by an administrator with aforesaid attributes.

Case: *Shidjack v Union Government* 1912

Asked in 2007 Exam: Explain the concept of delegation, including the rule *delegatus delegare non potest* (the rule against unauthorised delegation).

A: The rule *delegatus delegare non potest* means that if the action entails the exercise of a discretion, no delegation may take place unless authorised by the relevant legislation.

In other words, if a power is conferred on an administrator because of specific qualifications, expertise or knowledge, this function may not be delegated to another functionary.

The key judgment is *Shidiack v Union Government* (1912 AD).

Delegation is, however, permissible in terms of section 238 of the Constitution if it is consistent with the legislation in terms of which the power is exercised or the function is performed; or if the power is exercised for another executive organ of state on an agency or delegation basis.

A subordinate may, however be instructed to implement a decision.

An administrator may not put itself in the position of having to accept directions or orders from another body. The administrator may appoint a fact-finding body to assist it, providing the final discretion is exercised by the proper authority.

7.2.4 When is delegation of powers permissible?

Section 238 of the Constitution allows for delegation of powers as long as the delegation is consistent with the enabling legislation.

Rules when determining when delegation of powers is permitted:

1. If the administrator is authorised to perform a particular action and this entails the exercise of a discretion, the task concerned may not be delegated unless the delegation is authorised by statute.
2. An administrator that exercises a discretion and makes a decision is not prevented from instructing a subordinate administrator merely to implement the decision
3. An administrator may not, in the exercise of its discretion, put itself in the situation of having to accept directions or from another body. In other words, it must apply its own mind to the matter.
4. An administrator may appoint a fact-finding committee to assist it, provided the actual discretion is ultimately exercised by the proper authority.

7.2.5 The various forms of delegation

Kinds of delegation is determined by the form of relationship between relevant administrators:

1. Internal hierarchical relationship
2. Independent control

7.2.5.1 Internal hierarchical relationship (deconcentration)

Pyramid structure with minister at the top and officials at the bottom.

Types of delegation:

7.2.5.1.1 Mandate

Senior administrator makes a decision and then hands it over to another administrator to implement or execute.

7.2.5.1.2 Deconcentration

Act gives minister the ability to delegate any of his powers to an officer in the department.

Found in:

1. University
2. Municipal Council
3. Any institution exercising public power in terms of legislation

Reason for type of delegation:

1. Ensure division of labour

2. A quick and efficient execution of government function
- Rules applicable to deconcentration of administrative functions:
1. Head of administrative hierarchy (*delegans*) **may withdraw the delegation** at any time and perform the function personally, or he may prescribe certain requirements relating to the performance of the function of the delegate
 2. When the **delegate** performs a function on behalf of the *delegans*, he **acts in the place of the *delegans***: function is regarded as having been performed by the *delegans*.
 3. The *delegans* **may exercise** various types of **control over the delegate**, i.e. ask for a report or relieve him of duty.
 - a. If the matter has **not been concluded, the *delegans* may intervene and conclude the matter personally**. The *delegans* is not *functus officio* prior to the conclusion of the matter.
 - b. Where the matter **has been concluded** the *delegans* **cannot undo the execution of the delegated function**, although he or she may decide to withdraw the delegation.
 4. Authoritative functionaries within the same administrative hierarchy cannot become involved in a legal dispute with each other. In this regard we say that **there should be solidarity within the same administrative hierarchy**.

7.2.5.2 Independent control (decentralization)

Delegans transfers control to an independent body, i.e. minister delegates control of liquor licenses to a panel/board.

Administrator exercises control in 2 ways:

1. Appointment of panel/body members
2. Appeal or review of the decisions made

Exercise of public power by independent bodies is subject to management and control by the controlling body: thus there is no real delegation.

Case: *University of Pretoria v Minister of Education* 1948.

7.3 Powers of the administrator

7.3.1 The powers of the administrator prescribed by law

Content and scope of administrative powers are dependant on:

1. The statute in question
2. The appropriate rules of statutory interpretation
3. The general principles of administrative law as applied and developed by the courts

Empowering legislation contains provisions limiting the administrator's powers with regards to:

1. Geographical area within which or where he or she must exercise his or her
2. The time within which these powers must be exercised
3. The object (subject matter) of the action

7.3.2 The place where the administrator must exercise power

Administrator **must keep within boundaries** prescribed when he is empowered to exercise powers within a specific geographical area.

7.3.3 The time within which the administrator must exercise power

Administrator **cannot exceed time limits** prescribed a specific time is prescribed for the performance of his actions.

Administrative action must be **prospective** and not **retrospective**.

7.3.3.1 Rule against retrospectivity

Action will have retrospective effect only when the administrator has been empowered by the statute to make it retrospective.

7.3.4 The object (subject matter) of the power (authority)

The subject matter of the power to decide about something is usually described precisely in the empowering act.

Where the boundaries of the administrator's power are not clear, the rules of statutory interpretation are used.

