

**A CRITICAL ANALYSIS OF THE DOCTRINE OF LEGITIMATE
EXPECTATION IN THE CONTEXT OF THE ADVANCE TAX
RULING SYSTEM AND TAX ASSESSMENT MEASURES BY
SARS, WITH SPECIFIC EMPHASIS ON SUBSTANTIVE
LEGITIMATE EXPECTATION**

DISSERTATION

by

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DECLARATION

I, Ms M J Maluleke, the undersigned, hereby declare that the work contained in this thesis is my own original work and that I have not previously, in its entirety or in part, submitted it at any university for a degree.

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ACRONYMS

ADCJ	Acting Deputy Chief Justice
AJ	Acting Judge
ATR	Advance Tax Ruling
CRA	Canada Revenue Agency
CC	Constitutional Court
EU	European Union
HMRC	Her Majesty's Revenue & Customs
ITC	Income Tax Court
IRS	Internal Revenue Service
IRD	Inland Revenue Department
J	Judge
SA	South Africa
SARS	South African Revenue Service
SATC	South African Tax Court
SCA	Supreme Court of Appeal
PAJA	Promotion of Administrative Justice Act
UK	United Kingdom
UN)	United Nations
US	United States of America

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SUMMARY

Section 1 of the Income Tax Act, 58 of 1962 (the Income Tax Act) and other related Revenue Acts empower the South African Revenue Service (SARS) to administer the Acts and to collect revenue for the government of the Republic of South Africa. Sometimes, in order to assess tax liability and collect revenue, the Commissioner and/or officials of SARS have to make certain representations and undertakings to taxpayers in general through interpretation notes, rulings, and other forms of communication.

In certain circumstances, SARS is authorised to withdraw rulings made and at times already acted upon, often to the taxpayer's detriment. This results in lack of clarity, uncertainty and inconsistency in the application of the law. In order to address this problem, an Advanced Tax Ruling System (ATRS) was introduced. In terms of the ATRS, the issuing of rulings is statutorily regulated and binding on both the taxpayer and SARS when certain conditions provided for in the Income Tax Act are met. The purpose of an ATRS is to promote clarity, consistency, and certainty in respect of the interpretation or application of the provisions of tax laws to which it applies.

However, the Commissioner is not obliged to follow a policy or undertaking which is in violation of tax laws. Section 76N(3) provides that the Commissioner may withdraw or modify a binding private ruling, or a binding class ruling retrospectively, if the ruling was made in error; subject to sub paragraphs (a), (b) and (c) thereof. This creates uncertainty as opposed to the intention for which the ATRS was introduced.

The critical question is, if the Commissioner timeously informed the taxpayer that he has decided not to honour the undertaking made in a valid binding private ruling, which is still in force to the detriment of the taxpayer, can the taxpayer raise a defence of substantive legitimate expectation?

It is argued that the issuing of an ATR is an administrative action subject to judicial review, if, in the opinion of the concerned party, it will have an adverse effect. Further, in the event that the Commissioner informs the taxpayer timeously of the intention to withdraw a valid binding private ruling, which the taxpayer has acted upon to their

detriment, can they raise a defence of a practice generally prevailing and/or substantive legitimate expectation?

The doctrine of legitimate expectation as a defence was authoritatively accepted as part of the South African administrative law in the landmark case of *Administrator Transvaal v Traub*. However, Chief Justice Corbett expressly stated in a dictum that the content of the expectation may be substantive or procedural in nature, [but] the protection of that expectation, if found to be legitimate, was exclusively procedural. It is argued that the dictum ignores section 33 of the Constitution which introduced reasonableness as an element of the right to just administrative action, which means that the substance of a decision may be reviewed if it is unreasonable. The objective is to examine whether the courts could develop the doctrine of legitimate expectation beyond the procedural protection, as already done in countries in Europe.

CHAPTER 1. INTRODUCTION

1.1. Background

Section 1 of the Income Tax Act, 58 of 1962 (the Income Tax Act) and other related Revenue Acts, empower the South African Revenue Service (SARS) to administer the Acts and to collect revenue for the government of the Republic of South Africa. In order to assess tax liability and collect revenue, the Commissioner and/or officials of SARS will, needless to say, have to make certain representations and undertakings to taxpayers in general through interpretation notes, practice notes, rulings, letters and other forms of communication.

In addition, specific undertakings to specific taxpayers are unavoidable. In certain circumstances, SARS is authorised to withdraw rulings already made and at times already acted upon by taxpayers; often to the taxpayer's detriment. The question now is what defence or remedy is afforded taxpayers who find themselves in the circumstance outlined above?

In 2004, the Minister of Finance published a discussion paper on a proposal to introduce a system of 'advance tax rulings', in order to be in line with international best practice and jurisprudence.¹ Consequent to this, an advance tax ruling system (ATRS) was introduced into the Income Tax Act² in terms of the Second Revenue Laws Amendment Bill (B25-2004).³

¹ SARS (2004). *Discussion paper on a proposed system for advance tax rulings*. (Dated 2003 – published in 2004). [Online] Available at <http://www.sars.gov.za/home.asp?pid=5981>. Accessed 10 July, 2011.

² Income Tax Act, 58 of 1962.

³ <http://www.gov.za>.

In terms of this new system, the issuing of tax rulings is statutorily regulated and binding on the taxpayer or SARS, or on both the taxpayer and SARS when certain conditions provided for in the Income Tax Act⁴ are met.

The intention of introducing the ATRS is to promote clarity, consistency, and certainty in respect of the interpretation or application of the provisions of the Income Tax Act⁵ and other related tax laws to which it applies.

However, the Commissioner is not obliged to follow a policy or undertaking which is in violation of tax laws as set out in the Income Tax Act⁶ or any other Act of Parliament.⁷ Baxter echoes the same words.⁸ Further, section 76N(3) of the Income Tax Act⁹ provides that the Commissioner may withdraw or modify a binding private ruling, or a binding class ruling retrospectively, if the ruling was made in error; subject to sub paragraphs (a), (b) and (c) thereof. This creates uncertainty as opposed to the intention for which the ATRS was introduced.

In the event that the Commissioner *informs the taxpayer timeously* of the intention to withdraw a valid binding private ruling, which the taxpayer has already acted upon to his or her detriment, can he or she raise a defence of a practice generally prevailing and/or substantive legitimate expectation as the issuing of an ATR raises an expectation that the Commissioner will honour the promise? The issuing of the ATR is

⁴ Income Tax Act, 58 of 1962.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Collector of Customs v Cape Central Railways Ltd* (1888) 6 SC 402. In this case the Premier of the Colony authorised the Collector of Customs to admit 1800 barrels of imported cement duty free in the mistaken belief that duty was not payable. The Supreme Court found that to bar the Collector from recovering the duty fixed by law in consequences of the representatives of the Government having illegally abandoned the payment of such duty 'would be to enable Government officials to render the Act of Parliament nugatory' at 410.

⁸ Baxter, L. (1989). *Administrative Law*. 2nd Edition. Cape Town: Juta, at 401 – 402.

⁹ Income Tax Act, 58 of 1962.

an administrative action, and any administrative action is subject to judicial review, if, in the opinion of the taxpayer, it will have a material and adverse effect on him or her.¹⁰

Prior to the constitutional democracy and the promulgation of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA), the South African courts adopted the approach that the rules of natural justice would *only* apply where liberty, property or existing rights are affected.¹¹ The fact that mere interests or expectations, not amounting to rights, liberty, or property, could be affected, was of no consideration for protection by the courts.

The refusal to grant relief in the form of enforcing compliance with the doctrine of legitimate expectation, in the absence of the existence of a definite right, had grossly unfair results until it was recognised and applied in the following cases, among others: *Everett v Minister of the Interior*,¹² and *Administrator, Transvaal v Traub*.¹³

Now, the doctrine of legitimate expectation has been entrenched in our law through the right to just administration, section 33 of the Constitution of the Republic of South Africa, 1996 (the Constitution), and section 3(1) of PAJA, which provides that: 'Administrative action (as defined in section 1(i) PAJA) which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.'

¹⁰ Sec 3 Promotion of Administrative Justice Act, 3 of 2000.

¹¹ Rabie LAWSA (ed. Joubert). (2001) *Part 1 Labour Law and Social Security Law*, par 966 – 968.

¹² 1981 2 SA 453 (C) (*Everett*). This case was the first reported South African judgment in which the English doctrine of legitimate expectation was discussed and applied.

¹³ *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A), (*Traub*). In this case, Chief Justice Corbett extended the scope of application of the rules of natural justice, specifically the *audi* principle, beyond the traditional 'liberty, property and existing rights' formula to cases where something less than an existing right, a legitimate expectation, required a fair procedure to be followed.

1.2. Problem statement

The doctrine of legitimate expectation as a defence was authoritatively accepted as part of the South African administrative law in the landmark case of *Administrator Transvaal v Traub*.¹⁴ However, Chief Justice Corbett expressly stated that the content of the expectation may be substantive or procedural in nature, [but] the protection of that expectation, if found to be legitimate, was exclusively procedural. In the dictum Corbett CJ commented that:

*In practice, the two forms of expectation [procedural and substantive] are interrelated and even tend to merge. Thus, the person concerned may have a legitimate expectation that the decision by the public authority will be favourable, or at least that before the decision is taken he will be given a fair hearing.*¹⁵

The problem with the dictum above, and the position in many other reported judgments¹⁶ of our courts, is that they conclude that procedural and substantive legitimate expectations are intertwined and interrelated; that they cannot be independent of each other, and that whatever the legitimate expectation, the protection will be procedural.

¹⁴ 1989 (4) SA 731 (A). In this case, Chief Justice Corbett extended the scope of application of the rules of natural justice, specifically the *audi* principle, beyond the traditional 'liberty, property and existing rights' formula to cases where something less than an existing right, a legitimate expectation, required a fair procedure to be followed.

¹⁵ *Traub* 758 D – E.

¹⁶ *Premier of Mpumalanga v Executive Committee of State-Aided Schools: Eastern Transvaal* 1999 2 BCLR 151 (CC) par 47. Cf *Bushbuck Ridge Border Committee v Government of the Northern Province* 1999 (2) BCLR 193 (T) 200 D – E, where Kirk-Cohen J held that: '[a] person whose legitimate expectation has not been considered is limited to a procedural right to be heard and not to seek specific performance'.

This ignores the fact that section 33 of the Constitution introduced reasonableness as an element of the right to just administrative action, which means that the substance of a decision may be reviewed if it is unreasonable.¹⁷

The critical question is, if the Commissioner *timeously informed*¹⁸ the taxpayer that he has decided not to honour the undertaking made in a valid binding private ruling, which is still in force to the detriment of the taxpayer, can the taxpayer raise a defence of substantive legitimate expectation? Can the Commissioner be estopped or will the courts fail to protect the taxpayer, simply because the Commissioner has informed the taxpayer timeously of the decision not to honour the undertaking despite the fact that the taxpayer had a legitimate expectation that the Commissioner would honour the promise in the binding private ruling?

1.3. Research question

Following the expression by Chief Justice Corbett that the content of the expectation may be substantive or procedural in nature, [but] the protection of that expectation, if found to be legitimate, was exclusively procedural, the question that follows is whether the doctrine of 'substantive legitimate expectation' is part of our law or not.

If yes, then the following three questions borrowed from Steele¹⁹ need to be addressed:

1. When does a substantive legitimate expectation arise?

¹⁷ In *Ampofo v MEC for Education, Arts, Culture, Sports and Recreation, Northern Province* 2002 (2) SA 215 (T) it was held that the requirement of reasonableness cannot oblige a department to exercise its discretion in a particular manner merely because it had done so in the past. The concept of reasonable administrative action in s 33 of the Constitution and s6(2)(f)(ii) and s6(2)(h) of the AJA has been held to mean that a functionary (such as a department) is obliged to make decisions that are rationally justifiable. Thus reasonable administrative action is achieved where a functionary exercises its discretion in a rational and unfettered fashion.

¹⁸ S 76M(4), Income Tax Act, 58 of 1962.

¹⁹ Steele, I. (2005). Substantive Legitimate Expectation: striking the right balance? *Law Quarterly Review*, 121, 300-328.

2. When is it unlawful for a public body to frustrate a substantive legitimate expectation?
3. What is the appropriate remedy where a public body has unlawfully [negligently] frustrated a substantive legitimate expectation?

If it is not part of our law, what role can the courts play within the parameters of the 'separation of powers', to develop the doctrine beyond procedural protection to an extent that if the expectation is legitimate and substantive, a 'substantive remedy' can be awarded, as it is already happening in other countries such as England, Canada, Germany and others?

1.4. Research objectives

The issuing of the advance tax ruling (ATR) is an administrative action.²⁰ Any administrative action (as defined in section 3(1) PAJA) is subject to judicial review if it adversely affects the rights or legitimate expectations of the taxpayer.²¹ There are many cases where the courts have held that: 'no official of SARS can forgive taxes, whether through incompetence, negligence or error'.²²

While this is true, and the principle would also apply to a binding private ruling concluded under an error in law²³ as has been confirmed by the courts,²⁴ it has also been held in other cases that the Commissioner cannot change his mind without any reason.

²⁰ As defined in s 1(1) of the Promotion of Administrative Justice Act, 3 of 2000.

²¹ PAJA, s 3.

²² *Burghersdorp Municipality v Coney* 1936 CPD 305 at 308; *Durban City Council v Glenore Supermarket and Café 1981 (1) SA 470 (D)* at 478.

²³ Sec 76N (1) – (2), Income Tax Act, 58 of 1962.

²⁴ The Supreme Court of Appeal confirmed in *Eastern Cape Provincial Government and Others v Contractprops 25 (Pty) Ltd 2001 4 SA 142 (SCA)* that estoppels cannot be raised effectively where the effect thereof would be the validation of a decision which is *ultra vires*.

It is submitted that the Commissioner cannot appoint officials that always make mistakes to the detriment of taxpayers. Public servants must be skilled, competent and knowledgeable of the laws that they are supposed to implement. The 'rule of law' is applicable here.

The objective of the research is to analyse the impact of the ATRS on the doctrine of legitimate expectation, should the limited circumstances arise where the Commissioner withdraws a ruling on which the taxpayer had already acted on to the taxpayer's detriment, and whether the reliance on the representation by the taxpayer to his or her detriment can avail the defence of the doctrine of estoppel and substantive legitimate expectation.

The other objective is to explore the legal avenues where the courts could develop the doctrine of legitimate expectation beyond the procedural protection, to substantive protection independent of each other. The South African courts are enjoined by the Constitution²⁵ to have regard to the international law, such as commonwealth jurisdictions²⁶ including England and others, that have developed the doctrine of legitimate expectation beyond the procedural context to an extent that if an expectation is legitimate and substantive, the protection will be substantive.²⁷

This provides an opportunity for the future development of the principle of substantive legitimate expectation, beyond the procedural context, in line with the development of the doctrine of estoppel by the courts.

²⁵ The South African Constitution specifically provides for courts to have regard to international laws (s39). This means both international treaty law and customary international Law. Where there is no clarity as to whether a principle of international law has been integrated in South African law as indicated in the above, there is international precedence that empowers the judiciary to get around this obstacle.

²⁶ Quinot G. (2004). Substantive Legitimate Expectations in South Africa and European Administrative Law. *German Law Journal*, 5, no. 1.

²⁷ In *Re Preston [1985] AC 835*; *R v Northern and East Devon Health Authority [2001] QB 213*; *Ex parte Coughlan*, marked the decisive English acceptance of substantive legitimate expectation.

1.5. Significance of the research

South Africa, as a member of an international community, has to develop its policies to be in line with international best practice and jurisprudence in order to be internationally competitive. One such area is the development of the doctrine of legitimate expectation beyond procedural protection to an extent that a 'substantive remedy' can be awarded in the assessment and collection of revenue by SARS.

The research contributes to the development of the doctrine of legitimate expectation, beyond the procedural context, to an extent that a 'substantive remedy' can be awarded if the expectation is legitimate and substantive. It can also lead to the amendment of PAJA by the legislature, to be in line with international best practice and jurisprudence.

1.6. Research methodology

The research uses South African common law, legislation, law reports and secondary sources, such as books and law journals on the topic. Information from International and comparative law are also used.

The research is a mixture of descriptive, comparative, critical and analytical information. The study analyses national and international laws and court jurisprudence to explore the possibility of developing the doctrine of legitimate expectation beyond the procedural context, as currently provided for in PAJA and court jurisprudence, to an extent that a 'substantive remedy' can be awarded if needed. It is also descriptive in some instances as it describes the legal framework of a country. Further, a comparative analysis is conducted with countries such as Australia, Canada, England, New Zealand, and the United States of American law.

1.7. Limitations

The study focuses only on the binding private rulings and not the entire ATRS since all countries have private rulings similar to the binding private ruling.

The ATRS is still fairly new in South Africa and therefore there is not much literature and court jurisprudence in this regard.

1.8. Concluding remarks

It is submitted that the research examines whether there is room for developing the doctrine of legitimate expectation beyond the procedural context in tax assessment with specific reference to the binding private ruling in the ATRS.

In the following chapter, the South African ATRS is discussed. The ATRS is a fairly new system in South Africa and thus limited literature and case law. Therefore, in order to explore the advantages and disadvantages of ATRS, an international comparative analysis is conducted with countries that have long established the ATRS, in order to help South Africa avoid their mistakes and learn from their successes.

CHAPTER 2. ADVANCE TAX RULING SYSTEM

2.1. Introduction

The purpose of this chapter is to give a background to the establishment of an advance tax ruling system (ATRS) and to discuss its functioning.²⁸ It is still too early to be able to evaluate its effectiveness, however, an international comparative analysis with countries that have established and expanded the functioning of the advance tax ruling system is used to assess the effectiveness of our system and to recommend improvements.

2.2. South African Revenue Services

Chief Justice Marshall in the *McCulloch v Maryland* case²⁹ correctly said:

The power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which government may choose to carry it. The only security against the abuse of this power is found in the structure of government itself.

Taxation is governed by the Income Tax Act 58 of 1962 (the Income Tax Act). Section 5(1) thereof establishes the liability of a taxpayer for normal tax. According to Silke,³⁰ the taxable income of a person is determined in accordance with the ordinary rules of taxation (that is, gross income less exempt income less deductions). Normal tax is imposed upon persons, irrespective of whether they are natural persons, companies,

²⁸ SARS. (2011). *Comprehensive Guide to Advanced Tax Rulings*. Issued on 1 February 2011.

²⁹ McGehee, L.P. (1906). *Due Process of Law under the Federal Constitution*. New York: Edward Thompson Company.

³⁰ Stiglingh, M. *et al.* (2009). *Silke: South African Income Tax*. Durban: LexisNexis Butterworths.

close corporations or other taxable entities.³¹ There are other laws that govern payment of tax such as the Value Added Tax Act,³² among others.

The Commissioner for the South African Revenue Service (the Commissioner) is responsible for carrying out the provisions of the Income Tax Act s2(1), and the Minister of Finance is responsible for the development of regulations to facilitate the implementation of legislation, s107(1). It is said that these regulations have the same power as legislation.³³

It is often difficult to understand many laws; however, tax laws are even more complicated and ambiguous in many instances. As a result, there are different interpretations of laws by the Commissioner and officials of SARS, taxpayers and tax lawyers, often resulting in substantially different tax consequences; hence the proliferation of litigation in the tax courts, high courts and Supreme of Court of Appeal.³⁴ Recently, there have been Constitutional Court decisions on tax laws.³⁵

Givati³⁶ notes that the inherent complexity of tax law and frequent changes in the law exacerbates the problem, and further, that legal uncertainty creates a problem for taxpayers. This has a negative impact on investment and the economic viability of a country, because uncertain tax consequences deter some taxpayers from carrying out contemplated transactions or investors to invest in the country (Givati, 2009). On the other hand, some taxpayers will carry out the transactions and bear the risk of potential loss, thus leading to non-compliance with tax liabilities (Givati, 2009).

³¹ Stiglingh *et al.* (2009). *Silke: South African Income Tax*. Durban: LexisNexis Butterworths.

³² 89 of 1991.

³³ There are different schools of thought on whether or not the Regulations have the same power as legislation. This is critical as it is a determinant factor of whether the development of Regulations for the implementation of the laws is an administrative action or not. However, it will be discussed in the next chapter.

³⁴ See <http://www.lexisnexis.co.za>. ITC, SATC and SALR on cases.

