Administrative Law Exam Notes

BY Nigel T. Sithole- 071 039 7526

Study Unit 1

Overview of Unit

Part 1: State Authority and the Holders of such Authority

1.1 AN OVERVIEW OF THE GENERAL FEATURES OF ADMINISTRATIVE LAW

CONCEPT	KEYPOINTS
Features	There are four key features of administrative law, these are the gist of the module
State Authority	This is public power exercised by an organ of state or natural or juristic person over another person or body in a subordinate or subservient position. The exercise of such authority affects the rights of that subordinate.
	The question to ask in administrative law is whether any person or body has acted as an organ on state. Whether the actor does indeed have such authority as a public function.
Administrative Action	This is the conduct of functionaries and institutions, administrators when exercising a public power or performing a public function in terms of any legislation. It usually is in the form of a decision.
Just Administrative Action	This is the manner or conduct in which any administrative action must be performed by an organ of state, natural or juristic person in exercising state authority. The constitution requires all administrators to act lawfully, reasonably, to follow fair procedures and to give written reasons when decisions are made that adversely affect the rights of any subordinate person.
Control of administrative action	These are the means of correcting or rectifying administrative action that is not just/fair, when administrative action is not in line with the prescriptions of the law. It applies when prejudice of subordinate can be established. Does he have a case/grievance against the administrator

1.2 WHAT IS ADMINISTRATIVE LAW

CONCEPT	KEYPOINTS
Descriptive Definition	To explain it is not easy because it is a wide field and is present in every area of our lives.
	In any relationship where authority is present, the relationship is one of inequality. It's a vertical relationship. The power of one party to compel another legally to act in a specific way.
	The conduct of this authoritative person is called administrative action.
Administrative Action	Action taken by organs of state.
Executive Action v Administrative Action	*Note S 239 of C and S 1 of PAJA, Executive Action described in the constitution excluded administrative action described in PAJA.
Examples of this difference	When a minister makes and decides on policy as cabinet, this is an executive action (political decision), when they implement legislation or executes those same policies, this is administrative action
	Whether the action was authorized, that is, permitted, relates to the authority to act. Was the party that acted authorized to act the way it did. All parties should derive their authority from the constitution and/or specific legislation. The answer to the question whether action complies with the requirements of the law relates to the <u>way or manner in which public power has been exercised or a public function has been performed.</u>
Lawful	It must comply with all requirements of the show, as found in Constitution, relevant legislation, common law, customary law, case law.
Reasonable	It must be a reasonable effect or result. Decision must be sound and sensible to a point that the party involved can say "I don't agree with the decision but I understand it".
Procedurally fair	Correct procedure must be used to take a decision. This partly means that the subordinate party must be given an opportunity to air their case before a decision is taken and authority must act impartially.
Written reasons	If decision adversely affects the rights of a subordinate, the authority should provide a reason in writing.

- Administrative law forms part of public law. Administrative law regulates the activities of organs of state and natural or juristic persons that exercise public powers or perform public functions. Regulating the activities of organs of state and natural or juristic persons includes prescribing the procedures to be followed when public powers are exercised or public functions performed; and ensuring that such action is within the boundaries of the law. Regulating also includes control over such action.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
Section 239 of C a) Organ of state:	Any department of state or administration in the national , provincial or local sphere of gvt	Shows the scope of administrative action in terms of the organ of state	
Section 239 of C b) i)	Any other function or institution- i) exercising a power or performing a function in terms of the constitution or a provincial constitution	Covers Institutions like Chapter 9 institutions	
Section 239 of C b) 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		
Section1 of PAJA b (aa) (describing the scope of the Admin Action)	Does not include: the executive powers or functions of the national executive. (bb) the executive powers or functions of the provincial executive. (cc) the executive powers or functions of a municipality council. (dd) the legislative functions of parliament, provincial legislature or a municipality council (ee) the judicial function of a judicial officer	Areas of executive administration not deemed as admin action	
Section 33 (3) of C	Enacted to provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal. Impose a duty on the state to give effect to	Effect given to the courts to review admin action.	

	those rights; and promote an efficient administration.		
S 33 (1) of C	All administrative action by organs of state or natural or juristic persons exercising public power must be lawful, reasonable, and procedurally fair	The rights of every legal subject, goes to show the four functions of Admin Action and stipulates the areas and rights protected by the constitution	
S 33 (2(of C	Everyone whose "rights have been adversely affected by administrative action has a right to be given written reasons.	Same as above. fourth function.	

Activity Answers

1.3 LIST OF GENERAL CONCEPTS AND TECHNICAL TERMS OFTEN ENCOUNTERED IN THE ADMINISTRATIVE RELATIONSHIP

CONCEPT	KEYPOINTS
Accountability	A means to control the arbitrary exercise of administrative action.
Administration	That part of the gvt (all spheres) which is mainly concerned with the implementation of legislation, day to day running of various gvt bodies.
Administrator	I.t.o PAJA, it means an organ of state or any natural or juristic person taking administrative action.
Arbitrary Action	Action based on random choice or impulsive and or not on reason, in other words, unrestrained action.
Basic Values and Principles	In section 195(1) of C, principles governing public administration. They include the promotion of an open and transparent public administration by providing the public with timely, accessible and accurate information and the promotion of a high standard of professional ethics.
Bill of Rights (chapter 2 of C)	List of fundamental rights which must be respected and protected.
Case Law	The decisions of the courts and which are reported in the Law Reports
Common Law	Is law which is not written down in legislation
Constitution	In a broad sense, it includes the entire body of rules, written and unwritten governing the exercise of state authority in a particular state as well as the relationship between the citizens of a state and the state authorities. Embodies the will of the people, reflecting popular and current values. Also sets out limits of powers and rights.
Constitutionalism	Governance in accordance with the constitution. Gvt derives power from C. Refers to a state where the law is supreme and gvt and state is bound by Constitution.
Delegated (subordinate) legislation	Legislation which is enacted by the executive branch of gvt. It is not originally parliamentary, national, provincial or municipal.

Duty	Something a person/administrator has to do because it is legally necessary. See function and power
Executive (authority)	Refers first to the political functionaries/officials of the country: President, deputy president, ministers (cabinet), premiers, MEC's. 2ndly also refers to the functions performed by these functionaries.
Fons et Origo	The source and origin
Function	Means performing a task, the word function encapsulates both the power(ability to do something) and the duty (as the obligation to do something)
Government	In a broad sense, it embodies the legislative, executive and judicial authority of the country. It covers all the functions of the organs of state. In a narrow state it is used to specify the executive organs of state, related to the executive function and implementation of policy.
Inte se	Between themselves
Legal Subject	A person or entity that can have rights, duties and capabilities
Judicial Precedent (stare decisis)	Means that the decision of a higher court is binding to the lower courts until such a time as the decision is overturned by the a higher court. The court is also bound by is own previous decisions, unless they are clearly wrong.
Judicial Authority	Refers to all courts in the republic see section 165(1) of C
Judicial Review	The power of the higher courts to control administrative action through an enquiry into any excess of power, irregularity of procedure and non-compliance.
Just Administrative Action	An umbrella term for action/conduct by any person or body in authority which is lawful, reasonable and procedurally fair (s 33 of C).
Law	Refers to all forms of law, that is, the constitution, statute law, common law and customary law. Today this form of law is found largely in the judgments of our highest courts.
Legality	Refers to the lawfulness of the state action. All gvt actions must be performed in accordance with certain set legal principles.
Legislature	Is a body of persons elected who make laws (legislation).
Limitation clause	Makes it possible for the fundamental rights protected in the Bill of Rights to be limited in certain instances. (s36 of C).
Ne bis in idem	The rule that the same matter may not be heard twice.
Organ of state	Defined in s 239 of C
Parliamentary Sovereignty	Means that the parliament is supreme. System before 1993 in SA, also used in England, Westminster system. Parliament is highest legislative power but also not questionable by the courts.
Power	Means possession of authority, discretionary power to choose between two or more options.
Public Administration	Chapter 10 of C, used to describe the actions of all organs of state.
Public Service s 197(1) C	Used to denote the officials within the public admin who implement gvt policies and laws.
Res iudicata	The matter has been dealt with and cannot be reconsidered by the same body but only by a higher-ranking power.
State	It is a permanent bearer of authority within a particular country.
Statutory bodies	Bodies created by law to perform certain functions for the state

Supreme Constitution	The highest law in the country
Testing of Legislation	The process whereby legislation which allegedly conflicts with the constitution is reviewed or tested by the court. Known as constitutional or judicial review.

Study Unit 2

The ADMINISTRATIVE-LAW RELATIONSHIP

2.1 THE CHARACTERISITICS OF THE ADMINISTRATIVE-LAW RELATIONSHIP

CONCEPT	KEYPOINTS
Public Law	Regulates the organization of the state and the relationship btwn the state & the relationship btwn the individual. Concerned with the exercise of state authority by the gvt and deals with relationships were one of the parties are always the state as bearer of state authority.
Vertical Relationship	The Public law relationship is vertical: someone in authority-subordinate.
Private Law	Concerned with relationships btwn individuals who are on an equal footing. It is a relationship of equality.
Horizontal Relationship	Private law is horizontal: individual – individual
Characteristic	Atleast one legal subject must be in a position of authority. 2- it must be held by a person who has the right to exercise state authority. Must have the power to prescribe, restrict or allow certain behavior.
	It can also exist between a person exercising authority and a lower-ranking official in the same department. Gvt *inter se*

Activity Answers

An administrative law relationship is the gist of public law, it is the relationship between a natural or juristic person in a position of state authority and a subordinate legal subject, it can also include a superior member of a gvt department's authority over a lower-ranking official. It is described as a vertical relationship.