The more important rules stem from the requirement that the subject matter of the administrative power must be precisely defined in the administrative act, i.e. authorizing the administrator to regulate and control, but not prohibit (*Mokoena v Commissioner of Prisons* 1985)

7.3.5 Prohibition of the abuse of power by the administrator

7.3.5.1 The rule against unauthorised purpose

Where the administrator uses his or her power for a purpose other than that set out in the enabling statute, his or her action amounts to the abuse of a power for an unauthorised purpose.

When an administrator exercises his or her powers for an unauthorised purpose, the legal force of the empowering statute is extended in an unauthorised manner. In other words, the administrator takes over the functions of the legislature by extending the legal force of the particular legislation. This in turn conflicts with the entire principle of lawfulness, as well as with the doctrine of separation of powers.

7.3.5.1.1 The test for proving that a power has been used for an unauthorised purpose

Test is **objective**.

Question thus is not whether administrator thought he was serving the authorised purpose, but whether the authorised purpose has been achieved.

Proof of unauthorised purpose thus depends on the results or effects of the exercise of power.

The exercise of administrative power for an unauthorised purpose amounts to *ultra vires* action.

Read case synopses:

- *University of Cape Town v Ministers of Education and Culture* 1988
- *Rikhotso v East Rand Administration Board* 1983
- *Cassiem v Commanding Officer, Victor Verster Prison* 1982

7.3.5.2 Exercising power using an unauthorised procedure

Normally happens when the proper procedure is time-consuming, difficult or cumbersome: administrator circumvents the correct procedure by using a shortcut.

Cases:

Van Coller v Administrator Transvaal 1960: director of education transferred someone instead of taking disciplinary action.

Pretoria City Council v Meerlust Investments (Pty) Ltd 1962: City council relied on private law purchase and sale procedure to enforce an expropriation of a property: did not follow proper procedure.

7.3.5.3 Exercising power using ulterior motives to defeat the purpose of the law (acting *in fraudem legis*)

When exercising power *in fraudem legis* the administrator deliberately and intentionally evades the provisions of the empowering statute.

Case: *Dadoo Limited v Krugersdorp Municipal Council* 1920

Using power for an ulterior motive (*fraus legis*) and unauthorised purpose cannot be equated. To exercise power *in fraudem legis* presupposes a fraudulent intention which is not necessarily found in the case of abuse of power for an unauthorised purpose.

7.3.6 The administrator and the exercise of power in good faith (*bona fide*)

All administrators must exercise their power in good faith (*bona fide*) because they must consciously apply their minds to all the requirements for valid administrative action.

Mala fide usage of power may be understood in a wide as well as a narrow sense. In the narrow sense it refers to fraud, dishonesty or corruption, and in the wider sense to the wrongful use of power.

Mala fide actions indicate that the administrator did not apply their mind to the matter and indicates a deliberate disregard of the basic requirement that public power must be exercised in the public interest.

Cases:

Hart v Van Niekerk 1991: municipality closed swimming pools to circumvent repeal of the Reservation of Separate Amenities Act: the municipality did not act in a *bona fide* matter or apply its mind to the matter.

8 The right to procedurally fair administrative action

There WILL be a long question with regards to a procedurally fair administrative action. See both 2006 & 2007 exam papers.

8.1 The origin of the right to procedurally fair administrative action

8.1.1 Rules of natural justice

Set of rules aimed at ensuring administrator acts in a fair and that the individual is treated fairly, i.e. the administrator applies his mind to the matter.

Demand that the administrator follow certain procedural requirements:

1. Giving the individual the opportunity to present his case before the administrator makes his decision
2. Allow the individual to counter adverse allegations
3. Being impartial and unbiased

Purpose of rules of natural justice:

1. They facilitate **accurate and informed decision making**.
2. They ensure that **decisions are made in the public interest**.
3. They **preserve important procedural values**.

8.2 The content of the rules of natural justice

Condensed into 2 Latin maxims:

1. *audi alteram partem* (literally: "to hear the other side")
2. *nemo iudex in sua propria causa* (literally: "no one may or should be a judge in his own cause".) In other words, it is a rule against bias (partiality or prejudice).

8.2.1 The audi alteram partem rule

Consists of the following:

1. The individual must be given an opportunity to be heard on the matter (i.e. the opportunity to put his or her case).
2. The individual must be informed of considerations which count against him or her.
3. Reasons must be given by the administrator for any decisions taken.

8.2.1.1 The individual must be given an opportunity to be heard on the matter

Any individual affected by an administrative action's decision must be given the right to be heard.

Applies to any situation where a person's rights, privileges or liberties are at issue, i.e. judicial action, legislative action or purely administrative action.

Opportunity to be heard is subdivided into 7 sub-rules:

1. proper notice of intended action
2. reasonable and timeous notice
3. personal appearance
4. legal representation
5. evidence/cross-examination
6. public hearing

8.2.1.1.1 Proper notice of intended action

1. Person must be given adequate notice of the forthcoming administrative action, whether required by statute or not.
2. Notification must contain all the necessary details to assist the individual in his/her preparation for the hearing

8.2.1.1.2 Reasonable and timeous notice

The person must be given reasonable notice to enable him or her to collect the necessary information to prepare their case (reasonable time depends on circumstances of each case: more involved = longer time: *Turner v Jockey Club* 1974).