³⁵ See <http://www.constitutionalcourt.org.za/site/thelibrary/aboutthelibrary.htm>.

³⁶ Givati, Y. (2009). Resolving legal uncertainty: the unfulfilled promise of advance tax rulings. *Virginia Tax Review*, no. 29, p. 1.

In order to ensure a measure of certainty and consistency for taxpayers, the Commissioner is empowered to make certain representations and undertakings to taxpayers in general, through interpretation notes, practice notes, rulings, letters and other forms of communications. However, these practice notes, interpretation notes, rulings and letters do not have the force of law. This will be discussed further in section 2.3 below.

In 2004, the Minister of Finance published a discussion paper on a proposal to introduce a system of 'advance tax rulings', in order to be in line with international best practice and jurisprudence.³⁷ The issuing of tax rulings is statutorily regulated and binding on the taxpayer or SARS, or on both the taxpayer and SARS when certain conditions provided for in the Income Tax Act³⁸ are met. The aim is to promote clarity, consistency, and certainty in respect of the interpretation or application of the provisions of the Income Tax Act³⁹ and other related tax laws to which it applies. This will be discussed further in section 2.4

2.3. The SARS communication methods prior to the introduction of the advance tax rulings

2.3.1 Practice notes and interpretation notes

Practice notes and interpretation notes are tools used by SARS to be transparent and to provide clarity on the interpretation and application of certain provisions of a particular tax law. For example, in the Draft Interpretation Note No 43 (Issue 3): Circumstances in which certain amounts received or accrued from the disposal of shares are deemed to be of a capital nature (SARS, 2011) its purpose is to clarify the

³⁷ SARS (2004). *Discussion paper on a proposed system for advance tax rulings*. (Dated 2003 – published in 2004). [Online] Available at <http://www.sars.gov.za/home.asp?pid=5981>. Accessed 10 July, 2011.

³⁸ Income Tax Act, 58 of 1962.

³⁹ *Ibid.*

interpretation and application of section 9C.⁴⁰ Section 9C came into effect on 1 October 2007 and deems the amount derived from the disposal of certain shares held for a continuous period of three years to be of a capital nature.

These communication materials do not have a legal force and are not binding on the Commissioner. However, in practice the Commissioner will not act contrary to the guidelines outlined therein without good reason.⁴¹ Even though these communication materials are helpful to taxpayers in their dealing with SARS, it is important to note that they can, and have, been withdrawn.

Dwyer⁴² submits that the publication of the SARS Income Tax Practice Manual was undertaken in order for SARS to comply with section 32(1)(a) of the Constitution of the Republic of South Africa, 1996 (the Constitution), which provides that everyone has the right of access to information held by the state. He further notes that although the manual is not considered to be law, and SARS cannot be held to it, taxpayers could rely on it in general terms to the extent that SARS would not deviate from it without good reason (Dwyer, 2004).

However, Dwyer⁴³ raises an important issue that in certain cases, local branch offices have disagreed with the interpretation taken in the Practice Manuals, and that the Commissioner does not warrant the correctness or currency of the practices therein. He⁴⁴ refers to an article in the Taxgram, February 1997, which states that the Practice Manual is merely a guide and can only be taken at face value level. It is correctly stated that each case would be judged on its own merits.

⁴⁰ Income Tax Act, 58 of 1962.

⁴¹ SARS Income Tax Practice Manual. [Online] Available at sars.gov.za.

⁴² Dwyer, I. (2004). *The Rights and Remedies of Taxpayers in the New South Africa* Unpublished LLM dissertation. Durban: UKZN.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

The submission by Dwyer⁴⁵ is important to demonstrate the importance of the ATRS, which will be discussed in section 2.4 below. The following section discusses a practice allowed in tax assessments by the proviso (iii) to section 79 of the Income Tax Act,⁴⁶ i.e. the ‘practice generally prevailing’, which in many instances raises the taxpayers’ legitimate expectation on the assessment of the taxpayers’ transaction.

2.3.2 Practice generally prevailing

According to Givati,⁴⁷ ‘there are three types of possible ambiguities in tax law: ambiguity concerning the precise meaning of statutory language, ambiguity concerning the application of the law to a specific factual situation, and ambiguity concerning the type of evidence sufficient to establish necessary facts. This has been the case even before the establishment of the ATRS and will always be the case.

In the process of administering the Income Tax Act⁴⁸ and other taxation laws, practices are established informally and agreed upon on dealing with certain tax transactions. One such practice that is also provided for by the Income Tax Act,⁴⁹ proviso (iii) to section 79(1), is ‘the practice generally prevailing’.

The Commissioner can overlook a transaction which was supposed to have been assessed but was not, due to the defence of the practice generally prevailing raised by the taxpayer. It was also held in the *CIR v SA Mutual Unit Trust Management Co Ltd*⁵⁰ that the onus to establish a ‘practice generally prevailing’ rested on the taxpayer.

⁴⁵ *Ibid.*

⁴⁶ Income Tax Act, 58 of 1962.

⁴⁷ Givati, Y. (2009). Resolving legal uncertainty: the unfulfilled promise of advance tax rulings. *Virginia Tax Review*, no. 29, p. 5.

⁴⁸ Income Tax Act, 58 of 1962.

⁴⁹ *Ibid.*

⁵⁰ 1990 (4) SA 529 (A); 52 SATC 205.

In *ITC 1459*,⁵¹ President Howie J said that he considered the words, 'practice generally prevailing' to mean a practice which is both known to the Commissioner and which he has authorised for application by the various Receivers of Revenue throughout the country. He referred to an unreported case, *Tax case 7975*, where it was held that the onus is on the taxpayer to show the existence of the practice in question.

The Supreme Court of Appeal in *C SARS v Hulett Aluminium (Pty) Ltd*⁵² dealt with the ambit of s79(1)(iii) of the Act⁵³ to consider whether a 'practice generally prevailing' at the date of assessment precluded the Commissioner from issuing additional assessments.⁵⁴

Hefer ADCJ, who delivered the judgment of the court,⁵⁵ reiterated that a 'practice generally prevailing' was one which was applied generally in the different offices of the Department and the onus to prove the existence of such a practice rested on the taxpayer.

⁵¹ *Income Tax Case No 1459 (1988) 51 SATC 142 (C)*.

⁵² 62 SATC 483.

⁵³ Income Tax Act, 58 of 1962.

⁵⁴ The taxpayer company had carried on the business of manufacturing aluminium products. In each of its returns for the 1983 – 1988 years of assessment it had deducted expenditure incurred for the purpose of scientific research from its income. The Commissioner had allowed the deductions and had assessed the taxpayer to tax accordingly. Long after the tax had been paid, the taxpayer noted an objection to the assessment raised on it for the years of assessment 1983 – 1988 on the basis that it was not only entitled to deduct scientific research expenditure in terms of section 11(a) of the Act but also was entitled to deduct expenditure in terms of s 11(p)(i) of the Act and it followed that it was entitled to deduct these expenses under both ss11(a) and 11(p)(i) of the Act. The Commissioner then conceded the objection in respect of the years 1984 – 1988 and issued reduced assessment in respect of those years stating expressly in each assessment that the s 11(p) allowance has been allowed. Subsequently there were several amendments to the Act which affected the deduction of scientific research expenditure and, in particular, s 23B(1) which provided that tax deductions shall not be allowed more than once in the determination of the taxable income of any person. Section 23B(1) was rendered retrospective to all years of assessment commencing on or after 1 July 1962 and as a result, the Commissioner issued additional assessment to the taxpayer wherein each assessment stated that 'the s 11(p) allowance has now been disallowed.' The taxpayer unsuccessfully objected to the assessment and then appealed successfully to the Natal Special Court for Hearing Income Tax Appeals where after its President granted the Commissioner leave to appeal directly to the appeal court.

⁵⁵ *C SARS v Hulett Aluminium (Pty) Ltd*.

He held that the inevitable result of the acceptance at the highest level of the judgment of the *Cape Income Tax Special Court*⁵⁶ and of the terms of the circular dated 30 June 1988 despatched to every Receiver of Revenue and subordinate officials, must have been that double deductions would, pending the amendment of the Act,⁵⁷ be allowed as a practice generally prevailing in assessments with due date after the date of the judgment and this is plainly what the circular conveyed to its recipients.

Moreover, the probabilities favoured the conclusion that the circular dated 30 June 1988 marked the inception of a 'practice generally prevailing' of allowing double deductions pending the amendment of the Act.⁵⁸ It was held accordingly that, even if it were to be assumed by virtue of the retroactivity of 23B(1) that the double deductions were wrongly allowed, it was done in accordance with 'practice generally prevailing' and section 79(1) could therefore not be invoked.

There is a series of cases similar to the one above where the Commissioner was not allowed to raise section 79(1), and proviso (iii) on the practice generally prevailing has been enforced against the Commissioner,⁵⁹ or where the court held that the taxpayer failed to prove the existence of a practice generally prevailing.⁶⁰

Meyerowitz⁶¹ argues that the practice of a department in SARS plays an important role in the administration of the Income Tax Act, for instance, in terms of this Act, the Commissioner cannot issue additional assessment if the amount which should have been subject to tax was in accordance with the practice generally prevailing at the time when the assessment was made not assessed to tax⁶² nor may he refund any amount

⁵⁶ *Case No 8412* (23 November 1987).

⁵⁷ Income Tax Act, 58 of 1962.

⁵⁸ *Ibid.*

⁵⁹ *CIR v SA Mutual Unit Trust Management Company Ltd.*

⁶⁰ *Weave v C. SARS.*

⁶¹ Meyerowitz, D. (2006/7). *Meyerowitz on Income Tax*. The Taxpayer CC: Cape Town.

⁶² Section 79(1) proviso iii.

paid under an assessment made in accordance with the practice generally prevailing at the time.⁶³

He further says that 'Apart from these provisions the practice of the Commissioner made known by his publication of practice notes in the Government Gazette serves a very useful function' and that these notes do not have the force of law, except perhaps to the extent that should the Commissioner not adhere to his practice without due warning of a change, the taxpayer prejudiced thereby could raise the objection based on legitimate expectation.⁶⁴ Would this not amount to estoppel? What is the difference? When is estoppel raised and when is it allowed or not allowed?

Meyerowitz⁶⁵ responds that like any levy, income tax is essentially a 'creature' of statute and whatever policy the legislature may have pursued in imposing the tax, it is the statute alone which must be consulted in order to ascertain the tax position of a person. It follows that if any of the so-called canons of taxation such as propounded by Adam Smith, viz, fairness, certainty, convenience and inexpensiveness, have not been observed, the taxpayer cannot refuse to pay the tax for that reason. It is for the legislature to provide remedy if so advised. The doctrine of estoppel will be discussed in Chapter 3.

The 'practice generally prevailing' can lead to a situation where a taxpayer develops a legitimate expectation that the Commissioner will treat his or her transaction similar to the others in their favour. However, the courts will not overrule SARS' decision simply because the taxpayer avers a representation by the Commissioner; the taxpayer bears the onus to prove what they are relying on. The link between the legitimate expectation and the practice generally prevailing is confirmed in the *Traub*⁶⁶ decision, which

⁶³ Section 102(1).

⁶⁴ Meyerowitz, D. (2006/7). *Meyerowitz on Income Tax*. The Taxpayer CC: Cape Town.

⁶⁵ *Ibid.*

⁶⁶ *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A). In this case, Chief Justice Corbett extended the scope of application of the rules of natural justice, specifically the *audi* principle, beyond the traditional 'liberty, property and existing rights' formula to cases where something less than an existing right, a legitimate expectation, required a fair procedure to be followed.

established the principle that if a person has a legitimate expectation flowing from an express promise by an administrator or a regular administrative practice (*practice generally prevailing*), that person has a right to be heard before administrative action affecting that expectation is taken.

It is submitted that a 'practice generally prevailing' can raise a legitimate expectation, in particular, a substantive legitimate expectation that the Commissioner will hold to his promise. Similarly, the binding private ruling can raise a substantive legitimate expectation that the Commissioner will treat a certain transaction as promised in the binding private ruling. The next section provides a summary of the ATRS in South Africa.

2.4. Advance tax ruling system in South Africa

2.4.1 Introduction

Internationally, especially in developed economies, the advance tax ruling system has become an increasingly important component of many tax systems and a reliable mechanism to provide clarity, consistency and certainty in complex and sophisticated legislative environment. This is critical as tax law is ambiguous in many cases and subject to different interpretations resulting in litigation, where courts sometimes find in favour of the Receiver or in favour of the taxpayer.⁶⁷

Since the democratic era, South Africa has been a member of the international community and is also a developing country which has to encourage investment from developed economies. As a result it has to ensure that its tax system is competitive and attractive. Even though South Africa is not a member of the OECD, it subscribes to its principles and was mentioned as one of the non-OECD countries which has

⁶⁷ Givati, Y. (2009). Resolving legal uncertainty: the unfulfilled promise of advance tax rulings. *Virginia Tax Review*, no. 29, p. 1.

established an advance tax ruling system in a survey conducted by the OECD in 2005⁶⁸ on countries with an advance tax ruling system.

In 2004 the South African Revenue Services (SARS) published a discussion paper proposing to introduce a system of advance tax rulings; this to be in line with international best practice and jurisprudence. Consequent to this, an Advance Tax Ruling System (ATRS) was introduced into the Income Tax Act, through the Second Revenue Laws Amendment Bill (B 25 0 2004). In terms of this new system, the issuing of tax rulings is statutorily regulated and binding on the taxpayer or SARS, or on both the taxpayer and SARS when certain conditions are met. The ATRS became operative on 1 October 2006.

2.4.2 Definition of an advanced tax ruling

An 'advance tax ruling' (ATR) means a written statement issued by the Commissioner regarding the interpretation or application of the Act, (section 76B of the Income Tax Act, 58 of 1962).

2.4.3 Purpose

To promote clarity, consistency, and certainty regarding the interpretation and application of the provisions of the Income Tax Act (58 of 1962) and other related Acts.

This presupposes that the Commissioner of SARS and his officials are *au fait* with the provisions of the Income Tax Act⁶⁹ and other related Acts, and therefore have the skills, knowledge and understanding of the Acts that taxpayers can rely on their rulings which are binding to both the Commissioner and the taxpayer, and as a result, the taxpayer does not anticipate an error in the interpretation of the law.

⁶⁸ OECD. (2005). *Survey on advance tax ruling systems*. [Online] Available at www.oecd.org. Accessed 12 September 2011.

⁶⁹ Income Tax Act, 58 of 1962.

2.4.4 Scope

An advance tax ruling may only be issued in respect of any tax, duty or levy payable in terms of the following Acts:

- Income Tax Act No 58 of 1962;
- Value Added Tax Act No 89 of 1991;
- Transfer Duty Act No 40 of 1949;
- Securities Transfer Act No 25 of 2007, effectively from 1 July 2008.

It does not cover the Customs and Excise Act 91 of 1964 or the Estate Duty Act 45 of 1955.

2.4.5 Types of advance tax rulings

The ATRS provides for three types of advance tax rulings: The binding private rulings (section 76Q); binding class rulings (section 76R), and binding general rulings (section 76P). The main focus of the dissertation will be limited to the binding private ruling under section 76P as the discussion of all rulings is beyond the scope of this study.

A binding private ruling is an advance tax ruling issued in response to an application by a taxpayer (the applicant) in terms of section 76Q,⁷⁰ regarding the application or interpretation of a provision (or provisions) of the tax laws to a specific proposed transaction. It may either agree (positive specific ruling) or disagree (negative specific ruling) with the answer or result you have requested.

⁷⁰ Income Tax Act, 58 of 1962.

If the Commissioner intends to issue a negative specific ruling, the applicant will be notified and given reasonable opportunity either to consult with the Commissioner regarding the proposed decision, or withdraw the application before the ruling letter is issued.

2.4.6 *The binding effect of the binding private ruling*

Subject to certain important requirements and limitations, the applicant for a binding private ruling may rely upon the specific ruling that is given in respect of the proposed transaction in question. Accordingly, as a general rule, the Commissioner for SARS must assess the taxpayer's liability in connection with that transaction in accordance with the specific rulings set forth in the ruling letter.

A binding private ruling does not have any binding effect upon the Commissioner in connection with any person other than the applicant for that ruling, i.e. section 76H(2).⁷¹ In addition, section 76H(4) provides that a binding private ruling may not be cited in any proceedings before the Commissioner or the courts by any person other than the applicant for the binding private ruling. The provision that a taxpayer cannot rely on the binding private ruling of another taxpayer creates an impression of inconsistency and seems like a contradiction of the doctrine of a 'practice generally prevailing'. This poses a challenge to the principle of the practice generally prevailing as provided for by proviso (iii) of section 79(1) of the Income Tax Act.⁷²

2.4.7 *Rulings rendered void due to fraud, misrepresentation, etc.*

Section 76K⁷³ provides that a binding private ruling only has this effect if the applicant has fully and accurately disclosed all material⁷⁴ facts in connection with the proposed

⁷¹ Income Tax Act, 58 of 1962.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ A fact is generally considered 'material' if it would have resulted in a different specific ruling had the Commissioner been aware of it when specific ruling was made.

transaction and the transaction itself, and the manner in which it is carried out are fully consistent with those facts. In addition, the applicant must satisfy any conditions or assumptions that the Commissioner has stipulated in the ruling letter when carrying out the proposed transaction.

Failure to comply with any of these requirements will render the ruling letter void from the beginning. It can lose its binding effect if:

- The facts stated in the application regarding the proposed transaction are materially different from the transaction as actually carried out;
- The application involves fraud, misrepresentation or the nondisclosure of material fact; or
- A condition or assumption stipulated by the Commissioner in the ruling letter has not been satisfied or carried out.

2.4.8 *Withdrawal or modification*

In terms of section 76M,⁷⁵ the Commissioner may also withdraw or modify a binding private ruling that has been issued to the applicant. *Before doing so, however, the Commissioner must first notify the applicant of the proposed withdrawal or modification and provide the applicant with a reasonable opportunity to state any proposition of law or fact relevant to the decision to withdraw or modify the ruling. Further, in terms of section 76N, the withdrawal or modification could be retrospective (Author's emphasis).*

The procedural requirement of notifying the taxpayer of the Commissioner's intention to withdraw the ruling is an attempt by SARS to comply with the Promotion of Administrative Justice Act 3 of 2000 (PAJA). In certain instances, procedural protection may not be sufficient for some taxpayers to whom the notice to withdraw will not address the looming loss or financial hardship due to the withdrawal of the ruling.

⁷⁵ Income Tax Act, 58 of 1962.

This will further be discussed in the section that discusses the doctrine of legitimate expectation.

In certain very limited circumstances, the Commissioner is authorised to withdraw or modify a binding private ruling with retrospective effect, in terms of section 76N(3).⁷⁶ In particular, the Commissioner may do so only if:

- The specific ruling was made in error, (this is the main focus of this dissertation), and
- Any one or more of the following circumstances apply –
- The applicant has not yet commenced the proposed transaction; or
- There is someone other than the applicant who will suffer a significant tax disadvantage if the ruling is not withdrawn or modified retrospectively, while the applicant will suffer comparatively less if it is; or
- The effect of the specific ruling will materially erode the South African tax base and it is in the public interest to withdraw or modify that specific ruling retrospectively.

It is argued that the South African law context, where human rights and dignity are among the basic principles of the Constitution, depending on the source of error or the kind of error that results in the withdrawal of the binding private ruling, there are instances where the doctrine of estoppel⁷⁷ by representation⁷⁸ will be successfully raised.

⁷⁶ Income Tax Act, 58 of 1962.

⁷⁷ Rabie LAWSA (ed Joubert) 9 (2005) Par 652. It is a rule of substantive law and its function is to provide a defence to a claim, or to counter a defence to a claim. It has to be pleaded and proved by the party who raises it. It is not a cause of action and cannot found a claim, but it can, in an indirect way, by defeating a defence to a claim, operate to secure the enforcement of a claim.

⁷⁸ It provides that a person is precluded, i.e. estopped, from denying the truth of a representation previously made by him or her to another person if the later, believing in the

I take cognisance of the fact that the doctrine of estoppel is sometimes not allowed to operate in circumstances where it would have a result which is not permitted by law or where the principle can result in administrative wheels grinding to a halt, if every decision made by officials, however small, is necessarily referable back to the authority itself entrusted with the matter. A defence of estoppel will therefore not be upheld if its effect would be to render enforceable what the law, be it common law or statute law, has in the public interest declared to be illegal or invalid; for example, it will not be allowed to waive or suspend the taxpayer's liability to tax.

