



Chapter 3

Administrative Law and Health Service Delivery

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Introduction

In the traditional view of the world the state holds all of the power and the individual must be protected from excesses in the exercise of that power. This is still evident in



some of the older Constitutions, such as that of the United States of America, in terms of which human rights were essentially seen as the protection of private individuals against inappropriate or unacceptable displays or abuses of public power by the state. The world has changed substantially since then. It has become a great deal more complex. Concentrations of power have shifted significantly away from the state into the hands of private sector groupings. The influence of non-governmental organisations that join forces globally on certain issues can no longer be ignored. The power of large trade unions and religious movements has been an important socio-economic factor in many parts of the world for some decades. Multinational corporations and their domination of world trade arenas spanning the borders of many different countries are a force that many governments now have to reckon with¹. It is against the backdrop of such a world that the dynamics involving the delivery of health care services must be considered. Cockrell points out that the focal points of power in society have changed considerably since the days when it resided primarily with the state². The significance of increasing globalisation and the concentration of power in the hands of the private and non-governmental sectors cannot be overstated. Individuals may not be in a contractual relationship with many such organisations and yet they have the power to take decisions which can seriously adversely affect those individuals' lives. In the context of health care services, for instance, a large multinational pharmaceutical manufacturer may decide not to sell a particular patented drug in a particular country or to price it in such a manner that renders it unaffordable to all but the extremely wealthy. A body such as the Medicines Control Council which is a juristic person in its own right can decide that a particular medicine is not effective for a particular indication and refuse to register it for that indication which means that it cannot lawfully be prescribed for such indication even

¹ Tushnet, M "The Issue of State Action/Horizontal Effect in Comparative Constitutional Law" *I.CON* Vol 1 No 1, 2003 p 79-88 observes at p 79 that: "Liberal constitutions identify human rights that ought not to be violated. But by whom? An important strand in liberalism focuses on creating political structures that simultaneously empower and limit governments. Put crudely, this strand leads constitutionalists to pay primary attention to the threats to human rights that government poses. Another strand takes the human rights themselves as a focus. It notes that corporations and non-governmental actors can threaten human rights too." He observes that governments and corporations can discriminate on the basis of race; governments and corporations can fire employees for speech with which the employer disagrees. The two strands come together when one observes that the people or corporations exercising "private" power are actually exercising power conferred on them by laws creating and regulating market behaviour. Thus government is always somehow implicated in private decisions. He then asks the crucial question: What are the constitutional implications of this? Is the way in which government is implicated in decisions by private employers to discriminate and the like sufficient to place some duties on either government or the private actors?

² Cockrell A "Private Law and the Bill of Rights: A Threshold Issue of Horizontality" *Private Law* P3 A-4 states that: "Whereas once it was only the state which might be considered to have had at its disposal instruments of authority and oppression, modern society has witnessed the emergence of new fragmented centres of power such as voluntary associations, trade unions, corporations, multinationals, universities, churches etcetera. The emergence of large, private institutions, wielding massive power over the lives of citizens is an integral part of modern life."

if it may be beneficial in certain circumstances. Health care services and products often fall into the same category as food and shelter. They are indispensable and essential to preserve life. Nevertheless they are economic goods, commercial commodities which are sold in multi billion dollar markets around the world. How does the man in the street engage them? In many ways the *raison d'être* for law is the existence of relationships and the need to define and regulate them. Some would no doubt argue that law is simply the external or societal manifestation and recognition of a relationship – whether it is between the individual and the executive, legislative or judicial branch of government, the national, provincial and municipal spheres of government, the minority and the majority, natural persons in the private capacity, juristic persons in their private capacity or the individual and society as a whole. The branch of law that is relevant depends upon the nature of the parties in relationship and the nature of the relationship.

The provider, in the provider-patient relationship, is not considered in this thesis only in the narrow sense of the doctor-patient relationship or hospital-patient relationship since providers of health care services come in many different forms and guises. Moreover, the distinction between funder and provider is often blurred. In the Medical Schemes Act, the definition of “business of a medical scheme” makes it clear that a medical scheme may itself render a ‘relevant health service’³. Similarly the state is both provider and funder of health care services in relation to most of the patients who are treated in the public sector⁴. The health professionals working in the public sector

³ Medical Schemes Act No 131 of 1998. In the Act the term “relevant health service” is defined as “any health care treatment of any person by a person registered in terms of any law, which treatment has as its object-

- (a) the physical or mental examination of that person;
- (b) the diagnosis, treatment or prevention of any physical or mental defect, illness or deficiency;
- (c) the giving of advice in relation to any such defect, illness or deficiency;
- (d) the giving of advice in relation to, or treatment of, any condition arising out of a pregnancy, including the termination thereof;
- (e) the prescribing or supplying of any medicine, appliance or apparatus in relation to any such defect, illness or deficiency or a pregnancy, including the termination thereof; or
- (f) nursing or midwifery,

and includes an ambulance service, and the supply of accommodation in an institution established or registered in terms of any law as a hospital, maternity home, nursing home or similar institution where nursing is practised, or any other institution where surgical or other medical activities are performed, and such accommodation is necessitated by any physical or mental defect, illness or deficiency or by a pregnancy;”.

⁴ Most state hospitals classify patients into different categories in order to determine whether or not there should be a co-payment and if so, on what basis. For example, in the Western Cape the Regulations Relating to the Uniform Patient Fee Schedule For Health Services Rendered by the Department of Health: Western Cape For Externally Funded Patients (Provincial Gazette No 5977 Notice No 21 of 29 January 2003) apply only to “externally funded patients”. An externally funded patient is defined as “a patient whose health services are funded or partly funded in terms of - (a) the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No 130 of 1993), or (b) by the Road Accident Fund created in terms of the Road Accident Fund Act, 1996 (Act 56 of 1996) or (c) a medical scheme registered in terms of the Medical Schemes Act (Act 131 of 1998), or (d) another state department, local authority or foreign government or any other employer, or who exceeds the generally accepted income means test as implemented by the Provincial Government: Western Cape”. See for instance also the Regulations on Ambulance Fees in the Free State (Provincial Gazette No 64, Notice No 141 of 01

are, more often than not, employees rather than independent contractors as they are in the private sector.⁵ The employment relationship between the state and health professionals creates certain obligations for the health professionals that cast the provider-patient relationship in a different light to that in the private sector. The simple provider-patient relationship that is most often contemplated in many discussions of health law represents only a small percentage, in terms of volume of transactions, of the number of provider-patient relationships that exist in reality.

Since in South Africa a largely federal system of government prevails, especially in the arena of health services where, in terms of Schedule 4 of the Constitution, the national and provincial governments have concurrent legislative competence and since government as whole is in many respects different in legal terms to providers of health care services in the private sector, it is proposed to divide this chapter into two parts. The first will deal with the provider-patient relationship where the former is the state and the latter will deal with the relationship involving various types of private sector providers.

A PUBLIC SECTOR

3.1 Introduction

The government is a provider of health care services. In order to fulfil its role as such it is capable of exercising many different kinds of legal power. This fact renders an examination of the relationship between the patient and the state as provider of health care services fairly complex. For instance, is there ever a contractual relationship between them such as is most often inferred between the patient and the private sector provider or is this the exception rather than the norm? Are health service delivery decisions in the public sector based largely upon administrative law or are they 'business decisions' in terms of the law of contract? In the case of the former, a patient's legal relationship and the remedies available to him or her would differ significantly in form to those in terms of the law of contract. There is also the

October 2002) which states that a patient conveyed per ambulance shall be liable for the payment of the following fees in respect of every 50 kilometres, or part thereof, travelled: (a) An H1 hospital patient R30,00; (b) An H2 hospital patient R60,00; (c) An H3 hospital patient.

⁵ The private sector does employ health professionals but they are mainly nurses. General practitioners, dentists, physiotherapists, medical specialists, pharmacists and dieticians in the private sector are more likely to be self-employed than they are to be employees.

question of the state's constitutional obligations and the extent to which these must be seen as creating separate rights to those already contemplated in terms of the law of contract, delict and administrative law. It is proposed in this section to examine administrative law as it relates to the delivery of health care services within the public sector in order to establish the nature of the provider-patient relationships in various circumstances where the state is the provider.

3.2 The Nature of Administrative Law

According to Baxter, administrative law is:

“a set of common law principles which are designed to promote the effective use of administrative power, to protect individuals and organizations from its misuse, to preserve a balance of fairness between public authorities and those with whom they interact, and to ensure the maintenance of the balance of public interest.”⁶

It has been described by an American judge as including-

“the entire range of action by government with respect to citizen or by citizen with respect to the government, except for those matters dealt with by the criminal law, and those left to private civil litigation where the government's only participation is in furnishing an impartial tribunal with the power of enforcement”.⁷

It is not so easy in practice to define the concept of administrative action, despite the fact that this has been attempted in the Promotion of Access to Administrative Justice Act⁸. Klaaren⁹ observes that the administrative justice provision introduced by section 24 of the Interim Constitution, and continued in section 33 of the final Constitution, has had far-reaching consequences for South African administrative law. He states that both the structure of the Interim Constitution and the decisions of the constitutional court have nevertheless made it clear that this section is not “the single fount of administrative justice” and that work performed in comparable constitutional instruments has been divided and allocated to several distinct sections of the Constitution namely:

- the limitations clause;

⁶ Baxter *Administrative Law* (1984) p 3

⁷ Friendly H J, “The Federal Administrative Agencies: The Need For Better Definition of Standards, 75 *Harvard Law Review* 863(1962)

⁸ Act No 3 of 2000. See below for further discussion.

⁹ Klaaren J “Administrative Justice” Chaskalson *et al* (eds) *Constitutional Law of South Africa* 25-1

- the right of access to information;
- the right of access to court; and
- the right to freedom and security of the person

and that the right to administrative justice must be considered in relation to these other provisions.

3.3 Classifications of Administrative Action

To add to the confusion¹⁰ within administrative law, the courts at one stage used¹¹, and still today to some extent may have to use¹², a system of classification of administrative action that imitates the system of classification of different types of action of which administrative action itself forms a part. It is hardly surprising that this has the potential to cause considerable confusion for the courts and government officials alike¹³. The classification divides administrative acts into legislative, quasi-

¹⁰ Baxter (fn 6 *supra*) says at p 350: "The distinction between legislative and non-legislative administrative acts is often difficult or impossible to draw satisfactorily."

¹¹ Thus in *Premier, Eastern Cape, and Others v Cekeshe and Others* 1999 (3) SA 56 (TK) the court observed: "To some extent the learned Judge must have been influenced by the then existing classification of administrative acts into 'quasi-judicial' and 'purely administrative'. At 263F - G the learned Judge states: 'In the absence of a provision prescribing a quasi-judicial enquiry as a pre-requisite to the exercise of a power of expropriation, the act of expropriation is a purely administrative act. (Cf *Johnson & Co v Minister of Health* [1947] 2 All ER 395 at 398 - 9 and *Minister of the Interior and Another v Mariam* 1961 (4) SA 740 (A) at 751.)'... This classification has since been dealt a final blow. In the oft-cited case of *Administrator, Transvaal, and Others v Traub and Others* 1989 (4) SA 731 (A) Corbett CJ held at 759A - C: 'Another feature of the modern English administrative law which emerges from a study of the aforementioned cases, and others, is that the old classification of decisions into judicial, quasi-judicial and administrative no longer seems to have any relevance in this sphere. In *R v Gaming Board for Great Britain; ex parte Benaim and Another* [1970] 2 All ER 528 (CA) Lord Denning MR stated that "the "heresy" to the effect that the principles of natural justice apply only to judicial proceedings, and not to administrative proceedings, was "scotched" in *Ridge v Baldwin*. This was confirmed . . . by Lord Oliver in *Leech's case supra* at 505e where the latter stated that: ' . . . the susceptibility of a decision to the supervisory jurisdiction of the Court does not rest on some fancied distinction between decisions which are 'administrative' and decisions which are 'judicial' or 'quasi-judicial'.'"