Other cases:

Du Preez and another v Truth and Reconciliation Commission 1997

NISEC (Edms) Bpk v Western Cape Provincial Tender Board 1997

8.2.1.1.3 Personal appearance

Person must be given a fair opportunity of presenting his case by:

1. appearing personally
2. making written presentations

Not essential that the person appears personally unless a statute makes personal appearance compulsory.

8.2.1.1.4 Legal Representation

Does not form part of the *audi alteram partem* rule: can only be claimed where it has been conferred by statute: thus no right to legal representation.

Wiechers, however, contends that the nature of the hearing should be the deciding factor for legal representation:

1. Purely factual hearing: no legal representation
 2. Highly technical matter affecting the individual's status, reputation, etc: legal representation
- Crucial question is whether person has been given a proper opportunity to present his case.

8.2.1.1.5 Evidence and cross-examination

Right to lead evidence and to cross-examine witnesses does not form an inherent part of the rules of natural justice.

Cross-examination:

1. Courts found that an oral hearing does not necessarily include the right to cross-examine, although each case must be decided on merit.

Evidence:

1. Hearsay and opinion evidence are usually permitted
 2. Hearing of irrelevant evidence is not necessarily irregular.
- Criterion is whether individual has had proper opportunity to present his case.

8.2.1.2 The party must be informed of considerations which count against him or her

Loxton v Kenhardt Liquor Licensing Board 1942: Any consideration or fact that may count against a person affected by a decision must be communicated to him, to enable him to defend the issue.

However: *Down v Malan* 1960: if an interested party could **reasonably have foreseen** that facts prejudicial to him would be taken into consideration, he should act accordingly, and, if he did not, failure would be attributed to his own carelessness or recklessness.

8.2.1.3 Reasons must be given by the administrator for any decisions taken

Administrator must give reasons for his decision.

In the past:

1. Rule was applied inconsistently
2. Was excluded by the enabling act
3. Administrative functionaries and institutions were reluctant to provide reasons for the exercise of their discretionary powers.
4. Court adopted the approach that an administrative body exercising a discretion makes its own decisions and accordingly need not give reasons.

All of the above obviously changed by section 33(2) of the Constitution.

8.2.2 The *nemo iudex in sua causa* rule

Literally: no one should be judge in his own **cause**, thus: the decision maker must be, and must be reasonably perceived to be, impartial.

Also known as: rule against bias or prejudice.

Requires that administrative functionaries and institutions exercise their powers in an impartial manner.

Most common examples of bias:

- the presence of pecuniary interest
 - the presence of personal interest
1. Pecuniary interest

Rose v Johannesburg Local Road Transportation Board 1947: Chairman of board responsible for granting/refusing of transport licenses was also director of 3 large taxi companies. Court found that any reasonable person would realize that the chairman was biased because of his pecuniary interest.

2. Personal interest

Liebenberg v Brakpan Liquor Licensing Board 1944: Mayor of the town was present when his brother's liquor license application was heard. Court found that relationship led to bias and set the decision aside.

Test to determine bias: (*BTR Industries SA v Metal and Allied Workers Union* 1992):

Not enough to show that there was in fact no bias or partiality in the process: criterion is that no reasonable person would have had a **perception or suspicion** of bias.

8.2.3 The common-law principle of legitimate expectations

Application of this doctrine is used when the affected party has no vested right, but does have a potential right or legitimate expectation.

Person has a right to be heard before a decision which might affect him is taken: right is based on:

1. the legitimate expectation that a benefit will be conferred on him or
 2. that an existing benefit will not be taken away.
- Right to be heard does not mean that person will succeed in the application.

Legitimate expectation might arise in at least two circumstances:

1. an express promise given by the authoritative body
2. a regular practice, which the claimant of a legitimate expectation reasonably expects to continue.

Cases:

1. *Everett v Minister of the Interior* 1981: First raised in SA
Person who is granted a residence permit for a certain period of time "acquired a right consisting of a legitimate expectation of being allowed to stay for a permitted time".
2. *Administrator, Transvaal and others v Traub* 1989
Doctors had legitimate expectations to be appointed to senior house officers at Chris Hani / Baragwanath
3. *Claude Neon v City Council of Germiston* 1995
Applicant had a legitimate expectation that he would be notified when the tender documents were ready
4. *Jenkins v Government of the Republic of South Africa* 1996
Public servant who received housing and an official vehicle had a legitimate expectation that she would be given a hearing before any decision was taken to withdraw the benefits.

Asked in 2007 Exam: Briefly explain when the concept of legitimate expectation may be used to obtain a hearing.

Answer: The doctrine of legitimate expectation provides that the rules of natural justice must be complied with when a regular practice exists which the affected party reasonably expects to continue and/or an express promise was given by the authority.

8.3 The constitutional right to procedurally fair administrative action

Section 33(1) of the Constitution expressly guarantee the right to procedurally fair administrative action.