However, the next case will show that some errors cannot always justify the Commissioner withdrawing the binding private ruling. The doctrine of estoppel will be discussed further in the following chapter.

Corbett JA in *CIR v Nemojim (Pty) Ltd*⁷⁹ said that:

'It has been said that there is no equity about a tax, however, while this may in many instances be a relevant guiding principle in the interpretation of the fiscal legislation, there is nevertheless a measure of satisfaction to be gained from a result which seems equitable, both from the point of view of the taxpayer and from the point of view of the fiscus. It may be fairly inferred that such a result is in conformity with the intention of the legislature'.

2.4.9 Impact of subsequent changes in tax law

A binding private ruling ceases to be effective if the underlying tax law is changed, repealed or there is a judicial decision⁸⁰ that modifies or overturns an interpretation of the underlying tax laws upon which the specific ruling was based.

truth of the representation, acted thereon to his or her prejudice. It is based on considerations of fairness and justice, and is aimed at preventing prejudice and injustice.

⁷⁹ *CIR v Nemojim (Pty) Ltd* 1983 (4) SA 935 (A) [958], 45 SATC 241.

2.4.10 Exclusions, refusals and rejections

In terms of section 76G (1)⁸¹ the Commissioner may reject an application for a [binding private ruling] in any of the circumstances listed from subsections 2 to 4. This section has mandatory exclusions and discretionary refusals and rejections. There is a plethora of literature about the Commissioner's exercise of the discretionary powers; however, it is not the subject of this dissertation.⁸²

2.4.11 Fees

Section 76F⁸³ provides for fees in the form of an application fee and a cost recovery fee. However, it can be argued that this is not the only cost involved as there is a cost for preparation of the request and legal consultation costs; this might lead to the ATRS not being accessible for small business.

It is clear from the discussion above that the binding private ruling will ensure certainty and consistency, except in instances where the Commissioner may withdraw or modify the rulings or dishonour them to the detriment of the taxpayer. This will also depend on the court's willingness to protect the taxpayer where necessary. Overall, it will encourage investors to invest in the country with a certainty of the tax consequences of their proposed transactions or trades.

⁸⁰ *Ibid.*

⁸¹ Income Tax Act, 58 of 1962.

⁸² Van Schalkwyk, L. (2004). The discretionary powers of the Commissioner for the South African Revenue Services – Are they constitutional? *Meditari Accountancy Research*, 2, 165-183.

⁸³ Income Tax Act, 58 of 1962.

2.5. International comparative analysis with countries that have the advance tax ruling system

2.5.1 Introduction

South Africa is a member of the international community and understands the reality of globalisation which impacts on any economy and that the growth of international trade outperforms the growth in domestic growth. As a developing economy it has to align its tax system with international standards and trends to ensure that its tax laws are competitive in order to attract investment and/or trade. South Africa has adopted many of the detailed sets of international tax rules and entered into many treaty networks - approximately 50 treaties since 1994, the dawn of democracy.⁸⁴

An advanced tax system is considered an indispensable tool in the modern world of tax administration and globalisation, with advantages for both the taxpayer and tax authorities. However, due the different set of rules governing the various tax ruling systems in all these countries, cross border investments in the light of globalisation may seem difficult.⁸⁵ Therefore, there is a need for the OECD members and aligned non-members to establish systems that will develop investor confidence.

The development of the South African advance tax system was modelled on many developed countries and therefore it is compared with the tax ruling systems of those countries. A general comparison is made, with special emphasis on the US, United Kingdom, New Zealand, Australia, Netherlands, and Canada.

⁸⁴ www.gov.za.

⁸⁵ Duta, A. (2009). The Harmonization of Advanced Tax Rulings Systems in European Union Member States – Why? *Finance - Challenges of the Future*, May issue, pp. 248-250.

2.5.1 *United States of America*

Introduction: Literature shows that the United States of America (US) presents one of the most developed tax ruling system in the world with a wide variety of legal instruments of guidance to taxpayers.

The US Internal Revenue Services (IRS) provides advance tax rulings for taxpayers inquiring about the tax effects of contemplated acts or transactions.⁸⁶

Purpose: Like the South African system, the purpose of the US IRS advance tax ruling system is to promote clarity, consistency, and certainty regarding the interpretation and application of the Taxation Act on proposed transactions. However, unlike South Africa, the US system also provides private rulings on transactions already entered into. South African entertains proposed transactions only, and not those transactions that have already entered into.

There are two broad types of guidance on the US tax code: public guidance and private guidance. The latter takes the form of private letter rulings.

Public guidance: Public guidance consisting of regulations, are issued jointly by the US Treasury and US Internal Revenue Service (IRS), and revenue rulings, revenue procedures, notices and announcements as issued by the IRS.

Revenue rulings, revenue procedures, notices and announcements are generally issued by the IRS without any public input. The IRS issues revenue rulings on interpretative matters if the issue is common to a number of taxpayers (similar to the binding general rulings). Unlike regulations, revenue rulings can be retrospective in operation. The IRS states that it will be bound by revenue rulings. Courts will also give some weight to these rulings.

⁸⁶ The information on the US advanced tax rulings was obtained from the Internal Revenue Service website www.irs.gov/pub/irs-drop.

Revenue procedures are IRS statements of the procedures that affect taxpayers under the US tax code. Two examples of matters dealt with in these statements are how to calculate certain entitlements, and what constitute safe harbours in matters involving examination by IRS personnel. Substantive revenue procedures are binding on the IRS in the same manner as revenue rulings.

Notices and announcements by the IRS deal with a wide variety of matters, including the provision of interim guidance on matters that are likely to be finalised at a later date. These documents can be binding on the IRS but these types of documents will generally state whether this is the case.

Types of private rulings: Unlike the South African system which has three main types of binding rulings, the US has five main types of private guidance:

- Private letter rulings issued to taxpayers (similar to the binding private rulings),
- Technical advice memoranda,
- Closing agreements, and
- Other specialised documents such as advance pricing agreements, and
- Pre-filing agreements.

Publishing of the private rulings: Similar to the South African system, private letter rulings have been published by commercial publishers in a sanitised form since the late 1970s; however, the difference is that taxpayers pay a flat fee to access the published format while in South Africa they are freely accessed on the SARS website.

Exclusions, refusals and rejections: The US system also has exclusions, refusals and rejections. Private letter rulings will not be issued on certain subject matters. These subject matters are published in annual revenue procedures.

Binding effect of the private ruling: Similar to the South African system, by law, a private letter ruling may not be relied on as precedent by a third party other than the taxpayer on which it was issued.

However, they are considered binding on the IRS in respect of the taxpayer to whom they are issued if the taxpayer has fully and accurately disclosed material facts of the proposed transaction in the original request for a ruling and carries out the transaction as proposed.

As stated by Givati,⁸⁷ despite the fact that the ATRS provides that it cannot be relied upon as precedent by a third party other than the taxpayer on which it was issued, it does have a *de facto* precedent effect, since they are published and accessible.

Fees: Unlike in South Africa, the private ruling system is not on a cost recovery basis and no fee is charged.

2.5.2 *United Kingdom*

Introduction: The United Kingdom does not have a private rulings process; instead, it provides binding status advice.⁸⁸

Binding status of advice issued by HMRC: The HMRC issues guidance documents which set out when taxpayers can rely on information or advice provided. The principles set out in these document do not distinguish between advice that is given in writing, provided in the form of guidance on the internet, or given in person over the phone or via email. The principles of where the taxpayers can rely on the advice they have received are therefore the same for all forms of guidance and communication.

The HMRC's guidance document states that its primary duty is to collect tax according to the statute. This means that the HMRC may not be bound by advice it has given should the following circumstances occur:

⁸⁷ Givati, Y. (2009). Resolving legal uncertainty: the unfulfilled promise of advance tax rulings. *Virginia Tax Review*, no. 29, p. 3.

⁸⁸ HM Revenue & Customs. (2011). *Income Tax Binding Rulings*. [Online] Available at <http://search.hmrc.gov.uk/kb5/hmrc/hmrc/results.page?uk-income-tax-binding-rulings>. Accessed 20 September, 2011.

- For pre-transaction advice, where the nature of the transaction changes in a way that has a material impact on the transaction as a whole;
- Where the taxpayer provides incorrect or incomplete information;
- Where a court or tribunal changes the prevailing interpretation of the law and the taxpayer's liability to tax has not been finalised;
- Where the relevant statutory law changes.

Status of the advice made in error: The guidance statement also states that if information or advice provided by HMRC is incorrect in law, HMRC *will be bound by such advice* [author's emphasis] provided that it is clear, unequivocal and explicit and the taxpayer can demonstrate that:

- They reasonably relied on the advice;
- Where appropriate, they made full disclosure of all the relevant facts;
- The correct application of the law would result in the taxpayer's financial detriment. Financial detriment means that a taxpayer *who received incorrect advice would be financially worse off than a taxpayer who received correct advice* [author's emphasis].

Where a taxpayer has made a return in accordance with an incorrect ruling, HMRC will not seek penalties, where the penalty is dependent on the presence of negligence by the taxpayer.⁸⁹ This is unlike South Africa, where the Commissioner may withdraw a binding private ruling if it was issued in error, even if it was SARS' error. The South African courts of law and SARS must learn from this best practice.

⁸⁹ HM Revenue & Customs. *Income Tax Binding Rulings*. [Online] Available at <http://search.hmrc.gov.uk/kb5/hmrc/hmrc/results.page?uk-income-tax-binding-rulings>. Accessed 20 September, 2011.

2.5.3 *New Zealand*

Introduction: New Zealand introduced a legislation in 1995 that gives taxpayers the right to obtain binding rulings from Inland Revenue.⁹⁰ The aim, as in all other countries, is to ensure certainty and consistency in tax administration. This section discusses the types of rulings, status, fees etc.

Types of binding rulings: New Zealand's binding rulings system was introduced in 1995. The Commissioner of the Inland Revenue Department (IRD) can issue four types of binding rulings on the interpretation of tax laws:

- Public rulings,
- Private rulings,
- Product rulings, and
- Status rulings

Impact of subsequent change in tax law: The New Zealand private ruling, unlike the South African binding private ruling, does not cease to be effective from the date of repeal or amendment of legislation. The taxpayer in possession of a private ruling or product ruling can apply for a status ruling on the application of a change in the law on such existing private ruling or product ruling.

Fees: Like the South African system, the New Zealand private ruling system is on a statutory basis in terms of sections 91A-91J of the New Zealand Tax Administration Act 1994. The IRD charges fees for private, product and status rulings. The Commissioner of the IRD will issue binding status rulings to taxpayers who have

⁹⁰ Inland Revenue (NZ). *Technical tax issues*. [Online] Available at <http://www.ird.gov.nz/technical-tax/general-articles/ga-irpublic-rulings-unit.html>. Accessed 18 September 2011.

applied for and obtained private or product rulings and who require certainty on the effects of legislative change to their rulings.

The tax payer has a statutory right to consult with the Commissioner prior to the issue of a private ruling if the content of the proposed ruling differs from that requested by the applicant.

Transactions on which the ATR will be issued: Unlike the South Africa ATRS which provides binding private rulings, in New Zealand the private rulings can be on proposed, current and/or completed arrangements, and the proposed arrangements must be seriously contemplated, not just fact-finding by the parties involved.

Publishing of the private rulings: Unlike in South Africa, private rulings are not published, even in a sanitised form, but where the content of a private ruling raises an issue of wider significance to taxpayers generally, the Commissioner may issue a public ruling reflecting the approach taken in the private ruling.

Exclusions, refusals and rejections: Similar to the South African system, the private ruling system also has exclusions, refusals and rejections and the applicants cannot appeal or challenge an unfavourable ruling through the IRD's dispute resolution process and they cannot be issued on questions of fact.

Binding status of public rulings: Like in South Africa, private rulings are legally binding on the Commissioner of the IRD, provided that all taxation laws relating to the person and/or arrangement in question in accordance with the ruling have been complied with.

Unlike South Africa, if a public ruling is withdrawn, the Commissioner is still bound to apply the ruling to the related arrangement, provided it has been entered into prior to the date of withdrawal, either for the remainder of the period or tax year specified in the ruling, or for three years after the date stated in the notice of withdrawal. However, if there was no withdrawal, cancellation or voiding, the ruling remains in force and taxpayers are protected from the effects of penalties and interest should they choose to rely on that ruling.

2.5.4 Australian Advance Tax Ruling System

Introduction: There is no statutory obligation to provide advance tax rulings. The practice is performed as a service provided to taxpayers to obtain a higher degree of certainty and consistency in the interpretation and application of tax law and to ensure sound tax administration.⁹¹ There are two basic types of taxation 'rulings' issued by the Commissioner of Taxation:-

- Taxation rulings that provide guidelines for the public and Taxation Office staff in relation to the interpretation of income tax law and to the administration of that law by the Commissioner; and
- Advance opinions given in response to specific requests from taxpayers seeking advice as to the income taxation consequences of proposed transactions.

Taxation rulings: These are issued on a regular basis and provide guidance for both the public and staff of the Australian Taxation Office on matters of policy, procedural instruction and interpretation of tax law. The majority of Taxation Rulings cover the interpretation of the income tax law and, where appropriate, detail guidelines, precedents, practices or procedures that affect the taxation rights or liabilities of the general public.

Rulings are also an appropriate vehicle for the Australian Taxation Office to clarify administrative developments arising from new or revised interpretations of income tax law. These rulings are similar to the South African binding general ruling, which is not the focus of this dissertation.

Advance opinions: An advance opinion is a written response by the Taxation Commissioner to a request by taxpayers or their representatives on the likely taxation

⁹¹ Australian Taxation Office. *Tax professionals*. [Online] Available at <http://www.ato.gov.au/taxprofessionals/pathway.aspx?pc=001/001/021/001>. Accessed 18 September 2011.

consequences of a proposed course of action. Their advance opinions can be classified as follows:

- Private rulings,
- Product rulings, and
- Priority rulings.

Advance opinions are subject to the necessary reservation that they are not binding on the Commissioner. As in the case of taxation rulings, when the time comes to assess liability to tax, the law as it then exists must be applied to the facts as established at that time.

Accordingly, while it is the administrative policy of the Australian Taxation Office to adhere to the advice supplied to a taxpayer in an advance opinion, and then only in relation to the particular case to which it relates, it would generally be necessary to depart from the advice in circumstances warranting departure from taxation rulings; for example, if the opinion was incorrect and as a result the taxpayer is placed in a position of continuing competitive advantage.

If, for example, one trust was incorrectly treated as carrying on an eligible investment business for the purposes of Division 6C of the Income Tax Assessment Act and other similar trusts were treated as public trading trusts, the first trust would be in a continuing tax advantaged position viz a viz its competitors. In such a case the advance opinion would be reviewed so that as far as practicable all the trusts received the same tax treatment on a prospective basis.

Binding effect of the private ruling: An advance opinion applies only to the taxpayer for whom it is given and cannot be taken as a precedent for other cases. The advance opinion is only effective as far as the fact situation presented in respect of the transaction specified in the advance opinion were applied. Departure, not fully disclosing the facts of a transaction, or if it is implemented differently from the proposed course of action, may lead to the opinion not being applicable.

Exclusions, refusals and rejections: While advance opinions will be given as to the likely taxation consequences of a proposed course of action, consideration will not be given to determining questions that solely concern the quantum of assessable income or allowable deductions and/or requests that depend entirely on factual questions.

2.5.5 *The Netherlands*

Introduction: The Netherlands traditionally had an extensive, efficient and reliable advance ruling practice, which provided for various rulings for different types of activities and structures.⁹² The old ruling policy, a set of standard rulings, were developed for certain frequently occurring situations; for example, the determination of arm's length remuneration for finance and royalty activities, activities of an auxiliary and supportive nature, and application of the Dutch participation exemption for Dutch (intermediary) holding companies. This old ruling policy was abolished in 2001 and replaced by a new policy.⁹³

In 2001, the Dutch ruling practice was restructured into an advance pricing agreement (APA) and advance tax ruling (ATR) practice. For purposes of this dissertation, only the ATR will be discussed. In the Netherlands, unlike in South Africa and other countries, the ATR provides certainty in advance regarding the tax consequences of certain international structures and/or transactions. It can be requested for:

- The application of the participatory exemption for intermediate holding companies or top holding companies,
- International structures in which hybrid financing forms hybrid legal forms are involved, and
- The (non)existence of a permanent establishment in the Netherlands.

⁹² Tax Consulting International. (n.d.). *Fiscal information*. [Online] Available at <http://www.tax-consultants-international.com>. Accessed 18 September, 2011.

⁹³ *Ibid.*

Advance pricing agreement (APA): It provides certainty in advance regarding transfer-pricing issues, and is issued within the scope of Dutch transfer-pricing principles.

An APA request can in principle cover all transfer-pricing issues of a taxpayer or may be limited to specific associated enterprises or specific transactions.

Advance Tax Ruling: Provides certainty in advance regarding the tax consequences of certain international structures or transactions.

Retroactive application: Though an APA generally applies to future transactions or activities, in certain cases it may be possible to get clearance on (comparable) transactions in earlier years. This is unlike South Africa, which focuses on proposed future transactions.

2.5.6 *Canada*

Introduction: Unlike the South African system, the Canadian private ruling system is on a non-statutory basis. The Canada Revenue Agency (CRA) issues two broad types of guidance on the interpretation of its income tax laws: guidance which is provided to specific taxpayers (similar to binding private rulings) and guidance which is provided to the public generally (similar to the binding general ruling).⁹⁴

Guidance provided to specific taxpayers will generally take the form of either an advance income tax ruling or a technical interpretation. The income tax laws of Canada do not require the CRA to issue advance income tax rulings or interpretations.

Advance tax rulings: The advance income tax ruling process has been in place since 1970 and applies when a taxpayer seeks advice on a proposed transaction.

⁹⁴ Canada Revenue Agency. (2002) *IC70-6R5 Advanced Income Tax Rulings*. May 17 2002.

The technical interpretations' process applies when a taxpayer seeks general interpretive assistance with respect to the Income Tax Act or the Income Tax Regulations.

Fees: The CRA charges a cost recovery fee for advance income tax rulings. No fees are charged for technical interpretations.

Publication of the private rulings: Similar to South Africa, all advance income tax rulings are released to the public in a sanitised form. This is done via third party tax publishers who charge a subscription fee for accessing this material and produce bilingual versions. However, in South Africa the sanitised forms are accessed from SARS website for free.

Binding effect of the private ruling: Publication of advance income tax rulings is done for information purposes only. Unlike in South Africa, advance income tax rulings can be relied upon by other taxpayers only if the facts are identical to the proposed transactions in the advance rulings. However, similar transactions often have different facts.

Exclusions, refusals and rejections: The following transactions are excluded from advance rulings:

- Whether a transaction is income or capital;
- Where the transaction involves a determination of a fair market value; or
- Where the matter involves a question of fact.

Advance income rulings are regarded as administratively binding upon the CRA. Technical interpretations are not binding on the CRA.

Unlike in South Africa, in Canada if a taxpayer relies on an interpretation set out in a document published by the CRA and that interpretation is incorrect, tax will be assessed but penalties and interest will generally be waived or cancelled.⁹⁵

In the recent Canadian landmark court decision, the *Sentinel Hill Productions (1999) Corporation v The Queen (2008 DTC 2544)*, the Tax Court of Canada refused a motion by the Crown that would have prevented the taxpayer from arguing that the Canadian Revenue Agency (CRA) is barred from assessing in a manner that conflicts with a previously issued, valid advance ruling.

In October 1998, December 1998 and February 2000, the CRA issued advance tax rulings relating to proposed film industry tax shelters involving the taxpayer's parent company and other entities and investors. Based on these rulings, the taxpayer entered into a series of identical transactions. As many as 10 000 Canadians invested in such film industry tax shelters from 1998 to 2001. Later, the CRA reassessed these investments in a manner that could have been contrary to the treatment the CRA had promised in the original advance rulings. The CRA's contradictory actions in respect of the treatment of these tax shelters likely stemmed from a disagreement between CRA's internal Rulings Directorate and the Tax Avoidance section.

The taxpayer raised the argument that the legal doctrine of estoppel operates to prevent the CRA from reassessing in a manner inconsistent with its advance rulings. In response, the Crown brought an unsuccessful procedural attack under Rule 53 of the Tax Court of Canada Rules. The court found in favour of the taxpayer and enforced the ATR.