¹² In *Shoprite Checkers (Pty) Ltd v Ramdau No And Others* 2001 (4) SA 1038 (LAC) the court notes: "I agree with the above approach by the Constitutional Court. In para [18] of the judgment in *Carephone Froneman DJP* does not seem to have appreciated that the administrative justice section could only apply if the action in question was an administrative action and that, because of this, a court would have no choice but to have to satisfy itself that such action was an administrative action before it could apply the provisions of the administrative justice section to it. This means that, however regrettable or even unpalatable it may be to have to classify actions according to whether they are administrative, judicial or quasi-judicial, courts have no choice but to classify actions according to such categories in certain circumstances under the new constitutional order in order to give effect to certain constitutional provisions.

¹³ The confusion is if anything compounded by the fact, for instance, that under the interim Constitution (and the 1996 Constitution) a local government is no longer a public body exercising delegated powers. Its council is a deliberative legislative assembly with legislative and executive powers recognised in the Constitution itself. Whilst it might not have served any useful purpose under the previous legal order to ask whether or not the action of a public authority was 'administrative', it is a question which must now be asked in order to give effect to s 24 of the interim Constitution and s 33 of the 1996 Constitution. One has a situation in which laws are made in terms of administrative action. See for instance *Fedure Life Assurance Ltd And Others v Greater Johannesburg Transitional Metropolitan Council And Others* 1999 (1) SA 374 (CC) where it was held that: "In addressing this question it is important to distinguish between the different processes by which laws are made. Laws are frequently made by functionaries in whom the power to do so has been vested by a competent legislature. Although the result of the action taken in such circumstances may be 'legislation', the process by which the legislation is made is in substance 'administrative'. The process by which such legislation is made is different in character to the process by which laws are made by deliberative legislative bodies such as elected municipal councils. Laws made by functionaries may well be classified as administrative; laws made by deliberative legislative bodies can seldom be so described." The constitutional court in this case explains how things worked under the previous legal order as follows: "Prior to the enactment of the interim Constitution, Courts adopted a more deferential attitude to laws made by elected legislatures than they did to laws made by administrative functionaries. Judicial review was developed and applied by South African Courts against the background of a legal order which

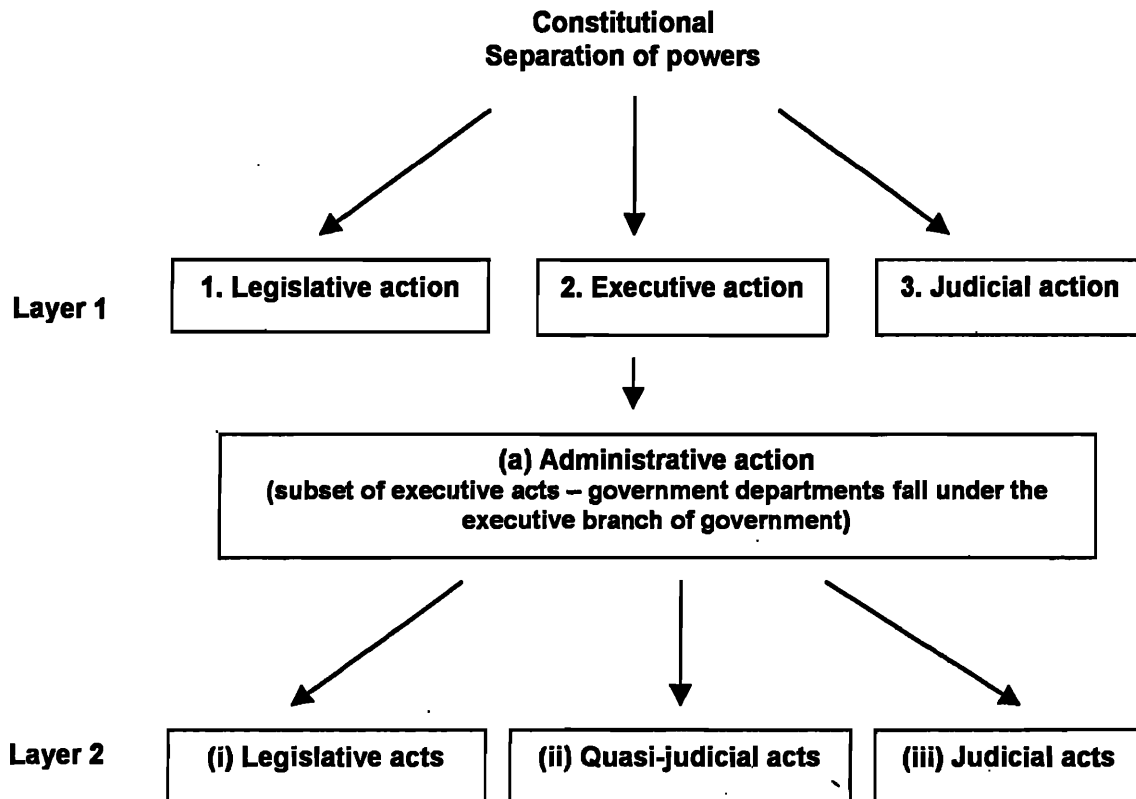
judicial and purely administrative. One has administrative action, that is essentially a sub-set of executive action¹⁴, which can be legislative, judicial or quasi-judicial in nature and which involves action neither the legislature nor the judiciary but by the executive. One thus has a hierarchy of classifications of different types of action in the diagram below using very similar nomenclature.

recognised the supremacy of Parliament. Legislation duly passed by Parliament in accordance with the then existing Constitution was not subject to judicial review, and the power of the Courts was confined to interpreting such laws and applying them to the facts of the particular case. However, a distinction was drawn between parliamentary legislation and other legislation enacted by 'subordinate legislatures' which was subject to judicial review. The true basis on which Courts were entitled to review subordinate legislation was a matter of some dispute. Some commentators saw it as implicit in the empowering legislation which was said to be subject to certain implied provisions applicable to the delegation of legislative powers unless expressly excluded by the empowering statute. Others, and this is the prevailing view, saw it as an inherent power of the Court, existing independently of the statute, which would be applied unless excluded by the empowering legislation... When there were elected provincial councils, their legislation (though in a sense legislation of a subordinate legislative body) was treated differently. The legislative power was characterised as original and not delegated, and the only question open on judicial review was whether the legislation fell within the scope of the powers vested in the councils. If so it could not be challenged on the ground of unreasonableness or on any of the other grounds on which the exercise of delegated legislative power could be reviewed by the Courts. " The court emphasises however, that the jurisdiction of the Courts to review legislation made by subordinate legislatures was not, however, a disputed issue. In broad terms the legislation was reviewed for 'legality'. The subordinate legislatures were not entitled to exceed their powers, nor to exercise them in a manner inconsistent with the limitations ordinarily attaching to the delegation of legislative power. If they did so, their laws would be struck down by the Courts as being invalid. It then goes on to explain the situation under the new legal order: "The introduction of the interim Constitution has radically changed the setting within which administrative law operates in South Africa. Parliament is no longer supreme. Its legislation, and the legislation of all organs of state, is now subject to constitutional control. It is within this context that consideration has to be given to the proper interpretation of the words 'administrative action' in s 24...The constitutional status of a local government is thus materially different to what it was when Parliament was supreme, when not only the powers but the very existence of local government depended entirely on superior legislatures. The institution of elected local government could then have been terminated at any time and its functions entrusted to administrators appointed by the central or provincial governments. That is no longer the position. Local governments have a place in the constitutional order, have to be established by the competent authority, and are entitled to certain powers, including the power to make by-laws and impose rates."

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The court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) stated as follows at para [142]: "As we have seen, one of the constitutional responsibilities of the President and Cabinet Members in the national sphere (and premiers and members of executive councils in the provincial sphere) is to ensure the implementation of legislation. This responsibility is an administrative one, which is justiciable, and will ordinarily constitute 'administrative action' within the meaning of s 33. Cabinet Members have other constitutional responsibilities as well. In particular, they have constitutional responsibilities to develop policy and to initiate legislation. Action taken in carrying out these responsibilities cannot be construed as being administrative action for the purposes of s 33. It follows that some acts of members of the executive, in both the national and provincial spheres of government will constitute 'administrative action' as contemplated by s 33, 108 but not all acts by such members will do so.

In *Premier, Eastern Cape, And Others v Cekeshe And Others* (fn 11 *supra*) the court observed that: "The general distinction between legislation and the execution of legislation is that legislation determines the content of the law as a rule of conduct, where executive authority applies the law in particular cases." *The Commonwealth v Grunseit and Others* (1943) 67 CLR 58. The enactment of primary legislation is not an administrative act but the implementation of such legislation is. (See definition of 'administrative action' in the PAJA section 1). Subordinate legislation is administrative action and therefore subject to judicial review. See Wiechers M *Administrative Law* who states: "Legislation does not appear out of the blue - first the authorised organ takes a decision to perform a legislative act, then the legislative measure goes through a process of consultation and drafting, then the measure is passed and finally promulgated. The initial decision to perform the administrative act will, in most cases, involve a legislative discretion and this discretion may be impugned on the same grounds as the exercise of a discretion in the performance of other legislative acts. The legislative act may also be challenged on the ground of other defects in the course of legislative process and on the strength of the ultimate effect of the act . . . even though a proclamation by the State President may be immune to judicial review in terms of an Act of Parliament, it remains subordinate legislation nevertheless and is subject to the rules relating to the creation, adoption, promulgation and interpretation of subordinate legislation."



Devenish *et al*¹⁵ note that there has in recent times been a strong inclination to avoid using the classification of administrative acts as legislative, quasi-judicial and purely administrative and that in *Du Preez v Truth and Reconciliation Commission*¹⁶, the Appellate Division held that for the purpose of applying the rules of natural justice, the classification of decisions as quasi-judicial or administrative has in effect been abandoned. They express the view, however, that the classification can nevertheless be beneficial in some circumstances and proceed to discuss the three types of administrative action on this basis. They note that legislative acts of the administration give rise to delegated legislation and that they are the most easily recognised. They note with regard to *Fedsure*¹⁷ that the resolutions taken by the municipality could not be classified as administrative action because the municipal council was exercising a power that was exclusively exercised by legislative bodies and that on this interpretation, other non-exclusive legislative decisions, as opposed to

¹⁵ Devenish GE, Govender K and Hulme D *Administrative Law and Justice in South Africa* at p 91

¹⁶ *Du Preez* 1997 (3) SA 204 (A) 11A-C

¹⁷ *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* fn 13 *supra*

legislative enactments, may still be subject to scrutiny under section 33 of the Constitution. Devenish *et al* point out that section 156(2) of the Constitution provides that a municipality may make and administer by-laws for the effective administration of matters which it has a right to administer and that therefore the Constitution empowers municipalities to administer by-laws. They observe that the implementation and administration of a by-law requires the exercise of a discretion in that decisions have to be taken and choices made between alternative courses of action. Such decisions required the exercise of delegated power and the application of the by-laws to a given set of circumstances. They are therefore subject to section 33 scrutiny.

In terms of Part B of Schedule 4 of the Constitution, municipalities are responsible for municipal health services, although these are not defined. Municipalities now have the power to make original, or primary, legislation on the subject of municipal health services. This has to be interpreted, however, within the broader constitutional context, particularly the concurrent legislative (and therefore executive) competence of the national and provincial spheres of government in the field of 'health services' as contemplated in Part A of Schedule 4 of the Constitution. In the National Health Act an attempt has been made to define municipal health services so as to be able to comply with and work within the fiscal federalism imposed by the Constitution and other legislation and avoid unfunded mandates as proscribed by the Public Finance Management Act¹⁸ for both municipalities and provinces with regard to the provision of health services. In order to know what funding must be made available to the three different spheres of government (national, provincial and executive) in respect of health services it is necessary to define for operational purposes the term "municipal health services". Naturally such a definition is not without its challenges given the fact that any attempt to define a constitutional term, no matter how well intentioned, is subject to constitutional challenge on the basis that it constitutes an attempt to amend the Constitution by stealth. In light of the foregoing discussion, however, it must be noted that the passing of by-laws by a municipality concerning municipal health services would be legislative as opposed to administrative action, in contrast to the position under the previous legal dispensation.