2.2 THE DISTINCTION BETWEEN A GENERAL AND AN INDIVIDUAL ADMINISTRATIVE-LAW RELATIONSHIP

CONCEPT	KEYPOINTS
The general or objective	Legal rules governing the relationship btwn the parties apply to all the

relationship	subjects within a particular group. This relationship is created and ended by legislation and cannot be changed by a decision by an administrator. E.g the Refugee Act & stance on permits.
The Individual or subjective relationship	Legal rules apply personally btwn parties, applicable to specifically identifiable legal subjects. They are created by individual administrative decisions. Eg (theodor's asylum seeker n Home affairs).*Furthermore, these individual relationships are not affected by new general legislative provisions, unless the amending Act specifically says so.(presumption against retrospectivity)

Study Unit 3

THE LEGAL SUBJECTS OF THE ADMINISTRATIVE-LAW RELATIONSHIP

3.1 THE IDENTIFICATION OF THE AUTHORITATIVE PARTY IN THE ADMINISTRATIVE RELATIONSHIP

CONCEPT	KEYPOINTS
Organ of State	It is always always always invested in the organ of state, as stipulated in section 239 of the constitution. MUST memorise s 239. These include gvt departments at national, provincial and municipal level, cabinet.
Breaking down s 239 National sphere	National sphere: refers to department of state or gvt departments, public sevice. e.g forestry and fisheries, arts and culture, basic education, science n tech.
Note	* Although the president, deputy and ministers are organs of state, not all their functions constitute administrative action. Some of their functions are executive or constitutional functions.
Provincial Sphere	Organ of state would include provincial department of state, provincial public service, Premiers and MEC's who are executive heads of departments. Note there is also difference between executive and administrative functions of the premiers and MEC's.
Local Government	Organs of state include municipalities and various municipal councils vested with state authority.
Functionary or institution	Not part of public administration but either exercise power or perform functions in terms of constitution or provincial constitution and legislation.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
Section 83 of C a)	The president is the head of state and head of the executive	Goes to show the presidency and deputy as organs of state and their role as	

		administrative authority	
Section 151 (1)	The local sphere of gvt consists municipalities which must be established for the whole of the republic	Explains the municipal organ of state and the scope of their authority	
Section 151 (2)	The legislative and executive authority of a municipality is vested in its municipality council		
Section 239 (b)	Any other functionary or institution (i) exercising a public power or performing a function in terms of the C or PC. (ii) i.t.o legislation.	Shows the complexity of determining whether a function by an institution/functionary (chptr9) is private or public.	*Chirwa v Transnet Ltd 2008 (CC)* Langa CJ found " determining whether a power or function is public is a difficult task(minority)
Currie and De Walt	This indicates that, while a pvt person or entity can be an administrator, what is important is the public nature of the power exercised	Supports the Chirwa V Transnet minority decision. How to determine the pvt or public nature of the decision/action.	

Activity Answers

3.2 THE ROLE OF ASSOCIATIONS, CLUBS AND OTHER "PRIVATE" ORGANISATIONS

CONCEPT	KEYPOINTS
Common Law	e.g soccer clubs, unions, associations, traditional common law rules are applied to them, because management is in a position of authority over a member, who is in a position of subordination. They have a an internal relationship based on authority so the rules are applied.
	Because the matters such as admission, suspension, and other disciplinary actions are governed by their constitution, the courts will interpret the powers of these associations strictly based on the agreement between the members and the associations, as contained in their constitutions.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
		Emphasises that the agreements of these unions and clubs and their members is considered contractually binding by the courts according to common law. The constitutions are the law.	*Gvt of the self-governing territory of Kwazulu vs Mahlangu 1994(T) The Fons et origo* of the power of review in every instance was the agreement of the membership of the jockey club. Being members they were contractually bound themselves to a club
		Shows the uncertainty of the application of PAJA, the constitution or common law to every union or club case. You have to determine if there is enough significant public interest to apply PAJA.	*Tirfu Raiders Rugby Club v SARU2006(C)* Decision affecting the log standing, court saw the significant public interest. They found that the conduct of the union was sufficiently public in nature to justify the application of PAJA.

3.4 IS THE SURBODINATE PERSON POWERLESS IN THE AUTHORITATIVE RELATIONSHIP?

CONCEPT	KEYPOINTS
The answer is no	Persons in the subordinate position are never stripped of their rights, privileges and interests when entering into such a administrative relationships.
	Neither are those in authority allowed to abuse their superior positions
	The authority is obliged to act in accordance with the law and perform a duty in the interest of the society and to serve and promote public interests.

3.5 THE OBJECT OF/REASON FOR THE ADMINISTRATIVE-LAW RELATIONSHIP

CONCEPT	KEYPOINTS
	It may be said that the objective 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.
	When we link the object of the administrative-law relationship to administrative action we may say that the object is the subject matter of the administrative action.

Study unit 4

THE SOURCES OF ADMINISTRATIVE LAW

Overview of Unit

4.1 WHAT ARE THE SOURCES OF LAW

CONCEPT	KEYPOINTS
Definition	Sources of law are the places where we can find the legal rules, the norms, principles and values that govern a particular branch of the law.
	Administrative law is not self-generating but is conferred by law.
Baxter (1984:384)	Administrative power means lawfully authorised power. Public authorities possess only so much power as is lawfully authorized, and every act must be justified by reference to some lawfully authority for the act.
	Mainly PAJA and other legislation, and the constitution, common law, case law, administrative practice, International law.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW

Activity Answers

4.2 THE SOURCES OF ADMINISTRATIVE LAW

CONCEPT	KEYPOINTS
Binding sources of Admin Law	The constitution, principle source of law above all else.
Constitution	Constitution sets the standard of exercise of power as provides a check and balance. It also promotes and guarantees a culture of human rights. *In the Admin-Law context, it insists on justice of the individual by commanding that all the requisites of the valid admin action of lawfulness, procedurally fairness, and reasonableness must be met. (S33)
Legislation	Legislation: Primary source of administrative power. Legislation adds flesh and bones of the principles, norms and values expressed in the constitution. S 33(3). Original Legislation is passed by parliament I the national sphere of government e.g (PAJA and Promotion of Access to Information Act 2 of 2000.). Delegated Legislation must be enacted i.t.o the original legislation and it must not conflict with enabling Act.
Case Law	It is the duty of the court to interpret legislation in line with the values and principles of the constitution and apply such rules to concrete factual situations. The courts have to control the exercise of public power.
Common Law	It is unwritten law in SA in the sense that it is not written up in legislation. It is not an important source of South African Law. But for e.g – the principle of *ultra vires* and the development in the rules of natural justice.
Administrative practice/custom or usage	Custom is made up of unwritten rules or fixed practices, which communities have carried down for generations which they regard as binding. PAJA acknowledges customary la as an empowering provision in section 1. *Question, does administrative customs acquire the force of law, do administrative practices, circulars, policy outlines? Can it be regarded as a customary force of law?????
International Law	I.t.o the constitution international law is an important source of law, but in admin-law it plays a lesser role. Section 39 (1)(b). It regulates the relationship btwn states and/or international orgs.
Persuasive Sources	Writings in books, journals, policy documents(white and green papers), Reports by state institutions chptr 9 institutions, Foreign law.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
Sec 2 of C- Supremacy of Constitution	The constitution is the supreme law of the land, any law or conduct inconsistent with it is invalid, and	Goes to show the supremacy of the constitution as the primary binding source of not only	*Pharmaceutical Manufacturers Ass of SA: In re Ex Parte President of SA 2000(CC)*- The IC shifted

	the obligation imposed by it must be fulfilled	administrative law, but all law.	constitutionalism and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is supreme law.
Section 33(3)	Legislation must be enacted to give effect to these rights	Shows the empowering provision of legislation(PAJA) by C	
		Shows the duty of the courts as controllers of the administrative action, the authoritative power and how it is applied.	*Pharmaceutical Manufacturers Ass of SA: In re Ex Parte President of SA 2000(CC)*- The courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the C.

4.3 WHERE TO FIND ADMINISTRATIVE-LAW SOURCES

CONCEPT	KEYPOINTS
Government Gazette	Published and printed by gvt
Lexis Nexis leaflets	Annual collection of statutes
Internet	www.polity.org.za/legislation, www.acts.co.za, www.safli.org
Law Reports	Case law SA Law Reports by Juta, BLLR, BCLR
Articles	SA Public Law(SAPL) SA Journal on Human Rights (SAJHR)
Policy Documents	www.polity.org.za

STUDY UNIT 5

ADMINISTRATIVE ACTION

5.1 THE NEED TO ESTABLISH WHETHER ADMINISTRATIVE ACTION IS INVOLVED

CONCEPT	KEYPOINTS
To apply s 33 of C	The concept of just administrative action should be applied. The right to Just administrative action depends on whether the action has been performed by an organ of state or a person exercising public power.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
Sec 33 of C	1-Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.2-Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.3-National legislation must be enacted to give effect to these rights. a) provide for review of admin action by court b) impose duty to give effect to 1 & 2. c) promote an efficient administration.	The scope of the administrative law application, and the enabling legislation to the need for administrative action.	

5.2 THE DEFINITION OF ADMINISTRATIVE ACTION

CONCEPT	KEYPOINTS
Section 33 of Constitution	Just Administrative Action Explained
	Before PAJA the approach of the CC was more about telling us what wasn't Admin-law than what was. So PAJA also strongly goes to describing, defining and outlining what is administrative Law.
Section 33 (1)	Explains the 1st three functions and rights of Just Administrative Action, lawfulness, reasonableness and procedural fairness
Section 33 (2)	Explains the 4th optional function and right in case of an action that adversely affects the rights of an individual the authority should give written reasons.
Section 33 (3)	Enabling provision for PAJA, instructs the national legislator to provide for the review of admin action in a fair and objective platform, to pass legislation giving effect to these rights in accordance to the four abovementioned functions, to see to the promotion of effective administration.
Section 1 of PAJA	The meaning of terms in s 1 help to determine what is and what is not admin action. It has to be seriously noted.
	Some of the key words in definition in sec 1 are approval, consent, permission, suspending, revoking, making, refusing, giving, imposing a condition, making a declaration, demand, require, retaining.
A put together definition of what qualifies as Admin Action for the purpose of PAJA	1-A decision, including a proposed decision as well as the failure to take a decision 2- of an administrative nature 3-under an empowering provision 4-organ of state or natural or juristic person when exercising public power or performing a public function 5- that adversely affects the rights of any person 6-that has a direct, external legal effect 7-that is not specifically excluded by the list of nine broad categories of exclusions mentioned in subparagraphs.
Difference between Constitutional law and admin Law	Constitutional law deals with the actions and interactions of the organs of state, the branches of gvt with each other. It regulates their power, all the way through the spheres from national to municipal gvt. Whereas Admin-law is concerned with the only one branch of the state system, the executive, the conduct of the executive i.t.o implication of law and policy, (and note their legislative functions). Con-Law is formulation of policy; admin law is its implementation.* Note *Fedsure* Decision.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
		A definition of administrative action. Given in a court of law thereby creating	*Greys Marine Hout Bay v Minister of Public works 2005(SCA)*- The conduct of bureaucracy,

		precedence.	in carrying out the daily functions of the state, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for groups or individuals
		These two cases prime that created legal precedence to explain what was NOT administrative Action vs exercising Judicial functions by the President	*President of the Republic of SA v SSARFU & Pharmaceutical manufacturers Ass of SA In Re Ex Parte President of the Republic of SA*
Section 1 of PAJA	Administrative action means a decision taken or failure to take a decision by an organ of state.	Explains the important function of the definitions as a tool to identify admin action.	