⁹⁵ Canada Revenue Agency (CRA). (2007). *Income Tax Information Circular IC07-1*, dated 31 May 2007.

Concluding remarks

It is conclusive that the purpose of ATRS in all these countries is to provide the taxpayer with a higher degree of clarity, consistency and certainty in the interpretation and application of the law and to enhance transparency, which is an important principle of administrative justice. There is a general agreement that the ruling system will reduce potential disputes between the taxpayer and tax authorities and the necessity of recourse to the courts. Some ATRS have a legal basis, while some have an administrative basis. Some have limits and exclusions on the application of the ATRS.

For example, the South African system does not rule on transactions already engaged in, but only proposed future transactions, while countries such as the US and Netherlands rule on transactions already engaged in. All systems provide the Commissioner with the powers to decline requests for different reasons, and the rulings cannot be appealed. Some countries, like South Africa, utilise the charging system, such as the application fee and cost recovery, while in the US it is free.

Most countries publish a sanitised version of the binding private ruling, and provide that the rulings do not have a precedential effect. However, it is arguable that though they do not have a *de jure* precedential effect, in reality they do have a *de facto* precedential effect.

Unlike South Africa, where the Commissioner can withdraw with retrospective effect, a binding ruling already been acted upon, if it was concluded under a mistake in law, in other countries like Canada, the Commissioner remains bound by that ruling if a taxpayer relied on a ruling that was interpreted incorrectly. The taxpayer will be assessed correctly, but the penalties and interest will generally be waived or cancelled. There is room for South Africa to learn from countries such as the USA, Netherlands and others in fulfilling their promises to ensure certainty in the taxation field.

CHAPTER 3. ADMINISTRATIVE ACTION IN SA

3.1. Introduction

This chapter provides the basic legal framework and principles that lay the foundation for administrative law and just administrative action in South Africa prior and post the Constitutional era. The following concepts; administrative action, judicial review and remedies, will be discussed.

This chapter is a mixture of descriptive, comparative and critical analysis approaches. It will include national and international jurisprudence. The aim is to discuss and assess how principles such as legitimate expectation and the doctrine of estoppel are accommodated within this legal framework, and the role of the courts in developing the doctrine of legitimate expectation beyond the current procedural protection similar to the way the courts developed the doctrine of estoppel.

Under the apartheid era, the unrepresentative legislature used its sovereign power to impose on South Africans a system of institutionalised racial discrimination, routinely conferring tremendously wide and invasive discretionary powers on government officials.⁹⁶ To make matters worse, the original legislation could not be attacked on any but the narrowest procedural grounds through administrative law review, which had its own limitations.⁹⁷

For the majority of South Africans before 1994, effective protection of human rights through the courts was virtually impossible, because the Constitutional law (Westminster) was dominated by the doctrine of parliamentary supremacy, which dictated that Parliament was the supreme law-making authority in the state.

⁹⁶ Currie, I., De Waal, J. 2005. *The Bill of Rights Handbook* (In association with Lawyers for Human Rights and the Law Society of South Africa). Cape Town: Juta.

⁹⁷ *Ibid.*

The common law provided some protection for individual rights, but Parliament could pass legislation amending the common law as it saw fit.⁹⁸

The position changed when the Interim Constitution came into force on 27 April 1997; replaced the doctrine of parliamentary supremacy, and conferred on the courts the power to declare invalid any law or conduct inconsistent with the Bill of Rights and the Constitution. The strong central government of the apartheid era was replaced by a system of government in which legislative and executive power was divided among the national, provincial and local spheres of government.⁹⁹ The courts conferred the necessary judicial authority to guarantee the rights and freedoms of the individual, and to preserve the sovereignty of the law. Their responsibility is to interpret and apply the law, and *not the Acts*, and to exercise sanctions where appropriate.¹⁰⁰ The interim Constitution was replaced by the final constitution, the Constitution of the Republic of South Africa, in 1996.

3.2. Pre-constitutional era

3.2.1 *Administrative law was based on common law*

Baxter¹⁰¹ argues that our public law of pre-democratic era has aptly been described as a 'pale reflection of the English law of by-gone age, noting that English courts would interfere with administrative action in order to ensure that the will of parliament is carried out.¹⁰² Baxter¹⁰³ defines administrative law as a branch of public law which regulates the legal relations of public authorities, whether with private individuals or

⁹⁸ Currie, I., De Waal, J. 2005. *The Bill of Rights Handbook* (In association with Lawyers for Human Rights and the Law Society of South Africa). Cape Town: Juta.

⁹⁹ *Ibid.*

¹⁰⁰ Van der Walt, G., Helmbold, R. (1995). *The Constitution and the new Administration*. Cape Town: Juta & Co Ltd.

¹⁰¹ Baxter, L. 1989. *Administrative Law*. 2nd Edition. Cape Town: Juta.

¹⁰² See *R v Boundary Commission for England, ex parte Foot* [1983] 1 QB 600 (CA) 615F-616E.

¹⁰³ Baxter, L. 1989. *Administrative Law*. 2nd Edition. Cape Town: Juta.

organs, or with other public authorities. He provides that there are two aspects of admin law, the general and the particular, and distinguishes them as follows:¹⁰⁴

- The 'general administrative law' may be said to comprise the general principles of law which regulate the organ of administrative institutions and the fairness and efficacy of the administrative process, govern the validity of the liability for administration, and judicial remedies relating to such action or inaction, and
- The 'particular administrative law' comprises the legislation governing, and legal principles and policies developed in respect of, specific areas of administration.

For the purposes of this dissertation, the general understanding of administrative law is similar to that which is defined by Baxter¹⁰⁵ as 'general administrative law'. The dissertation will focus on administrative action, with particular emphasis on SARS, and the fairness and efficacy of the administrative process, and judicial remedies relating to such action or inaction.

Many institutional writers agree that,¹⁰⁶ prior to the advent of democracy, South African administrative law was generally understood to be founded on the 'common law',¹⁰⁷ and also confirmed by the court.¹⁰⁸

¹⁰⁴ Baxter, L. 1989. *Administrative Law*. 2nd Edition. Cape Town: Juta.

¹⁰⁵ *Ibid.*

¹⁰⁶ Klaaren, J, Penfold, G. (2002-2008). *Administrative Action, Chapter 63*. In Constitutional Law of South Africa. Woolman, S (Ed. In Chief). Cape Town: Juta; Hoexter, C. (2004). The Principle of Legality in South African Administrative Law. *Macquarie Law Journal*, 8.

¹⁰⁷ Common Law (case law) refers to law developed by judges through decisions of courts and similar tribunals, rather than through legislative statutes or executive action, and to corresponding legal systems that rely on precedential case law. The decisions of the superior courts form binding precedents, and with few exceptions, will be followed subsequently. This is known as the doctrine of *stare decisis*, which means that 'the decision must stand'. The doctrine of *stare decisis* is justified on the ground that it brings certainty into the law and administration of justice.

¹⁰⁸ See *Zantsi v Council of State Ciskei & Others 1995 (4) SA 615 (CC), 1995 (10) BCLR 1424 (CC)* for an understanding of judicial review and the South African legal system prior to 1994 that emphasises its constitutional, as compared to its common law, nature.

Under the Westminster Constitution, administrative law and the courts' power to review were based on the constitutional principles of the rule of law and sovereignty of Parliament.¹⁰⁹ Parliament sovereignty, in terms of which the will of Parliament was supreme, was then the primary feature of South African constitutional law. Accordingly, the application of principles of judicial review was subject to the whim of Parliament. Parliament could limit the level of scrutiny of administrative action or even ultimately oust the courts' jurisdiction to enquire into the validity of administrative action.¹¹⁰

The courts reviewed the exercise of public power on the basis of their inherent jurisdiction.¹¹¹ In so doing, the courts developed and applied judge-made rules of review with which exercises of public power were required to comply. Accordingly, the actions of decision makers could be set aside if they abused their discretion, failed properly to apply their minds, or failed to follow the rules of natural justice.¹¹²

Hoexter¹¹³ argues that in the pre-democratic era, the original legislation could not be attacked on any but the narrowest procedural grounds and that administrative law review was virtually the only method for challenging the invasion of rights, and that the court's response was feeble. There were glimmers of light, such as the judicial refusal to capitulate to private or 'ouster' clauses¹¹⁴ and some fairly rigorous review of

¹⁰⁹ *Pharmaceutical Manufacturers Association of South Africa & Another: In re Ex parte President of the RSA & Others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) ('Pharmaceutical Manufacturers') at par 33, 35 and 37

¹¹⁰ Hoexter, C. (2004). The Principle of Legality in South African Administrative Law. *Macquarie Law Journal*, 8.

¹¹¹ *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Town Council & Others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) (Fedsure) at paras 23 and 28.

¹¹² *Johannesburg Stock Exchange & Another v Witwatersrand Nigel Ltd & Another* 1988 (30 SA 132, 152 (A) (Succinct formulation of common-law grounds of review)

¹¹³ Hoexter, C. (2004). The Principle of Legality in South African Administrative Law. *Macquarie Law Journal*, 8.

¹¹⁴ *Ibid*. She explains that ouster clauses were frequently included in legislation to prevent review of action taken 'in terms of' or 'under' it. The courts reasoned that illegal action was not taken 'in terms of' the legislation, meaning that judicial review was ousted only where there was no illegality. She quotes cases that were decided at a time of extreme judicial deference, e.g. *Narainsamy v Principal Immigration Officer* 1923 AD 673 and *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A).

delegated legislation¹¹⁵ but for the most part, the courts simply became more deferential and more formalistic as the pre-democratic era wore on.¹¹⁶ Accordingly, a good example of the courts' deferential and formalistic stance was manifest during the state of emergency declared by the government in the 1980s, which was one of the darkest periods, where the courts proved largely unable or unwilling to use administrative law to prevent the abuse of power.¹¹⁷ According to Hoexter,¹¹⁸ administrative justice at that time was something to be carefully hoarded and doled out only grudgingly. She argues that the tendency being informed mainly by fears of overburdening the administration - this is similar to the current excuse of separation of powers and being mindful not to impose their opinion on the administration.¹¹⁹

Hoexter termed this over-cautiousness 'parsimony'.¹²⁰ She further uses the term 'conceptualism' which she says means a kind of formalism,¹²¹ explaining formalism to describe a judicial tendency to rely on technical or mechanistic reasoning instead of substantive principle, and subjecting formal reasons to moral, political, economic or other social considerations.

¹¹⁵ Hoexter, C. (2004). The Principle of Legality in South African Administrative Law. *Macquarie Law Journal*, 8. She says that relying on *Kruse v Johnson* [1989] 2 QB 9, the courts reasoned that the legislature could not have intended the law making powers in delegated to others to be used unreasonably or in a discriminatory fashion – even when it was patently obvious that Parliament intended exactly that. This optimistic reasoning was no longer possible after the famous admission of Holmes JA in *Minister of Interior v Lockhat* 1961 (2) SA 587 (A) that government's apartheid policies were both intended to and bound to cause injustices and inequality.

¹¹⁶ *Ibid.* She refers to Hugh Corder, *Judges at Work: The Role and Attitude of the South African Appellate Judiciary, 1910-50* (1984).

¹¹⁷ *Ibid.* She refers to Kate O'Regan, 'Breaking Grounds: Some Thought on the Seismic Shift in our Administrative Law' (2004) 121 *South African Law Journal* 424.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ *Ibid.* She uses the standard dictionary description, that formalism entails 'excessive adherence to prescribed forms' and use of forms without regard to inner significance'.

Hoexter¹²² argues that parsimony combined with conceptualism was not only devastating for the victims of the system, but also for the **development of judicial review** [author's emphasis]. The courts' energies were largely directed towards a negative enterprise, i.e. finding ways to restrict the application of principles of good administration and their obverse, the grounds of review. The results were an all-or-nothing application of those principles, with most victims of official action getting no recourse from the courts.¹²³ History is repeating itself, where courts clearly indicate the legitimate expectation, whether procedural or substantive, the protection will be procedural.

Consequently, due to the courts' focus, the most fundamental, helpful and positive question was never asked: 'What does administrative justice require in this case?' It meant, in fact, that hardly any effort went into the essential task of working out the appropriate content of lawfulness, reasonableness and fairness in particular cases. Courts are refusing to inquire into substantive legitimate expectation and just focus on procedural protection, which does not really develop the content of substantive protection.

It is interesting to note that current legitimate expectation cases are, in many instances, undergoing the same problem as identified by Hoexter¹²⁴ of 'parsimony' combined with 'conceptualism'; despite the fact that the Constitutional Court held that the doctrine of Separation of Powers is not a fixed or rigid constitutional doctrine and that it is given expression in many different forms and made subject to checks and balances of many kinds. Whereas the purpose of separating functions and personnel is to limit power, the purpose of checks and balances is to make the branches accountable to each other.¹²⁵

¹²² Hoexter, C. (2004). The Principle of Legality in South African Administrative Law. *Macquarie Law Journal*, 8.

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ Ex parte Chairperson of the Constitutional Assembly: In re *Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744 (CC)*.

3.2.2 Procedural fairness in the pre-democratic era

Hoexter states that procedural fairness, as practiced in the pre-constitutional era, was influenced by English law.¹²⁶ The courts' treatment of procedural fairness (natural justice, as it was called then) is a good illustration of the pre-democratic tendencies described above. In *Laubscher v Native Commissioner, Piet Retief*,¹²⁷ Fagan CJ and Steyn JA concurred with Schreiner JA, who reasoned that the appellant clearly [had] no antecedent right to go upon the property and [the] refusal did not prejudicially affect his property or his liberty. Nor did it affect any legal right that he already held. It can be said to have affected his rights only in the sense that it prevented him from acquiring the right to go on to the property; to the same extent, but no further, it may be said to have involved legal consequences to him.

The benefit of procedural fairness were carefully restricted to 'judicial' and 'quasi-judicial' cases in which 'existing rights' were adversely affected. This ruled out 'legislative' and 'purely administrative' cases. This meant that applicants who lacked 'existing rights' but were rather hoping to acquire them, were never entitled to procedural fairness. Preliminary decisions, because they were not final, and investigative action, because it did not itself abolish rights, also could not be regarded as affecting existing rights adversely; so these sorts of decisions did not attract procedural justice either.¹²⁸

¹²⁶ Hoexter, C. (2004). The Principle of Legality in South African Administrative Law. *Macquarie Law Journal*, 8.

¹²⁷ 1958 (1) SA 546 (A) ('Laubscher') P 549E-G, The appellant was a lawyer and legal adviser to Zulu people occupying farms that belonged to the South African Native Trust. Officials of the Native Affairs department prevented him from visiting the Trust area, so that he was unable to consult with his clients. Several applications for permission to enter the area were refused. The appellant applied unsuccessfully to have these refusals set aside on review, and the case went all the way to the Appellate Division. In three separate judgments this court unanimously dismissed the appeal.

¹²⁸ Hoexter, C. (2004). The Principle of Legality in South African Administrative Law. *Macquarie Law Journal*, 8.

3.2.3 Reasonableness in the pre-democratic era

In relation to the requirement of reasonableness, the judicial fear was not so much of over burdening the administration, as of violating the separation of powers by blurring the distinction between review and appeal.¹²⁹ Hoexter¹³⁰ argues that the method the courts evolved for doling it out was equally cheese-paring. Thus the requirement of reasonableness applied only to 'legislative' administrative action (delegated legislation)¹³¹ and eventually to 'purely judicial' administrative action such as disciplinary decisions.¹³² But the requirements never extended to 'purely administrative' action – which was the biggest category by far, encompassing most decisions about welfare, licensing, immigration, national security and many other areas. In the leading case, *Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Limited 1928 AD 220*,¹³³ Stratford JA said of this 'purely administrative' category:

Nowhere has it been held that unreasonableness is sufficient ground for interference; emphasis is always laid upon the necessity of the unreasonableness being so gross that something else can be inferred from it, either that it is 'inexplicable except on the assumption of mala fides or ulterior motive' ... or that it amounts to proof that the person on whom the discretion is conferred, has not applied his mind to the matter...

¹²⁹ Hoexter, C. (2004). The Principle of Legality in South African Administrative Law. *Macquarie Law Journal*, 8.

¹³⁰ *Ibid.*

¹³¹ Relying on *Kruse v Johnson* [1989] 2 QB 9, the courts reasoned that the legislature could not have intended the law making powers it delegated to others to be used unreasonably or in a discriminatory fashion – even when it was patently obvious that Parliament intended exactly that. This optimistic reasoning was no longer possible after the famous admission of Holmes JA in *Minister of Interior v Lockhat 1961 (2) SA 587 (A)* that the government's apartheid policies were both intended to and bound to cause injustice and inequality.

¹³² *Theron v Ring van Wellington van die NG Sendingkerk in Suid-Afrika, 1976 (20 SA 1 (A))*.

¹³³ *Ibid.*, at 237.

3.2.4 *Legitimate expectation under common law*

Traditionally the South African law was that the rules of natural justice would only apply where liberty, property or existing rights had been affected.¹³⁴ The fact that mere interest or expectations, not amounting to rights, liberty, or property, could be affected was of no avail. The refusal to grant relief in the form of enforcing compliance with the rules of natural justice, in the absence of the existence of a definite right, had grossly unfair results until it was recognised and introduced in the South African law by the supreme court decision in *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A), where Chief Justice Corbett extended the scope of application of the rules of natural justice, specifically the *audi* principle, beyond the traditional 'liberty, property and existing rights' formula to cases where something less than an existing right, a legitimate expectation, required a fair procedure to be followed.

Despite this case being a landmark decision, it has created a challenge in that the Chief Justice's remark that the expectation could be substantive or procedural, and that these two forms may be interrelated and even tend to merge, however, the court was merely prepared to grant procedural (emphasis on the *audi alteram partem* rule), not substantive protection.

The problem with the Chief Justice's remark, with special emphasis on the recently introduced advance tax rulings as discussed in Chapter 2, is that most of the countries that SARS modelled the advance tax ruling on do protect substantive legitimate expectation. In order for South Africa to be competitive with the developed countries, it will have to align its policies and laws, and the doctrine of Substantive Legitimate expectation is one of the policies that need to be developed to that level. However, it will be dealt with extensively in Chapter 5.

¹³⁴ Rabie LAWSA (ed Joubert) (2001) Par 966 – 968.

3.2.5 *The doctrine of estoppel*

The doctrine of estoppel is one of the common law principles. There are many determinations where the doctrine of estoppel can be raised.¹³⁵ The expression 'estoppel by representation' usually includes what is sometimes referred to as estoppel by negligence, estoppel by conduct, and estoppel by silence; the term 'representation' being wide enough to cover a representation made by conduct, including silence.

For the purpose of this study, only the 'doctrine of estoppel by representation' will be discussed. In terms of this doctrine, a person, and in a public law context an administrative authority, is precluded or stopped from denying the truth of a representation previously made by him or her to another person if the latter, believing in the truth of the representation, acted thereon to his or her prejudice.¹³⁶

It is based on considerations of fairness and justice, and is aimed at preventing prejudice and injustice. It is a rule of substantive law, and its function is to provide a defence to a claim, or to counter a defence to a claim. It has to be pleaded and proved by the party who raises it. It is not a cause of action, and cannot found a claim, but it can, in an indirect way, by defeating a defence to a claim, operate to secure the enforcement of a claim.¹³⁷

Estoppel is not allowed to operate in circumstances where it would have a result which is not permitted by law. A defence of estoppel will therefore not be upheld if its effect would be to render enforceable what the law, be it common law or statute law, has in the public interest declared to be illegal or invalid. For example, it will not be allowed to waive or suspend the taxpayer's liability to tax.¹³⁸

¹³⁵ Rabie LAWSA (ed Joubert). (2005). 9, par 652.

¹³⁶ Baxter, L. 1989. *Administrative Law*. 2nd Edition. Cape Town: Juta.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

In *Eastern Cape Provincial Government and Others v Contractprops 25 (Pty) Ltd 2001 (4) SA 142 (SCA)*,¹³⁹ the Supreme Court of Appeal confirmed that estoppel cannot be raised effectively where the effect thereof would be the validation of a decision which is *ultra vires*.¹⁴⁰ The Supreme Court of Appeal, following *Trust Bank van Bpk v Eksteen 1964 (3) SA 402 (A)*, (*Trust Bank van Bpk*), held that it is settled law that a state of affairs prohibited by law in the public interest cannot be perpetuated by reliance upon the doctrine of estoppel.¹⁴¹ The minority judgment of Hoexter JA touched on the justification for maintaining the common law rule, even when it results in undue hardship to the individual, but pointed out that the Constitution had altered the context in which the doctrine of estoppel, in terms of the public law, is to be viewed [also taking into consideration the rule of law that everyone is equal before the law].