¹⁸ Act No 1 of 1999



Devenish *et al* note with regard to judicial acts that it is sometimes problematic to determine whether an administrative organ is carrying out purely judicial or curial functions and that there are only a few administrative authorities which perform judicial functions. Quoting *Garner*¹⁹, they identify the essential characteristics of judicial functions as:

- (1) There must be a *lis inter partes*, i.e. a dispute between two or more parties;
- (2) The proceedings in the disputed *lis* must have been initiated by one or more of the parties to the dispute, but not by the tribunal itself or some other governmental body not being a party to the dispute; and
- (3) As a general rule, the presiding officer or judge, having found the facts and applied the appropriate principles of law thereto, has little discretion in coming to his or her decision, he or she may not be influenced by preconceived principles of policy, but must apply prescribed rules so as to reach a decision.²⁰

Decisions involving the delivery of health care are in the main unlikely to be judicial administrative decisions. Under the old system of classification of administrative decisions they are more likely to be quasi-judicial or purely administrative decisions since except in the case of a dispute mechanism in terms of which a department of health must adjudicate between the interests of two or more parties (which is very unlikely in the health care context and is only necessary rarely, if at all).

Quasi-judicial acts are administrative acts in which an administrative body exercises a discretion²¹. A quasi-judicial function is an administrative function which the law requires to be exercised in certain respects as if it were judicial²². In *Hack v*

¹⁹ Jones BL and Thompson K *Garner's Administrative Law* p 344

²⁰ Devenish *et al* fn 15 *supra* at p 98

²¹ In *Administrator, Transvaal, And Others v Traub And Others* (fn 11 *supra*) the court held that whether the function be an 'administrative' function or whether it be 'purely administrative' or 'quasi-judicial' or 'judicial' the duty is to act 'fairly' and the *audi alteram partem* rule is simply a species of such duty. The courts have held that a public statutory body entrusted with administrative or quasi-judicial functions can be cited *eo nomine* in review proceedings, even if it is not a body corporate in the ordinary acceptance of that term (*M G Holmes (Pty) Ltd v National Transport Commission And Another* 1951 (4) SA 261 (T)). In *The Administrator, Transvaal And The Firs Investments (Pty) Ltd v Johannesburg City Council* 1971 (1) SA 56 (A), it was said that the court has jurisdiction under the common law to review a decision if an examination of the statute concerned reveals that the particular discretion or power involved is a quasi-judicial one. It is sufficient to show a "clear intention" of the legislature to negative and exclude the implication that the power so given is to be exercised in accordance with the fundamental principles of justice, rather than that this should be demonstrated as a "necessary implication". See *Publication Control Board v Central News Agency*, 1970 (3) SA at p. 489B - D. The first requirement is that the decision should prejudicially affect the property or liberty or rights of that individual who takes action to upset the decision. See *R. v Ngwevela*, 1954 (1) SA at p 127F; *Minister of Interior v Bechler and Others*, 1948 (3) SA 409. The prerequisites for deciding whether the function of a person statutorily authorised is quasi-judicial where that official's decision must be preceded by the recommendation of another body are dealt with in *Cassem v Oos-Kaapse Komitee van die Groepsgebiederaad*, 1959 (3) SA at pp. 659A - H; 661H - 662C; *South African Defence and Aid Fund v Minister of Justice*, 1967 (1) SA at pp. 270A - 271A.

²² Devenish *et al* fn 15 *supra*

*Venterspost Municipality And Others*²³ the court observed that as a general rule, a tribunal, or a body, even if administrative, must exercise its functions in a judicial or quasi-judicial way whenever it is empowered to make decisions, not in its own arbitrary discretion, but as a result of an enquiry into matters of fact, or of fact and law, and these decisions may affect the rights of, and involve civil consequences to, individuals. In the health-care context, quasi-judicial decisions are likely to consist primarily of licensing type decisions such as those contemplated in the National Health Bill in connection with the granting of certificates of need by the Director-General.

The Appellate Division in *Sugar Industry Central Board And Another v Hermannsburg Mission And Another*²⁴ stated that for the purpose of determining whether the *audi alteram partem* rule applies in relation to the exercise by the first appellant of the power, or duty, in terms of clause 37, depends on a determination of whether, in exercising such power or duty, the first appellant exercises a purely administrative function or acts in a quasi-judicial capacity. If the first appellant exercises a purely administrative function, the *audi alteram partem* rule has no application. If it acts in a quasi-judicial capacity the *audi alteram partem* rule applies unless it has been expressly or impliedly excluded. (*South African Defence and Aid Fund and Another v Minister of Justice*²⁵; *Publications Control Board v Central News Agency Ltd*²⁶; *Roberts v Chairman, Local Road Transportation Board, and Others*²⁷.) As to the tests to be applied in determining whether a statutory function being performed is quasi-judicial in nature or purely administrative, are to be found in *Hack v Venterspost Municipality and Others*²⁸, *Minister of the Interior and Another v Mariam*²⁹ and Roberts' case *supra*³⁰.

A professional act that is performed using professional skill and knowledge is apparently not an administrative act of any kind. In *S v Dobson*³¹ the court held that

23 *Hack* 1950 (1) SA 172 (W)

24 *Sugar Industry Central Board And Another* 1983 (3) SA 669 (A)

25 *South African Defence and Aid Fund and Another* 1967 (1) SA at p 270

26 *Central News Agency Ltd* 1970 (3) SA at p 488 - 489

27 *Roberts* 1980 (2) SA at p 489 - 490

28 *Hack* 1950 (1) SA at p 190

29 *Mariam* 1961 (4) SA at p 751

30 *Roberts* fn 26 *supra* at p 489 G - 490

31 *Dobson* 1993 (4) SA 55 (E)

the *audi alteram partem* rule is not applicable to the process of compiling of a report by a psychiatrist pursuant to an enquiry in terms of ss 77, 78 and 79 of the Criminal Procedure Act³²: the psychiatrists do not perform an administrative, judicial or quasi-judicial function but conduct their own enquiry in their own way to enable them to furnish an opinion concerning the mental capacity of the accused.

As stated previously the courts are presently inclined not to ascribe much value to these distinctions one of the reasons being that they are not particularly clear of useful³³.

Purely administrative acts are by definition neither judicial nor quasi-judicial. They are acts by which an administrative body creates, alters or terminates individual administrative law relationships. An administrative decision is one that is made according to administrative policy whereas a judicial one is made according to law³⁴.

3.4 Administrative Agreements

In *Transnet Ltd v Goodman Brothers (Pty) Ltd*³⁵ the court held that the reasoning employed in *Umfolozu Transport Bpk v Minister van Vervoer en Andere*³⁶, where it was held that the State Tender Board's handling of tenders for government transport services constituted administrative action and that the steps that had preceded the conclusion of the contract were purely administrative actions and decisions by officials, and that public money had been spent by a public body in the public interest, applied also to *Transnet*. In *Cape Metropolitan Council v Metro Inspection Services*

³² Criminal Procedure Act No 51 of 1977

³³ In *Knop v Johannesburg City Council* 1995 (2) SA 1 (A), the court stated that if the distinction between quasi-judicial and purely administrative decisions is of little use in solving problems in the context of the justiciability of a decision on the ground of failure to act fairly (see *Administrator, Transvaal, and Others v Traub and Others* fn 11 *supra* at 759A-C, 762F-H, 762H-763E, 763E-I and 763I-J), it is equally of little value in resolving the issue whether negligence in the making of the decision gives rise to liability for damages in delict. It found that in South African law there is no justification for treating the distinction between quasi-judicial and purely administrative functions as the touchstone for determining a public authority's liability for loss caused by the negligent exercise of statutory powers. It held that to determine the issue of wrongfulness, there was no point in straining to categorise the functions of the public authority as either quasi-judicial or purely administrative and quoted the remarks of the court in *Mutual Life & Citizens' Assurance Co Ltd and Another v Evans* [1971] 1 All ER 150 (PC) as being particularly apposite: 'In our judgment it is not possible to lay down hard and fast rules as to when a duty of care arises in this or in any other class of case where negligence is alleged. When in the past Judges have attempted to lay down rigid rules or classifications or categories they have later had to be abandoned'.

³⁴ See *Devenish et al* fn 15 *supra* at p 103 onwards.

³⁵ *Transnet Ltd v Goodman Brothers* 2001 (1) SA 853 (SCA)

³⁶ *Umfolozu Transport Bpk* [1997] 2 B All SA 548 (SCA)

*(Western Cape) CC And Others*³⁷ the court found that different considerations applied where a contract between an organ of state and a private entity was preceded by purely administrative actions and decisions by officials in the sphere of the spending of public money by public bodies in the public interest. It held that these amounted to administrative actions because s 217(1) of the Constitution specifically provided that, when an organ of state in the national, provincial or local sphere of government contracted for goods or services, it had to do so in accordance with a system that was fair, equitable, transparent, competitive and cost-effective³⁸. The court in this case held that that it served little purpose to classify the agreement between the first respondent and the appellant as an 'administrative agreement' as the question remained whether the cancellation of the contract amounted to 'administrative action'.

It stated that that section 33 of the Constitution was not concerned with every act of administration performed by an organ of state, but was designed to control the conduct of the public administration when it exercised a public power, and that it followed that whether or not conduct amounted to 'administrative action' depended on the nature of the power being exercised. Other relevant considerations, said the court, are the source of the power, the subject matter, whether it involved the exercise of a public duty, and how closely it was related to the implementation of legislation. The court found that that it could not be said that the appellant had exercised a public power when it purported to cancel the contract. Although it derived its power to enter into the contract with the first respondent from statute, it derived its power to cancel the contract from the terms of the contract and the common law; when it had concluded the contract it did not act from a position of superiority or authority, nor did it, when cancelling, find itself in a stronger position than the position it would have been in had it been a private institution. When it purported to cancel the contract, it did not perform a public duty or implement legislation, but purported to exercise a contractual right founded on the consensus of the parties in respect of a commercial contract³⁹.

³⁷ *Cape Metropolitan* 2001 (3) SA 1013 (SCA)

³⁸ *Cape Metropolitan* fn 36 *supra* paragraph [19] at 1024B/C - F.)

³⁹ Pretorius DM 'The Defence of the Realm: Contract and Natural Justice' 2002 *South African Law Journal* 119 374 has criticised this judgment saying that the question as to the true nature of public power is not addressed adequately by the judgment and that the court did not provide a satisfactory analysis of the relationship between public power and contractual rights. He states that in addition, insufficient consideration was given to the fact that the appellant had, by means of its contract with the respondent, outsourced the performance of its own statutory and public functions and that it had done so by virtue of specific statutory authorisation. In other words, the contract (the conclusion of which was



Burns⁴⁰ notes that it has been said that although South African courts have recognised the administrative disposition and private law contract concluded by the state, they have not as yet, recognised the administrative law agreement⁴¹. She observes that it has also been said that these administrative agreements (in which the state acts in its capacity as an organ of state and exercises a measure of state authority) fall somewhere between the boundary of public law and private law. Public authorities are not empowered to conclude contracts which are incompatible with the proper exercise of their powers and duties: such contracts or actions are void because the authority has exceeded its power and has acted *ultra vires*. This is something that the general public and even members of the legal profession fail to understand when litigating or threatening litigation against organs of state and statutory bodies. The Medicines Control Council, for example, would be unable to conclude an out of court settlement agreement with a private company that is an importer of a medicinal product in respect of the seizure of those products which were being sold illegally because they were not registered. Such an agreement would be outside of the mandate of the Council whose primary task is to ensure the safety quality and efficacy of medicines sold in South Africa by means of a registration process.