5.3 ACTION THAT DOES NOT QUALIFY AS ADMINISTRATIVE ACTION

CONCEPT	KEYPOINTS
Inclusions(recap)	As defined by PAJA (s 1) admin action embraces the decisions of all organs of state or natural or juristic persons exercising public power or performing a public function. Included note the 9 categories of exclusions in section 1 (*aa) to (ee)*.
Exclusions (the exception)	However, PAJA also excludes certain powers or functions from the definition of admin action. In other words, some actions performed by either organs of state or natural/juristic persons exercising public power DO NOT qualify as admin action.

Organ of State	Excluded function according to s 1 (b) (aa) to (ee)
*(aa)*Executive Power and function of the Executive in	79-Assenting of bills. 84-the legislative process in relation to the national assembly in creation of legislation, appointing commissions of

the national sphere	enquiry. 85-developing and implementing policy, co-coordinating state departments, preparing and initiating legislation, any other executive function stipulated in the constitution or national legislation. 91-Appointment, relations and reshuffling of Deputy V.P and Cabinet Ministers. 100- Intervention in the provincial government if they do not fulfill an executive obligation.
*(bb)*Executive Power and function of the Executive in the Provincial sphere	121-Assenting of Bills. 125-Developing and implementing policy, developing and policy, co-coordinating state departments, preparing and initiating legislation. Appointment, relations, reshuffling of MECs. 139- Intervention in local gvt if they fail to fulfill an executive function.
*(cc)*Executive power and functions of municipal council.	
*(dd)*The legislative functions of parliament, a provincial legislature and a municipality council.	
*(ee)*The Judicial functions of a Court	Section 166, outlining the Judicial system & Courts
(ff,gg,hh,ii)	Decision to institute of continue prosecution, decision relating to nomination of judicial officers, decision or failure of decisions i.t.o Access to Information Act
Does this mean that no rules apply to these actions or is the performance of these actions above the law?????	NO…In a system of constitutional supremacy no public action is ever above the law. However these are in the territory of Constitutional law and regulated by those rules and prescriptions. They are reviewed under the constitution not PAJA.

5.4 THE CLASSES OF ADMINISTRATIVE ACTS

CONCEPT	KEYPOINTS
Administrative Acts	Different from admin action
Separation of powers & 3 classes in Admin action	Legislation, executive (note: there is difference between formulation and development of policy and execution and implementation of policy), judiciary. It is important to separate power amongst the branches so as to avoid monopoly of one. Borrowing from this principle, admin action is also classified into 3 classes: Legislative administrative acts, judicial administrative acts, and administrative acts.
Legislative administrative Acts	Refers to administrative acts which are legislative in nature. It is characterized by the making and issuing of rules by the administrator when authorized to do so by original legislation. e.g The Minister of Home affairs empowered by the Refugee act to make regulations that deal with particular aspects relating to refugees. It is a legislative act by an executive functionary. This is the essence of delegated legislation!!!! Also includes directives, proclamations, directives and orders. Characteristics: Published in gvt Gazette. Creation of general admin relationships, Specific rules apply to repeal, amendment, adoption of admin acts,*the power to delegate legislative authority only exists

	when there is express statutory authority for this. Must not be in conflict of original statute, be clear and not vague.
Judicial administrative Acts	Like the courts administrators also interpret and apply (legal rules) in concrete situations. Administrative adjudication is usually undertaken by specialist bodies, known as administrative tribunals. There are very few examples of these bodies; they are also subject to review by the judiciary.
Administrative Acts	This class refers to the true administrative acts where individual administrative-law relationships are created or varied. These relate to the day to day business of implementing and applying policy, legislation or an adjudicating decision. In short, encompasses every possible aspect of gvt activity.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
Du Plessis (1998)	Delegated legislation is administrative action	Any decision, regulation or policy that is enabled by legislation is admin action. By Minister, MEC, gvt official	

5.5 THE LEGAL FORCE OF ADMINISTRATIVE ACTION

CONCEPT	KEYPOINTS
Definition	Legal force of admin action refers to the effect of such action in law, we distinguish between the moment admin action takes effect (becomes operative) and the point when the legal force of admin action is terminated.
When does it take effect?	Necessary for various reasons. Baxter (1984;367) for the sake of obedience but also n order to compute expiry dates for lodging of appeals, complaints, review, objections, applications and actions for damages. In legislative admin acts: as soon as the regulation or proclamation has been promulgated or on the stated date of commencement. In judicial admin acts: as soon as particular tribunal, board gives its ruling, unless if there is a provision for a period of appeal. I admin acts: upon decision being known, publication in gvt gazette or individual notification.
When is it terminated?	It is generally ended by repeal/revocation, amendment, lapse of time, withdrawal of one party or an order of court. When the class involved has dealt with the issue and can no longer revisit decision. Identifying the relevant class is thus very pivotal. Legislative admin acts: can be repealed at any time, note, it is not retrospective. Judicial admin acts: once the board or tribunal has made a decision and it cannot be

	revoke decision, of course they can be rescinded or upheld by a higher judicial body. Admin Acts: draw a line of distinction between valid and invalid acts. If validity requirements are not met, the act is said to be invalid.Valid, onerous/burdensome admin acts can be changed at any time. Decisions that give benefit or place burden on an individual can be reviewed and changed at any time.

Study Unit 6

JUST ADMINISTRATIVE ACTION-SETTING THE SCENE

6.1 AN EXPLANATION OF THE CONCEPT OF JUST ADMINISTRATIVE ACTION

CONCEPT	KEYPOINTS
When will admin action be performed validly, what are the requirements?	Basic answer: it is valid when the decision of the administrator of state is authorized in law and all the requirements set by the law are met. To determine validity we focus on the constitution, specifically section 33.
Section 33	Actions must be lawful, reasonable, procedurally fair and written reasons when individual rights are adversely affected.
Definition of just admin action	The performance of the action must be lawfully constituted in authority. In taking the decision the administrator must obey the prescriptions of the law, exercise her/his discretion impartially- follow correct procedure when taking decision-act procedurally fairly by, for example listening to what the person has to say, he also needs to justify the decision, the decision must be reasonable. And provide adequate reasons for decision.
Reason for S 33	Prevents the state and individual with public power from abusing their power against a person in a subordinate position. It also guarantees the individual just treatment or justice and protects him from injustice.
Principles of S 195 (1) of C and its relation to just admin action	It contains the inventory list in which the public admin must adhere to. The importance of the protection of the individual and the prevention of the abuse of power on part of the administrators emphasized through the list of principles and values. When s 1, 33 and 195 are read together, we see they are aimed at creating a duty to achieve and uphold a fair and honest administration, aimed at: increasing public participation, weighing of decisions and actions against the constitution and its principles and values and administrative accountability.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW

Baxter (1984:301)	The administrator must be "legally empowered to perform the act"	Simple authority description of concept	
Section 33 of Constitution	1-Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.2-Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.3-National legislation must be enacted to give effect to these rights. a) provide for review of admin action by court b) impose duty to give effect to 1 & 2. c) promote an efficient administration.	The enabling provision for Just administrative Action.	
Sectio 195 (1) of C	Public administration must be governed by the "democratic values and principles enshrined in the C" include the following. a) promotion and maintenance of professional ethics, b) effective use of resources, c) development orientated PA, d) fair provision of service, e) encourage public participation in policy-making, f) accountability, g) transparency through access of info, h) career-orientated HR, i) fair representation.	A practical list of the constitutions expectation on public administrators. The meeting of this criteria goes a long way to achieve just administrative action	
S 1 of Constitution (part of)	Democratic government to ensure accountability,	In complying with and acting upon these principles the	

	responsiveness and openness.	administration of the state is kept on a sound legal footing and the requirements of just administrative actions are met.	

6.2 OTHER OVER-ARCHING TERMS USED TO REFER TO JUST ADMINISTRATIVE ACTION

CONCEPT	KEYPOINTS
Intra Vires/ Ultra vires	Ultra vires-derived from common law to establish whether admin action was not performed outside the boundaries of the power granted to administrators. Literally means to "act beyond ones powers" Intra vires- *it has no effect so therefore it is not legally recognized, means within the power conferred in the administrator.
The wide and narrow approach in comparison	Narrow approach requires the compliance to legislation only as an intra vires wheras a wide approach realizes that even if procedurally and legislatively even if the authority meets the legislation requirements, ALL of law must be met before it is met. So today Intra vires is not compliance with just the relevant legislation and its procedural provisions, it requires compliance to the entire constitution as well as PAJA, common law, other legislation, case law.
Applying one's mind to the matter	When the public functionary has not complied with all the requirements for validity we could say that he or she has not "applied his or her mind" to the task or function at hand. It is not an independent requirement for validity but an over-arching concept that incorporates all the requirements for valid administrative action.
Legality	The principle originated at common law and was employed to point towards all the legal requirements that administrators have to meet and obey to act lawfully. Used by courts to determine whether administrative action was not only authorized by law but also performed in accordance with the prescripts laid down by the law. It must serve and protect the public interest and respect fundamental human rights.
	*Legality requires that any administrative action should be in accordance with the requirements of the law. Legality should therefore be regarded as the basis of all administrative action.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
		Legal precedence for the over-arching concept of legality.	*Fedsure v Greater Joburg T Metro Council (1999) (CC)* Chaskalson held that the executive "may exercise no power and perform no functions beyond that conferred them by law

Study Unit 7

THE RIGHT TO LAWFUL ADMINISTRATIVE ACTION AS REQUIREMENT FOR VALID ADMINISTRATIVE ACTION

7.1 THE CONCEPT OF LAWFULNESS

CONCEPT	KEYPOINTS
Definition	To grasp the development of the term lawfulness fully, and to understand why it has become the cornerstone of administrative validity, we also have to examine other sources of law, legislation, common law, case law, sources outside section 33 (1), to understand the practical function of the concept used long before its constitutional provision. It is also because of these sources that it is then regarded as an umbrella concept that covers all requirements for admin validity.
Describe term lawful	In a narrow sense it relates to the enabling provisions of the concept governing administrative action, but it is difficult to completely separate it from other influences. They are also other independent requirements for lawfulness, developed over the years in practice by the public functionaries that perform the actions.
The meaning of "lawful" in context of the right to admin action in section 33 (1)	Common law requirements of administrative legality prescribe that all requirements of law must be met when admin action is taken. One of the most important principles underpinning any democratic state and our constitution is that all organs of state must comply with all law, the power must be authorized by law. However this right is guaranteed in the constitution for 1: to prohibit the adoption of any laws that will exclude judicial control over admin action (s 33 (3) (a). Note the ouster clause in pre-1994 gvt. The right to admin action in the new constitution. Section 33 (1) entrenches the principle of legality which demands full compliance with all law. *Lawful admin action and the principle of legality are synonymous and encompass all the requirements of valid admin action.