Buruchowitz J also relied on section 33 of the Constitution, which provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.¹⁴² In this regard he noted that:

‘A rule of law permits an organ of state, through its own carelessness or neglect, to deprive the defendant of a statutory right of recourse and then to render itself immune from a defence to that deprivation, which estoppel would offer the defendant, is in my view is inconsistent with the culture of justification of which the right to reasonable administrative action is an important part. To permit the plaintiff to take advantage of the established rule against the raising of an estoppel where there is no alleged or minimal countervailing benefit

¹³⁹ As cited by Du Toit, G.A.. (n.d.) *Estoppel and Substantive Legitimate Expectation in South African Tax Law: The mistaken king as minor*. Unpublished mini-dissertation for Post-graduate diploma in Income Tax Law, University of Cape Town.

¹⁴⁰ The Department of Education, Culture and Sport of the Eastern Province entered into two leases with the respondent company without following tender procedures as required by statute.

¹⁴¹ *Eastern Cape Provincial Government and Others v Contractprops 25 (Pty) Ltd 2001 (4) SA 142 (SCA) par 11.*

¹⁴² *Trust Bank van Bpk*, at para 29 -32; 35; 36; 39.

*would, to my mind, be inconsistent with the entrenched constitutional value of reasonable public administration.*¹⁴³

The court went on to state that,

*'If the leases are, in effect, 'validated' by allowing estoppel to operate, the tender board will have been deprived of the opportunity of exercising the powers conferred upon it in the interests of the taxpaying public at large ... The fact that the respondent was misled into believing that the department had the power to conclude the agreement is regrettable and its indignation at the stance now taken by the department is understandable. Unfortunately for it, those considerations cannot alter the fact that leases were concluded which were ultra vires the powers of the department and they cannot be allowed to stand as if they were intra vires.'*¹⁴⁴

The *Durban City Council v Glenmore Supermarket and Café*¹⁴⁵ addressed a related principle that estoppel cannot operate where it would prevent a public body from performing a duty imposed upon it by statute. Where this is the case, it is necessary to enquire whether the provision imposing the duty is peremptory and whether the duty imposed is in the public interest. If it is, then the plea of estoppel cannot succeed. In this case the City Council instituted an action against the defendant for payment of an amount which it alleged it had undercharged the defendant in respect of electricity. The undercharging was as a result of the electricity meter at the defendant's house having been incorrectly set.

The court found that a section of the applicable ordinance made it unlawful to charge anyone for electricity otherwise than according to the tariff applicable to him, and that

¹⁴³ *Trust Bank van Bpk*, at par 37.

¹⁴⁴ *Eastern Cape Provincial Government and Others v Contractprops 25 (Pty) Ltd*, 2001 (4) SA 142 (SCA) par 12 – 13.

¹⁴⁵ *Durban City Council v Glenmore Supermarket and Café*, 1981 (1) SA 470 (D) at 478; *Union of Teachers' Associations of South Africa and Another v Minister of Education and Culture, House of Representatives and Another* 1993 (2) SA 828, at 841 D-G.

the provisions of the section were peremptory and had been imposed in the public interest.¹⁴⁶ It held accordingly that an argument based on estoppel could not succeed. Further, that the City Council 'has no right to waive or renounce its right to collect revenue which it is, in the interest of the general body of ratepayers, obliged by law to collect'.¹⁴⁷

The decision that a waiver will not be allowed where a provision was enacted in the public interest was confirmed in *South African Co-operative Citrus Exchange Limited v Director General: Trade and Industry 1997 (3) SA 236 (SCA)*.¹⁴⁸ The Supreme Court of Appeal quoted with approval a statement of the principle in the following terms,

'the public has an interest in the due compliance with every requirement of a revenue statute. It is of the highest public importance that in the administration of such statutes every taxpayer shall be treated exactly alike, no concession being made to one to which another is not equally entitled. Where there is no express provision for discretion ... and none can be properly implied from the tenor of the statute, the Commissioner can have none; he must with Olympian impartiality hold the scales between taxpayer and Crown giving to no one any latitude not given to others'

The courts have therefore found for revenue authorities in circumstances where the effect of a mistake will be the illegal abandonment of taxes. For example, in *Commissioner for Inland Revenue v Master and Another 1957 (3) 693 (c)*, revenue officials had, through serious negligence, failed to object to a liquidation and distribution account in respect of taxes which were due. The court having found that if the Commissioner had been a private person he would not have been entitled to an order

¹⁴⁶ *Ibid* at 479 B-C.

¹⁴⁷ *Ibid* at 479E.

¹⁴⁸ At 245D.

for the re-opening of the account, nevertheless afforded the Commissioner relief as officials' failure amounted to an illegal abandonment of taxes.¹⁴⁹

In *Bato Star Fishing (Pty) Ltd v Minister of Environment and Tourism 2004 (7) BCLR 687 (CC)*, note the dictum at par 48:

'In treating the decisions of administrative agencies with the appropriate respect, courts are recognising the proper role of the executive within the Constitution. In doing so a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government...'

Individuals who *bona fide* entered into a (invalid) contract and have later suffered loss as a result of the state not honouring these contracts should be entitled to claim damages on the basis of misrepresentation on the part of the state [cost implications]. Such individuals should, however, not be entitled by way of estoppel to hold the state accountable in terms of the misrepresentation it has made since that would amount to a condonation of the state having acted outside its powers and would therefore violate the principles of legality.

Bower and Turner¹⁵⁰ argue that the doctrine of estoppel by representation and administrative law poses a dilemma and refers to a judgment of Sachs J that nicely poses this dilemma.¹⁵¹ They argue that the strict application of the doctrine of estoppel must result in the acceptance of the proposition that a public authority cannot be frustrated by estoppel in the exercise of a discretion given it by statute in the public interest and they acknowledge that there is good sense in the view so persistently advanced by the Master of the Rolls that an over-slavish adherence to this principle can result in administrative wheels grinding to a halt, if every decision made by officials,

¹⁴⁹ At 700E-F 702G.

¹⁵⁰ Bower, G.S., Turner, A.K. (1997). *The Law Relating to Estoppel by Representation*. (3rd ed) London: Butterworth's, Par 154.

¹⁵¹ *Lever (Finance) Ltd v Westminster Corporation [1970] 3 All E R 496 C*, at p 502 – 504.

however small, is necessarily referable back to the authority itself entrusted with the matter.

Baxter¹⁵² states that,

*'To allow a public authority to hold out incorrectly that it is empowered to act in a certain manner would permit it to arrogate powers to itself which it does not possess. This would open the door to all kinds of abuse and, were a public authority permitted to excuse someone from compliance with the law, this would constitute recognition of a dispensing power. It would enable officials to render legislation 'nugatory' or a 'dead letter'.*¹⁵³

Baxter,¹⁵⁴ writing before the *Peter Klein* decision,¹⁵⁵ noted that by refusing to extend the operation of estoppel to the *ultra vires* acts of public authorities, the principle of legality is maintained and the interests of the general public are protected. However, as he points out, it is undeniable that the individual who has been misled by the representations concerning the public authority's powers is likely to suffer considerable prejudice.¹⁵⁶

It is in this context that Baxter¹⁵⁷ assessed the possibility of compensation in the form of damages being provided for an innocent representee who has suffered prejudice. He notes that it will not in all circumstances be possible to prove negligence, and compensation may not always be appropriate; for, example, where the cost thereof

¹⁵² Baxter, L. (1989). *Administrative Law*. 2nd Edition. Cape Town: Juta.

¹⁵³ *Collector of Customs v Cape Central Railways Ltd (1888) 6 SC 402*. In this case, the Premier of the Colony authorised the Collector of Customs to admit 1800 barrels of imported cement duty free in the mistaken belief that duty was not payable. The Supreme Court found that to bar the Collector from recovering the duty fixed by law in consequence of the representatives of the Government having illegally abandoned the payment of such duty *'would be to enable Government officials to render the Act of Parliament nugatory'* at 410.

¹⁵⁴ Baxter, L. (1989). *Administrative Law*. 2nd Edition. Cape Town: Juta.

¹⁵⁵ *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd 2001 (4) SA 661 (W)*.

¹⁵⁶ Baxter, L. (1989). *Administrative Law*. 2nd Edition. Cape Town: Juta.

¹⁵⁷ *Ibid.*

outweighs the advantage to be derived from upholding the principle of legality.¹⁵⁸ He concluded that ‘it might sometimes be “in the public interest” to allow public authorities to be estopped’.¹⁵⁹

Hoexter¹⁶⁰ also states that public bodies should not fetter the free exercise of their discretion in future by making promises or assurances in advance as to how the discretion will be exercised. In certain circumstances to allow estoppel to operate could have the effect of violating this principle.

As far back as in 1952, the courts were prepared to allow estoppel, as long as it was not against an original policy, as stated by Hoexter.¹⁶¹ *In Mossel Bay Municipality v Ebrahim* 1952 (1) SA 567 (C) where, due to a mistake of fact, a local authority granted a licence contrary to an existing policy, an argument of estoppel was upheld.¹⁶²

Lastly, estoppel may succeed where the legal duty that has been violated is not mandatory (compulsory), but merely directory.¹⁶³ In the English decision of *R v IRC, ex parte Unilever plc* [1996] STC 681, the taxpayer had been routinely permitted to claim loss relief in spite of the fact that the statutory period for claiming the loss had expired. In finding that Revenue was prohibited from disallowing the late claims, the court considered it relevant that the statutory provision involved was regulatory.

Sir Thomas Bingham MR stated that,

‘While a statutory provision is not to be overridden or disregarded simply because it is regulatory, it is not irrelevant in considering the overall picture

¹⁵⁸ Baxter, L. (1989). *Administrative Law*. 2nd Edition. Cape Town: Juta.

¹⁵⁹ *Ibid.*

¹⁶⁰ Hoexter, C, (2002). *The New Constitutional and Administrative Law, Vol II Administrative Law*, at 22.

¹⁶¹ *Ibid.*

¹⁶² At 573C-E.

¹⁶³ *Durban City Council v Glenore Supermarket and Café* 1981 (1) SA 470 (D) at 478A.

*that the provision is regulatory. It is one thing for the Revenue to forgive tax which Parliament has ordained shall be collected; it may be quite another for the Revenue to neglect a statutory time limit which given the Revenue's dealings with a particular taxpayer, lacks any useful purpose.*¹⁶⁴

In certain very limited circumstances, the Commissioner for SARS is authorised to withdraw or modify a binding private ruling with retrospective effect, section 76N (3), especially where it was agreed under a mistake in law. Can the doctrine of estoppel be successfully raised against the Commissioner on the basis of a 'practice generally prevailing' or 'legitimate expectation'?

The writer agrees with Ngcobo J where he noted in *Masetlha*¹⁶⁵ that the very essence of the requirement to act fairly is its flexibility and practicability, and this is explained by Klaaren and Penfold to mean that it depends on the circumstances of each case.¹⁶⁶ My argument is that the introduction of the advance tax ruling was an administrative action which promises the taxpayer that SARS is the expert in this matter and therefore submits that this is how one's taxes will be assessed. If a SARS official, due to a mistake, negligence, ignorance or incompetence misleads the taxpayer, the taxpayer should not suffer and SARS must take responsibility.

3.3. Administrative action post-democratic era

3.3.1 The Constitution of the Republic of South Africa, 1996

The Constitution of the Republic of South Africa, 1996¹⁶⁷ (the Constitution) is regarded by academics as an indigenous constitution which incorporates both common and

¹⁶⁴ At 690.

¹⁶⁵ *Masetlha v President of the Republic of South Africa & Another 2008 (1) SA 566 (CC)* at para 190

¹⁶⁶ Klaaren, J, Penfold, G. (2002-2008). *Administrative Action, Chapter 63*. In Constitutional Law of South Africa. Woolman, S (Ed. In Chief). Cape Town: Juta. Page 63-83.

¹⁶⁷ 108 of 1996.

unique features. Such features include a comprehensive and modern Bill of Rights that protects various universally accepted rights and specifically affirms the values of human dignity, equality and freedom in sections 7(1) and (2) of the Constitution, constitutional supremacy, institutions to enhance democracy, principles of co-operative government and also a separate constitutional court with the necessary judicial authority to oversee constitutional compliance and protection.¹⁶⁸ The text of the Constitution also reflects the past history of South African society and provides an important tool for constitutional interpretation and social development. The right to 'just administrative action' is contained in the Bill of Rights.

Basic principles of the Constitution

There are important basic principles that are fundamental to an understanding of the Bill of Rights in its constitutional context. These are 'Constitutionalism', 'the Rule of Law', 'Constitutional Supremacy', 'Justiciability' and 'Entrenchment'. Other important principles that govern the structure and functioning of the state power and inform the way the Bill of Rights is interpreted are, 'Democracy and Accountability', 'Separation of Powers' and 'Checks and balances'. These principles are important in informing judicial review. Most of these features were not present in the administration prior to the democratic government, or were just not considered important.¹⁶⁹

Constitutionalism

This symbolises a state that is founded on the law. This means that government should derive its powers from the law and such powers are limited to those powers as determined by the law. Government should have enough power from the written Constitution to be able to govern and deliver services to the people, and simultaneously its powers should be structured and controlled so as to prevent it from being used oppressively or maliciously.

¹⁶⁸ Currie, I., De Waal, J. (2005). *The Bill of Rights Handbook* (In association with Lawyers for Human Rights and the Law Society of South Africa). Cape Town: Juta.

¹⁶⁹ *Ibid.*

The state may not use its power in such a way as to violate any of the rights listed in 'The Bill of Rights'. This includes the right to 'just administrative action' and judicial review'.¹⁷⁰

Constitutional supremacy

Section 2 of the Constitution provides that the Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled. Both substantive and procedural requirements of the Constitution, relevant to legislative authority, must be fulfilled or complied with. This means that the rules and principles of the Constitution are binding on all branches of the state (Parliament, Executive and the Judiciary) and have priority over any other rules made by government, the legislature or the courts.¹⁷¹

Constitutional supremacy would mean little if the provisions thereof were not justiciable. For a supreme Constitution to be effective, the judiciary must have power to enforce it. This is supported by the fact that an order or decision issued by a court of law binds all persons and organs of state to which it applies; i.e. section 165(5) of the Constitution.

Where there is a right, there is a remedy when that right is violated and the violation cannot be justified. There is a plethora of high court and constitutional court cases where the public has enforced their rights entrenched in the Bill of Rights, whether against government or members of the public.¹⁷²

Entrenchment

¹⁷⁰ Currie, I., De Waal, J. (2005). *The Bill of Rights Handbook* (In association with Lawyers for Human Rights and the Law Society of South Africa). Cape Town: Juta.

¹⁷¹ *Ibid.*

¹⁷² See *Administrator, Transvaal v Traub* 1989 (4) SA 731; *Everett v Minister of the Interior* 1981 2 SA 453 (C); *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC); *Premier of Mpumalanga v Executive Committee of State-Aided Schools: Eastern Transvaal* 1999 2 BCLR 151 (CC), etc.

The Constitution is specifically entrenched against future amendments; i.e. section 74 of the Constitution. Therefore, Parliament cannot easily amend some of the provisions in the Constitution as some provisions may only be amended by two thirds majority (66.6% of the National Assembly). This means that the right to 'just administrative action' in the Bill of Rights is entrenched and therefore cannot be amended by anyone on a whim. Parliament cannot amend the right to 'just administration action' (s33 of the Constitution) through enacting legislation that contradicts the spirit and purport of that section.¹⁷³

The Rule of Law

The 'Rule of Law' is a principle that every person – regardless of their rank, status and office – is subject to the same law and same legal processes. That is, no one is above the law, not the executive, legislature, judiciary or government officials. It is about equality before the law. The purpose of the 'Rule of Law' is to protect basic individual rights. Such rights are protected by requiring government to act in pre-announced, clear and general rules that are enforced by impartial courts in accordance with fair procedures.¹⁷⁴

Democracy

Generally democracy relates to the power of the people. Democracy, as entrenched in our Constitution, called 'Constitutional Democracy', means that elected representatives in government cannot adopt legislation freely and without control. For example, individuals or institutions are given the opportunity to take part in the making of decisions that affect them.

¹⁷³ Currie, I., De Waal, J. 2005. *The Bill of Rights Handbook* (In association with Lawyers for Human Rights and the Law Society of South Africa). Cape Town: Juta.

¹⁷⁴ Currie, I., De Waal, J. 2005. *The Bill of Rights Handbook* (In association with Lawyers for Human Rights and the Law Society of South Africa). Cape Town: Juta.

The Parliamentary Monitoring Group holds hearing sessions from interested individuals or groups before legislation is passed into law, and Bills are always referred back to the South African Law Reform or relevant Departments after the hearing to address the concerns of the public.¹⁷⁵

This particular constitutional democratic system allows for various Checks and Balances. Such Checks and Balances include free and fair elections, regular elections, universal suffrage, and the protection of minority interests, accountability, openness and judicial oversight.

The meaning of democracy is that government must be based on the will of the people. The courts have enforced this principle in many instances where the court invalidated law or conduct which was inconsistent with the principle of democracy. The Amendment Bill to the Choice on Termination of Pregnancy Act (Act 92 of 1996) was passed on 17 January 2008.

Prior to the Act being passed, it was challenged up to the Constitutional Court due to the failure by the Department of Health to consult extensively.¹⁷⁶

Accountability

Simply put, this means that government must explain its conduct or any exercise of its power, especially to any person affected by that conduct or power, if it negatively affects them. This is supported by section 32, Right to Access to Information, and section 33, Right to just Administrative Action, amongst others. Accountability is enhanced by 'Separation of Powers', and Checks and Balances.¹⁷⁷

¹⁷⁵ *Ibid.*

¹⁷⁶ *Doctors for Life International v Speaker of the National Assembly and Others 2006 (12) BCLR 1399 (CC).*

¹⁷⁷ Currie, I., De Waal, J. (2005). *The Bill of Rights Handbook* (In association with Lawyers for Human Rights and the Law Society of South Africa). Cape Town: Juta.

Separation of Powers

Separation of Powers is a crucial function of a constitution. It is one of the classical features of democracies. It is the division of power among the three pillars of government (Parliament, Executive and Judiciary). The chief objective of the doctrine of Separation of Powers is to prevent the excessive concentration of governmental powers in one person or body. It also requires the functions of government to be classified as legislative, executive or judicial, and requires each function to be performed by separate branches of government:¹⁷⁸

- Only the judicial branch of government should discharge judicial functions, and it should do so free of interference by the other two branches. This is called 'judicial independence'.
- The Executive appoints judges, they do not appoint themselves, even though they are represented in the JSC.
- Parliament passes laws.

The separation of powers as provided for in our Constitution is as follows:

- Legislative authority (that is, power to make and pass laws) is vested in parliament, the nine provincial legislatures and the 284 municipal councils.
- Executive authority (having the power to put plans, actions, and laws into effect) vests in the president, the nine premiers and the 284 municipal councils.
- Judicial authority for the entire Republic of South Africa is vested in the courts.

In practice, it means that each arm of the state keeps watch over the power of the others. The Constitutional court confirmed this in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744 (CC)* where it held that the purpose of separating functions and

¹⁷⁸ *Ibid.*

personnel is to limit power, and the purpose of Checks and Balances is to make the branches accountable to each other in terms of complying with the constitution.

It is submitted that effective application of rights entrenched in the Bill of Rights depends greatly on the availability of the right to access to justice, which also depends on the existence of a democratic government and the rule of law. The judiciary has a central role in the protection and promotion of these rights. This was also pointed out by Chief Justice Arthur Chaskalson,¹⁷⁹

“The role of the judiciary in translating human rights law into practice is not a subject which can be addressed in abstract. It is to a large extent determined by the laws, the legal culture and conditions of life existing in the country in which a judge holds office.”