Burns notes that the liability of the state for administrative agreements is anything but clear and that at this stage a delictual claim against the state for negligent action of independent contractors will in all probability also be unsuccessful. The state is usually unable to supervise or exercise control over the actions of a private agency while the latter is fulfilling its contractual obligations. Indeed one of the reasons for contracting in the first place is often the fact that the state lacks the resources to do the job itself. Burns comments that currently administrative agreements are governed in the main by rules of private law and courts are influenced by private law contracts when determining the rules which apply to administrative agreements. Thus, she says,

authorised by statute) had a public dimension in that it was intended to achieve a statutory objective, namely to collect levies imposed by statute for the benefit of the provincial fiscus. This fact, says Pretorius, was not accorded sufficient weight by the court, and militates against its assertion that the contract was of a commercial nature.

⁴⁰ Burns *Y Administrative Law Under the 1996 Constitution*

⁴¹ She refers to Floyd TB "Die onderskeid tussen die ooreenkoms en die administratiewe beskikking" 1995 SAPR/PL 282 at p 285

the liability of the state for private law contracts and administrative agreements is governed by the State Liability Act⁴².

It is submitted that the conceptual difficulties which Burns encounters in the failure of the courts to recognise “the true nature and extent of the administrative agreement” are caused largely by her own insistence on the conceptual framework that seeks to distinguish public and private law. The problem lies largely in this distinction. If the distinction is unimportant then what does it matter whether or not the courts recognise administrative agreements as a concept? The law of contract and the law of delict have served quite well for a number of centuries in righting the wrongs between contracting parties and members of society. Burns seems to be of the view that the state should be held liable for the actions of a private contractor that has been tasked by the state with the performance of a public function purely because it is a public function. It is submitted that this view is neither logical nor equitable in all instances since it absolves the private contractor of just about all relevant responsibility for its own incompetence or incapacity. Burns suggests that the state should be held liable for contracting negligently with contractors who are unable to perform the required function. Her view also demonstrates a superficial understanding of the practical realities of state contracting procedures which are usually in the form of tender processes and are heavily regulated by legislation such as the State Tender Board Act⁴³, the Public Finance Management Act⁴⁴, the Preferential Procurement Policy Framework Act⁴⁵, the National Supplies Procurement Act⁴⁶, the Broad-Based Black Economic Empowerment Act 53 of 2003 and last but not least the Constitution⁴⁷. The full scope of the concept of contractual freedom, it is submitted, is a privilege reserved to the private sector. Provided that public entities follow the rules and procedures contained in the legislation detailed above, it is submitted that the chances of success of a claim against the state for negligent contracting are negligible. She asks how the individual can be protected from the negligent acts of the contractor

⁴² Act No 20 of 1957. This may seem something of a contradiction as the State Liability Act can hardly be said to be private law but the point is that the Act serves as little more than an entry point for the private law of contract and of delict into public affairs.

⁴³ Act No 86 of 1998

⁴⁴ Act No 1 of 1999

⁴⁵ Act No 5 of 2000

⁴⁶ Act No 89 of 1970

⁴⁷ Act No 108 of 1996. Section 217(1) states: “When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.”



apparently on the understanding that the law of delict does not apply to private contractors who are performing public functions. It is submitted that the law of delict applies to private contractors performing public functions as much as it does to private contractors fulfilling private functions. It is not clear why, simply because it happens to be a public function that is performed, in Burns view the rules of delictual liability should work differently. As the courts have rightly stated it is not so much a classification of the agreement that is important as the nature of the action taken and whether it was in consequence of an ordinary contractual arrangement or some statutory provision which conferred the power to do so. Essentially administrative law is about the exercise of power that is granted not by the person over whom that power is exercised, as would be the case in a contract, but by some other agency, for example the state in terms of legislation. If one is not obsessed with distinctions between public and private law it becomes obvious that administrative law should be capable of regulating private entities where they are granted power over the general public or groups within the general public by way of processes over which the regulated group had little or no control. It is submitted that the concern of administrative law is not the nature of the authority that wields the power but rather that of the power itself.

3.5 Private Law in The Public Health Sector

In the healthcare context, the question of whether a nation or provincial government or municipality is exercising a public power or performing a public function is central to the question of whether the provider-patient relationship can be governed purely by private law, such as the law of contract, or whether it will always have an additional element of administrative law. Powers derived from statute are generally regarded as public powers and functions derived from statute are usually public functions. Unfortunately, life, as usual, is never that simple since it is possible to derive the power to enter into a contract from a statute in which case the conclusion of the contractual relationship in question is an administrative act⁴⁸. In the context of health

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See for instance *Metro Inspection Services (Western Cape) CC And Others v Cape Metropolitan Council* 1999 (4) SA 1184 (C) where it was observed that: "In *Cekeshe and Others v Premier, Eastern Cape, and Others* 1998 (4) SA 935 (Tk) at 956J - 957C (1997 (12) BCLR 1746 at 1766D - F) the Court emphasised that the substance and not the form of the action should be looked at in order to determine whether an action amounts to an administrative action or not. While this is undoubtedly so, one cannot disregard the fact that in the present case the contract is for the supply of services on behalf of an organ of state and that the authority of the respondent to conclude the contract is derived from statute. In *Goodman Bros (Pty) Ltd v Transnet Ltd* 1998 (4) SA 989 (W) at 996D (1998 CLR 405 at 411; [1998] 3 All SA 336 at

care, the concepts of public powers and functions are not particularly helpful. The question remains, in the context of a purported 'contract' for health care services between a public provider and a private patient, what is the source of the power or the public provider to enter into the contract? If the contract is expressly mandated by statute then the source of the power to contract is clearly statutory. However, if the statute is silent on the subject of whether or not services must or may be rendered on the basis of a contract and there is the possibility that they may be rendered on the basis of contract or administrative law, is a power on the part of a public provider to enter into a contract statutory in origin or does it derive merely from the fact that as a juristic person it has the power to enter into contracts in the same way as any other legal *persona*. Would a decision by a public entity to enter into a contract for health care services amount to an exercise of public power under these circumstances? Is it not too simplistic to say that when a public entity acts in terms of legislation it always exercises public power and that such action must always be classified as administrative action? The principle of legality and the rule of law require that a public entity must not overstep the bounds of its authority as conferred by legislation⁴⁹. If this is the case then the authority for every legitimate act of a public entity is based upon one piece of legislation or another and every act in terms of legislation constitutes the exercise of a public power or the performance of a public function in which case every such act is administrative in nature. This cannot be the case however, if one considers the dicta of the courts in judgments such as in *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC And Others*⁵⁰ which the court stated that:

343c; and 1998 (8) BCLR 1024 at 1031G) Blieden J expressed himself as follows: 'In my view, this argument overlooks the true meaning of an administrative act. It means any act relating to the management of the affairs of the respondent.' Applying this test, it could be said that the act of terminating the contract in terms of which the first applicant was carrying out the functions of the respondent in terms of the Regional Services Councils Act is an act relating to the management of the affairs of the respondent."

⁴⁹ In *Minister Of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)* 2001 (3) SA 1151 (CC) it was noted at p 1166 that: "In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [fn 13 *supra*] this Court held: '(I)t is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law - to the extent at least that it expresses this principle of legality - is generally understood to be a fundamental principle of constitutional law.' Later in the same judgment it is said that: '(i)t seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution.' The Constitution now states explicitly that the rule of law is a foundational value of our legal order." See also *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council And Others* (fn 13 *supra*) where the court stated that: "It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution."

⁵⁰ *Cape Metropolitan Council* fn 48 *supra*

“It follows that whether or not conduct is ‘administrative action’ would depend on the nature of the power being exercised. Other considerations which may be relevant are the source of the power, the subject-matter, whether it involves the exercise of a public duty and how closely related it is to the implementation of legislation.”

and in *President of the Republic Of South Africa and Others v South African Rugby Football Union and Others*⁵¹ where the court observed:

In s 33 the adjective ‘administrative’ not ‘executive’ is used to qualify ‘action’. This suggests that the test for determining whether conduct constitutes ‘administrative action’ is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in *Fedsure*, that some acts of a legislature may constitute ‘administrative action’. Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is ‘administrative action’ is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.”⁵²

The general rules to be derived from these dicta are:

- 1 It is not so much the nature of the power bearer or functionary as the nature of the power or function that is relevant;
- 2 The nature of the power is only one of the considerations to be taken into account. Others are the source of the power, the subject-matter, whether it involves the exercise of a public duty and how closely related it is to the implementation of legislation;
- 3 The list of considerations referred to in 2 above is not exhaustive;
- 4 The source of the power is not apparently an overriding consideration but must be balanced in relation to other factors such as the nature of the power, how closely it is related to the implementation of legislation etc.
- 5 The nature of the task to be performed is an important factor;
- 6 The assessment must be made in light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration.

⁵¹ *South African Rugby Football Union 2000 (1) SA 1 (CC)* at para 141

⁵² See also para 143 of the same judgment: “Determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will, as we have said above, depend primarily upon the nature of the power. A series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. So, too, is the nature of the power, its subject-matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. While the subject-matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of s 33. Difficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of s 33. These will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration. This can best be done on a case by case basis.”

7 The assessment must ultimately be done on a case-by-case basis. This implies taking into account all of the relevant factors in each particular set of circumstances.

If it follows that a statute may confer and impose powers and functions other than public powers and functions. Public entities may enter into contracts and conduct business of a nature which does not mean that the power exercised in doing so is a public power or function. National, local and provincial governments are juristic *personae* with power to contract separately and individually from each other⁵³. What happens where there is a broad statutory obligation, as opposed to a power, to provide health care services? In terms of section 16 of the Health Act⁵⁴–

“(1) In addition to the functions entrusted to a provincial administration by any other law, the functions of a provincial administration with regard to health services in its province, shall, subject to the provisions of this Act, be-

- (a) to provide hospital facilities and services;
- (b) to provide ambulance services within its province and, with due regard to similar services provided by provincial administrations in adjacent provinces, to co-ordinate such services;
- (c) to provide facilities for the treatment of patients suffering from acute mental illness;
- (d) to provide facilities for the treatment of outpatients in hospitals or in other places where patients are treated for a period of less than twenty-four hours;
- (e) to provide and maintain maternity homes and services;
- (f) to provide personal health services, either on its own or in co-operation with any local authority;
- (g) with a view to the establishment of a comprehensive health service within its province, to co-ordinate the services referred to in paragraphs (a) to (f), inclusive, with due regard to similar services rendered by the Department of Health and Welfare, other provincial administrations and by local authorities;

⁵³ In *Lombard v Minister van Verdediging* 2002 (3) SA 242 (T) the court held: “Die Staat is ’n regspersoon maar sonder ’n geregistreerde kantoor of hoofbesigheidsplek en sonder ’n direkteur of beampte soos bedoel in die artikel.” See also *Minister Of Law and Order v Patterson* 1984 (2) SA 739 (A) where the court stated that: “Before proceeding to discuss the appeal, I should say that it was common cause between counsel in this Court that the state was the real defendant in the action instituted by the respondent, and, also, that the state is a legal persona.”

⁵⁴ Act No 63 of 1977



- (h) to promote family planning in the province concerned; and
- (i) to perform any other function as may be assigned to it by the Minister.”

There is nothing in this section that precludes the possibility of a province’s entering into a contract with a patient for the rendering of health services in fulfilment of its legal obligations as described in section 16. The fact that a province does not have to contract with a patient in order to create a legal relationship between itself and that patient does not mean that it cannot do so. In the case of contract law, however, intention is everything and in the case of the state in particular, one is only likely to encounter the question as to whether or not the necessary intention existed in pathological circumstances where a case has come before the court. In this situation, the state is likely to argue its case in the manner best calculated to win its case which may result in an argument based on the law of delict rather than that of contract since the onus of proof in the case of the former is possibly a harder one for the plaintiff to discharge⁵⁵. Thus in *Magware v Minister of Health No*⁵⁶ the defendant in his plea denied any contractual relationship between the parties choosing rather to admit negligence as averred in the declaration but pleading that such negligence consisted only of acts of omission not giving rise to delictual liability on the part of the defendant⁵⁷. In *Dube v Administrator, Transvaal*⁵⁸, *Buls and Another v Tsatsarolakis*⁵⁹, *Mtewa v Minister of Health*⁶⁰, *Pringle v Administrator, Transvaal*⁶¹, *Collins v Administrator, Cape*⁶² the basis of all of the claims was the law of delict and not the law of contract. The plaintiffs apparently did not even attempt to argue the existence of a contractual relationship between themselves and the public providers or that the terms thereof had been breached.