Note	Strictly speaking, this means that the rights to admin action that are "reasonable and procedurally fair" are superfluous, they are given their own provisions to demonstrate their importance but in essence both reasonableness and procedural fairness in common law form part of the general requirements of admin legality.
PAJA and lawful admin action	PAJA gives effect to the right of lawful admin action by providing the judicial review of action that is unlawful. Examples of unlawful admin action that can warrant judicial review include unauthorized delegation, failure to comply with an empowering provision.
Lawfulness and the enabling or empowering statute	Admin authority mainly derives from legislation, this is the enabling act, and here we find commands and directives relating to the scope and content or nature of admin power. It may also prescribe specific procedures to be followed, requirements on administrator, knowledge, qualification, etc.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
Klaaren and Penfold(2008:6376)	Under our system of constitutional supremacy….an act of parliament can nolonger unjustifiably oust a court's constitutional jurisdiction and deprive the courts of their review function to ensure the lawfulness of admin action	Goes to reaffirm the provision of the courts right to review admin action and do away with the ouster clause of pre-1994. s 33 (3) (a) of constitution.	

7.2 PROVISIONS DEALING WITH THE ADMINISTRATOR

CONCEPT	KEYPOINTS
Definition	The administrator's authority and power to take administrative action must be authorized by law. We find the description of exactly who the administrator is as well as what he or she is allowed or authorized to do in the empowering statute. Provisions usually include qualifications of the administrator, geographical area where the administrator must perform administrative action, the time at or within which the action must be performed and the subject matter of the admin action. It also deals with the scope or reach of administrator's power.
Who is the administrator	The administrator is a public functionary or institution performing administrative action. In PAJA section 1 administrator is defined as follows: "means an organ of state or any natural or juristic person taking administrative action; two characteristics are that they are

	always clothed in state authority in a superior capacity and have the legal power of discretion.
Qualifications of the Administrator	The empowering act often prescribes that the administrator must possess the necessary qualifications, a certain status, qualification, attributes, experience or knowledge. he or she cannot perform a valid administrative action, if he does not possess the necessary qualifications, even though his or her action may meet all the other statutory requirements. A possession of qualification can then be said to be the absolute minimum requirement, the threshold requirement for any valid admin action. Note the liquor Act e.g.
The rule about delegation	The question in this regard is whether such handing over/transfer of power or delegation boils down to abandonment or abdication of his or her powers. The general rule against delegation: *delegates delegare non potest* roughly translated the person to whom a power is granted may not delegate to another.
When is delegation permissible	When an original legislator, parliament in legislation expressly empowers an administrator (or by necessary implication, this is termed sub-delegation. It is humanly impossible that the named administrator perform all the functions sub-delegated to him by original legislator, thus there are provisions made for delegations of powers just so the departments are able to function. This is to effect quick and efficient division of labor within administration. Section 238 is the empowering provision for delegation. The rules if decision entails discretion it cannot be delegated, however an administrator can delegate implementation of a decision he has already made. He must not be influenced by another body when he Is supposed to be applying his own discretion, he can appoint a fact-finding committee who will report to him with the data, hopefully objective data, and thereafter he will make a decision. *Remember discretion does not mean allowing the administrator to make arbitrary decisions; it is making a choice on a number of outlined, acceptable options.
The various forms of delegation: mandate, deconcetration and decentralization	The difference in this forms depends largely on the degree of transfer of power by the original holder of authority. Deconcetration: type of delegation that takes place within departments of state, broken down by an internal hierarchical system where we encounter different ranking administrators. Decentralisation: is when a senior administrator transferring certain powers and activities to an independent organ or body which carries these functions entirely in its own name. The delegator cannot interfere with the activities of the board, e.g a minister appoints a board to issue transport license or to run a University. Control is by way of appointment of board members or by way of appeal to or review by original delegator.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
Liquor Act 27 of 1989 s 7 (2)	No person shall be appointed as chairperson or deputy chairperson under subsec 1 unless he or she possess such qualification in law.	Shows the importance of the qualification of the administrator lest his decisions be invalid	*Awuney v Fort Cox Agricultural College(2003)* A board decided to suspend the principal of a college and eventually to terminate his services. The boards decisions was set aside because some of the members were unqualified.
		General common law rule on delegation of authority of power by administrator. It goes to show that when a discretionary power is granted, because of one's qualifications, knowledge and experience that was a requirement for them to be in that position in the 1st place, it would not make sense to then delegate that function.	*Foster v Chairman, Commission for Administration (1991) (C)* When a power in entrusted to a person to exercise his own individual judgment and discretion, it is not competent for him to delegate such power unless he has been empowered to do so expressly or by necessary implication by the empowering statute.(common law)
		Legal precedence on delegation of a discretionary duty. This is the key judgment o subject. There is a judicial spirit to the discretionary exercise of power, it has to be done by the qualified and selected person.	*Shidiack v Union Gvt(1912)* The responsibility of exercising a discretion can only be exercised in a judicial spirit, then the responsibility cannot be discharged by someone else. The person concerned has the right to demand the judgment to demand the judgment of specially selected

			officers.
Section 38 of Constitution	An executive organ of state in any sphere of gvt may (a) delegate any power or function that is to be exercised or performed in terms of legislation to any other executive organ of state provided that the delegation is consistent in terms of which the power is exercised or function is performed.	This is the constitutional provision that empowers and controls delegation within the executive.	
		Stresses the fact that when decentralisation is done and power is given to an outside body, the original administrator has limited power, he can appoint board members and review their actions in appeal but cannot subdue them to his control.	*University of Pretoria v Minister of Education 1948(T)* The court found that the minister did not have power to appoint a principal of a university and that this power fell in the mandate of the University Council. It can be approved or ratified by minister but he could not substitute their decisions for his.

Activity Answers

7.3 THE POWER OF THE ADMINISTRATOR

CONCEPT	KEYPOINTS
Prescribed by law	It must be clear by now, the administrator is not allowed to make a decision that is not authorized by law. It is found descriptively in the empowering statute. However, the common law rules have been developed to help in determining the scope of an administrators reach in the statute in question, the rules of interpretation, developed in case law.
The geographical area or place were administrator must exercise power	Administrators must keep to the geographical area prescribed by empowering provisions
The time within which the	Administrator must keep to the prescribed time set out in the

administrator must exercise power.	empowering provision; he has no authority to exceed this time. It should also be prospective and not retrospective.
The object or subject matter of the power/authority	Requirements which relate to subject matter relate to the object of the admin-relationship. They ask the question in rationale or reason why the administrator is exercising his power or the purpose why the power is granted. What creates the admin relationship is the subject matter. It is usually described in the empowering provision.
Prohibition of/restriction on the abuse of power by the administrator: Unauthorised purpose.	There are different forms of abuse of power. Unauthorised or ulterior motives: The administrator must use his power to fulfill the objective set out in the empowering act, anything outside of these scope after taking into cognizance developed purposes in practice that have precedence in case law, statutory interpretations, is tantamount to an abuse of power. When an administrator exercises his or her powers for an unauthorised purpose, the legal force of the empowering statute is extended in an authorized manner. In other words the administrator takes over the function of the legislator, this goes against the whole principle of legality as well as the doctrine of separation of powers.
Exercising power using an unathorised procedure	Used by administrator when proper procedure is too difficult or takes too long. This form of abuse of power actually undermines the law and boils down to action in *fraudem legis*- fraudulent action
Exercising Power using Ulterior Motives *(Fraudem legis)*	As much as it Is similar to unauthorised purpose, we need to be thorough and distinguish. Ulterior motive, when exercising the power in *fraudem legis,* the administrator intentionally and deliberately evades the provisions of the empowering act. Note *Dadoo v Krugersdorp Municipality Council Case.* It is possible to find both fraudulent action and unauthorised purpose in the same action.
The Administrator and the exercise of power in bad faith *(malafides)*	This is an over-arching requirement were an administrator is required to apply their mind to all the requirements of just and valid admin action. Malafide in the narrow sense refers to fraud, dishonesty, corruption and in a wider sense means wrongful use of power.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
		Emphasises the need for the motive or purpose why a power was granted is maintained and that the purpose set out in the empowering provision is carried out.	*Oranjezicht Estates v Cape Town Council(1906)(SC)* It is a well established principle of South African Law that powers given to a public body for one purpose cannot be used for ulterior purposes which are not contemplated at the time when the powers were conferred.

		Perfect example to show unauthorised authority, even though the Minister acted in a bonafide manner, his actions were invalid, like we said, one can determine this also by the outcome f the decisions, withholding the funds would affect the Uni's delivery of sound tertiary education which as the purpose of the funds in the 1st place. The question is not his intention, it's the outcome.	*University of Cape Town v Minister of Education & Culture (1988)(C)* Minister stopped subsidy payment to University to on the basis that the Uni had to 1st maintain law and order on campus, the Uni argued that the subsidies were not used to promote law and order but rather tertiary education, court ruled in favour of Uni and declared Ministers actions invalid.
		A number of methods to determine this are used here. For one, the purpose of the empowering provision, probably interpretation as well. Principle of legality in common law.	*Rikhoto v East Rand Admin Board(1983)(W)* The admin board had implemented Blacks Consolidation Act in such as way, relying on the call-in procedure to restrict an applicant from qualifying as a resident for the area where he had worked for 10years, the court rejected the AB reliance on the call-in procedure (yearly renewal of contract) and that the AB was not empowered to frustrate the process on basis of the call-in.
		Classic case of good intentions, wrong application. The empowering provision does not allow for such sanction. Thus the action is invalid because it is unauthorised.	*Cassiem v Commanding Officer Victor Verster Prison(1982)(C)* The power to revoke prisoner privileges in the event of abuse of those privileges I the event of abuse of those privileges, was improperly used to

			punish prisoners
		He took a shortcut instead of doing things properly, he took away the educators right to be subjected to a DC were he could have had a chance to defend himself, rules of natural justice.	*Van Coller v Administrator Transvaal(1960)(T)* Director of education transferred an educator to another post after getting many complains about that teacher, instead of instituting a DC.
			Dadoo v Krugersdorp Municipality Council Case(1920) An examination of the authority therefore leads me to the conclusion that a transaction is in fraudem legis when it is designedly disguised so as to escape the provisions of the law, but falls in truth within these provisions.
		Carried out an act in an attempt to carry out the empowering provisions of an act, it was a wrong use, wrong application of the law and also did not think it through and probably out of frustration or taking advantage of the RSA Act.	*Hart v Van Niekerk(1991)(W)* The municipalities decision to close swimming pools in their attempt to apply the amendments to the Reservations of Separate Amenities Act was an improper purpose, they acted in bad faith and did not apply their mind.