However, this is what causes the problems identified by Hoexter;¹⁸⁰ over-cautiousness ‘parsimony’ and ‘conceptualism’ which describes a judicial tendency to rely on technical or mechanistic reasoning instead of substantive principle, in preference to formal reasoning regarding moral, political, economic or other social considerations. She argues that parsimony, combined with conceptualism, was not only devastating for the victims of the system, but also for the development of **judicial review**.¹⁸¹

The courts’ energies were largely directed towards a negative enterprise; i.e. finding ways to restrict the application of principles of good administration and their obverse, the grounds of review. The results were an all-or-nothing application of those principles, with most victims of official action obtaining no recourse from the courts.¹⁸²

¹⁷⁹ As cited in Commonwealth Secretariat and Interights. (2001). *Developing Human Rights Jurisprudence, Volume 8: Eighth Judicial Colloquium on the Domestic Application of International Human Rights Norms: Bangalore, India, 27-30 December 1998*. London: Commonwealth Secretariat.

¹⁸⁰ Hoexter, C. (2004). The Principle of Legality in South African Administrative Law. *Macquarie Law Journal*, 8.

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

History is repeating itself where courts clearly indicate the legitimate expectations, whether procedural or substantive, the protection will be procedural.

3.4. The Constitution and common law

In the interim and 1996 Constitutions, and prior to the coming into effect of the Promotion of Administrative Justice Act¹⁸³ (PAJA), the common law rules and principles pertaining to judicial control of public power were subsumed by the Constitution and, as a consequence, the judicial review had a constitutional basis.¹⁸⁴ This meant that challenges to the validity of administrative action involved direct application of the administrative justice right in the Bill of Rights, and after commencement of PAJA, judicial review of most administrative action has a legislative basis.

The Supreme Court of Appeal in *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd* held that [judicial] review under the Constitution and the common law are different concepts, and that the common law system of judicial review was separate from the constitutional one.¹⁸⁵

However, the Constitutional Court overruled that SCA decision in the Pharmaceutical Manufacturers case.¹⁸⁶ The common law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to judicial review, they gain their force from the Constitution. In judicial review of public power, the two are intertwined and do not constitute separate concepts.

¹⁸³ Act 3 of 2000.

¹⁸⁴ Currie, I., De Waal, J. 2005. *The Bill of Rights Handbook* (In association with Lawyers for Human Rights and the Law Society of South Africa). Cape Town: Juta.

¹⁸⁵ *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd; Commissioner of Customs and Excise v Rennie's Group Ltd t/a Refreight 1999 (3) SA 771 (SCA), 1999 (8) BCLR 833 (SCA0 at pa 20).*

¹⁸⁶ As cited by De Vos, P. (2011). *Should our Constitutional Court become an apex court?* [Online] Available at <http://constitutionallyspeaking.co.za/category/uncategorized/>. Accessed 02 September, 2011; Pharmaceutical Manufacturers Association of SA: In re: ex parte President of the Republic of South Africa 2000 (2) SA 674 (CC).

Klaaren and Penfold¹⁸⁷ also argue that common law plays an indirect role in interpreting the provisions of both the final Constitution and the PAJA.¹⁸⁸ For example, in *Premier, Mpumalanga*, the court used the common law meaning of 'legitimate expectations' to interpret this phrase in section 24 of the interim constitution.¹⁸⁹ The rule laid down here was that in all cases involving procedural fairness, a balance must be struck between the rights of affected persons and the need for administrative efficiency. The claim for procedural fairness cannot go as far as defeating the efficiency of the administration.

Several years later the majority in the *Welele* case did the same balancing of rights in the context of section 3(1) of PAJA.¹⁹⁰ O'Regan ADCJ agreed with Jafta AJ that the applicant had not shown that he had a right or legitimate expectation under section 3 of PAJA to receive a hearing prior to the approval of his neighbours' building plans.¹⁹¹

3.4.1 *Acceptance of the doctrine of estoppel by the courts*

Despite the fact that estoppel has traditionally been circumscribed by the rule that it cannot be upheld if the effect thereof would be to validate an ultra vires act, in the *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* 2001 (4) SA 661 (W) (the *Peter Klein* case) the court sought to extend the doctrine beyond these limits.¹⁹²

¹⁸⁷ Klaaren, J, Penfold, G. (2002-2008). *Administrative Action, Chapter 63*. In Constitutional Law of South Africa. Just Administrative Action Chapter 63. Woolman, S (Ed. In Chief). Cape Town: Juta.

¹⁸⁸ Pharmaceutical Manufacturers Association of SA: In re: ex parte *President of the Republic of South Africa* 2000 (2) SA 674 (CC).

¹⁸⁹ *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC), 1999 (2) BCLR 151 (CC) para 41.

¹⁹⁰ *Azeem Hassan Welele v The City of Cape Town and Others with the City of Johannesburg as Amicus Curiae* CCT 64/07 [2008] ZACC 11.

¹⁹¹ *Ibid.*

¹⁹² The facts of the case were ideally suited to an argument in favour of the development of common law rule. The plaintiff local authority sued the defendant, an owner of a block of flats,

The court held that the common law rule that estoppel cannot be raised to prevent or excuse the performance of a statutory duty or discretion, should be developed in line with section 39(2) of the Constitution.¹⁹³ This is because although the rule itself does not infringe any provision of the Bill of Rights, and is in conformity with the doctrine of legality implied in the Constitution, the blanket application of the rule may in certain instances run counter to a fundamental rights provision or value which underpins the Constitution.¹⁹⁴

The court held that the common law should be developed to emphasise the equitable nature of estoppel and function as a rule allocating the incidence of loss, and that the proper approach is for the court to balance the individual and public interests at stake and decide whether the operation of estoppel should be allowed in a specific case.¹⁹⁵

The Peter Klein case¹⁹⁶ is in line with English case authority. In *R v Board of Inland Revenue, ex parte MKF Underwriting Agencies Ltd* [1990] 1 All ER 91 (*R v Board of Inland Revenue, ex parte MKF Underwriting Agencies Ltd*), the Revenue, contrary to earlier representation but in accordance with the statute, decided to tax a certain index-linked element payable on redemption of certain securities as income. The Crown argued that judicial review could not lie to oblige the Revenue to act contrary to its statutory duty. Bingham LJ rejected this argument, accepting in principle that Revenue might in certain circumstances be bound to a representation, even if the tax were payable on a proper construction of the relevant legislation.¹⁹⁷

in respect of rates and sanitary services which it had neglected to charge. As a result of misrepresentations by the local authority that there was nothing owing by the defendant and the effluxion of time, the defendant had lost its statutory right of recourse against the occupiers. The defendant would therefore have suffered substantial prejudice if were not permitted to raise an argument of estoppel.

¹⁹³ *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* 2001 (4) SA 661 (W).

¹⁹⁴ *Ibid*, at par 34.

¹⁹⁵ *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* 2001 (4) SA 661 (W), at par 40.

¹⁹⁶ *Ibid*.

¹⁹⁷ *R v Board of Inland Revenue, ex parte MKF Underwriting Agencies Ltd*, at 110f.

Bingham LJ required that the taxpayer show that certain conditions had been fulfilled, including that he had 'put all his cards face upwards on the table' with regard to the specific transaction in respect of which he sought a ruling; that he made plain that a fully considered ruling was sought; and that he indicated the use he intended making of the ruling sought. The ruling would also have to be clear, unambiguous and devoid of relevant qualifications.¹⁹⁸

3.5. Just administrative action, section 33 of the Constitution

Currie and de Waal¹⁹⁹ argue that administrative action is, at its broadest and simplest, the exercise of public power by all organs of state except the following; the legislatures (national, provincial, local) when exercising their legislative function;²⁰⁰ the judiciary, when exercising judicial functions²⁰¹; the President when exercising the constitutional powers of the head of state (and similarly, the Premiers of Provinces exercising their constitutionally enumerated powers);²⁰² and the cabinet and provincial cabinets (when making political decisions). However, this does not mean that legislative or executive actions cannot be questioned by the courts.

They argue further that from the Constitutional Court decisions one can conclude that decisions of an administrative nature are decisions connected with the daily business of government: the implementing (administering) of the legislative policy and the making of policy within the framework allowed by primary legislation. Administrative action is a conduct connected with the daily business of government, including the

¹⁹⁸ *Ibid*, at 110 h-j.

¹⁹⁹ Currie, I., De Waal, J. (2005). *The Bill of Rights Handbook* (In association with Lawyers for Human Rights and the Law Society of South Africa). Cape Town: Juta.

²⁰⁰ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC).

²⁰¹ *Nel v Le Roux* NO 1996 (3) SA 562 (CC).

²⁰² *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC).

making of delegated legislation, adjudicating and administering.²⁰³ Further, they state that whether something is administrative action depends on the nature of the power that is being exercised; that is, the function and not the functionary.²⁰⁴

However, Klaaren and Penfold²⁰⁵ state that,

*‘ the general scope of administrative action extends to all action taken by persons and bodies exercising public power or performing public functions save for specific exceptions that have been identified by the Constitutional Court. These exceptions are: legislative action elected, deliberative legislatures; executive policy decisions (or matters of high political judgment); judicial action by judicial officers; and, it seems, the recently added category of labour relations.’*²⁰⁶

Section 33 of the Constitution²⁰⁷ guarantees an administrative action that is reasonable, lawful and procedurally fair. It provides for the right to request reasons for administrative actions that have an adverse effect. It requires government to pass laws to define administrative action and provide for the implementation thereof. The

²⁰³ Currie, I., De Waal, J. (2005). *The Bill of Rights Handbook* (In association with Lawyers for Human Rights and the Law Society of South Africa). Cape Town: Juta.

²⁰⁴ *Ibid.*

²⁰⁵ Klaaren, J, Penfold, G. (2002-2008). *Administrative Action, Chapter 63*. In Constitutional Law of South Africa. Just Administrative Action Chapter 63. Woolman, S (Ed. In Chief). Cape Town: Juta.

²⁰⁶ SARFU at pa143; Grey’s Marine.

²⁰⁷ Sec 33. Just administrative action:

Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

National legislation must be enacted to give effect to these rights, and must 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 the rights in subsections (1) and (2); and promote an efficient administration.

Promotion of Administrative Justice Act 3 of 2000 was promulgated in compliance with s 33(3) of the Constitution.

Klaaren and Penfold²⁰⁸ use the *Fedsure* case²⁰⁹ to distinguish between legislative and administrative action. The Constitutional Court was called on to review a municipal council's decision to pass resolutions adopting a budget, imposing rates and levies, and paying subsidies. In examining whether the resolutions amounted to administrative action, the Constitutional Court emphasised the changed constitutional landscape in which administrative review operated following the advent of the Interim Constitution.²¹⁰

In relation to legislative action, the court pointed out the need to distinguish between the processes by which laws are made. The process by which delegated legislation is made by a functionary vested with such power by the legislature is different from the process by which laws are made by deliberative legislative bodies. Further, in the course of its judgment in the *Fedsure* case²¹¹, the court also pointed out that the interim Constitution reserved the power of taxation and appropriation of government funds to legislatures, and that when a legislature exercises such powers it is therefore exercising a power 'peculiar to elected legislative bodies' after due deliberation.²¹²

The distinction is important because there are actions and decisions that are excluded from the definition of administrative action and therefore fall outside the scope of the Promotion of Administrative Justice Act which will be discussed next.

²⁰⁸ Klaaren, J, Penfold, G. (2002-2008). *Administrative Action, Chapter 63*. In Constitutional Law of South Africa. Just Administrative Action Chapter 63. Woolman, S (Ed. In Chief). Cape Town: Juta.

²⁰⁹ *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Town Council & Others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) (*Fedsure*) at par 44 and 45.

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

²¹² *Ibid.*

3.6. The Promotion of Administrative Justice Act 3 of 2000 (PAJA)

3.6.1 Introduction

The purpose of the PAJA is to give effect to the right to just administrative action that is lawful, reasonable and procedurally fair, and the right to written reasons where the right to administrative action has been adversely affected, as contemplated in section 33 of the Constitution.²¹³ The preamble of PAJA²¹⁴ states that the aim is to promote an efficient administration and good governance and to create a culture of accountability, openness and transparency in the public administration or in the exercise of public power or the performance of a public function, by giving effect to the right to just administrative action. This is also in line with the United Nation's²¹⁵ requirement for good governance.

The national legislation envisaged in the final Constitution,²¹⁶ section 33(3), the Promotion of Administrative Justice Act, elaborates the broad constitutional right to just administrative action, clarifies the scope and content of the right to procedural fairness, enacts a detailed regime for the provision of reasons, provides a legislative basis for judicial review of administrative action, and provides an institutional framework for the enactment of such rights.

²¹³ Act 108 of 1996.

²¹⁴ Act 3 of 2000.

²¹⁵ Mr. Kofi Annan, the UN Secretary General, said that the distinct advantage of this approach is that it allows people to demand justice as a 'right' not 'charity' in 1998.

²¹⁶ Act 108 of 1996.

3.6.2 Definition of administrative action

Section 1(i) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) defines administrative action.²¹⁷ It determines that any decision which is defined as a decision 'of an administrative nature' can constitute administrative action. But, it excludes from the scope of the definition of administrative action 'the executive powers and functions of the National Executive'. In *Masetlha v President of the Republic of South Africa & Another 2008 (1) SA 566 (CC)*, the distinction between conduct of an administrative nature and conduct of an executive nature was at issue.²¹⁸

Moseneke DCJ (with Langa CJ, Navsa AJ, Nkabinde J, O' Regan J, Skweyiya J and van der Westhuizen J concurring) held in this respect that the President's decision did not constitute administrative action but action of an executive nature. In support of this approach, Moseneke J pointed out that the power to appoint and to dismiss the head of the National Intelligence Agency is, although regulated by legislation, derived from s209(2) of the Constitution.

²¹⁷ 'any decision taken, or any failure to take a decision, by –

(a) an organ of state, when –

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect.'

²¹⁸ The appellant in this case – previously head and Director-General of the National Intelligence Agency – challenged a decision of the President of the Republic to dismiss him relying, inter alia, on the argument that the dismissal was procedurally unfair, as he was not afforded a proper opportunity to state his case to the President before the decision was taken. This aspect of the challenge to the decision required the appellant to establish that the President's decision constituted administrative action.

In addition, the power is a ‘special power’ conferred specially on the President to enable him properly to conduct the business of government and, in particular, effectively to pursue national security.²¹⁹

In consequence, so Moseneke DCJ held that it would not be appropriate to subject this power to the constraints of procedural fairness, since this would jeopardise the President’s ability to act effectively and promptly in the interest of national security.²²⁰

In *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council*,²²¹ the court held that the budgetary resolutions made by a local authority were clearly legislative and not administrative action, since the Constitution gave such resolutions the status of original legislation. Even though the issuing of an ATR is statutorily regulated it does not have the status of original legislation.²²²

The definition of administrative action, when read with the definition of a ‘decision’²²³ essentially comprises six elements:²²⁴

- a decision of an administrative nature;
- made in terms of an empowering provision (or the Final Constitution, a provincial constitution or legislation);
- not specifically excluded from the definition;

²¹⁹ *Masetlha v President of the Republic of South Africa & Another 2008 (1) SA 566 (CC)*.

²²⁰ *Ibid.*

²²¹ 1999 (1) SA 374 (CC)

²²² *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Town Council & Others 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) (Fedsure)* at par 44 and 45.

²²³ A decision is defined in s1 PAJA as ‘any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to: ...’

²²⁴ Klaaren, J, Penfold, G. (2002-2008). *Administrative Action, Chapter 63*. In Constitutional Law of South Africa. Just Administrative Action Chapter 63. Woolman, S (Ed. In Chief). Cape Town: Juta.

- made by an organ of state or by a private person exercising a public power or performing a public function;
- that adversely affects rights; and
- that has a direct external legal effect.

It can be argued that the first four elements relate to the nature of action, while the fifth and sixth relate to the effect of the action (impact threshold). The requirement of 'adversely affecting rights' together with the requirement of a 'direct, external legal affect' imposes an impact threshold²²⁵ on the meaning of administrative action. The impact threshold, on the face of it, greatly restricts the scope of PAJA.²²⁶

Klaaren and Penfold²²⁷ submit that the right to procedurally fair administrative action, entrenched in the Constitution section 33(1), is a right of participation. This right entitles persons to participate in the decision-making process in relation to administrative decisions that affect them, and, at a minimum, entrenches the common law rules of natural justice.²²⁸ These rules are embodied in two fundamental principles:

- The right to be heard (*audi alteram partem*); and
- The rule against bias (*nemo iudex in sua causa*).²²⁹

3.6.3 Exclusions from the definition of administrative action

Section 1 (b)(ee) of the PAJA²³⁰ excludes from the definition of administrative action the 'judicial functions of a judicial officer of a court'.

²²⁵ De Ville, J.R. (2005). *Judicial Review of Administrative Action in South Africa*. Durban: Lexis Nexis Butterworths.

²²⁶ The Promotion of Administrative Justice Act 3 of 2000.

²²⁷ Klaaren, J, Penfold, G. (2002-2008). *Administrative Action, Chapter 63*. In Constitutional Law of South Africa. Just Administrative Action Chapter 63. Woolman, S (Ed. In Chief). Cape Town: Juta.

²²⁸ *Ibid.*

²²⁹ *Ibid.*

In *Sidumo v Rustenburg Platinum Mines Ltd 2008 (2) SA 24 (CC)* the Constitutional Court had an occasion to consider the distinction between administrative action and conduct of a judicial nature.

Excluded also from the definition of 'administrative action' in the PAJA²³¹ are executive powers or functions of the Provincial Executive and the executive functions of municipalities, the performance of legislative functions by Parliament and other elected legislative bodies, a decision to prosecute, decisions relating to the appointment of judicial officers by the Judicial Service Commission, and so forth.

In the *New Clicks* case,²³² Chaskalson CJ held that all regulation-making amounts to administrative action under the PAJA²³³ and Ngcobo J found that the particular regulations at issue in that case amounted to administrative action.²³⁴

The definition of administrative action in the PAJA²³⁵ contains a number of specific exclusions.²³⁶ These exclusions are, broadly speaking, are as follows:

- Executive powers or functions of a national executive, provincial executive and a municipal council;
- Judicial functions of a judicial officer (including a judge or magistrate);
- Judicial functions of a special tribunal and traditional leader under customary law or any other law;

²³⁰ The Promotion of Administrative Justice Act, 3 of 2000.

²³¹ Ibid.

²³² *Minister of Health v New Clicks South Africa (Pty) Ltd 2006 (2) SA 311 (CC)*.

²³³ The Promotion of Administrative Justice Act, 3 of 2000.

²³⁴ *Minister of Health v New Clicks South Africa (Pty) Ltd 2006 (2) SA 311 (CC)*.

²³⁵ The Promotion of Administrative Justice Act, 3 of 2000.

²³⁶ Klaaren, J, Penfold, G. (2002-2008). *Administrative Action, Chapter 63*. In Constitutional Law of South Africa. Woolman, S (Ed. In Chief). Cape Town: Juta.

- Decisions to institute or continue prosecutions;
- Decisions relating to any aspect regarding the appointment of a judicial officer by the judicial service commission;
- Decisions in terms of PAIA²³⁷; and
- Decisions in terms of s4(1) of PAJA.²³⁸

In *President of the Republic of South Africa v South African Rugby Football Union 2000 (1) SA 1 (CC)*, the court found that the President's decision to appoint a commission of inquiry to investigate the administration of rugby was an executive, rather than an administrative, action. The relevant power was political in character, akin to a prerogative power as provided in the Constitution²³⁹ and it did not involve the implementation of legislation, which is the hallmark of administrative action.²⁴⁰

In *Cekeshe and Others v Premier for the Province of the Eastern Cape and Others 1997 (12) BCLR 1746 (Tk)*, the court stated as a general position that legislative action which has its source in the parliamentary process, in the sense that there is a special opportunity for a motion and debate by a body with legislative powers, will by definition not qualify as 'administrative action.' Beyond that there are legions of statutory powers which are exercised by ministers of state, departments and other officials and bodies and which have their origin in an Act of parliament or an Act of a provincial legislature.

The question is, when will the exercise of statutory power constitute an 'administrative action' for the purpose of s33 of the Constitution?²⁴¹ Are all statutory powers or functions which do not fall within the first category to be regarded as 'administrative

²³⁷ The Promotion of Access to Information Act (PAIA), Act 2 of 2000.

²³⁸ For a detailed discussion of these specific exclusions, see Currie I., Klaaren J. (2001). *The Promotion of Administrative Justice Act Benchbook*. Cape Town: Juta.

²³⁹ Section 84(2) of the Constitution of the Republic of South Africa 1996, Act 108 of 1996.

²⁴⁰ *President of the Republic of South Africa v South African Rugby Football Union 2000 (1) SA 1 (CC)*.