The fact that a contractual relationship is possible between a public provider of health care services and a patient is evidenced in *Shiels v Minister of Health*⁶³. In that case

⁵⁵ The onus of proving the intention of a complex and diffuse body such as the state which is comprised of many minds may possibly be even more difficult to discharge in the event that the state denies an intention to contract.

⁵⁶ *Magware* 1981 (4) SA 472 (Z)

⁵⁷ The facts of the case and the judgment of the court are discussed in more detail in the section on the law of delict

⁵⁸ *Dube* 1963 (4) SA 260 (W)

⁵⁹ *Buls* 1976 (2) SA 891 (T)

⁶⁰ *Mtewa* 1989 (3) SA 600 (D)

⁶¹ *Pringle* 1990 (2) SA 379 (W)

⁶² *Collins* 1995 (4) SA 73 (C)

⁶³ *Shiels* 1974 (3) SA 276 (RA)

the Minister of Health sued the appellant for the cost of manufacturing an artificial limb. The court quite clearly dealt with the relationship on the basis of the law of contract, stating at 279:

“Now clearly the principle established in those cases must apply to a contract such as this involving the highly technical task of constructing an artificial leg and making it fit, particularly in the case of the appellant who, on his own admission, is a difficult customer because, unfortunately, he has a very short stump.”

The case of *Administrator Natal v Edouard*⁶⁴ is a further example. In that case there was a contractual obligation to sterilise the respondent’s wife. The court refused to allow a claim for non-patrimonial loss on the ground that the South African law of contract does not allow a claim for intangible damages in the event of breach of contract.

Whilst there is strict and specific law relating to the situation in which the state is a purchaser of goods and services, the same does not hold true in a situation in which the state is the supplier of goods and services – in the health care context at least. The fact that there is a constitutional obligation upon the state to achieve the progressive realisation of the right of access to health care services within available resources also does not necessarily preclude the conclusion of a contract for the provision of these services. As stated in a previous chapter there is a significant difference between “a right of access to” and “a right to”, the former being less direct than the latter and creating the possibility that some action or effort is required on the part of the person exercising the right.

In practice, public providers differentiate between “externally funded patients” and others. They publish regulations, the promulgation of which is, in view of previous discussion, subject to administrative law, in terms of which fees are set for various categories of patients. For the most part the fees payable are determined on the basis of a means test. For instance in the “Regulations Relating To The Uniform Patient Fee Schedule For Health Care Services Rendered By The Department Of Health: Western Cape For Externally Funded Patients”⁶⁵ it is stipulation that “these regulations apply

⁶⁴ *Edouard* 1990 (3) SA 581 (A) the facts of the case and the judgement of the court are discussed in more detail in the section on the law of contract

⁶⁵ Provincial Gazette No 5977 of 29 January 2003, Notice No 21

to externally funded patients only.” The regulations define an externally funded patient as-

“a patient whose health services are funded or partly funded in terms of-

- (a) the Compensation for Occupational Injuries and Diseases Act, 1993 (Act 130 of 1993), or
- (b) by the Road Accident Fund created in terms of the Road Accident Fund Act, 1996 (Act 56 of 1996), or
- (c) a medical scheme registered in terms of the Medical Schemes Act, 1998 (Act 131 of 1998), or
- (d) another state department, local authority, foreign government or any other employer, or

who exceeds the generally accepted income means test as implemented by the Provincial Government: Western Cape.”

The Regulations set out a Uniform Patient Fee Schedule for various health care services provided to externally funded patients by the Western Cape Provincial government. Regulation 3 states that: “An externally funded patient who receives any medical treatment or any medical service, listed and categorised in Schedule 2, from a DOH facility, must pay the applicable tariff for such medical treatment or medical service received in accordance with the tariff of fees and charges as set out in Schedule P”. Technically speaking there is thus no need of a contract to create an obligation on the part of the patient to pay the applicable tariff.

Similarly in KwaZulu-Natal⁶⁶, the Regulations Relating To The Administration, Management And Control Of Provincial Hospitals, Services And Institutions Established In Terms Of Section 4 Of The Provincial Hospitals Ordinance⁶⁷ distinguish between “Private patients”, “full paying Hospital patients” and “part-paying hospital patients”.

The Regulations stipulate that -

⁶⁶ Notice No. 405 of 24 October 2002

⁶⁷ Ordinance No. 13 of 1961

“There shall be payable in respect of services rendered and supplies provided at, in or from provincial hospitals, community health centers and clinics the following charges which are defined by and subject to the 2002 KwaZulu-Natal Hospital Fees Manual which is available on request from any Provincial hospital in the Province:”
and then give the schedule of fees.

In the Free State the Regulations⁶⁸ entitled ‘Regulations On Fees For Health Services In The Free State’ provide for the classification of patients as follows–

- (1) Upon admission to a hospital, a patient shall be classified by the chief executive officer or delegated officials as a foreign patient, hospital patient or private patient.
- (2) A patient shall furnish such information and submit such proof as the chief executive officer or delegated officials may require of him or her, in order to be able to make a classification in terms of subregulation (1).

The regulations then go on to provide for a means test and methods of classification patients into the various categories.

The fact that the fees are prescribed by regulations means that they are not negotiable except within the scope of the regulations and as permitted by them. In practical terms, although they are subject to administrative law and therefore judicial review, unless they are excessive in the extreme, it would be difficult in practice to challenge them since the costs of operating a particular public hospital are not generally known either to the public at large or to the provincial government that owns it. Although the publication of tariffs of fees in regulations does not preclude a contractual relationship between the public provider and the patient it could be argued that the creation of a legal obligation by way of regulations to pay the fees and the specification and control of conditions of service by way of regulations is evidence of the absence of an intention to create a contractual obligation between the public provider and the private patient since it is difficult to conceive of a situation in which the state may wish to duplicate the terms of such relationship by way of a contract. In terms of the South African law of contract it is the intention of the parties to the transaction that is the

⁶⁸ Notice No 140 of 2002

deciding factor⁶⁹. Lately there has been development of some of the larger public hospitals in order to attract so-called “private” or “medical scheme patients” – the externally funded patients referred to in the Western Cape Regulations quoted above. Differentiated amenities, with more of a private sector flavour such as carpets on the floors, curtains on the windows and television sets in the ceiling, have in some cases been created with a view to attracting such patients and in contractual relationships have been entered into or are contemplated with medical schemes. However, not all of these contractual relationships apply to differentiated amenities within public hospitals. Relationships between schemes and provincial governments are presently contemplated in terms of which the public hospital becomes a designated provider in terms of the regulations to the Medical Schemes Act⁷⁰ and scheme beneficiaries are treated in the same facilities as other patients who are not beneficiaries of medical schemes. The mere fact that a contractual relationship exists between the medical scheme and the public provider does not necessarily mean that a contractual relationship is also created between the patient and the provider however. This topic will be discussed in more detail in the section on contracts with public providers. However it must be noted at this point that the type of contract is relevant in this context. These contracts are not necessarily for the benefit of a third party – which have the potential to make the patient a party to the contract – but more usually consist of arrangements between the scheme or scheme administrator and the provincial government in order to clarify payment methods and arrangements, to ensure treatment of the patient in accordance with the rules of the medical scheme and the exchange of information pertaining to the patient between the provider and the scheme, to balance the financial risks to which the scheme and the provider are both exposed between the parties, and to secure patient referrals to the provider by the medical scheme and its administrators and other contractors in order to ensure bed occupancy levels. It is submitted that despite what medical schemes and providers may claim to the contrary, contractual arrangements of this nature, especially where the scheme is represented by its administrator or a managed care contractor, are rarely intended for the exclusive or direct benefit of the patient. Although they are both likely to argue that the patient benefits in that public providers are cheaper and therefore he or she is less likely to exhaust medical scheme benefits, there are a

⁶⁹ This aspect of the relationship will be discussed in more detail in the section dealing with the law of contract.

⁷⁰ Medical Schemes Act fn 3 *supra*

number of fallacies behind this argument and it represents an oversimplification of the market forces and mechanisms that operate within health funding in the private sector. Further discussion of the medical schemes industry is not within the scope of this chapter. However it is worth noting that in terms of the Medical Schemes Act and Regulations regarding the mandatory package of minimum benefits which all schemes must provide, schemes are obliged to pay the costs of all of the treatments contemplated in that package in full regardless of in which sector treatment occurs and without co-payment unless the beneficiary uses a non-designated provider without good reason. Furthermore, due to differences in treatment protocols, operational procedures and sometimes staffing levels between public and private hospitals and the relative incapacity of the public sector to ‘manage’ inpatient stays in public hospitals so as to keep them to the minimum duration that is absolutely necessary, there is the distinct possibility that the costs of treatment in a public hospital may not be that much lower than those within a private one. Many medical schemes are battling for survival as they are too small, do not have significant market power to bargain effectively with providers, are unable to benefit from the legislatively mandated principles of community rating, their membership profiles are unfavourably skewed or they need to increase their reserves to levels mandated by the registrar without becoming so unaffordable to members that they start to leave for other more competitive schemes. The result is increasing pressure to keep the costs of the real, direct benefits to members as low as possible. Consequently arguments that these contracts between schemes and providers are for the benefit of scheme beneficiaries are overly simplistic. They are more often than not, arrangements of expedience for the scheme and the public provider. As is evident from the regulations referred to above, medical scheme members are in any event treated in public hospitals on the basis of the regulations and in the absence of contractual relationships between the provincial governments and the medical schemes concerned.

3.6 The Right to Lawful, Reasonable and Fair Administrative Action

In terms of section 33 of the Constitution:

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



- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and must-
- (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - (c) promote an efficient administration.”

The legislation referred to in subsection (3) above is the Promotion of Administrative Justice Act⁷¹ (PAJA). It is against this constitutional and legislative backdrop that one must examine administrative law in relation to the delivery of health care services. As with all other areas of law in South Africa, administrative law is informed by and based upon constitutional principles⁷².

The implications of this for the state will be canvassed in more detail below. However it is important to note at this stage that the current status of administrative law as a branch of constitutional law as opposed to the common law, casts decisions by the state concerning the delivery of health care services in a whole new light. Decisions relating to the provision of health services based on administrative law are now subject to the provisions of the Constitution and the PAJA. The courts are no longer restricted, as they were when administrative law formed part of the common law, to trying the case only on the basis of principles of natural justice and rules of procedural fairness such as whether the official applied his or her mind, whether there was bias, whether the person affected by the decision was given an opportunity to be heard

⁷¹ Fn 8 *supra*

⁷² Chaskalson P has observed that: “Whilst there is no bright line between public and private law, administrative law, which forms the core of public law, occupies a special place in our jurisprudence. It is an incident of the separation of powers under which courts regulate and control the exercise of public powers by the other branches of government. It is built on constitutional principles which define the authority of each branch of government, their inter-relationship and the boundaries between them. Prior to the coming into force of the interim Constitution, the common law was ‘the main crucible’ for the development of these principles of constitutional law. The interim Constitution which came into force in April 1994 was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law. That is not to say that the principles of common law have ceased to be material to the development of public law. These well-established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development. But there has been a fundamental change. Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution, which defines the role of the courts, their powers in relation to other arms of government and the constraints subject to which public power has to be exercised. Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed. The written Constitution articulates and gives effect to the governing principles of constitutional law.” (*Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC))



etc⁷³. They can now look into the merits of the case to a much greater extent. For instance the courts can look at the rationality of the exercise of a public power. It has been held that administrative action must be justifiable in relation to the reasons given for it and that value judgements have to be made by the courts in assessing whether administrative action is justifiable in relation to those reasons. This inevitably involves consideration of the merits in some way or another⁷⁴.