Right to procedural fairness can only be limited if exemptions comply with the limitation clause in the Bill of Rights.

8.3.1 The content of the right to procedurally fair administrative action

Van Huyssteen NO v Minister of Environmental Affairs and Tourism 1995: Constitutional right to procedural fairness is more comprehensive than the rules of natural justice and may encompass aspects of fair procedure not yet covered by the common law.

However, the content of the common-law rules gives a good indication of the content of the constitutional right, but the constitutional right is not confined to the rules of common law.

8.3.2 The courts' interpretation of the constitutional right to procedural fairness

1. *Kotze v Minister of Health* 1996

Applicant was denied fair procedural administrative action due to the director general's consideration of information that did not form part of the applicant's application. Applicant should have been given the opportunity to deal with any information that did not form part of his application and which was taken into account when the considering the application.

2. *Fraser v Children's Court, Pretoria North 1996*
Commissioner decided matter without hearing oral evidence, thus denying the entitled applicant the benefit of the *audi alteram partem* rule (fatal irregularity).
3. *Janse van Rensburg and Another v Minister of Trade and Industry NO and Another 2000*
Where a wide discretion is conferred upon a functionary, guidance should be provided as to the manner in which those powers are to be exercised. The absence of such guidance in this case left the procedure provided for in section 8(5)(a) of the Consumer Affairs (Unfair Business Practices) Act 71 of 1988 unfair and a violation of the administrative justice guarantee of section 33(1). The Court therefore declared the provision constitutionally invalid.

8.4 PAJA and the right to procedurally fair administrative action

8.4.1 Section 3 – Procedurally fair administrative action affecting any person

Applies to the individual administrative-law relationship.

8.4.1.1 Section 3(1)

States that: "Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair." Thus includes legitimate expectations.

8.4.1.2 Section 3(2)

States that a fair administrative procedure depends on the circumstances of each case

Subsection (2)(b) reiterates the common law principles of natural justice, that in order to give effect to the right to procedurally fair administrative action the administrator must give the affected person:

1. adequate notice of the nature and purpose of the proposed administrative action
2. reasonable opportunity to make representations
3. a clear statement of the administrative action
4. adequate notice of any right of review or internal appeal
5. adequate notice of the right to request reasons in terms of section 5

However, right to procedurally fair administrative action must be given a generous interpretation in order to include any situations not covered by the Act (*Van Huyssteen*).

8.4.1.3 Section 3(3)

States that an administrator may give a person whose rights or legitimate expectations have been materially and adversely affected, an opportunity to:

1. obtain assistance and even legal representation
2. present and dispute information and arguments
3. appear in person.

8.4.1.4 Section 3(4)

Describes when a departure from the requirements of fair administrative action may take place.

Section 3(4)(a): departure may take place only where this is reasonable and justifiable.

Section 3(4)(b): in determining whether a departure is reasonable and justifiable, an administrator must take all relevant factors into account, including:

1. the objects of the empowering provision
2. the nature and purpose of and the need to take administrative action
3. the likely effect of the administrative action
4. the urgency of taking the administrative action or the urgency of the matter
5. the need to promote an efficient administration and good governance

However, any limitation must always comply with Section 36, which states that:

1. the rights in question must be limited by law of general application
2. the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom
3. certain relevant factors must be taken into account, namely the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means of achieving the purpose.

8.4.1.5 Section 3(5)

Permits an administrator to follow a different procedure, subject to:

1. the (different) procedure must be fair
2. there is an empowering provision that authorizes the administrator to follow a different procedure

8.4.2 Section 4 – Administrative action affecting the public

Applies to the general administrative-law relationship.

Purpose is

1. To remedy the past position when the general public had little or no input prior to the promulgation of subordinate legislation or before administrative decisions of general application were taken
2. to provide the general public with a right to be heard on issues of public concern, through a public hearing or notice and comment procedure.

Administrator must decide whether:

1. to hold a **public enquiry** (ss 1)(a))
2. to follow a **notice and comment procedure** (ss 1(b))
3. to adopt a **combination of the two** (ss 1(c))
4. where the administrator is empowered by any empowering provision **to follow a procedure which is fair but different**, to follow that procedure (ss 1(d)) or
5. to **adopt another appropriate procedure** which gives effect to section 4 (ss 1(e)).

8.4.2.1 The holding and procedure of a public enquiry (s 4(2))

Requirements of Section 4(2):

1. The administrator must conduct the public enquiry **himself** or appoint a suitably qualified person, or panel of persons, to do so.
2. The administrator must **determine the procedure** (which must include a public hearing and compliance with prescribed procedures).
3. The **public enquiry** must then be conducted **in accordance with that procedure**
4. A **written report** must be compiled.
5. **Reasons must be given** for any administrative action taken or recommended.
6. A **notice containing a concise summary** of the report and particulars of the places and times at which the report may be inspected and copied must be published in English and

one of the other official languages in the Gazette or relevant provincial Gazette as soon as possible.

7. The administrator must **convey the information** contained in the notice and report to the public, by such other means of communication which the administrator considers effective.