Activity Answer

Study Unit 8

THE CONSTITUTIONAL RIGHT TO REASONABLE ADMINISTRATIVE ACTION

CONCEPT	KEYPOINTS
Definition	All administrative action must have a reasonable effect, it will have a reasonable effect when the administrator has exercised his/her discretion in a proper way and the decision is based on objective facts and circumstances. Reasonable admin action will be any justifiable decision making, it is based on reason and not subjective opinion or psychological temperament.
Unreasonableness	Admin action can be deemed unreasonable when the decision maker's decision Is irrational and nonsensical. When there is no balance of proportionality between the decision and the means employed to reach that result.
The Common law and reasonableness	The courts have been hesitant to pronounce on the reasonableness or unreasonableness of admin action, reason for this is tension between two positions. It is not the function of the courts to substitute its decisions for those of the public administration. It has been argued that this unreasonableness relates to merit or substance of the decision, an area in which the courts should not intervene. When reviewing the admin action on basis of unreasonableness, the courts should act as a super administrator and not substitute the administrator's opinion for the courts. Anything else would be in conflict with the doctrine of separation of powers. The task of reviewing unreasonableness by the courts is not to determine or question administrative policy or to determine whether a decision is correct or if the courts agree with it, but to apply legal norms to ensure that the procedure followed by the administrator was formally correct, whether it was within the confines of law.
Some earlier decisions on reasonableness	The courts are reluctant to question unreasonableness as an independent requirement of valid admin action, hence the employment of the principle of "symptomatic unreasonableness": The courts argue that unreasonableness is merely an indication for the transgression of other valid admin action requirements. This also then introduces the principle of "gross unreasonableness": Courts held that Judicial review is only permitted when the degree of unreasonableness is so serious (gross), incomprehensible except on the grounds of *malafide*, ulterior motives or the failure of application of one's mind to the matter. This narrow approach does not look at the effect of the decision on the individual, but the state of mind of the administrator.
Justifiable administrative action in terms of section 24(d) of the Interim	Rational requires the achievement of a justifiable balance between the extent to which the rights have been affected and the reasons given for the decision. A justifiable decision is one based on reason,

Constitution	whenever discretion is used a certain amount of subjectivity because of personal experiences, expertise and knowledge cannot be avoided, however this decision has to be such that an objective bystander can go along with it and determine the reasoning behind it, even if he does not agree with it or if he could have arrived at a different determination. Question is, is the decision important enough to outweigh the right of the individual?
The Courts approach to justifiability in section 24(d) of Interim Constitution	Note *Standard Bank of Bophuthatswana v Reynolds(1995)(B) and Kotze v Minister of Health(1996)(T) and Roman v Williams(1997)(C)* A justifiable decision must be capable of objective substantiation. It must meet the requirements of suitability, necessity and proportionality in order to qualify as justifiable in relation to the reasons given.
Suitability, necessity and proportionality	Suitability: requires the administrator in her/his discretion to choose the means that are best appropriate for achieving the desired end. An end set out in the statutory provision. Necessity: administrator must take steps only that are necessary if any prejudice to an individual is removed. Proportionality: Weighing up the advantages and disadvantages to the public and affected party. The method must not be out of proportion with the advantages. It requires the achievement of a balance.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
		Goes to show that the courts will not question discretion on unreasonableness, unless gross unreasonableness can be proved.	*Union Government v Union steel company(1928(SA)* *"*There is no authority and none is cited that allows the intervention of the courts on the exercise of discretion on the grounds of unreasonableness
Davis and Marcus(1997:161) on section 24 (d)	It requires administrative action to be justifiable in relation to reasons given, this introduces the requirement that admin decisions must be rational, coherent and capable of being reasonably sustained having due regard to the reasons for the decision. In short, there has to be a reasonable link between the	This concept of justifiability which is translated as reasonableness in the New Constitution introduced a new concept of rationalism in discretionary decision making.	

	decision and the reasons given for it.		
Section 24(d) of I.C	Every person shall have the right to (d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights are affected or threatened.	This gives rise to the principle of reasonableness in the new constitution. The birth of Just admin action.	
		The new modern approach over the old narrow approach. Mainly because it enforces the Bill of rights which apply in every single element of law. The stringent application only on gross unreasonableness in now over.	*Standard Bank of Bophuthatswana v Reynolds(1995)(B)* The old narrow approach of judicial review only when there is gross unreasonableness is no long valid according to the new modern approach, particularly when we apply the chapter 2 fundamental rights that bind all legislation, and executive organs of state. It is necessary for the courts to adopt the less stringent test of unreasonableness rather than the more restrictive one of gross unreasonableness.
		This is prime example of the courts reviewing the discretionary procedure and not the correctness of the actual decision. The reasons, that he felt the employee could still perform his duties was incorrect and not the decision to keep him on. DG failed to apply her mind properly.	*Kotze v Minister of Health(1996)(T)* DG's refusal to grant early retirement of an employee who had continuous ill health because he did not believe it would affect his work, court found that decision was that the reasons advanced for the action were not supported by facts of law.
		In order to prove justifiability in relation	*Roman v Williams(1997)(C)*

		to reasons given, the 3 requirements are suitability, necessity and proportionality.	Prisoner put under correctional supervision and sought review of decisions, court found that " Justifiability should be objectively tested.

Activity Answers

8.4 THE PRESENT POSITION IN TERMS OF THE 1996 CONSTITUTION AND THE PROVISIONS OF PAJA.

CONCEPT	KEYPOINTS
Section 33 (1) and PAJA Provisions	S 33(1) is far much simpler than its predecessor s 24(d) of IC since subsection 1 simply requires that everyone has the right to administrative action that is reasonable. When we consider the new constitution makes no reference to the narrow approach (subjective/objective) , the Standard Bank of Bophuthatswana v Reynolds and the Roman v Williams judgments in which the modern approach of application of all the chapter 2 fundamental rights in all legislation and executive organs of state and a less stringent application of reasonableness review rather than the old gross reasonableness method, the new constitution has introduced a new review of reasonableness of administrative decision making. Reasonableness is no longer a symptomatic method but an independent requirement of valid admin action.
PAJA and the right to reasonable administrative action	PAJA gives effect to this right by giving an individual the capacity under s 6(1). We then review it under the reasonable person test, the *Wednesbury test.* Remember, difference between subjective state of mind and objective consequence of decision.
The Constitutional Court's Interpretation of the right to reasonable administrative action	Note: *Bato Star Fishing v Minister of Environmental Affairs(2004)(CC)* according to O'Regan J the factors relevant in determining whether a decision is reasonable include the nature of the decision, identity & expertise of decision-maker, range of relevant factors to the decision, the reason given, the nature of the competing interests involved, the impact of the decision on the lives of the affected.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
Section 6 (1) giving right to institute proceedings in a court to review admin action	The exercise of power or the performance of the function authorized by the empowering provision, in pursuance of which the administrative action was purportedly taken,	This is PAJA giving effect to the right of reasonable admin action. The new approach different from pre-1994 methods and a further expression from 24(d) of IC.	

	is so unreasonable that no reasonable person could have so exercised the power or performed the function.		
		Only the really bad instances are reviewed using the Wednesbury test.	*Associated Provincial Picture Houses Ltd v Wednesbury Corporation(1948)(KB)* In the case that a decision is found to be so unreasonable that a reasonable person could not have come to it, then the courts have to intervene, but to prove that case requires something overwhelming.
		One has to look at a decision that is reviewable and apply the test and find if the decision is one a reasonable administrator would have reached.	*Bato Star Fishing v Minister of Environmental Affairs(2004)(CC)* Decision dealt with the allocation of Fishing quotas by the Chief Director. Bato challenged the allocation in terms of the Marine Living Resources Act. O'Regan J found that the Wednesbury test had to be applied on sec 33 of C and not really on the language of PAJA s 6(2)(h) not literally.

Study Unit 9

THE RIGHT TO PROCEDURALLY FAIR ADMINISTRATIVE ACTION

9.1 INTRODUCTION: THE PURPOSE OF THE RIGHT TO PROCEDURAL FAIR ADMINISTRATIVE ACTION

CONCEPT	KEYPOINTS
Definition	The right to procedural fairness is characterized as the right of participation. This right entitles persons to participate in the decision-making process in relation to administrative decisions that affect them. Remember this right is about the procedure only and not the substance of the decision taken. This requirement of acting fairly is encapsulated in the common-law rule of "hear the other side" *(audi alteram partem)* .This is duty on the administrator is recognized, not only in section 33 (1) on just admin action, but in s 195 (1) on the basic values and principles governing public administration.
	Procedural fairness also improves the quality of decision making. The "I don't agree, but I can go along with it" factor.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
Section 195 (1) requires that public admin must be governed by democratic values and principles including;	(1)the provision of services impartially, fairly, equitably and without bias.(2)responsiveness to the people's needs and the encouragement of public participation.(3)accountability of public administration and.(4)fostering transparency by providing the public with timely, accessible and accurate information.	The statutory provision for the right to procedural fairness, also note section 33.	
Klaaren and Penfold(2008:63-81)	The better informed the decision making the less the potential for resentment and anger on the part of the individual against whom the particular decision has gone.	Other reasons why procedural fairness is just good governance.	

9.2 THE ORIGIN OF THE RIGHT TO PROCEDURALLY FAIR ADMINISTRATIVE ACTION

CONCEPT	KEYPOINTS
Origin-definition	It is found in the common-law rules of natural justice. The "rules of natural justice" is the collective terms of a number of common law provisions and principles applicable to administrative enquiries and hearings. They include allowing an individual the opportunity to be heard, to counter allegations and for the administrator not to be impartial and biased. They are meant to insure that the individual is treated in a fair manner and that the administrator really applies his mind to the matter. Age old principle "justice must be done, and must seen to be done"

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
Baxter(1984:538)	He calls these the principles of good administration that serve 3 purposes:1-facilitate accurate and informed decision-making.2-they ensure that decisions are made in the public interest.3-preserve important procedural values.	The purpose and outcome of actually practicing procedural fairness and their impact on the community and help create a better relationship, one that is quantifiable between the administrator and the people.	