Three aspects of the right to administrative justice are identified in section 33(1) – lawfulness, procedural fairness and reasonableness. These three elements are designed to ensure accountability, responsiveness and transparency in government. In *Kolbatschenko v King NO and Another*⁷⁵ the court held that as the requirement of accountable, responsive and transparent government was one of the founding values of constitutional democracy, it was only in highly exceptional cases that a court would adopt a hands-off approach where a discretion has been exercised or an executive or administrative decision made which directly affected the rights or interests of an individual applicant.

3.6.1 Lawfulness

⁷³ In *Van der Merwe v Slabbert No and Others* 1998(3) SA 613 (N), the court observed that the rules of natural justice described as the *audi* principles, came into play whenever a statute empowers a public official or body to perform an act or give a decision prejudicially affecting an individual in his liberty or property or existing rights or whenever such an individual had a legitimate expectation entitling him to a hearing. However, said the court, the *audi* principles were but one facet of the general requirement of natural justice that in the circumstances postulated that the public official or body concerned had to act fairly. In *Commissioner of Customs and Excise v Contained Logistics (Pty) Ltd* 1999 (3) SA 771 (SCA) the court observed that judicial review under the Constitution and the common law are different concepts. In the field of administrative law constitutional review is concerned with the constitutional legality of administrative action, the question in each case being whether or not it is consistent with the Constitution and the only criterion being that Constitution itself. While judicial review under the common law is essentially also concerned with the legality of administrative action, the question in each case is whether the action under consideration is in accordance with the behests of the empowering statute and the requirements of natural justice. The court noted that grounds for common law review developed over the years can never be regarded as a *numerus clausus* for the simple reason that administrative law is not static, particularly given the requirement of s35 (3) of the interim Constitution that any law be interpreted and that the common law be applied with due regard to the spirit, purport and objects of the Bill of Rights. It should be observed in this context that Chaskalson P rejected the idea that there were two separate systems of law saying that “I cannot accept this contention, which treats the common law as a body of law separate and distinct from the Constitution. There are not two systems of law, each dealing with the same subject-matter, each having similar requirements, each operating in its own field with its own highest Court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.” (*Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic Of South Africa and Others* (fn 72 *supra*) para 44). It is submitted that with the further advent of the PAJA, any distinctions purists might wish between constitutional law and the common law as far as administrative law principles are concerned will become even more blurred. Chaskalson P’s assertion that there is only one system of law is reinforced by this Act. Section 6 of the Act provides for judicial review of administrative action on various grounds that are there listed including *ultra vires*, procedural unfairness, error of law, bad faith, bias etc.

⁷⁴ *Pharmaceutical Manufacturers of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* fn 72 *supra*

⁷⁵ *Kolbatschenko* 2001 (4) SA 336 (C) at 355I - 356D

The constitutional court in *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council*⁷⁶ held that in relation to legislation and to executive acts that do not constitute 'administrative action', the principle of legality is necessarily implicit in the Constitution and that therefore the question whether local governments act *intra vires* in imposing rates and levies and paying subsidies remains a constitutional question. It held that it was fundamental to the principle of rule of law that local authorities act within the powers lawfully conferred upon them⁷⁷. In *De Lille and Another v Speaker of the National Assembly*⁷⁸ the court held that the rule of law did not countenance the administrative issue of a certificate to shield illegal and unconstitutional acts from judicial review. In *Minister of Correctional Services and Others v Kwakwa and Another*⁷⁹ the Appellate Division pointed out that the doctrine of legality, an incident of the rule of law, was an implied provision of the Constitution and that it was central to the conception of South African constitutional order that the Legislature and the Executive in every sphere was constrained by the principle that they could exercise no power and fulfil no function beyond that conferred upon them by law. In the same manner, said the court, the Commissioner of Correctional Services, in exercising public power, had to comply with the Constitution and had to act within the parameters of his statutory powers. In that case the court found that it was clear that the Commissioner had fundamentally misconceived his powers in terms of the Act and that in implementing the new system he had acted beyond his powers. He had disregarded the provisions of the Constitution and had fashioned a privilege system, in terms of which privileges were granted on a differential basis to prisoners in specified categories, that was inconsistent with its core values and not countenanced by the statutory regime from which he assumed his powers. For that reason the privilege system designed by him could not be allowed to stand.

Devenish *et al* point out that an administrative act has a specific and recognisable form. They note by way of example that a licence or permit has a stipulated form and

⁷⁶ *Fedsure* fn 13 *supra*

⁷⁷ See also *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* (fn 72 *supra*) where the constitutional court held that the Court had previously held that the doctrine of legality, an incident of the rule of law, had been an implied provision of the Constitution of the Republic of South Africa Act 200 of 1993 (the interim Constitution) and that that decision was applicable to the exercise of a public power under the 1996 Constitution which, in s 1(c), specifically declared that the rule of law was one of the foundational values of the Constitution.

⁷⁸ *De Lille* 1998 (3) SA 430 (C)

⁷⁹ *Kwakwa* 2002 (4) SA 455 (SCA)



a letter by the licensing authority in question purporting to constitute a licence or permit will not constitute a valid certificate or permit because it does not comply with the stipulated form. The boundaries and requirements of an administrative act or decision are usually set out in the relevant statutes, regulations and proclamations⁸⁰. Administrative action which exceeds the limitations imposed by the empowering legislation or which does not meet the criteria set by that legislation is *ultra vires* and therefore unlawful⁸¹.

At common law, lawfulness is determined on the basis of public policy. As such it is fundamental not only to administrative law and administrative justice as contemplated in section 33 of the Constitution but also to the law of contract and of delict. The link between public policy and the values expressed in the Constitution was elucidated by the court in *Ryland v Edros*⁸². In this case the court held that if the spirit, purport and objects of Chapter 3 of the Constitution and the basic values underlying it were in conflict with the view as to public policy expressed and applied in the Ismail case then the values underlying chapter 3 had to prevail. The court said that the values of equality and tolerance of diversity and recognition of the plurality of South African society were among the values that underlie the Constitution and that those values “irradiate” the concepts of public policy and boni mores that the courts had to apply. The court held that courts should only brand a contract as offensive to public policy if it was offensive to those values which were shared by the community at large and not only by one section of it. In *Du Plessis and Others v De Klerk and Another*⁸³ Kriegler J stated that:

⁸⁰ Thus in *National Police Service Union and Others v Minister of Safety and Security* 2000 (3) SA 371 (SCA) the court held that the character of the scheme had not been of the kind which would normally call for promulgation: it had not amounted to a ‘by-law, regulation, rule or order’ within the purview of s 16 of the Interpretation Act and the proclamation itself had provided for the form of notification the administrative decision underlying the directive was to take, namely that members who might be affected thereby were to be informed, which had been done.

⁸¹ See for example *Munimed v Premier, Gauteng, an Andere* 1999 (4) SA 351 (T) in which the court said that that inasmuch as no other enabling provision existed in terms of which the Administrator was authorised to establish a medical aid fund (i.e. apart from s 79bis(1)) the result of the Administrator’s *ultra vires* act was that the applicant was not a juristic person at all. By establishing a medical aid scheme contrary to the provisions of s 79bis(1) the Administrator had acted beyond the scope of his powers, as a result of which the act of incorporation was a nullity. The fact that the applicant had been registered in terms of the Medical Schemes Act did not legitimise the *ultra vires* act (from headnote). See also *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* (fn 72 *supra*) in which the constitutional court held that the exercise of all public power had to comply with the Constitution, which was the supreme law, and with the doctrine of legality, which was part of that law. The question whether the President had acted *ultra vires* or *intra vires* in bringing the 1998 Act into force when he had done so was, accordingly, a constitutional matter and the finding that he had acted *ultra vires* was a finding that he had acted in a manner inconsistent with the Constitution.

⁸² *Ryland* 1997 (2) SA 690 (C)

⁸³ *Du Plessis* 1996 (3) SA 850 (CC) at p 906 Mahomed JP stated in the majority judgment that: “ The common law is not to be trapped within the limitations of its past. It need not to be interpreted in conditions of social and constitutional ossification. It needs to be revisited and revitalised with the spirit of the constitutional values defined in chapter 3 of the

“What I am contending is that the law can deal effectively with these challenges through the very process envisaged by s 35(3), namely the indirect radiating effect of the chapter 3 rights on the post-constitutional development in the common law and statute law of concepts such as public policy, the boni mores, unlawfulness, reasonableness, fairness and the like, without any of the unsatisfactory consequences that direct application must inevitably cause. The common law of this country has, in the past, proved to be flexible and adaptable, and I am confident that it can also meet this new constitutional mandate.”

Mahomed JP referred with approval to the German legal system in which, he noted, the jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic right norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the legislature, executive and judiciary⁸⁴.

This is reminiscent of the observations of Thirion J in *Edouard v Administrator, Natal*⁸⁵ which predated the Constitution.

Constitution and with full regard to the purport and objects of that chapter.” See also *Brisley v Drotosky* 2002 (4) SA 1 (SCA) in which Cameron AJ points out at para 91 p35 that: “The jurisprudence of this Court has already established that, in addition to the fraud exception, there may be circumstances in which an agreement, unobjectionable in itself, will not be enforced because the object it seeks to achieve is contrary to public policy. Public policy in any event nullifies agreements offensive in themselves - a doctrine of very considerable antiquity. In its modern guise, ‘public policy’ is now rooted in our Constitution and the fundamental values it enshrines. These include human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism.” (footnotes omitted)

⁸⁴ See also p 902 of *Du Plessis* fn 83 *supra* where Mahomed JP observed: “There are some features, however, which bear on the construction of our own Constitution. The Federal Constitutional Court refers to the radiating effect (*Ausstrahlungswirkung*) of the basic rights on private law. In the Lüth case the Federal Constitutional Court held as follows: “The influence of the scale of values of the basic rights affects particularly those provisions of private law that contain mandatory rules of law and thus form part of the *ordre public* - in the broad sense of the term - that is, rules which for reasons of the general welfare also are binding on private legal relationships and are removed from the domination of private intent. Because of their purpose these provisions are closely related to the public law they supplement. Consequently, they are substantially exposed to the influence of constitutional law. In bringing this influence to bear, the courts may invoke the general clauses which, like article 826 of the Civil Code, refer to standards outside private law. “Good morals” is one such standard. In order to determine what is required by social norms such as these, one has to consider first the ensemble of value concepts that a nation has developed at a certain point in its intellectual history and laid down in its constitution. That is why the general clauses have rightly been called the points where basic rights have breached the (domain of) private law. . . .”

⁸⁵ *Edouard* 1989 (2) SA 368 (D). Thirion J stated, despite the fact that the Constitution had not yet been written at that time, that “Certain moral values and policy considerations have become generally accepted in the community and some of these have in their turn hardened into rules of law. By reasoning from settled principles in related fields and by striking a balance between competing consideration the Court tries to arrive at a result which will be fair to the individual and the community. In the process the Court must consider what interests legitimately require to be protected for the sake of the collective welfare and it must evaluate the probable consequences of adopting a public policy rule. The Court will only apply community attitudes and values in deciding cases if such attitudes and values have gained general acceptance in the community and are clear and if their application is necessary in the interests of sound social policy and the welfare of the community.”

There is no better evidence of the general acceptance of a value by a community than its enshrinement within its Constitution.

Clearly public policy and Constitutional values are inextricably intertwined. A court will not be able to justify a decision in which public policy as it perceives it, runs counter to constitutional values. Contracts that are contrary to public policy are unenforceable and unlawful⁸⁶. Similarly, it is submitted that administrative action that is contrary to public policy and therefore the underlying constitutional values is unlawful and subject to challenge in terms of section 33 of the Constitution and the PAJA. Lawfulness, in the context of section 33 of the Constitution, means more than just *intra vires*. The concept of lawfulness is based in South African law on constitutional values and considerations of public policy throughout the legal system⁸⁷. It is only the context that varies.