8.4.2.2 Notice and comment procedure (s 4(3))

Less formal procedurally: normally followed when the impact will not have an onerous impact on the general population.

If an administrator decides to follow a notice and comment procedure he must:

1. Take appropriate steps to **communicate** the administrative action **to those** likely to be **materially and adversely affected** by it and call for comments from them
2. **Consider any comments** received
3. **Decide whether or not to take the administrative action**, with or without changes
4. **Comply with the prescribed procedures** relating to notice and comment procedures.

8.4.3 Section 4(4)

Allows a departure from the requirement of fair administrative procedure affecting the general public where it is reasonable and justifiable to do so.

Same considerations set out in 3(4) apply.

8.5 The application of the right to procedurally fair administrative action

Observance of the rules take place **before** any decision is taken.

9 The constitutional right to reasonable administrative action

9.1 Uncertainty about the requirement of reasonable administrative action and the reasons for this uncertainty

1. It is not the function of the courts to substitute its decisions for those of the public administration:
Reasonableness relates to the merits and substance of the decision: an area in which the courts should not intervene. Thus, when courts review actions based on unreasonableness, they are required to act as super-administrative organs and to substitute their opinions for those of the administration.
2. Courts must ensure that the decisions of the administration are in line with the requirements of basic fairness and rationality:
It is not the task of a reviewing court to determine administrative policy, the correctness of a decision or to agree/disagree with a decision: it must only apply legal norms, i.e. determine whether discretion has been exercised properly and correctly within the confines of the law.

9.1.1 Earlier decisions about reasonableness

Courts argue that unreasonableness is not in itself a reviewable defect, but is relevant only in so far as it points to some other defect in the decision ("**symptomatic unreasonableness**").

Union Government (Minister of Mines and Industries) v Union Steel Corporation (SA) Ltd 1928 and *National Transport Commission v Chetty's Motor Transport* 1972:

Judicial intervention is permitted only when unreasonableness is inexplicable except on grounds such as *mala fides* or that it points to a failure on the part of the administrator to apply his or her mind duly and properly to the matter before him or her ("**gross unreasonableness**").

According to these narrow interpretations of unreasonableness, it is not the unreasonable **result** of the action on the individual that is considered, but rather the unreasonable **disposition of the administrator**: thus: **test is not objective** (testing consequences or effect of action) **but subjective** (examines mental condition, morality, etc. of the administrator)

9.2 "Justifiable" administrative action in terms of section 24(d) of the interim Constitution

Section 24(d) provided for administrative action that is "**justifiable** in relation to the reasons given for it where any of their rights is affected or threatened".

A justifiable decision:

1. Is based on reason
 2. Is a decision where the purpose for which it has been taken is important enough to outweigh the right of the individual.
 3. Must be compliant with the principles of proportionality: (German law principles)
 - a. the **suitability** of the administrative measure
 - b. the **necessity** of the measure
 - c. a **weighing up of the advantages and disadvantages** when considering the end to be attained.
-
1. Suitability
Administrator must choose only those means that are most appropriate for achieving the desired end
 2. Necessity
Administrator must take only such steps as are indispensable if any prejudice to an individual is involved
 3. Weighing up of the advantages and disadvantages
Administrator must weigh advantages and disadvantages and consider the injury to the general public or the individual.

9.2.1 The courts' approach to justifiability in section 24(d) of the interim Constitution

Standard Bank of Bophuthatswana Limited v Reynolds 1995

Court adopted a less narrow approach to the review of unreasonable administrative action (said that courts adopt a less stringent test of "unreasonableness" rather than the more restricted one of "gross unreasonableness").

Kotze v Minister of Health 1996

Stated that the reasons advanced for the administrative action must show that the action is adequately just or right. Found that the director general failed to properly apply her mind and had not reached her conclusion on facts that were relevant to the matter before her.

Roman v Williams 1997

Decided that test of justifiability was objective, i.e. that the decision must be capable of objective substantiation. Also: the action must meet the requirements of suitability, necessity and

proportionality in order to qualify as justifiable in relation to the reasons given. This requires the purpose of the decision maker being determined in order to assess suitability and necessity.

9.3 The present position in terms of the 1996 Constitution and the provisions of PAJA

9.3.1 Section 33(1) of the 1996 Constitution

Section 33(1) requires that everyone has the right to administrative action that is “reasonable”.

1996 Constitution has introduced complete review of the reasonableness of administrative decision-making

“Reasonableness” as a specific requirement for the validity of all administrative action requires that administrative action be procedurally and substantively fair and just.

9.3.2 PAJA and the right to reasonable administrative action

PAJA allows an individual the capacity “to institute proceedings in a court or a tribunal for the review of administrative action”.

The Act does **not** refer to the unreasonable result or effect of the action: this means the administrator’s **subjective** disposition or state of mind still determines whether the administrative action is valid or not, and **not the objectively** determinable effect or consequence of the action.