9.3 THE CONTENT OF THE COMMON-LAW RULES OF NATURAL JUSTICE

CONCEPT	KEYPOINTS
The *audi alteram partem* rule	"to hear the other side" before a decision is taken, as interpreted and developed by the courts(as all common law is): individual given an opportunity to be heard, individual must be informed of considerations formed against him (the charges or the issue that is in his interest), reasons must be given by the administrator for decision taken. This right is not limited to formal administrative enquiries, but applies in any situation where rights, privileges, liberties and even legitimate expectation are at issue.
Sub-rules of audi alteram partem rule	a)Proper notice of intended action- the individual must be given proper notice of the forthcoming administrative action, whether this is required by statute or not. It must include all necessary information to help individual prepare. b)Reasonable and timely notice-the person must be given reasonable notice to enable him/her to collect the

	necessary information to prepare each case, this all depends on the case, so the administrator has discretion, but remember, it has to be reasonable.-Note *Turner v Jockey Club(1974)(A)*& *Nisec Bpk v Western Cape Provincial Tender Board(1997)(C).*(c)Personal appearance-It is not essential for the person to appear personally before the administrative body unless, of course, a statute makes personal attendance compulsory, but he should have the option or at least written submissions.(d)Legal Representation-The right to legal representation does not form part of the audi alteram partem rule, and can be claimed only where it has been conferred in statute. There is no general right to legal representation, however, note Wiechers(1985:211).(e)Evidence and cross-examination-the right to lead evidence and to cross-examine witnesses does not form an inherent part of the rules of natural justice.(f)Public hearing/inquiry-there is no absolute right to a public hearing, arguments flair btwn public hearings helping the dissemination of discretionary power v confidentiality for the sake of state security. So every case has to be independently considered, consideration to the constitutional demand of transparency, openness and fairness will usually work better for public hearings.
The party must be informed of considerations which count against her	Any consideration or fact that may count against a person affected by a decision must be communicated to him/her to enable him/her to defend the issue. Note *Loxton v Kenhardt Liqour Licensing Board(1942) and Down v Malan(1960)(A)*
Reasons must be given by the administrator for any decision taken	This rule requires that the administrator give reasons for any decision taken. However it has not been consistently applied, not usually included in enabling act and courts usually gave the discretionary right to the administrator in question. However if it is enabled in statute, it should be applied; failure to do that creates suspicion and dissatisfaction from individual involved. Baxter says “the good administrator provides reasons for decision even if there is no duty to do so”.Note *WC Greyling & Erasmus v Johannesburg Local Transportation Board(1982)(A)*

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
		Judicial precedence. Discovery to a certain acceptable extent expected.	*Turner v Jockey Club(1974)(A)* The hearing was set aside when the jockey had suddenly been confronted with allegations that he had

			not had a chance to prepare for.(ambush)
		The limitation and functional structure of the right to reasonable and timely notice.	*Nisec Bpk v Western Cape Provincial Tender Board(1997)(C)* The court found that the right to a hearing does not include a right to complete discovery of documents, it does require that the individual be furnished with sufficient information placing them in a position to sufficiently defend themselves.
Wiechers(1985:211)	In a purely factual hearing, the individual does not need legal representation, but in a highly technical manner, he should be entitled to one. The question is, was he given adequate opportunity to present his case.	The subjective opinion of Wiechers on the circumstances were legal representation should be afforded to the individual. Each case should be approached independently with the intention being giving the individual the right to fully defend himself.	
		Judicial precedence.	*Loxton v Kenhardt Liqour Licensing Board(1942)* The essential facts must be given to the person to enable him to reply.
		The exception to the rule or the limit to the right, the common sense to the stringent application.	*Down v Malan(1960)(A)* If the interested party could reasonably have foreseen the facts prejudicial to him would be taken into consideration, he should act accordingly, if he did not , the failure would be attributed to him.
		Another exception to	*WC Greyling & Erasmus*

		the rule, discretionary decision making is key here. In this case, it simply was not on that after such an overwhelming application, the respondent simply would not be bothered to give reasons. This was grossly irregular. Creates suspicion and dissatisfaction and does not aid any of the 195(1) principles.	*v Johannesburg Local Transportation Board(1982)(A)* the court found that the application had made impressive submission in their application and the respondent had refused to give reasons for the refusal of the permit, court found that even if they did not have the duty to provide reasons, this did not justify them ignoring the evidence brought forward.

Activity Answers

9.3.2 THE *NEMO IUDEX IN SUA CAUSA* RULE (NO ONE SHOULD BE A JUDGE IN THEIR OWN CASE) the rule against bias or prejudice

CONCEPT	KEYPOINTS
Definition	This is another rule of natural justice that says the decision-maker must be, and must be reasonably perceived to be, impartial or unbiased , this is known as the rule against bias. It requires that all administrative institutions, functionaries exercise their powers in an impartial and unbiased manner. The foundation of the nemo-principle is rooted in the two "common-sense rules of good administration", 1st that for a decision to be sound it must not be tainted with bias, 2nd is that the public faith is the admin process will be more if "justice is done and seen to be done." The common examples of bias are:
The presence of pecuniary/financial interest	Note *Rose v Johannesburg Local Road Transportation Board(1947)(W)* Financial Interests would obviously remove objectivity and impartiality.
The presence of personal Interest	Note *Liebenberg v Brakpan Liquor Licensing Board(1944) and BTR Industries SA V Metal and Allied workers Union(1992)(A)* Therefore one is not required to show that there is in fact actual no bias or partiality in the process, the criterion is that no reasonable person would have had a perception or suspicion/apprehension of bias. In other words the individual just has to prove a reasonable appearance of bias or partiality rather than the existence of actual bias.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
		A clear contravention of this rule. Anyone could smell the bias a mile away. Judicial precedence, not that its needed really.	*Rose v Johannesburg Local Road Transportation Board(1947)(W)* The chairman responsible for board that refused permits was a director to one of the three taxi companies, he refused to step down, the court found that a reasonable person would realize the conflict of interest and the bias of the chairman.
		Legal precedence on personal interest in the common law rule *nemo iudex in sua causa*	*Liebenberg v Brakpan Liquor Licensing Board(1944)* The mayor present at the awarding of a liquor license were his brother was an applicant. The court found that " Every person who undertakes to administer justice, is disqualified if he has a bias which interferes with his impartially, or the suspicion of it."
		The test to determine bias.	*BTR Industries SA V Metal and Allied workers Union(1992)(A)* Court found that "in our law the existence of a reasonable suspicion of bias satisfies a test that an apprehension of the real likelihood that the decision maker will be biased is not a prerequisite for the disqualification of bias"

9.4 THE CONSTITUTIONAL RIGHT TO PROCEDURALLY FAIR ADMINISTRATIVE ACTION.

CONCEPT	KEYPOINTS
Overview	Both the 1993 IC and the 1996 constitution's guarantee the right to procedural fair admin action. Therefore these rules of natural justice are not only common law but also constitutionally empowered. Note section 24 (b) of Interim C and section 33(1) of 1996 constitution.
The content of the right to procedurally fair administrative action	It is not the codification of pre-constitutional law, or is it simply confined to the principle of natural justice. The 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 common law. We have to look into these common law rules of natural justice as developed and applied by the courts to give "flesh and meaning" to the constitutional right.
The court's interpretation of the constitutional right to procedural fairness before PAJA.	Note *Kotze v Minister of Health(1996)(T).*Denying a person a hearing who is entitled to the benefit of a fair hearing (a fair procedure) is a fatal irregularity, irrespective of the strength of the case against the person. *Fraser v Children's Court, Pretoria North(1996)(T)* The constitution always applies the procedural fairness of a decision against the Bill of rights, whatever the legislative provision.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
Section 24(b) of IC	"Every person has the right to procedurally fair administrative action where any rights or legitimate expectations is affected or threatened."	The empowering provision for procedural fairness in the IC and in turn propelled it for the 1996 C.	
Section 33(1) of C	"Everyone has the right to administrative action that is lawful, reasonable and procedurally fair"	Current empowering provision for procedural fairness.	
		Judicial Precedence. You cannot make a decision on external information that is not part of the issue at hand, if you are to consider certain information, make it	*Kotze v Minister of Health(1996)(T).* The court found that the DG's consideration of information that did not form part of the application amounted to a denial of

		part of the application and allow the individual to address it, lest you conduct unfair procedure.	procedurally fair admin action. The applicant should have been given a change to deal with any other information that did not form part of his application but was taken into account when considering the decision.
		No matter how strong the case, no matter how justifiable and correct the decision, it can't be said to be fair one key party is not allowed to be heard.	*Fraser v Children's Court, Pretoria North(1996)(T)* The commissioner did not allow the father to make submission(to be heard) before allowing adoption, on review the Judge found that this was very irregular.

9.5 PAJA AND THE RIGHT TO PROCEDURALLY FAIR ADMINISTRATIVE ACTION

CONCEPT	KEYPOINTS
Definition and overview	When will admin action be procedurally fair, PAJA sets out requirements for it. We need to distinguish between the provisions of s 3 and 4 of PAJA. Section 3 deals with "procedurally fair administrative action affecting a person. This sec applies to the individual admin law relationship. Section 4 however takes care of admin action affecting the public, the general admin action relationship and provides for situations where the rights of the public are affected by admin action. Note *Walele v City of Cape Town(2008)(CC*) giving effect to legitimate expectations.
Legitimate expectation, its development at common law ad its recognition in s 3(1) of PAJA	It is very much recognized in our case law and common law. Note *Jenkins v Government of RSA(1996)(TK)* . Legitimate expectation comes into the picture when a decision is taken and it will only be fair towards the affected person that he is given the opportunity to be heard, the problem comes when he has no existing right on which it depends.
Legitimate expectation and its development at common law	This doctrine was developed by British courts in a process of imposing upon administrative decision-makers a general duty to act fairly. This application the means that the rights of natural justice are extended to cover a person who does not have any existing rights, but does have a potential right or a legitimate expectation. The 1st ever SA case on this was *Everett v Minister of Interior (1981)(C)* . This expectation ca be in the form of either an express promise given by the authoritative body

	or from a regular standing practice which is expected to continue unchanged. Remember, legitimate expectation gives you a right to a ruling and not the success of your application.
Decisions dealing with legitimate expectation after 1994	Note *Claude Neon v City Council of Germiston (1995)(W) and Jenkins v Government of RSA(1996)(TK)* The courts stated that the doctrine of legitimate expectation has become part of our law. This means that the doctrine will continue to exist and apply to situations in which the application of procedural fairness is in issue.
Section 3 of PAJA and the application of procedural fairness	Section 3 (2)(a)- decisions like *Masetlha v President of the RSA* shows that the very essence of the requirement to act fairly allows discretion and gives room for flexibility and practicability. S 3(2)(b)- The peremptory/mandatory or minimum/core requirements for procedural fairness. The right to procedural fairness administrative action must be given a generous interpretation; the purpose of this generous interpretation is to include any situations not covered by the Act.
	Section 3 (3): The discretionary requirements for procedural fairness, "In order to give effect to the right to procedurally fair administrative action an administrator may, in his/her or its discretion, also give a person referred to in subsection 1 an opportunity to, (a) obtain assistance and, in serious or complex cases, legal representation,(b) present and dispute information and arguments and(c) appear in person."
	Section 3 (4): Departures from the requirements of fair procedure set out in section 3(2). S 3 (4)(a) it reads "If it is reasonable and justifiable in the circumstances an administrator may depart from any requirements referred in subsection 2" This represents a limitation of the right to fair procedure. Section 3 (4)(b) sets out the factors to be considered to determine whether a decision is reasonable and justifiable., they include (i) the objects of the empowering provision (ii) the nature and purpose of the need to take administrative action (iii) the likely effect of the administrative action (iv) the urgency of taking the administrative action or urgency of the matter (v) the need to promote an efficient administration and good governance.
	Section 3 (5): it permits an administrator to follow a different procedure, it is a discretionary power, subject to certain requirements, these requirements are that the different procedure must be fair, and that there must fair, and there is an empowering provision that authorizes the administrator to follow a different procedure. It is up to statutory interpretation to determine whether an empowering provision to a particular procedure is fair or not.
Section 4 of PAJA and the application of procedural fairness(decision affecting the public)	It reads " In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the rights to procedural fair administrative action must decide whether – (a) to hold a public enquiry in terms of subsection 2 (b) to follow a notice and comment procedure In terms of subsection 3 (c) to follow the procedure in both subsection (2) or (3) (d) where the administrator is empowered by an empowering provision to follow a