In terms of the law of delict, unlawfulness is also determined with reference to public policy and therefore to the underlying values of the Constitution. In *Mpongwana v Minister of Safety and Security* the court held that the test for whether an omission could be viewed as wrongful related to the existence or otherwise of a duty of care

⁸⁶ For instance in *Sasfin v Beukes* 1989 (1) SA 1 (A) the court held that agreements which are clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience will accordingly on grounds of public policy not be enforced. The court held that a further relevant and important consideration is that public policy should properly take into account the doing of 'simple justice between man and man'. It is submitted that the distinction between natural justice in the public law context and 'simple justice between man and man' in the private law context is merely contextual. The principle of the balancing of competing or conflicting interests is the same in both contexts. See the reference by Cameron J at p611-612 in *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) to balancing of fundamental rights as follows: "It is not clear, where a balance has to be struck between two fundamental values, why it should be done at a point which is so generous in its protection of the one and so meagre in its protection of the other." In *Holomisa*, the court states that: "The Constitution's structures and its values necessarily inform every aspect of legal reasoning and decision-making." In the same case Cameron J observes that: "A central consideration in South Africa is that the Constitution plants new values at the roots of our legal system. These include, as stated earlier, the values of equality, democracy, governmental openness and accountability."

⁸⁷ Traverso J acknowledges this in *Coetzee v Comitis And Others* 2001 (1) SA 1254 (C), stating: "We have moved from a very dark past into a democracy where the Constitution is the supreme law, and public policy should be considered against the background of the Constitution and the Bill of Rights." In *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC), the constitutional court notes at para 33 that "Arbitrariness is inconsistent with 'values which underlie an open and democratic society based on freedom and equality', and arbitrary restrictions would not pass constitutional scrutiny." The fact that constitutional values underlie the entire legal system should not diminish the importance of context at a less abstract level. The court in *S v Lawrence supra* explained the need for context in the balancing of rights and values that: "The reason why context is so important in constitutional matters is well explained by Wilson J in *Edmonton Journal v Alberta AG*: '. . . (A) particular right or freedom may have a different value depending on the context. It may be, for example, that freedom of expression has greater value in a political context than it does in the context of disclosure of the details of a matrimonial dispute. The contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it. It seems to be more sensitive to the reality of the dilemma posed by the particular facts and therefore more conducive to finding a fair and just compromise between the two competing values. . . .' It stated that "In deciding what is reasonable and necessary in the present case we should accordingly look to the actual dilemma triggered by its particular facts, and not deal with it in a formulaic way simply because s 14 has been infringed." (footnotes omitted). The golden thread of public policy and constitutional values operates at a broadly systemic level throughout South African law. This does not exclude the case- by-case approach. One should not make the mistake of adopting a 'one-size-fits-all' reasoning because that in itself would be unconstitutional.

owed to the claimant being part of the enquiry into lawfulness. In deciding whether a duty of care existed, the court said that, public policy played a role⁸⁸. In *Motor Industry Fund Administrators (Pty) Ltd and Another v Janit and Another*⁸⁹ the court held that not all invasions of privacy or publications of private facts are unlawful. It said that in demarcating the boundary between the lawfulness and unlawfulness of the intrusion or publication the court must have regard to the particular facts of the case and judge them in the light of contemporary *boni mores* or the genuine sense of justice of the community⁹⁰. Lawfulness is clearly a reflection of public policy and the latter in turn is underpinned and irradiated by the values of the Constitution. As such whether the concept occurs in administrative, delictual or contractual law, it is fundamentally that same golden thread that unifies them.

3.6.2 Reasonableness

An aspect of reasonableness is rationality. In *Durbsinvest (Pty) Ltd v Town and Regional Planning Commission, Kwazulu-Natal, and Others*⁹¹ the court observed that the principles of administrative law (as contemplated by the right to administrative justice entrenched in s 33 of the Constitution of the Republic of South Africa Act 108 of 1996 which are to be derived from the decision of the Constitutional Court in *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others*⁹²) are:

- (1) The review of an administrative decision of an organ of the Executive gives rise to a constitutional enquiry.

⁸⁸ *Mpongwana* 1999 (2) SA 794 (C). See also *Aucamp and Others v University of Stellenbosch* 2002 (4) SA 544 (C) in which Van Zyl J observed that: "It is trite that in order to succeed in a delictual claim for pure economic loss the plaintiff has to show, *inter alia*, that the conduct causing pure economic loss was wrongful in the sense that it infringed upon a subjective right of the plaintiff or breached a legal duty owed to the plaintiff. The legal duty as such must be directed at preventing reasonably foreseeable damage being caused to the plaintiff. In considering whether or not the conduct in question is wrongful the Court is required to make a value judgment. In doing so it must weigh up the interests of the parties and of the community at large against the background of the relevant facts and circumstances. In addition, it must strive, impartially and objectively, to apply the values of justice, fairness and reasonableness, while taking into account considerations of good faith (*bona fides*) and good morals (*boni mores*), otherwise known as public policy reflecting the legal convictions of the community." There is a detailed discussion of the concept of lawfulness in *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A)

⁸⁹ *Motor Industry Fund Administrators* 1994(3) SA 56 (W)

⁹⁰ The court referred to *Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another* 1993 (2) SA 451 (A) at 462.

⁹¹ *Durbsinvest* 2001 (4) SA 103 (N)

⁹² *Pharmaceutical Manufacturers Association of SA* (fn 72 *supra*)



- (2) In any such enquiry the first question to be asked is whether the decision complained of is, objectively speaking, rationally related to the purpose for which the power was given.
- (3) If it was, and the decision was arrived at *bona fide* and within the authority and jurisdiction of the body whose decision is being enquired into, the Court cannot interfere with the decision merely because it disagrees with it⁹³.

In *Mafongosi And Others v United Democratic Movement And Others*⁹⁴ the court held that an administrative decision could be justified only by the reasons underpinning it. It was those reasons which showed whether decision was rational or not. If it was not, the decision could not be allowed to stand and had to be set aside even if the decision was reached in a manner that was *bona fides*. It said that administrative decisions had to be rationally related to the purpose for which the power was given, otherwise they would in effect be arbitrary and that the question of whether a decision was rationally related to the purpose for which the power was given called for an objective enquiry. Were this not so, a decision that, viewed objectively, was in fact irrational, may pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine the important constitutional principle.

Justifiability is an important criteria in establishing both the lawfulness and reasonableness of a decision. In *Roman v Williams NO*⁹⁵ the court held that justifiability as specified is to be objectively tested. It stated that the scope of this constitutional test is clearly much wider than that of the common-law test and it overrides the common-law review grounds as set out in *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd*⁹⁶. The court held in *Roman* that administrative action, in order to prove justifiable in relation to the reasons given for it, must be objectively tested against the three requirements of suitability, necessity and proportionality which requirements involved a test of reasonableness. It said that gross unreasonableness is no longer a requirement for review. The constitutional test embodies the requirement of proportionality between the means and the end. The role

⁹³ *Durbsinvest* fn 91 *supra* at p 107F/G – H/I

⁹⁴ *Mafongosi* 2002 (5) SA 567 (TKH)

⁹⁵ *Roman* 1998 (1) SA 270 (C)

⁹⁶ *Johannesburg Stock Exchange* 1988 (3) SA 132 (A).

of the Courts in judicial reviews is no longer confined to the way in which an administrative decision was reached but extends to its substance and merits as well⁹⁷.

The concept of reasonableness permeates South African law. It is not unique or specific to administrative or constitutional law⁹⁸. The court in *S v Manamela and Another (Director-General of Justice Intervening)*⁹⁹ pointed out that:

“Reasonableness’ is a legal commonplace in the courts which are required to apply it daily in determining the standard of care exacted of persons in ordinary life.”

In *Holomisa v Argus Newspapers Ltd*¹⁰⁰ the court observed that:

“The reasonableness standard offers a powerful tool for resolving the difficulties inherent in protecting reputation while at the same time giving recognition to the role the Constitution accords free speech and expression. It will not be reasonable to publish most untrue statements of fact. Only due inquiry and the application of reasonable care will mark such conduct out for protection. A further valuable feature of the reasonableness standard is that, as

⁹⁷ *Roman* fn 95 *supra* at p 284F/G - 285A.

⁹⁸ In *Mafongosi and Others v United Democratic Movement and Others* fn 94 *supra* the court pointed out at p 576 that: “The reasonableness required for administrative actions taken by such functionaries is the same as the reasonableness required for decisions by organs of State. In other words there is a single set of standards for administrative justice.” In *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)* 2002 (1) SA 429 (CC) the court noted: “It is undesirable if not impossible to try to determine the requirements of reasonableness in the abstract. The reasonableness of notice provisions in any law must in the case of each provision be assessed on its own merits.” In *South African Commercial Catering and Allied Workers Union And Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC), a case involving allegations of bias on the part of labour appeal court judges, the constitutional court observed that: “The legal standard of reasonableness is that expected of a person in the circumstances of the individual whose conduct is being judged.” With regard to the test of reasonableness in the limitation of rights Sachs J noted in *Coetsee v Government Of The Republic Of South Africa; Matiso And Others v Commanding Officer, Port Elizabeth Prison, And Others* 1995 (4) SA 631 (CC) that: “The requirement that limitation be reasonable presupposes more than the existence of a rational connection between the purpose to be served and the invasion of the right. Thus a limitation logically connected to its objective could be unreasonable if it undermined a long-established and now entrenched right; imposed a penalty that was arbitrary, unfair or irrational; or, as in this case, used means that were unreasonable.” Referring to the judgement of Chaskalson P in *Makwanyane* where the latter stated *inter alia* that “The fact that different rights have different implications for democracy and, in the case of our Constitution, for ‘an open and democratic society based on freedom and equality’, means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests” Sachs J added at p 655-656: “If I might put a personal gloss on these words, the actual manner in which they were applied in *Makwanyane* (the Capital Punishment case) shows that the two phases are strongly interlinked in several respects: firstly, by overt proportionality with regard to means, secondly, by underlying philosophy relating to values, and, thirdly, by a general contextual sensitivity in respect of the circumstances in which the legal issues present themselves.” Sachs J stated in *Coetsee supra* that “The notion of an open and democratic society is thus not merely aspirational or decorative, it is normative, furnishing the matrix of ideals within which we work, the source from which we derive the principles and rules we apply, and the final measure we use for testing the legitimacy of impugned norms and conduct.”

In *Govender v Minister of Safety and Security* 2000 (1) SA 959 (D) the court noted that Section 49(1) of the Criminal Procedure Act is a law of general application. It said: “Subsection (1) at present deals with the use of force in general and subjects its legality to the reasonableness test of the common law. In terms of the present authoritative interpretation, this reasonableness includes both a form of proportionality as well as a subsidiarity principle. The amount and method of force used must therefore be in proportional balance to the aim that is to be achieved and must be the minimum force that would be reasonably effective and feasible in the circumstances. It furthermore includes the weighing up of the nature and seriousness of the specific crime in question, as committed, against the amount and method of force used. In my view, s 49(1) is both necessary and justifiable in an open and democratic society based upon freedom and equality.”

⁹⁹ *Manamela* 2000 (3) SA 1 (CC)

¹⁰⁰ *Holomisa* fn 86 *supra* at p 617

the plurality pointed out in *Theophanous*' case, 'Reasonableness is a concept with which the law is familiar.'"¹⁰¹

There is a strong link between lawfulness and reasonableness as evidenced by the observation of the appeal court in *National Media Ltd and Others v Bogoshi*¹⁰¹ that:

"In our law the lawfulness of a harmful act or omission is determined by the application of a general criterion of reasonableness based on considerations of fairness, morality, policy and the Court's perception of the legal convictions of the community."