10 The right to be given written reasons

10.1 The importance of reasons

Reasons show:

1. how the administrative body functioned when it took the decision
2. how the body performed the action
3. whether that body acted lawfully or unlawfully, rationally or arbitrarily, reasonably or unreasonably

Person wishing to challenge an administrative action is at a disadvantage when no reasons are provided as there is nothing concrete to base a review on.

Asked in 2006 Exam: Was Super Signs (Pty) Ltd entitled to reasons? What is the importance of receiving reasons?

A: In terms of s 33(2) of the Constitution Super Signs were entitled to written reasons since its rights were adversely affected by the decision.

This requirement is a safeguard against any arbitrary or unreasonable administrative decision making.

Currie and Klaaren 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.

S 5 of PAJA provides for the furnishing of reasons to anyone who has requested reasons and whose rights have been materially and adversely affected.

Adequate reasons must be furnished within 90 days of the request. Failure to furnish reasons leads to the presumption that the decision was taken without good reason.

The Act also provides that a court may review the action if the action is itself not rationally connected to the reasons given.

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 Super Signs would be at a great disadvantage to challenge the action. If no information is available to it, 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.

10.2 The right to reasons in terms of section 24(c) of the interim Constitution and section 33(2) of the 1996 Constitution

Requiring the administrator to give reasons for his decision:

1. is a **safeguard** against any arbitrary or unreasonable administrative decision making.
2. is to **justify** the administrative action that has been taken.
3. promotes **fairness** and proper administrative behaviour.
4. ensures administrative **openness**.
5. promotes administrative **accountability**.

10.3 When is the administrator required to give reasons?

Reasons need only be given where:

- rights and interests are affected (s 24(c) of the interim Constitution)
- rights are adversely affected (s 33(2) of the 1996 Constitution).

10.4 PAJA and the requirement of reasons

Section 5 gives effect to Section 33(2) of the Constitution:

Section requires the provision of 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.

Provides that a court has the power to review administrative action if the action itself is not rationally connected to the reasons given for it by the administrator (s 6(2)(f)(ii)(dd)).

10.4.1 Section 5(2)

Administrator must give the person adequate reasons in writing within 90 days of receiving the request for reasons.

10.4.2 Section 5(3)

The failure to furnish adequate reasons raises a presumption that the administrative action taken was without good reason.

10.4.3 Section 5(4)

Any departure from the requirement that adequate reasons be furnished must be reasonable and justifiable in the circumstances.

The administrator must inform the person making the request of the departure forthwith.

Represents a limitation of rights and the same requirements laid out under 3(4) and 4(4) must be followed.

10.4.4 Section 5(6)

Minister may, at the request of the administrator, or by notice in the Gazette, publish a list specifying any administrative action, or a group or class of administrative actions, in respect of which the administrator will automatically furnish reasons.

10.5 When will reasons be “adequate”?

There is a correlation between the action taken and the results furnished:

The more drastic the action taken, the more detailed the reasons which are advanced should be. The degree of seriousness of the administrative act should therefore determine the particularity of the reasons furnished. (*Moletsane v The Premier of the Free State* 1995)

11 Control of administrative action

11.1 Remedying or controlling administrative action

Remedies are used when administrative action is defective.

To control or remedy administrative action is to determine whether administrative action is performed validly and to ensure that it is indeed valid.

Remedies are divided into 2 broad categories:

1. Internal or extrajudicial control
2. Judicial control

11.2 Internal or extrajudicial control

11.2.1 Remedies within the administration itself (domestic control)

Control exercised within the administration itself.

Exercised by:

1. **Superior** (senior) **officials** and **specially constituted bodies**
2. **Parliamentary** control
3. **Public bodies and commissions**, such as the public protector and the auditor-general

11.2.1.1 Control by superior officers or specially constituted bodies

These are officers higher up in the hierarchy of the organization, i.e. School Governing Body -> Head of Department -> MEC for Education, and specially constituted bodies to hear appeals, i.e. the refugee appeals board.

Powers of the senior functionaries:

1. The senior functionary or institution has the power to **reconsider or re-examine the decision** and then to confirm it, set it aside or vary the decision
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 judicial act**. As a result, the same matter may be raised again within the same departmental hierarchy.

11.2.1.2 Parliamentary control

A form of internal control over administrative action.

Section 92(2) of the constitution makes ministers accountable for all administrative action taken within their department.

Parliamentary control takes place by way of:

1. Tabling of reports by ministers
2. Parliamentary enquiries

11.2.1.3 Public bodies and commissions

Institutions that are, according to the Constitution, "state institutions supporting constitutional democracy". They are:

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1. The **P**ublic Protector
2. The **H**uman Rights Commission
3. The Commission for the Promotion and Protection of the Rights of **C**ultural, Religious and Linguistic Communities
4. The Commission for **G**ender Equality
5. The **A**uditor-General
6. The **E**lectoral Commission
7. The Independent **B**roadcasting Authority

Guiding principles for these bodies:

1. they are independent and subject only to the Constitution and the law
2. they are impartial
3. they must exercise their functions "without fear, favour or prejudice"

11.2.1.3.1 The Public Protector

Created by Section 182 & 183 of the Constitution to curb administrative excesses (known in other countries as the "ombudsman").