	procedure which is fair but different to follow procedure or (e) to follow another appropriate procedure which gives effect to subsection 3.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
Section 3 (1)of PAJA	"Administrative action which is materially and adversely affects the rights of legitimate expectations of any person must be procedurally fair"	Gives effect to the right of admin action that is set out in s 33(1) of the constitution in an individual admin law relationship	
Section 4 (1) of PAJA	"In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right of procedurally fair administrative action must"	Gives effect to the right of admin action set out in s 33(1) of the constitution in a public admin law relationship.	
		The judge gives a more clear interpretation of the two, as the 1st one which included legitimate expectation in the constitution.	*Walele v City of Cape Town(2008)(CC)* The judge notes the contradiction in regards to the provision of legitimate expectation which is found in the definition of admin action in section 1 of the constitution but is not present in s 3(1) of PAJA which gives effect to this right.
		Proving the judicial precedence that existed with the doctrine of legitimate expectation. I think it's because of its mention in s 1, even	*Jenkins v Government of RSA(1996)(TK)* The court found that the doctrine of legitimate expectation had become a part of our

		though there is no mention of it in the empowering provisions.	common law, even though no reference is made to it in s 33 of the constitution.
		This sets the precedence. The 1st decision were legitimate expectation was enforced.	*Everett v Minister of Interior(1981)(C)* The court found that a person who has acquired a temporary residence permit cannot expect to remain in the country for longer than the duration on the permit, however, he has a legitimate expectation to be in the country for that stipulated period till the expiry date.
		Judicial precedence. When an expectation is created by repeated practice that has somewhat become a custom or unwritten policy, the authority has to meet it.	*Claude Neon v City Council of Germiston(1995)(W)* A tender procedure, the court found that the applicant had a legitimate expectation to be notified when the tender documents were ready, failure to furnish them with these by the council resulted in unfair administrative action.
Section 3(2)(a)	"A fair administrative procedure depends on the circumstances of each case".	This reflects the reality that the content of procedural fairness varies in depending on the contexts in which it is applied.	
		Discretion is still there but it has to be reasonable.	Earthlife Africa v D.G: Environmental Affairs and Tourism (2005)(C) Case deals with the intended construction of a pebble bed modular reactor(PBMR),the applicants challenge of

			the decision to authorize the construction "What is required to give effect to the right of a fair hearing is that the interested party must be placed in a position to present and counter evidence, they should know the gist of the case.'

Activity Answers

Study Unit 10

THE RIGHT TO BE GIVEN WRITTEN REASONS

10.1 GENERAL REMARKS ON THE IMPORTANCE OF REASONS

CONCEPT	KEYPOINTS
	In legislation it is first seen in Section 24 (c) of the Interim constitution, then section 33(2) of the 1996 constitution and is given effect by section 5 of PAJA. Written reasons are important to show how the administrative body functioned when it took the decision and in particular how the body performed the action, whether it acted lawfully, unlawfully, rationally, arbitrarily, reasonably, unreasonably. Refusing written reasons can be devastating to an individual's case. It is also important say in the event that an affect party wants to appeal or review the decision, written reasons would go a long way to facilitate that process.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
		Minority judgment but justifies written reasons	Bel Porto School Governing Body v Premier Western Cape(2002)(CC) The court found that " The duty to give reasons when the rights or interests are affected has been stated to constitute an indispensible part of

			judicial review. The individual can never be able to tell whether the decision is reviewable unless reasons are given. Giving reasons is also promotion of good governance."

10.2 THE RIGHT REASONS IN TERMS OF SECTION 24(c) OF THE INTERIM CONSTIITUTION AND SECTION 33(2) OF THE 1996 CONSTITUTION

CONCEPT	KEYPOINTS
	Requiring the administrator to give reasons for his decision is a safeguard against any arbitrary or unreasonable decision-making. The furnishing of reasons also promotes fairness and proper administrative behavior, since unsound reasons or absence of reasons may form the subject of review, it also ensures administrative transparency. Also promotes the basic values and principles of good public administration set out in s 195.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
Section 24 (c) of IC	"Every person has the right to be furnished with reasons in writing for administrative action which affects any of his/her rights or interests(Unless they have been made public"	Initial statutory provision to a formerly common law rule	
Section 33(2) of C	"Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons for the decision.	Current statutory provision that also allows for the enactment of section 5 of PAJA.	

10.3 WHO HAS A RIGHT TO REASONS?

CONCEPT	KEYPOINTS
Definition	In plain language the question is, what is the scope of the right to written reasons? Turing to the constitution, 33 (2) says that it is only a person whose right has been adversely affected by administrative action has a right to written reasons. Some academics say that s 33(1) reasons will be adversely affected if reasons are not given, look at the constitutions tone of openness and accountability. Giving due consideration to these s 33 (1) rights as a whole will make it essential to give reasons.

10.4 PAJA AND THE REQUIREMENTS OF REASONS

CONCEPT	KEYPOINTS
	Section 5 provides for the furnishing of reasons as required by s 33 (2) of the constitution. It gives this constitutional right, statutory form.
The request for reasons	S 5(1) requires the provision of written reasons at the request of any person adversely affected. It gives the administrator 90 days after which the person became aware of the action.
The response of the administrator	S 5(2) The administrator is obliged to give that person adequate reasons within 90 days of receiving request. He must provide reasons.
Failure to provide adequate reasons in writing leads to an "adverse inference"	S 5(3) provides for a rebuttable presumption that if you are not furnished with reasons the administrator made the decision without any. It can also be used by administrator not to provide reasons on the grounds of "reasonable and justifiable circumstances" as subject to subsection 4, as a departure from requirement to provide reasons.
Departure from the requirement to furnish written reason: Reasonable and justifiable refusal to furnish reasons	S 5(4) requires that this departure must be in "reasonable and justifiable circumstances". Since this is a limitation provisions, certain requirements, set out in s 5(4)(b) must be met, the same way as s 36 of constitution with the limitation clause.
A fair but different procedure in terms of section 5(5)	S 5(5) Usually applied in the situation were an act, being the empowering provision provides for a different procedure, provided its fair, this is now prone to statutory interpretation by the courts.
Providing reasons without the need for a request in terms of section 5(1)	In order to promote an efficient administration, an administrator may, through the minister publish reasons through the government gazette. This will be an automatic furnish in line with s 5(6)(a).

10.5 WHEN WILL REASONS BE ADEQUATE?

CONCEPT	KEYPOINTS
Definition	What will constitute adequate reasons will depend on the circumstances of each and every case, that is, the context n which the decision was taken.
	The reasons should be adequate enough to apply the principle "even if I don't agree, am not happy with you and can properly come to a different conclusion, I understand how you arrived at your decision and can go with it"
	"I am now in a position to decide whether that decision has involved an unwarranted finding of fact or an error of law which is worth challenging"
	Length should depend upon considerations, the more complex the matter was, the more drastic the decision was the more detailed the written reasons should be. The degree of seriousness of decision taken should determine particularity of reasons given.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
		Judicial precedence on giving adequate reasons, especially for the case of contesting the decision.	*Nomala v Permanent Secretary, Department of Welfare(2001)(E)* a termination of a disability grant. She was informed that her reapplication was not successful through a standard form reasons letter the court found that "is adequate as a mode of providing reasons since it discloses nothing, the reasons and its form of presentation do not educate the beneficiary about what to address in her application or appeal."
		Reasons should be informative about the decision taken.	Minister of Environmental Affairs v Phambili Fisheries(2003)(SCA

			quoting the Bato decision " It is apparent that reasons are not really reasons unless they are properly informative. They must explain why action was taken or not taken"

Study Unit 11

CONTROL AND REMEDIES

INTERNAL CONTROL OF ADMINISTRATIVE ACTION

11.1 THE DISTINCTION BETWEEN CONTROL AND REMEDY

CONCEPT	KEYPOINTS
Control	It would be the regulation and supervision of administrative action, comes into the picture when admin action is defective. Control ensures that the admin action is valid. It can be in various forms, namely internal control and Judicial control
Remedy	The means of gaining legal amends of a wrong, "in a legal sense" An order of court if admin action is found to have been invalid or unlawful.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
Baxter(1984:677)	"What is important, however, is that clear distinction should be drawn between the two separate functions which the court performs, namely reviewing the legality of the action in question and granting an appropriate order if the action is found to be unlawful.		

11.2 CONTROL WITHIN THE ADMINISTRATION ITSELF-INTERNAL CONTROL

CONCEPT	KEYPOINTS
	As much as judicial control is a more common form of control, Internal control is just as important and happens to come first. In procedural fairness one of the provisions as found in s 3 (2)(iv) of PAJA is to provide a person with adequate notice of the possibility of internal appeal, this is where internal control is exercised.
Forms of Internal control	Control by supervisor or specially constituted bodies or institutions, parliamentary control, control by public bodies and commissions such as public protector and auditor-general.
Control by senior/supervisor or specially constituted bodies or institutions	What are their powers: they have the power to reconsider or reexamine the decision, to confirm it, or set it aside. Or vary the decision (substitute by another). They may consider the validity, desirability or efficacy of the admin action in question. They may also consider policy (something the courts cannot do). They may review the manner used to reach the decision. The decision is not binding, the appeal process can go up from senior administrator to the other right to the top.
Parliamentary control	It is an important form of internal control since general administrative policy and matters may be questioned in parliament. Every minister is accountable the parliament on how their department is run. It takes place in the following manners: tabling of reports by ministers (budget reports for their departments) or parliamentary enquiries (question time in parliament).
Public bodies and commissions	The constitution has created a number of extrajudicial bodies that can create awareness and knowledge in the public of their rights and the enforceability. These are called in the constitution “state institutions supporting constitutional democracy” (Chapter 9 institutions). They are: The public prosecutor, the south African human rights commission, the commission for the promotion and protection of the rights of cultural, religious and linguistic communities, the commission of gender equality, the auditor general, the electoral commission, the independent authority to regulate broadcasting. These are regulated by section 181. They are two very important ones
The Public Protector	The office has been created to curb administrative excesses, in other countries known as the “ombud”. He/she investigates citizens complaints against the public administration and its officials. Provisioned in section 182(1).Note subc 3 states that they may not investigate court decisions. Subc 5, report must be open to public except in the consideration of national security and circumstances set out in national legislation.
The Auditor-General	Relates to auditing and reporting on the accounts, financial statements and financial management of all national and provincial state departments and administrations and all municipalities. And any institution funded by the National Revenue Fund. Set out in 188.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
Section 92(2) of C	"Members of the Cabinet are collectively and individually accountable to parliament for the exercise their powers and the performance of their functions."	Provision for parliamentary control as a form of internal control of administrative action.	
Section 181	(1)The bodies 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.	These are the principles that both provide and govern the activities of the chapter 9 institutions.	
Section 182(1)	"to investigate any conduct in respect of state affairs or in the public administration in any sphere of gvt that could be improper, or could result in any impropriety(b) to report o that conduct(c) to take proper remedial action.	Empowering provision to the office of the public protector and outlines function.	