²⁴¹ Constitution of the Republic of South Africa 1996, Act 108 of 1996.

action' and should the only limitation be the extent to which the repository of the power should comply with the fairness requirements of s 33?²⁴²

Further, it would be undesirable to attempt to provide any precise test by which in every instance the distinction between 'legislative action' and administrative action' can be determined for purposes of s33,²⁴³ and the question may be answered with reference to the nature of the function and the nature and effect of the decision under the statutory scheme. It is not to be determined by having regard to the authority exercising the power or to the instrument used to publish the action or decision. It is substantive and not form, or the name, that matters. Accordingly, the fact that the statutory power, as in the instant matter was exercised by the Premier and issued by way of proclamation is in itself insufficient to conclude that it is legislative action.²⁴⁴

Deciding whether the constitutional requirement of procedurally fair administrative action requires a hearing, in compliance with the *audi* principle, would largely depend upon the circumstances of each particular case:²⁴⁵

'Fairness is a relative concept. The meaning to be attached to "procedurally fair administrative action" must therefore be determined within the particular framework of the act in question viewed in the light of the relevant circumstances. The procedure must be fair not only to the holder of the right affected by the administrative act, but also the executive or administration acting in the public interest.'

The court held that it did not understand section 24(b) to mean that the *audi* principle is absolutely applicable to every administrative act.

²⁴² Of the Constitution of the Republic of South Africa 1996, Act 108 of 1996.

²⁴³ *Ibid.*

²⁴⁴ *Cekeshe and Others v Premier for the Province of the Eastern Cape and Others 1997 (12) BCLR 1746 (Tk).*

²⁴⁵ *Cekeshe and Others v Premier for the Province of the Eastern Cape and Others 1997 (12) BCLR 1746 (Tk), page 1770.*

Such an interpretation would make possible the misuse of the Constitution²⁴⁶ to hold up necessary social reform measures, or for that matter any executive or administrative act.²⁴⁷

3.6.4 *Critical provisions of the PAJA²⁴⁸ in this regard*

- Section 3: Administrative action which ‘materially and adversely’ affects ‘rights or legitimate expectations.’ The question that needs to be addressed here is whether procedural fairness will be fair when an administrative action which ‘materially affects’ the rights of a taxpayer who has acted on a ruling, is subsequently withdrawn by the Commissioner of SARS after informing the taxpayer of the intention to withdraw.
- Section 4 deals with administrative action that affects the public.
- Section 5 provides for the affected person to request reasons for the administrative action.
- Section 6 gives effect to the constitutional right to lawful administrative action by providing a right to judicial review of administrative action on a number of specific grounds and general ground of unlawfulness.
- Section 7 provides procedure for judicial review. (Section 8 provides for remedies in proceedings for judicial review.)
- Section 8 provides for control of administrative action which includes procedure for judicial review and internal remedies.

Though the PAJA²⁴⁹ is intended to promote administrative justice through the creation of a culture of accountability, openness and transparency in the public administration or

²⁴⁶ Constitution of the Republic of South Africa Act 108 of 1996.

²⁴⁷ *Cekeshe and Others v Premier for the Province of the Eastern Cape and Others* 1997 (12) BCLR 1746 (Tk), page 1770.

²⁴⁸ Promotion of Administrative Justice Act, 3 of 2000.

in the exercise of public power or the performance of a public function, the protection guaranteed is procedural, not substantive, which is the focus of this dissertation.²⁵⁰ Administrative law seeks to regulate administrative action in order to ensure that all such action is lawful, reasonable and procedurally fair.

Procedural fairness thus promotes informed, rational and legitimate decision-making and reduces the risk of arbitrary decisions. In so doing, it entrenches the constitutional principle of openness, accountability and participation.

The PAJA²⁵¹ was enacted 'to give effect' to the constitutional right to just administrative action, as required by section 33(3) of the Constitution.²⁵² In *Minister of Health v New Clicks South Africa (Pty) Ltd 2006 (2) SA 311 (CC)*, the court had to address the relationship between the PAJA²⁵³ and the constitutional right to administrative justice, as entrenched in section 33 of the Constitution.²⁵⁴

3.6.5 *Administrative action materially influenced by an error of law (s6(2)(d))*

Administration must be based on a correct interpretation of the applicable legal position. If it follows from a wrong interpretation, it would be invalid. Section 6(2)(d)²⁵⁵ provides that a court or tribunal has the power to judicially review an administrative action if such action was materially influenced by an error of law. This does not refer to administrative action based on errors of fact.

²⁴⁹ *Ibid.*

²⁵⁰ *Administrator, Transvaal v Traub 1989 (4) SA 731 (A)*, (hereinafter referred to as 'Traub').

²⁵¹ Promotion of Administrative Justice Act 3, of 2000.

²⁵² Constitution of the Republic of South Africa Act, 108 of 1996.

²⁵³ Promotion of Administrative Justice Act, 3 of 2000.

²⁵⁴ Constitution of the Republic of South Africa Act, 108 of 1996.

²⁵⁵ Promotion of Administrative Justice Act, 3 of 2000.

A²⁵⁶ comparative analysis with other countries such as Germany, New Zealand, England and Canada reveals that they have developed mechanisms to address this problem amicably. Their approach is similar to that of section 6(2)(f),²⁵⁷ the test used by O'Regan J in *Bato Star Fishing*, par 24 – section 6(2)(h)²⁵⁸; rationality must be construed consistently with the Constitution and in particular section 33²⁵⁹ which requires administrative action to be reasonable. Section 6(2)(h)²⁶⁰ should then be understood to require a simple test; namely, that the administrative decision will be reviewable if it is one that a reasonable decision-maker would not have reached.

The PAJA,²⁶¹ however, makes a clear distinction between the two concepts, reasonableness and proportionality. Regarding section 6(2)(f)(ii)²⁶², rationality, viewed from the perspective of the affected person (not from the perspective of the administrator), focuses on the consequences of the impact of the administrative action on the affected person.

3.6.6 *Judicial review and remedies*²⁶³

- Directing the administrator to give reasons (section 8(1)(a)).
- Directing the administrator to act in the manner the court/tribunal requires (section 8(1)(a)(i)).
- Prohibiting the administrator from acting in a particular manner (section 8(1)(b)).
- Setting aside the administrative action (section 8(1)(c)).

²⁵⁶ *Bato Star Fishing (Pty) Ltd v Minister of Environment and Tourism* 2004 (7) BCLR 687 (CC).

²⁵⁷ Promotion of Administrative Justice Act, 3 of 2000.

²⁵⁸ *Ibid.*

²⁵⁹ Constitution of the Republic of South Africa Act, 108 of 1996.

²⁶⁰ Promotion of Administrative Justice Act, 3 of 2000.

²⁶¹ *Ibid.*

²⁶² *Ibid.*

²⁶³ *Ibid.*

3.7. Concluding remarks

The court in *Carlson Investments Share Block (Pty) Ltd v Commissioner for the SA Revenue Services 2002 (5) BCLR 521 (W)* observed that public authorities such as the Revenue Service were bound, in exercising their statutory powers and in carrying out their duties [including issuing of the ATRs], to have due regard to constitutional standards of fair administrative procedures and lawful administrative action. It was equally clear that arbitrary and capricious behaviour would not be tolerated and that statutes that permit such conduct would invariably be found wanting when measured against the Constitution.²⁶⁴

²⁶⁴ Act 108 of 1996.

CHAPTER 4. THE DOCTRINE OF LEGITIMATE EXPECTATION

4.1. Introduction

The doctrine of legitimate expectation has its origins in English law, and since English law has influenced South Africa law in many ways, the doctrine has found its way into the South African law. In South Africa, there have been many cases that have relied on the doctrine of legitimate expectation; some were successful but some not.

Of interest is *Everett v Minister of the Interior [1981] 3 All SA 146 (C)*. Fagan J and Lategan J concurred, and held that the notice withdrawing the applicant's temporary residence permit should be set aside, and the respondent was ordered to pay the applicant's costs.²⁶⁵

²⁶⁵ The facts of the case are as follows: Applicant is a British citizen by birth, having been born at Kingston-on-Thames in England. During 1968 her parents and two sisters, comprising her immediate family, emigrated from England to South Africa. They were later granted permanent residence here. In May 1972 the applicant entered South Africa at Beit Bridge. She travelled under a British passport. A temporary permit to stay in this country was issued to her, subject to security in an amount of R650 being furnished, which was done. Applicant remained on in South Africa.

The temporary residence permit issued to her was extended from time to time to enable her to study. She obtained the degree of Bachelor of Arts as well as an Honours degree in History at the University of Cape Town. She qualified as a school teacher. During 1979 and until 31 March 1980 she held temporary positions as a school teacher. Since the latter date she has been unemployed but has been seeking another teaching post. Applicant lives in a house which she owns in Observatory in Cape Town. She has a son of three and a half years.

A South African citizen, Avrom Kenneth Goldberg, whom she first met in 1976, lives with her. She and Mr Goldberg became engaged to be married, entered into an ante nuptial contract on 1 May 1980 and arranged to marry on 13 June 1980. Applicant wishes to become a citizen and permanent resident of South Africa. She has no immediate family in England and does not wish to return there. On 13 November 1979 applicant applied to the Secretary of the Interior for an extension of her temporary residence permit. By letter dated 23 April 1980 she requested a further extension of one year, during which period she intended to make further representations to the Immigrants Selection Board to grant her a permit for permanent residence.

In this case, the protection of the legitimate expectation was substantive, not procedural. This case²⁶⁶ shows that both procedural and substantive legitimate expectation have been part of our law, but the doctrine was for the first time accepted as part of our law by the Appellate Division in *Administrator, Transvaal v Traub & Others 1989 (4) SA 731 (A)*.²⁶⁷ This doctrine extended the scope of the right to a hearing beyond circumstances, in which a person's property, liberty or existing rights were adversely affected, to those whose legitimate expectation entitles him to a hearing.

Applicant's letter in the post crossed a letter from the Secretary of the Interior dated 28 April 1980. Therein he informed her that her temporary residence permit had been extended finally until 8 July 1980; that application for further extensions would not be considered; that she was required to leave the country on or before 8 July 1980; and that failure to do so would render her liable to prosecution in terms of the provisions of the Aliens Act 1 of 1937 (Aliens Act).

²⁶⁶ *Everett v Minister of the Interior* [1981] 3 All SA 146 (C).

²⁶⁷ The facts of the case are as follows: The six respondents in this appeal all graduated with the medical degrees MB ChB from the University of the Witwatersrand, the first and fifth respondents graduated at the end of 1985 and the others at the end of 1986. First and fifth respondents both did their internships at the Baragwanath hospital during 1986. During the first half of 1987 first respondent held the position of senior house officer (SHO) in the Department of Internal Medicine at the hospital. The position of SHO is held on a six months basis and appointments are made on application. First respondent applied to serve in the same position during the second half of 1987 and its application was granted. The fifth respondent completed his internship at the end of 1986. Having worked for six months in the Department of Surgery, Obstetrics and Gynaecology, and Medicine, he occupied the position of SHO in the Department of Paediatrics in the second half of 1987. The other respondents were during 1987, interns at the Baragwanath hospital and were due to complete their internship at the end of that year. Baragwanath hospital (the hospital) provides medical and hospital services for the people of Soweto. It also functions as a teaching hospital for the medical faculty of the University of the Witwatersrand. For many years prior to the 1987 members of the medical staff at the hospital had complained to the responsible authorities about the conditions prevailing in the wards serving the Department of Medicine. The wards were insufficient and not conducive for providing proper medical and nursing services and they were overcrowded at the rate of 150% - 300%, some patients sleeping on the floor. Patients were discharged before time in order to make room for incoming patients. On 5 September 1987, the South African Medical Journal published a letter signed by 101 doctors, virtually all of whom were employed in the Department of Medicine at the hospital. Signatures included that of the acting head of the Department, senior specialists, physicians and others. The six respondents were among the signatories of the letter. The letter drew attention to the conditions obtaining in the medical wards at the hospital and emphasized the inaction of the authorities, despite repeated appeals and pleas over the years. In September 1987 each of the respondents made an application for a SHO post at the hospital for the first six months of 1988, five of them in the Department of Paediatrics and one in the Department.

4.2. What is meant by the phrase ‘legitimate expectations’ in section 3(1) of the PAJA?²⁶⁸

This paragraph examines the recent developments in South African Administrative law regarding the doctrine of legitimate expectation generally and specifically with regard to substantive legitimate expectation.

It cannot be over-emphasised that the concept of legitimate expectation has emerged as an important doctrine; hence it is incorporated in the Promotion of Administrative Justice Act, 3 of 2000. There are two types of legitimate expectation: procedural legitimate expectation and substantive legitimate expectation.

The Constitutional Court applied the concept of legitimate expectation in *Premier Mpumalanga v Executive Committee 1999 (2) BCLR 151 (CC)*. In terms of this concept, the principles of natural justice (procedural fairness) apply not only to existing rights but also to potentially new rights or expectations. Legitimate expectation arises in basically two possible factual situations, namely:

- When an administrator has made an express promise to the affected person, or
- When a regular practice has previously been followed in relation to a person which the claimant can reasonably expect to continue,²⁶⁹ (a practice generally prevailing as discussed above).

A legitimate expectation flows from an express promise or undertaking or from a regular and long standing past practice.²⁷⁰ In the Supreme Court of Appeal in the *South African Veterinary Council & Another v Syzmanski*,²⁷¹ Cameron JA stated that

²⁶⁸ The Promotion of Administrative Justice Act, 3 of 2000.

²⁶⁹ *Council of Civil Services Unions v Minister for the Civil Service [1984] 3 All ER 935, 944 (HL)*.

²⁷⁰ See also *R v Liverpool Taxi Fleet Association [1972] 2 QB 299*.

²⁷¹ (79/2001) [2003] ZASCA 11.

the requirements for a legitimate expectation included that it was based on a clear, unambiguous representation that was induced by the decision maker. Further, it is important to note that a legitimate expectation can either be substantive or procedural. This was stated by O'Regan J in *Premier, Mpumalanga v Executive Committee 1999 (2) BCLR 151 (CC)*. Expectations can arise either where a person has an expectation of a substantive benefit, or as an expectation of a procedural kind.²⁷²

However, even though the court in *Traub*²⁷³ held that whatever the legitimate expectation the protection will be procedural, lately there have been many cases where the courts were prepared to give effect to an expectation in the substantive sense of the word by granting more than mere procedural protection. For example, in *Applicant v Administrator Transvaal 1993 (4) SA 733 (W)*, Aids patients had an expectation that certain treatment would continue and not be terminated and it was granted, and in *PSA v Department of Correctional Services 1998 ILJ 1655 (CCMA)*, certain acting public servants had a legitimate expectation to be promoted to the position they had been acting in and their requests were granted.

In *ITC 1751 (Cape Tax Court) 65 SATC 297*, although it was not necessary for the court to decide the matter on the basis of legitimate expectation, the court noted that the Commissioner was not entitled simply to change his mind when there was no factual justification for the change by making assumptions that could not be sustained after a vigorous examination of the facts before a court. The court noted further that the doctrine of fairness suggests that unless the Commissioner has given an undertaking which is mistaken on the basis of law, he should be obliged, where he took the initial decision after he had applied his mind carefully to the issuing of the letter to

²⁷² *Premier, Mpumalanga v Executive Committee 1999 (2) BCLR 151 (CC)*, par 36.

²⁷³ *Administrator, Transvaal v Traub 1989 (4) SA 731 (A)*. In *Traub* it was suggested that the expectation must have a reasonable basis. A reasonable balance must be maintained between the need to protect the individual from decisions unfairly arrived at by the public authority concerned and the contrary desirability of avoiding undue judicial interference in its administration. It was also said that a legitimate expectation remains subject to the overriding public interest.

the taxpayer, to follow that ruling.²⁷⁴ However, the burden of proof in establishing a representation sufficient to create a legitimate expectation is upon the taxpayer²⁷⁵

In *ITC 1751*, the Cape Tax Court had to determine whether the taxpayer had carried on trade post-liquidation during the relevant years of assessment, and hence whether its assessed loss should be carried forward. Further, whether the taxpayer had a legitimate expectation based both on an agreement reached between the parties and on the Commissioner's conduct thereafter until its objection to the 14th liquidation and distribution account that it was entitled to set off its post-liquidation income against the assessed loss brought forward from the date of liquidation for each year subsequent thereto.

In regard to the taxpayer's legitimate expectation, the court noted that in view of its conclusion there was no need for it to decide upon the legitimate expectation leg of the taxpayer's case, but suffice it to say, that there was substantial merit in the taxpayer's contention regarding its substantive legitimate expectation.²⁷⁶

The court²⁷⁷ observed that the doctrine of legitimate expectation has been part of South African law since the decision in *Administrator, Transvaal & Others v Traub & Others*²⁷⁸ and the dictum in *R v IRC Ex parte MFK Underwriting Agents Ltd and Others*²⁷⁹ is in accordance with the South African Constitution's²⁸⁰ commitment to the administrative fairness, which would be undermined were the Commissioner to change his approach in the particular context of this case where there was no factual justification for such a change.

²⁷⁴ *ITC 1751 (Cape Tax Court) 65 SATC 297.*

²⁷⁵ Section 82 Income Tax Act, 58 of 1962, and s37 of the Value-Added Tax Act, 89 of 1991.

²⁷⁶ *ITC 1751 (Cape Tax Court) 65 SATC 297.*

²⁷⁷ *Ibid.*

²⁷⁸ 1989 940 SA 731(A).

²⁷⁹ [1990] 1 All ER 91.

²⁸⁰ Constitution of the Republic of South Africa Act. 108 of 1996.

The court further stated that the Commissioner is not obliged to follow a policy which is in violation of the tax laws as set out in the Act or any other Act of Parliament, and in such a case the Commissioner would not be obliged to comply with an undertaking; however, the Commissioner is not entitled simply to change his mind when there is no factual justification for the change by making assumptions that cannot be sustained after a vigorous examination of the facts before a court.²⁸¹

Davis J stressed that the doctrine of fairness suggests that, unless the Commissioner has given an undertaking which is mistaken on the basis of law, he should be obliged, where he took the initial decision after he had applied his mind carefully to the issuing of the letter to the taxpayer, to follow that ruling.²⁸² As a result the Commissioner was directed to revise the taxpayer's 1997 – 2000 assessment on the basis that it had carried on trade in each of these years.²⁸³

In *Special Board Decision No 181*²⁸⁴ the court held that the taxpayer had not discharged its onus of proving that its sales to foreign tourists had been correctly effected at the zero-rate. In the result the taxpayer's revised assessments for the VAT period in question were confirmed and all interest and penalties imposed were remitted.²⁸⁵ It was held that the vendor can only rely on written rulings and requirements for a proper reliance on the doctrine of 'legitimate expectation' were

²⁸¹ *ITC 1751 (Cape Tax Court) 65 SATC 297.*

²⁸² *Ibid.*

²⁸³ *Ibid.*

²⁸⁴ Cape Town Special Board, 20 December 2002, page 59.

²⁸⁵ The facts of the case were as follows: The taxpayer had been selling jewellery to tourists without levying VAT on such supplies at the standard rate of 14%. The taxpayer company in its tax returns reflected the aforementioned sales as having been supplies at the zero rate. SARS carried out a VAT audit on the taxpayer company and as a result thereof, had raised revised VAT assessment which had subjected the aforementioned sales to foreign tourists to the standard rate of 14%. The taxpayer alleges to have telephoned the Receiver of Revenue's offices at Belleville at the beginning of 1998 in order to find out whether there was not an easier method of handling the VAT treatment of foreign tourists. He did not obtain the name of the person with whom he spoke.

set.²⁸⁶ Taxpayers must prove, on a preponderance of probabilities, that a presentation by Revenue officials has actually been made upon which s/he feels entitled to rely.²⁸⁷

Referred to a leading work, in De Smith, Woolf and Jowell's *Judicial Review of Administrative Action*,²⁸⁸ at 571, it is clearly stated that to qualify for protection, the legitimate expectation of a substantive benefit or advantage must contain the essential requirement of a representation addressed to a particular individual which may take the form of a letter or another considered assurance or undertaking, and to be binding, the representation must fulfil the following conditions:

- The representation must be based upon full disclosure;
- The representation must be made by a person with actual or ostensible authority to make the representation;
- The representation must be 'clear and unambiguous and devoid of relevant qualification.'²⁸⁹

Ten Berge and Widdershoven²⁹⁰ and Donner²⁹¹ regard the fundamental principle of legal certainty as the basic law from which three principles can be derived for constitutional and administrative law, namely (not hierarchical):

- The principle of substantive legal certainty which requires the executive to respect acquired rights - this principle imposes limits above all on the retroactive effect of regulations and the withdrawal of decisions;

²⁸⁶ Cape Town Special Board, 20 December 2002, page 59.