1. **Investigates citizens' complaints** against the public administration and its officials
2. Has the following powers:
 - a. To investigate any conduct in respect of state affairs or in the public administration in any sphere of government that could be improper, or could result in any impropriety
 - b. To report on that conduct and
 - c. To take appropriate remedial action
3. May **not** investigate **court decisions**.
4. Must be **accessible** to all persons and communities.
5. **Reports must be open** to the public (may only be kept confidential in exceptional circumstances).

11.2.1.3.2 The Auditor General

Created by Section 188 of the Constitution.

Control function relates to the auditing of and reporting on

1. the accounts
2. financial statements and
3. financial management of all national and provincial state departments and administrations and all municipalities

11.2.2 Advantages of internal control

1. Administrative decisions are thoroughly re-evaluated through internal control
2. Possible to bring inefficient officials to book
3. Less expensive, less difficult and less time-consuming than judicial control.

11.3 Judicial control as remedy

11.3.1 The importance of judicial review and the courts' traditional function of controlling administrative action

Judicial review allows the validity of legislation or administrative action to be challenged in a court. The judiciary must ensure that all state actions comply with the Constitution. This is why judicial control is universally regarded as the cornerstone of the control of administrative action in a democratic state.

In order to succeed in a claim for judicial review in terms of the common law, the applicant will have to prove the illegality or invalidity of the administrative action in question. To do so, he will rely on any of the recognised common-law grounds of invalidity, such as failure to comply with the rules of natural justice or failure to comply with the correct procedure, etc.

11.3.2 The "constitutionalisation" of administrative action and judicial review

Previously common-law rules of administrative law have now been included in section 33 of the Constitution.

The Constitution reigns supreme over any matter that was previously held under common law. The inherent review powers of the court with regard to administrative action have been subsumed by constitutional review in so far as they applied to the exercise of public power.

11.3.3 The provisions of PAJA for controlling administrative action

11.3.3.1 The grounds for judicial review in terms of PAJA

The grounds for judicial review may be divided into three "categories":

1. the administrator of administrative action
2. non-compliance with formal requirements relating to administrative action
3. the administrative action itself

11.3.3.1.1 The administrator of the administrative action

Grounds for judicial review relating to the administrator include:

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1. *ultra vires* action
2. excess of power by the administrator, for example
 - a. when the administrator lacked specified qualifications
 - b. when the administrator exceeded the geographical limits of the powers conferred
 - c. when the administrator did not act in accordance with provisions relating to time
 - d. when administrative actions exceeded the objectives or purpose of the empowering provisions
3. when the administrator was **biased**
4. when the administrator **delegated** his or her power without any authority to do so.

11.3.3.1.2 Non-compliance with formal requirements relating to administrative action

Refers to the requirements governing the form and procedure of administrative action

11.3.3.1.3 The administrative action itself

Refers to the manner in which the action has been taken or has not been taken.

Grounds for review based on the action itself include:

1. Procedurally **unfair** action

2. Action "materially influenced by an error of law"
3. Action taken
 - a. for unauthorised reasons
 - b. for unauthorised (ulterior) purposes or ulterior motives
 - c. taking into account irrelevant considerations, or not considering relevant considerations (errors of fact, therefore)
 - d. basing it on the unauthorised or unwarranted dictates of another person or body
 - e. in bad faith
 - f. arbitrarily or capriciously
4. Action itself which
 - a. contravenes the law or is unauthorised by the empowering provision; or
 - b. is not rationally connected to
 - i. the purpose for which it was taken
 - ii. the purpose of the empowering provision
 - iii. the information before the administrator
 - iv. the reasons given for it by the administrator
5. Failure to take a decision
6. Unreasonable action
7. Action otherwise unconstitutional or unlawful

11.3.3.2 Which court may review administrative action?

1. Constitutional Court
2. High Court or court of similar status
3. certain specifically designated magistrates' courts

11.3.3.3 Procedure for judicial review under PAJA

1. The period within which a review may be instituted has been limited to 180 days.
2. Judicial review is subject to the provision that internal remedies provided for in any law must be exhausted before the courts are approached.
 - a. Provision is made for exemption from this provision where the court or tribunal deems it to be in the interest of justice

11.3.3.4 The orders made by a court as prescribed by PAJA

The court may grant any order that is just and equitable. This includes orders

1. requiring the administrator to give reasons or to act in a required manner
2. prohibiting the administrator from acting in a particular manner
3. setting aside the administrative action
4. returning the matter for reconsideration (with or without directions regarding the way in which this is to be done)
5. in exceptional cases
 - a. substituting
 - b. varying the action
 - c. correcting a defect which has occurred as a result of the action
 - d. ordering the administrator to pay compensation
6. declaring the rights of the parties
7. granting a temporary interdict or other temporary relief.

11.3.4 Preconditions before judicial remedies may be used

1. all internal or domestic remedies must have been exhausted
2. the applicant must have *locus standi*

11.3.4.1 All internal or domestic remedies must have been exhausted

All internal remedies must be exhausted before approaching a court of law.