11.3 PAJA AND THE USE OF INTERNAL CONTROL

CONCEPT	KEYPOINTS
	One of the PAJA preconditions set before an affected person may take administrative action on judicial review is that he or she has exhausted internal remedies as required by section 7(2) of PAJA
Internal remedies must be exhausted	In an internal appeal that is simple and straightforward, the higher body only controls the excess of power or irregularity, but also considers the merit of the case (whether the decision is right) and the efficacy of the action (whether the decision is practicable or sensible). The rational of the internal process is that it is much cheaper for all parties involved and it saves the court from being unnecessarily overloaded. Reasons to skip internal remedy, a mistake in law, a malafide decision, prejudgment of case by administrator.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
Section 7(2) of PAJA(a)	"Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in another law has 1st been exhausted"		
(b)	"Subject to paragraph (c) a court or tribunal must if it is not satisfied that any internal remedy referred to in paragraph(a) has been exhausted, direct that the person concerned must 1st exhaust such remedy b4 instituting proceeding in a court or tribunal for judicial review i.t.o this Act"		
(c)	"A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from obligation to exhaust any remedy if the court or tribunal deems it in the interests of justice."		

Study Unit 12

JUDICIAL CONTROL OF ADMINISTRATIVE ACTION AND REMEDIES IN PROCEEDINGS FOR JUDICIAL REVIEW

12.1 THE IMPORTANCE OF JUDICIAL CONTROL AND THE COURTS' TRADITIONAL (COMMON LAW) FUNCTION OF CONTROLLING ADMINISTRATIVE ACTION THROUGH REVIEW

CONCEPT	KEYPOINTS
	Judicial control allows for the validity of legislation and/or admin action to be challenged in a court. The judiciary must make sure that the executive and the legislature comply with the constitution. The courts should remain independent and not be messed with s 165(3) of C. Even before 1994, the courts had an inbuilt power of administrative review.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
		Gives the common law right of the courts to review admin action even before it was legislatively provided before.	*Johannesburg Consolidated Investment Company v Johannesburg Tow Council (1903)(TS)* "Whenever a public body has a duty imposed on it by statute and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality or clear illegality in the performance of the duty, this court may be asked to review the proceedings complained of and set aside or correct them. This is not a special machinery created by legislature, it is a right inherent in the court".

12.2 THE 'CONSTITUTIONALISATION' OF ADMINISTRATIVE ACTION AND JUDICIAL REVIEW

CONCEPT	KEYPOINTS
	The common law rules of admin action have now been entrenched in the constitution, section 33, these are the fundamental rights of common law in admin action.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
Currie and De Waal(2005:644-645)	"The constitutional right to just admin action entrenches fundamental principles of administrative law that were developed by the courts in the exercise of their common-law review powers"	This goes to show that the principle of just admin action in section 33 of the constitution was somewhat simply a developed codification of the fundamental rights to admin action in common law.	
		This removes the responsibility or the competence of reviewing admin action by the courts from the high court's to the constitutional court, by the basis that, this has always been a constitutional matter, only before the adoption of the constitution, it was done by the courts on the common law principles of admin action, now that the constitution is that, providing in statute for this review, it is no longer necessary for the lower courts to feel that void.	*Pharmaceutical Manufacturers Ass of SA v:In re Parte President of the RSA(2000)(CC)* The court found that "the control of public power by the courts through judicial review has always been a constitutional matter, prior to the adoption of the IC and C this control was exercised by the courts through the application of common law constitutional principles"

12.3 THE GROUNDS FOR JUDICIAL REVIEW IN TERMS OF SECTION 6 OF PAJA

CONCEPT	KEYPOINTS
	It makes provision for the judicial review of administrative action of section 33(3)(a) of constitution. There are grounds in which anyone can found their admin action review provided for in section 6(2) of PAJA
The decision maker 6 (2)(a)	The authority of the decision maker, geographical limits, qualifications, time limits, exceeding objective or purpose of empowering provision, unauthorized delegation, *Nemo iudex in sau causa.*
The manner In which decision was taken 6 (2) (b)-(e)	Non-compliance with formal requirements, a mandatory and material procedure or condition prescribed by an empowering provision was not complied with, was the decision justifiable, reasonable, rational, and procedurally fair, and was action taken at all? Decision taken for unauthorized reasons, or ulterior purpose, taking into account irrelevant considerations or not considering relevant ones.
The administrative action itself 6 (2) (f)-(i)	This looks at the action itself: contravening the law or its authorization by empowering provision, is it rationally connected to (aa) the purpose for which it was taken, (bb) the purpose of the empowering provision (cc) then information before the administrator (dd) the reasons given for it by the administrator (g) the failure to take a decision (h) unreasonable action (i) action otherwise unconstitutional or unlawful.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
Section 6 of PAJA	"Any person may institute proceedings in a court or tribunal for the review of an administrative action"	PAJA provision to admin action review as set out in section 33(3)(a).	

12.4 THE VARIOUS FORMS OF JUDICIAL CONTROL

CONCEPT	KEYPOINTS
	They are other forms of judicial review outside of judicial review. These include statutory appeal, judicial review, interdict, *mandamus,* declaratory order, defence in criminal proceedings
Statutory appeal	An appeal may be lodged only against a final decision or final order, not against a provisional or interlocutory order. The provision governing the power of the courts to examine admin action on appeal, the requirements for appeal, the time within which the appeal must be noted and so on, laid down in the empowering statute. it will also determine the extent of the appeal. Either against the facts, or the question of the law.
Judicial Review	While the courts(ordinary courts) do not have ordinary appeal jurisdiction, they do have inherent review jurisdiction in terms of common law. Judicial review is applied in the context of legality, review of admin action in terms of the constitution, review of admin action in terms of the provisions of section 6 of PAJA, review of the proceedings in/decisions of lower courts in terms of the supreme courts act. Review in terms of provisions of specific statutes. The grounds being infringement of the bill of rights and requirements of valid action set out in s 6. NOTE: A review does not go into the merits of the case, it reviews the manner in which the decision was taken, and irregularities but the merits.
Interdict	If an applicant fears and can prove that an action or impending action by the administrator will affect his/her rights or prejudice him/her, he may apply for an interdict restraining the administrator from carrying out its action. The application must be supported with, proof of a clear legal interest, proof that there are no other satisfactory alternative remedies available, urgency of matter.
Mandamus	This is a remedy compelling the administrator to perform some or other statutory duty. It does not stipulate an action, it just compels to act.
Declaratory Order	It is used where there is a clear legal dispute or legal uncertainty regarding administrative action. It can be used to determine whether actual or pending admin action is lawful. It gives the court a definite answer on a matter.
Defence in Criminal proceedings	At common law, the validity of an administrative action may be challenged by raising its invalidity as a defence in criminal law.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
Wiechers(1985:265)	"It is a decree whereby the administrative organ is ordered to desist from an act or course of conduct which is causing direct prejudice to the applicant and constitutes an encroachment of rights"	This is simply a definition of an Interdict on an administrative organ.	
		Simple case law for the provision of *mandamus*	*Mahambela v Member of the Executive Council for Welfare, Eastern Cape P Gvt(2003)(SE)* The applicant waited nine months to be granted a disability grant, the courts decided that this time was unreasonable, a *mandamus* order was given

Activity Answers

12.5 PRECONDITIONS BEFORE TURNING TO JUDICIAL CONTROL

CONCEPT	KEYPOINTS
	There are various procedural requirements that must be met before one is to challenge admin action. e.g the review application must be brought to court timely, appeal may be brought only after final decisions of the admin body.
The applicant must have *locus standi*	*Locus standi* is legal standing, the capacity of a person to bring a matter to court. The interest in the outcome, English common law went with personal interest in the case, while roman law went for *actio popularis*, meaning a public interest

	as an individual to prevent public injustice. It's also proven by the type of admin relationship in that case, individual or public.
Locus standi i.t.o of s 38 of C	The constitution has broadened the scope of locus standi of individuals and groups to seek relief in matters involving fundamental rights matters. Section 38 (a-e) (a) anyone acting in their own interest (b) anyone acting on behalf of another person who cannot act in their own name (c) anyone acting as a member of, or in the interest of, a group or class of persons (d) an association acting in the interests of its members.

LEGISLATION	DESCRIPTION	APPLICATION	CASE LAW
		Locus standi on admin relationship type applications.	Bamford v Minister of Community of Community Dev(1981)(C) An individual's interest was recognized in a general admin relationship.
Section 38 of C	"Anyone listed in this section has the right to approach a competent court alleging that a right in the Bill of rights has been infringed or threatened and the courts may grant appropriate relief, including a declaration of rights"		

12.6 PROCEDURE FOR JUDICIAL REVIEW UNDER PAJA

CONCEPT	KEYPOINTS
Which court may review admin action?	The high court does have inherent common law powers of review. Other courts include the Con Court, by statutory empowerment, section 167(6)(a), this subsec gives access to the con court when the court gives permission, the high court or similar courts, the magistrate courts specifically designed to review admin action.
Procedure prescribed for the review of admin action	Review should be instituted within 180 days.

12.7 THE ORDERS MADE BY A COURT AS PRESCRIBED BY SECTION 8 OF PAJA

CONCEPT	KEYPOINTS
	In terms of section 8 (1) of PAJA, the courts or tribunal, in proceedings for judicial review in terms of section 6(1) may grant any order that is just and equitable. High Courts and Mag courts have a right to this order as prescribed in 8(1). The Mag court cannot examine the constitutionality of proclamations, regulations and rules, their jurisdiction is limited to an examination to the validity of admin action by any organ of state, other than the president. The High Court, Supreme court can declare unconstitutionality of admin action.

BY Nigel T. Sithole- 071 039 7526