²⁸⁷ *Ibid.*

²⁸⁸ De Smith, C.A. et al. (1996). *De Smith, Woolf and Jowell's Judicial Review of Administrative Action*. (5th edition). London: Sweet & Maxwell.

²⁸⁹ *Ibid.*

²⁹⁰ Ten Berge G., Widdershoven R. (1998). *The Principle of Legitimate Expectations in Dutch Constitutional and Administrative Law*. [Online] Available at igitur-archive.library.uu.nl/law/2010-0518-200300/b22.pdf. Accessed 13 September 2011.

²⁹¹ Donner, M. (1984). *Inleiding themanummer vertrouwensbeginsel (Introduction to the theme issues on the principle of legitimate expectations)* RM Themis 5/6, p. 464.

- The principle of procedural legal certainty which requires that the decisions must be clear and definite;
- The principle of legitimate expectation which requires that the executive bodies fulfil legitimate expectations wherever possible - this principle is of particular relevance to the expectations created by promises and policy rules.

Ten Berge and Widdershoven²⁹² argue that:

‘An important function of the law is to provide certainty by making possible legitimate expectation. The law cannot be based on trust and expectations, however reasonable and fair they may be.’

They say that although there is a clear tension between the two quotations, both are nonetheless true, and further, that the tension between law and legitimate expectations is thrown into even a sharper perspective in the situation where an administrative authority which wishes to take a fair decision pursues a policy which is contrary to the statutory regulations from which it derives its decision making powers.²⁹³ This is an indication that no right is absolute.

Ten Berge and Widdershoven²⁹⁴ argue that the question which arises is, which legitimate expectation must be fulfilled: the expectation which individuals can legitimately derive from the policy which is contrary to the law, or the expectation which can legitimately be derived from the law in general? They say that in the Netherlands the answer given to this question is that although the law generally takes precedence,

²⁹² Ten Berge G., Widdershoven R. (1998). *The Principle of Legitimate Expectations in Dutch Constitutional and Administrative Law*. [Online] Available at igitur-archive.library.uu.nl/law/2010-0518-200300/b22.pdf. Accessed 13 September 2011.

²⁹³ *Ibid.*

²⁹⁴ *Ibid.*

there may be circumstances in which the legitimate expectation derived from policy is so strong that the law must be overruled.²⁹⁵

This is true also in South Africa; for example; in the case of *C SARS v Hulett Aluminium (Pty) Ltd*²⁹⁶ the court overruled the law to find in favour of the taxpayer.

The doctrine of legitimate expectation and the 'generally prevailing practice' do avail a defence for taxpayers; however, the courts will not overrule a SARS decision simply because the taxpayer avers a representation by the Commissioner. In *ITC 1459*²⁹⁷ the court held that no 'practice generally prevailing' had been proved at any time relevant to the case, and that s79(1)(c)(iii) therefore had no application, and that assuming that the issue of all assessments in this case involved the exercise of discretionary power, the evidence failed to show that when the original assessments were issued, all the material facts were known to the assessor and/or the Commissioner; and therefore that s3920 of the Act had no application. In this instance the court found in favour of SARS.

Also see *Ampofo and Others v MEC Education, Arts and Culture, Sports and Recreation, Northern Province and Another 2002 (2) SA 251* where the court held estoppel to apply in the context of legitimate expectation.²⁹⁸

In *Azeem Hassan Welele v The City of Cape Town and Others*,²⁹⁹ the Constitutional Court decision is to-date the most comprehensive judicial consideration of the meaning of 'legitimate expectations' for purposes of s3 of the PAJA.³⁰⁰ *Welele* involved a challenge to the City of Cape Town's approval of the building plans of a four storey block of flats on a neighbouring property.

²⁹⁵ *Ibid.*

²⁹⁶ 62 SATC 483.

²⁹⁷ (1988), 51 SATC 142 (C).

²⁹⁸ At par 53 – 55.

²⁹⁹ *Azeem Hassan Welele v The City of Cape Town and Others with the City of Johannesburg as Amicus Curriae CCT 64/07 [2008] ZACC 11 (Welele).*

³⁰⁰ The Promotion of Administrative Justice, 3 of 2000.

Jafta AJ noted that the attitude of the majority appears to be that legitimate expectations are confined to the established categories of promises and past practices, and in the minority, O'Regan ADCJ, while leaving open the question as to whether legitimate expectations extend beyond their traditional scope, suggests that there may well be room for such an expansion under the PAJA.³⁰¹³⁰²

4.3. Procedural legitimate expectation

Section 3(1)³⁰³ states that when an administrative action '*materially and adversely affects the rights or legitimate expectations of any person*' that administrative action must, in order to be valid, be procedurally fair. While the PAJA³⁰⁴ acknowledges that what is fair depends on the circumstances of each case, section 3(2)(b) provides that the following are the minimum requirements of procedural fairness:³⁰⁵

- (a) *adequate notice of the nature and purpose of the proposed administrative action;*
- (b) *a reasonable opportunity to make representations;*
- (c) *a clear and precise statement of the administrative action;*
- (d) *adequate notice of any right of review or internal appeal, where applicable; and*
- (e) *adequate notice of the right to request reasons in terms of section 5.*

³⁰¹ The Promotion of Administrative Justice Act, 3 of 2000.

³⁰² *Azeem Hassan Welele v The City of Cape Town and Others with the City of Johannesburg as Amicus Curiae CCT 64/07 [2008] ZACC 11 (Welele).*

³⁰³ The Promotion of Administrative Justice Act, 3 of 2000.

³⁰⁴ *Ibid.*

³⁰⁵ *Ibid.*

Klaaren and Penfold³⁰⁶ submit that when the definition of administrative action in section 1(i)³⁰⁷ is therefore read with the legitimate expectation part of section 3(1),³⁰⁸ the effect is that the rules of procedural fairness will only be applicable once both a right, as well as a legitimate expectation of a person, is 'materially and adversely affected'.

In certain instances the above minimum requirements may be insufficient, and therefore procedural fairness may demand more than the set requirements. For this reason, administrators are granted discretion to allow a person to be assisted or legally represented in serious or complex cases to 'present and dispute information and arguments' and to appear in person before the administrator concerned.

4.4. Substantive legitimate expectation

The doctrine of substantive legitimate expectation has to date had a mixed reception in South African courts. The doctrine has been rejected in a more recent decision of the High Court – *Durban Add-Ventures v Premier Kwazulu Natal (2) 2001(1) SA 389 (N)*.

On the other hand, the majority of the Constitutional Court made this clear in *Bel Porto School Governing Body & Others v Premier, Western Cape, & Another*.³⁰⁹ It concluded that a standard of substantive fairness 'would drag courts into matters which, according to the separation of powers, should be dealt with at a political and administrative level and not at a judicial level'.³¹⁰

³⁰⁶ Klaaren, J, Penfold, G. (2002-2008). *Administrative Action, Chapter 63*. In Constitutional Law of South Africa. Woolman, S (Ed. In Chief). Cape Town: Juta.

³⁰⁷ The Promotion of Administrative Justice Act, 3 of 2000.

³⁰⁸ *Ibid.*

³⁰⁹ *2002 (3) SA 265 (CC), 2002 (9) BCLR 891 (CC) (Bel Porto)* at par 88.

³¹⁰ They noted, however, that the requirement of reasonable administrative action approaches that of substantive fairness and requires courts, to some extent, to engage with the merits of administrative decision-making.

The traditional objections to the protection of substantive legitimate expectations are the following:

- Involves courts descending into the merits of administrative decision-making and thus undermines the separation of powers between the executive and the judiciary;
- Results in fettering of administrative decision making by holding administrators to their undertakings and current practices or policies;
- Undermines the rule of law by enabling administrative decision makers to exceed their powers (creates the risk of administrator, in effect, arrogating to herself a power she does not have, through a promise or other form of conduct);
- Discourages changes to administrative decision making and policy making, thus undermines the ease with which the administration responds to evolving public interests.

Both the Constitutional Court and the Supreme Court of Appeal have left the question open as to whether substantive protection may be granted in respect of legitimate expectation or not, so there is still room for development.³¹¹

4.5. International comparative analysis on the protection of substantive legitimate expectation

Internationally, in recent years the doctrine of substantive legitimate expectation has been increasingly considered, and to some extent accepted in the United Kingdom and other countries, though not all Commonwealth countries. The doctrine has been specifically been rejected in Australia.

³¹¹ *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) 1999 (2) BCLR 151 (CC); *Bel Porto School Governing Body d Others v Premier of the Province, Western Cape and Another* 2002 (9) BCLR 891 (CC); *Meyer v Iscor Pension Fund* [2003] 5 BLLR 439 (SCA).

4.5.1 United Kingdom

In the United Kingdom, in *R (Abdi and Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363, the decision of the Court of Appeal, Laws J, held *obiter* that a public authority may only frustrate a legitimate expectation where it is proportionate to do so, taking into account the competing interests in the matter. He emphasised that holding a public authority to its promises or past practices accords with the principle of good administration.³¹² According to the court, substantive protection of legitimate expectation should only be denied:

*'In circumstances where to do so is the public body's duty, or otherwise ... a proportionate response, having regard to the legitimate aim pursued by the public body in the public interest.'*³¹³

*R v North and East Devon HA ex parte Coughlan*³¹⁴ is an English case which has affirmed substantive legitimate expectation as a mainstream principle of administrative law. The court held, allowing the application, that the oral assurance that MH would be a home for life amounted to a clear promise which could only be broken if the overriding public interest demanded it.³¹⁵ HA has assumed that it was no longer responsible for providing or arranging long term general nursing care and that social services had taken over that responsibility.³¹⁶ There was nothing, however, in the National Health Service and Community Care Act 1990 or the Health Service Guidance HSG (95)8 to support that assumption, and it remained the responsibility of health

³¹² *R (Abdi and Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363, p1.

³¹³ *Ibid.*

³¹⁴ [2001] Q.B. 213; [2000] 2 W.L.R. 622; [2000] 3 All E.R. 850; the facts of the case were that in 1993 C a disabled person and other patients were moved from a hospital which was closing to Mardon House (HM), a property owned by the NHS trust and providing facilities for the severely disabled. C, who was told on being moved that MH would be a permanent home for her, applied for judicial review of the decision of the health authority, HA, to cause MH to be closed.

³¹⁵ *R v North and East Devon HA ex parte Coughlan.*

³¹⁶ *Ibid.*

authorities to provide both general and specialist nursing care as part of the provision of health services.³¹⁷

The guidance set out the factors which a health authority had to take into account in reaching its eligibility criteria; multi disciplinary assessment being one of the requirements. HA had, however, as a result of its mistaken assumption, taken into account irrelevant considerations when deciding which patients it would accept for long term treatment at MH and had failed to identify alternative placements. It had not, therefore, acted in accordance with the guidance and its decision to close MH was unfair and irrational.³¹⁸

4.5.2 *European Union*

Legitimate expectations have long been judicially protected by means of review in the European Union. Quinot³¹⁹ submits that:

'In EU law the protection of legitimate expectations is, however, not restricted to procedural relief, but extend to substantive relief as well. The general principle is that EU institutions will be held to their representations irrespective of whether those are procedural or substantive in nature, provided that the requirements for applying the doctrine are met.

This principle is so well established in EU law that legitimate expectations are not classified as either procedural or substantive. If an expectation is created and that expectation is found to be legitimate the European Court of Justice ('ECJ') will protect that expectation by holding the relevant administrator to the representation that gave rise to the expectation'.

³¹⁷ *Ibid.*

³¹⁸ *Ibid.*

³¹⁹ Quinot, G. (2004). Substantive Legitimate Expectations in South Africa and European Administrative Law. *German Law Journal*, 5, no. 1.

*Mulder*³²⁰ participated in a regulatory measure to curb excess milk production in the EU by entering into a five-year-non-marketing period in exchange for a non-marketing premium. At the end of the five year period he applied for a reference quantity to resume production under a new levy system, which had been introduced since he entered into the non-marketing arrangement. The application was rejected on the grounds that Mulder did not prove his milk production in the preceding reference year, which was a requirement for a successful application.³²¹

Mulder subsequently launched review proceedings claiming that he had a legitimate expectation to resume production after the five year non-marketing period. The ECJ concluded that Mulder had a legitimate expectation to re-enter the market without being specifically prejudiced due to his participation in the non-marketing arrangement. The court consequently declared the new levy system invalid to the extent that it resulted in no allocation to those producers who participated in the non-marketing arrangement. As a result of the first Mulder case, the Council adopted a regulation which allocated a special quota to producers in Mulder's position in the amount of 60% of their production in the year proceeding the year in which they entered into the non-marketing arrangement. Mulder again brought review proceedings, which the court upheld, ruling that the 60% quota was too low. Mulder as a result claimed damages.³²²

The ECJ upheld Mulder's claim to the extent that he was originally denied any quota, but rejected his claim to the extent that he was awarded a 60% quota, despite the fact that the latter regulation was also struck down by the court. The reason for this difference was due to the fact that in the first instance there were no compelling public interests which outweighed Mulder's expectation, so that his legitimate expectation had to be protection. However, in the latter instance, there were important public interests involved in awarding the limited 60% quota, which outweighed Mulder's expectations

³²⁰ *Mulder (I) v Minister van Landbou, 1988, E.C.R. 2321, Case 120/86.*

³²¹ *Ibid.*

³²² *Ibid.*

so that he could not claim damages for loss suffered due to those administrative actions.³²³

Quinot says that:

'In adjudicating legitimate expectation claims the ECJ follows a two step approach. Firstly it asks whether the administrator's actions created a reasonable expectation in the mind of the aggrieved party. If the answer to this question is affirmative, the second question is whether that expectation is legitimate. If the answer to the second question is equally affirmative, then the court will hold the administrator to the representation that is enforcing the legitimate expectation'.³²⁴

The representation itself must be precise and specific and importantly, lawful. The reasonable person would not form a specific expectation on a vague representation or rely on unlawful representations.³²⁵ This requirement also implies that the individuals are required to know what the law is and consequently when a representation is lawful or not lawful, and hence can be relied upon or not.

³²³ *Ibid.*

³²⁴ Quinot, G. (2004). Substantive Legitimate Expectations in South Africa and European Administrative Law. *German Law Journal*, 5, no. 1, p.69.

³²⁵ One important aspect of the objective dimension of this inquiry in EU law is the foreseeability of potential retractions of the representation. EU law is quite strict in requiring individuals to demonstrate a high degree of diligence in foreseeing that specific representations may be retracted or may be subject to constant change and should therefore not be relied upon. This requirement also implies that individuals are required to know what the law is and consequently when a representation is lawful or not and hence can be relied upon or not. The subjective dimension in determining whether a reasonable expectation was created is the requirement that the individual must subjectively, that is in actual fact, hold the expectation. The representations on which expectations can be based may take many forms. It may be in the form of an express statement, including general policy statements. The expectation may also be generated by long-standing practice.

4.5.3 Germany

The development of the doctrine in EU law was strongly influenced by German law, where expectations created by administrators are given strong judicial protection. In German law the concept of *Vertrauensschutz* has long been recognised as requiring administrators to honour their representations.

The scope of the principle in German law also extends far beyond similar protection in Commonwealth jurisdictions to also applies to informal representations and mere expectations, as opposed to only vested rights. As early as 1956 the *Oberverwaltungsgericht* in Berlin applied this principle to hold an administrator to a representation regarding the payment of a welfare grant. As Forsyth indicates,³²⁶ this decision is remarkable in the sense that the court acknowledged that the administrator's representation was clearly unlawful, but still upheld the applicant's expectation on the grounds of her legitimate reliance on the representation.

4.5.4 Canada

In *Abdurahman Khadr v Attorney General of Canada* [2006] 142 CRR (2nd) 116, the applicant was a Canadian citizen and a member of a family which included open supporters of al-Qaeda. He applied to renew his Canadian passport, and complied with all of the requirements that existed at the time. The Minister of Foreign Affairs made the decision not to renew his passport because of national security concerns, including concerns about the effect on Canada-U.S. relations and public disapproval. National security was not grounds listed in the Canadian Passport Order for Denial of Passport at the time.

The applicant was not initially told that the decision was made by the Minister and not by the Passport Office.

³²⁶ As cited in Quinot, G. (2004). Substantive Legitimate Expectations in South Africa and European Administrative Law. *German Law Journal*, 5, no. 1, p.67.

The applicant brought an application for declaration that the Minister's decision was unlawful, unconstitutional, and violated his rights under sections 6 and 7 of the Canadian Charter and Freedoms.³²⁷

The application was granted. The court stated that the principle of legitimate expectations requires that government, at a minimum, follow the processes, procedures and regular practices which it has held out to either an individual or the public at large. The applicant had a legitimate expectation that the decision whether or not to renew his passport would be made by the Passport Officer, not the Minister, and that it would be based on the criteria contained in the Canadian Passport Order at the time of the application in particular. The applicant was entitled to have his legitimate expectations met, and he was entitled to an order as it stood at the time he applied for renewal. However, the respondent was not prevented from immediately taking steps to revoke the passport on the grounds now enumerated in the amended Canadian Passport Order.³²⁸

4.6. Concluding remarks

Internationally, the doctrine of substantive legitimate expectation has been developed beyond the procedural context to substantive for many years now. There are established tests and standards to address the traditional objections to substantive protection of substantive legitimate expectations:

- It involves courts descending into the merits of administrative decision-making and thus undermining the separation of powers between the executive and the judiciary;
- It results in fettering of administrative decision making, by holding administrators to their undertakings and current practices or policies;

³²⁷ *Abdurahman Khadr v Attorney General of Canada* [2006] 142 CRR (2nd) 117.

³²⁸ *Ibid.*

- It undermines the rule of law, by enabling administrative decision makers to exceed their powers (creates the risk of administrator, in effect, arrogating to herself a power she does not have, through a promise or other form of conduct); and
- It discourages changes to administrative decision making and policy making, thus undermining the ease with which the administration responds to evolving public interest

Even though the doctrine of legitimate expectation was originally from English law, the comparative analysis has revealed that there are other countries that have far developed the doctrine, and therefore South Africa should not restrict itself to English law, but should have regard to other jurisdictions such as New Zealand, Canada and Germany.

Germany is the preferred country as it has developed mechanisms that could help to resolve the South African administrative law challenges; especially in responding the cases that were left open by both the Constitutional Court and the Supreme Court of Appeal: *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal 1999 (2) SA 91 (CC), 1999 (2) BCLR 151 (CC)*; *Bel Porto School Governing Body and Others v Premier of the Province, Western Cape and Another 2002 (9) BCLR 891 (CC)*; *Meyer v Iscor Pension Fund [2003] 5 BLLR 439 (SCA)*.

4.7. Conclusion

It is submitted that the introduction of the ATRS does promote clarity, consistency, and certainty. Except for those limited instances where the Commissioner or his officials may have interpreted the provisions of the Act incorrectly, and the taxpayers having faith in them, acted upon that to his or her detriment, when the Commissioner decides to withdraw the ruling retrospectively.

However, as indicated above, that there is room for development of the doctrine of substantive legitimate expectation and this would, it is submitted, constitute progressive development and it would not amount to an 'unruly horse', provided the standard of reasonableness, established by our courts and courts in countries such as the United

Kingdom, is applicable to the situation. For example, in the United Kingdom, the guidance statement (which serves the same purpose as a binding private ruling) also states that if information or advice provided by HMRC is incorrect in law, HMRC **will be bound** by such advice [author's emphasis] provided that it is clear, unequivocal and explicit and the taxpayer complied with certain requirements.

The solution to this is that where a taxpayer has made a return in accordance with a ruling based on incorrect law, the Commissioner must apply the correct law but not seek penalties, unlike where the penalty would be required if there was the presence of negligence on the part of the taxpayer. An innocent taxpayer should not be punished for mistakes by SARS' officials. The law is not changed, it is applied as it is, but the penalties will be disregarded as it is SARS' mistake. This would really lead to the taxpayers having faith in SARS and there will be certainty, consistency and clarity in tax matters, as anticipated by the ATRS.

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