Justification:

1. It is unreasonable for a person to rush to court before his or her statutory remedies have been exhausted
2. the statutory remedies are usually cheaper and more expedient
3. it helps to prevent the courts being overloaded with cases that may be more efficiently dealt with by the administration itself.

11.3.4.1.1 Exceptions to the rule that internal remedies must first be exhausted

All exceptions are examples in which internal control would not be a proper remedy because:

1. the case has already been **prejudged** by the administrator
2. the decision has been made in **bad faith**, 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
4. the administrative authority has come to an **unacceptable** decision as a result of an error of law
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.

11.3.4.2 The applicant must have *locus standi*

Locus standi: the capacity of the person to bring the matter to court.

Before 1994:

1. Requirement was that an applicant for review had to show that he or she had a sufficient personal and direct interest in the case.
2. Financial (pecuniary) or material (patrimonial) loss was regarded as sufficient to establish legal standing.
3. The *actio popularis* (action in the public interest) of Roman law did not form part of our law
4. Determination of *locus standi* was affected by the type of administrative relationship involved

11.3.4.2.1 *Locus standi* in terms of section 38 of the 1996 Constitution

Asked in 2007 exam: List the persons who have locus standi in terms of section 38 of the Constitution.

Section 38 of the Constitution provides that anyone listed in the section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened.

The persons who may approach a court are:

1. anyone acting in their own interest
2. anyone acting on behalf of another person who cannot act in their own name
3. anyone acting as a member of, or in the interest of, a group or class of persons
4. anyone acting in the public interest
5. an association acting in the interest of its members

11.3.5 The various legal remedies

Asked in 2006 & 2007 Exam: Discuss the judicial remedies available to anyone whose rights have been affected by administrative action.

1. **Statutory appeal**
2. **Review**
3. **Interdict**
4. *Mandamus*
5. **Declaratory order**
6. Defence in criminal proceedings

11.3.5.1 Statutory Appeal

1. None of the higher courts have inherent appeal jurisdiction, thus
 - a. the courts may hear appeals only where this is provided for by **statute**
2. **Subordinate legislatures** may not make provision for statutory appeals in their legislation unless authorised to do so by the enabling Act.
3. An appeal may be lodged only against a **final** decision.
4. The provisions governing the power of the courts regarding all aspects of the appeal are laid down in the empowering statute.

11.3.5.2 Review

1. Courts do have inherent review jurisdiction in terms of common law.
2. All administrative decisions are subject to judicial review.
3. When reviewing administrative action, the courts judge whether any alleged excess of power or some irregularity that has caused prejudice or harm occurred. The courts do not judge the merits of the decision.

Judicial review may take one of the following forms:

1. review of administrative action in terms of the **Constitution**
2. review of administrative action in terms of **PAJA**
3. review of the proceedings of lower courts in terms of the **Supreme Court Act 59** of 1959
4. review in terms of the provisions of **specific statutes**

The grounds for review are the following:

1. The infringement or threatened infringement of a fundamental right listed in the Bill of Rights
2. Any challenge to the validity of administrative action, that is failure to comply with any of the requirements for valid administrative action.

Distinction between appeal and review:

1. Merits v. Validity
 - a. Appeal involves a rehearing on the merits of the matter (whether the administrative decision was "right" or "wrong");
 - b. Review goes only to the validity of the decision (whether the correct procedure was followed in reaching the decision).
2. Record
 - a. The court is restricted to the record of proceedings in appeals
 - b. The court may go beyond the record in reviewing administrative action.

11.3.5.3 Interdict

An interdict is aimed at preventing unlawful administrative action or threatened unlawful administrative action which will prejudice the rights of the affected party.

An interdict may be interim or final:

1. An interim interdict is a measure which provisionally decides the rights of parties while legal proceedings are pending.
2. A final interdict may be altered only on appeal.

An application for an interdict must be supported by the following:

1. The applicant has a clear **legal interest** which is being threatened.
2. There is **no other satisfactory** alternative **remedy** available.
3. The matter is so urgent that the applicant will suffer irreparable damage or prejudice if the interdict is not granted. In other words, the **matter** must therefore be one **of urgency**.

11.3.5.4 Mandamus

Aimed at **compelling** an administrator **to perform** some or other statutory duty.

A *mandamus* cannot stipulate **how** the power should be exercised.

Interdict **prohibits**, *mandamus* **demands**.

It is the flip side of an interdict - unauthorised action is prevented by means of an interdict and compliance with a statutory duty is enforced by way of *mandamus*.

11.3.5.5 Declaratory order

May be sought where there is a clear dispute or uncertainty about the validity or effect of administrative action.

Declaratory order the court gives a definite and authoritative answer to the question of what the legal position is regarding any particular person or a given state of affairs.

It clarifies the "status" of a matter

11.3.5.6 Defence in criminal proceedings

If a person is charged with a criminal offence created by legislation the person concerned may defend the charge by challenging the validity of the particular administrative decision that is the subject of the dispute.

The defence may be raised only after the accused has exhausted all the domestic or internal remedies.