The case involved a claim for defamation. It is of some significance that the court further observed in this case that proof of reasonableness will usually (if not inevitably) be proof of lack of negligence¹⁰². It is also much in evidence in the law of contract especially with regard to covenants in restraint of trade where public policy plays an important role in determining whether or not the covenant should be upheld¹⁰³. Reasonableness is one of the conceptual pillars of the law of delict. In *Vogel v Crewe and Another*¹⁰⁴ the court held that the test of reasonableness should be applied taking into account the general norms acceptable to the particular society and that the test of reasonableness is an objective one and must happen in the light of prevailing circumstances. The link between values and reasonableness is evident *inter alia*¹⁰⁵ from *Botha And Another v Mthiyane And Another*¹⁰⁶ in which Claassen J stated that

¹⁰¹ *Bogoshi* 1998 (4) SA 1196 (SCA)

¹⁰² *Bogoshi* fn 101 *supra* at p 1215

¹⁰³ In *Roffey v Catterall, Edwards & Goudré (Pty) Ltd* 1977 (4) SA 494 (N) the court said that the reasonableness or unreasonableness of the covenant must be assessed with reference to all of the circumstances, and the essential enquiry is an objective one. Leon, *Jin S.A. Wire Co. (Pty.) Ltd. v Durban Wire & Plastics (Pty.) Ltd* 1968 (2) SA 777 (D) said at p. 787G - H: "I am not... by any means certain that the South African cases have been right in adopting the English view relating to onus. If it is correct to say that the doctrine of restraint of trade is applied in our law because of public policy, then it becomes relevant to enquire what that public policy is. What I think is contrary to public policy is a contract in unreasonable restraint of trade. If such view be correct then, applying the ordinary principles of onus relating to pleadings, it would seem that the onus would lie upon the party alleging it to show that the contract in question is in unreasonable restraint of trade." See also *National Chemsearch (SA) (Pty) Ltd v Borrowman And Another* 1979 (3) SA 1092 (A)

¹⁰⁴ *Vogel* 2003 (4) SA 509 (T)

¹⁰⁵ See also *Carmichele v Minister Of Safety And Security And Another* 2003 (2) SA 656 (C) in which Chetty J held as follows at p 671-672: "Reasonableness, on which the legal convictions of the community are based, is now to be found in the Constitution and not in some vague notion of public sentiment or opinion. In *Van Duivenboden v Minister of Safety and Security* [2001] 4 B All SA 127 (C), Davis J adopted this understanding where he stated at 132d: '(I)t would appear that the requirement of wrongfulness demands of the court that it determine whether society requires that the law classify the type of conduct concerned as impermissible, that is conduct of which a society disapproves. See Van Aswegen at 192 and Neethling, Potgieter and Visser *The Law of Delict* (1999) at 39 - 41. In turn the determination of "impermissibility" shaped by a society's vision of itself is contained within its legal system. In terms of the ultimate law in this country, the Constitution, South African society predicated upon foundational values of human dignity, liberty and equality. The newly established constitutional community is to be built upon those "common values and norms" and the added principle that public authority must be transparent and accountable to the public it serves.' Consequently, in the enquiry whether the State owed the public in general, and women in particular, a duty at private law to exercise reasonable care in the prevention of violent crime, the proper application of the test requires one to attach primary significance to these constitutional imperatives. On the application of that test, Klein, Hugo and Louw owed the plaintiff a legal duty to protect her against the risk of sexual violence perpetrated by Coetzee. The negligent failure to do so was, therefore, unlawful."

¹⁰⁶ *Botha* 2002 (1) SA 289 (W)

“In applying the test of reasonableness, the court is exercising a value judgment about whether a defendant in the circumstances of any particular case should be accorded legal protection.” See also *S v Manamela And Another (Director-General of Justice Intervening)*¹⁰⁷ in which the court held that although s 36(1) differs in various respects from s 33 of the interim Constitution, its application continues to involve the weighing up of competing values on a case-by-case basis to reach an assessment founded on proportionality. Each particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom. There can accordingly be no absolute standard for determining reasonableness. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. The proportionality of a limitation must be assessed in the context of its legislative and social setting. Also in *S v Makwanyane and Another*¹⁰⁸ Chaskalson P noted that ‘The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of s 33(1) [of the interim Constitution]. The fact that different rights have different implications for democracy and, in the case of our Constitution, for “an open and democratic society based on freedom and equality”, means that there is no absolute standard which can be laid down for determining reasonableness and necessity.’”

3.6.3 Procedural Fairness

The constitutional court has observed with regard to the right to administrative justice contained in section 33 of the Constitution that it enumerates four aspects of just administrative action and that the theme of fairness must be seen as governing the manner in which the four enumerated sections must be interpreted¹⁰⁹. It is thus a

¹⁰⁷ *S v Manamela* fn 99 *supra* at p 20

¹⁰⁸ *Makwanyane* 1995 (3) SA 391 (CC)

¹⁰⁹ In the minority judgment in *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* 2002 (3) SA 265 (CC). The court commented further at p309-310 that: “The words themselves have no fixed and self-evident meaning. Unless animated by a broad concept of fairness, their interpretation can result in a reversion to what has been criticised as the sterile, symptomatic and artificial classifications which bedevilled much of administrative law until recently. Undue technicality and artificiality should be kept out of interpretation as far as possible; the quality of fairness, like the quality of justice, should not be strained. There are at least three respects in which the concept of fairness should be seen as animating s 33. The first is to provide the link between the four enumerated aspects so that they are not viewed as separate elements to be dealt with mechanically and sequentially, but, rather, as part of a coherent, principled and interconnected scheme of administrative justice. Secondly, the interpretation of each of the individual subsections within the framework of the composite whole must be informed by the need to ensure basic fairness in

pervading principle of administrative justice rather than a single aspect of it. Conradie JA notes in *Modise and Others v Steve's Spar, Blackheath*¹¹⁰ that procedural fairness is a dominant theme in both administrative and labour law. Fairness is also relevant in the law of contract¹¹¹. Unconscionable contracts or contractual terms are fundamentally unfair¹¹². Although South African law has not yet progressed to the point where consumers are guaranteed protection from unfair or unconscionable terms as is the case in other jurisdictions such as the United States of America, Sweden, Germany, Israel, the Netherlands, Denmark and England¹¹³, South African courts will not uphold unconscionable terms or support unconscionable behaviour relating to a contract on the grounds that this would be *contra bonos mores*¹¹⁴.

110 dealings between the administration and members of the public. Thirdly, the appropriate remedy for infringement of the rights must itself be based on notions of fairness.”
Modise 2001 (2) SA 406 (LAC) at p450

111 In *Standard Bank of SA Ltd v Essop* 1997 (4) SA 569 (D) Meskin J stated: “ In my opinion, the applicant's conduct in having purported to stipulate for these rights was, and remains, unconscionable. It has purported to empower itself, in the event of any relevant default by the respondent, to deprive him of his status as a solvent person, and inevitably to subject him to all the onerous obligations and extensive restrictions which bind an insolvent in terms of the Act, without any notice to him and without his being able in any event to defend himself. This conduct offends my, and in my opinion it would offend any reasonable person's, sense of what is procedurally fair and it offends my, and in my opinion would offend any reasonable person's, sense of justice.
 In *Janse Van Rensburg v Grieve Trust* CC 2000 (1) SA 315 (C) the court stated that “[I]n applying principles of logic and fairness in the *Wastie* decision *supra* [*Wastie v Security Motors (Pty) Ltd* 1972 (2) SA 129 (C)], Van Zijl J was, in my respectful view, doing just what the said Appellate Division decisions have been advocating over a long period of time. His concept of logic should, I believe, be understood to mean the reasonableness required by public policy to achieve justice and fairness between contracting parties. Together with the fundamental principle of good faith underlying the contractual relationship between such parties, public policy indeed requires a fine balance to be established between the relative rights, duties and interests of the parties, as held by Van Zijl J in his aforesaid judgment.

112 In *First National Bank of Southern Africa Ltd v Bophuthatswana Consumer Affairs Council* 1995 (2) SA 853 (BG) the court observed that: “The word ‘unconscionable’ has been judicially defined in the category of ‘unconscionable bargain’. ‘A bargain so one-sided and inequitable in its terms as to raise a presumption of fraud and oppression.’ See *Mozley and Whiteley's Law Dictionary* 10th ed by Hardy Ivamy E R. In England the subject of unconscionable bargains is dealt with in *Halsbury's Laws of England* 4th ed vol 18 para 344 at 157, and I quote: ‘Jurisdiction to grant relief: As part of the jurisdiction to grant relief against constructive fraud, Courts of equity have acted to protect persons in cases in which it was apparent, from the intrinsic nature and subject of the bargain itself, that it was one which no man in his senses and not under delusion would make on the one hand, and no honest and fair man would accept on the other; in fact, an inequitable and unconscionable bargain.’ It also noted that “The ordinary grammatical meaning of ‘unconscionable’ is ‘Having no conscience, unscrupulous, monstrously extortionate, harsh’, etc. See *The Shorter Oxford Dictionary* (*supra* vol II at 2405).”

113 See Discussion Paper of the South African Law Commission entitled ‘Unreasonable Stipulations in Contracts and the Rectification of Contracts’ (Project 47)

114 In *Mackay v Legal Aid Board* 2003 (1) SA 271 (SE) the court said: “But taxation does not override an enforceable contract between the parties, unless the agreed fee is so unreasonable as to be unconscionable and hence *contra bonos mores* (in which event the contract is not enforceable).” The Supreme Court of Appeal in *Eerste Nasionale Bank Van Suidelike Afrika Bpk v Saayman No* 1997 (4) SA 302 (SCA) noted that: “Die tendens word voortgesit in 1925 in *Weinerlein v Goch Buildings Ltd* 1925 AD 282 waar rektifikasie van ‘n kontrak op die bona fide-beginsel gebaseer word. Wessels AR verklaar op 292: The commentators put it thus: “As a general proposition your claim may be supported by a strict interpretation of the law, but it cannot be supported in this particular case against your particular adversary, because to do so would be inequitable and unjust, for it would allow you, under the cloak of the law, to put forward a fraudulent claim . . . It is therefore clear that under the civil law the Courts refused to allow a person to make an unconscionable claim even though his claim might be supported by a strict reading of the law. This inherent equitable jurisdiction of the Roman Courts (and of our Courts) to refuse to allow a particular plaintiff to enforce an unconscionable claim against a particular defendant where under the special circumstances it would be inequitable, dates back to remote antiquity and is embodied in the maxim ‘summum jus ab aequitate dissidens jus non est’.”
 Davis J in an *obiter dictum* in *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464 (C) op 474J-475F declared: “Like the concept of *boni mores* in our law of delict, the concept of good faith is shaped by the legal convictions of the community. While Roman-Dutch law may well supply the conceptual apparatus for our law, the content with which concepts are filled depends on an examination of the legal conviction of the community - a far more difficult task. This task requires that careful account be taken of the existence of our constitutional community, based as it is upon principles of freedom, equality and dignity. The principle of freedom does, to an extent, support the view that the contractual autonomy of the parties should be respected and that failure to recognise such autonomy could cause

The principles of procedural fairness are equally applicable to decisions of organs of state and other functionaries. In *Mafongosi and Others v United Democratic Movement and Others*¹¹⁵ the court stated that there were no separate principles applicable to the exercise of power by functionaries other than organs of State where the rights entrenched in s 33 of the Constitution were involved. It held that the reasonableness required for administrative actions taken by such functionaries was the same as the reasonableness required for decisions by organs of state and that there was a single set of standards for administrative justice. It also held that the requirement for procedural fairness was directed at the manner in which the administrative decision was concluded. This requirement, said the court, placed a duty upon the person taking the administrative decision to act fairly. The principles of natural justice formed the core content of procedural fairness¹¹⁶. The court found that what was required by procedural fairness differed from one case to the other and that it was the circumstances of the particular case which gave an indication of the procedural steps required for a proper decision¹¹⁷.

contractual litigation to mushroom and the expectations of contractual parties to be frustrated. See Glover G B [“Good faith and procedural unfairness in contract”] (1998) 61 *THRHR* 328 at p 334. But the principles of equality and dignity direct attention in another direction. Parties to a contract must adhere to a minimum threshold of mutual respect in which the “unreasonable and one-sided promotion of one’s own interest at the expense of the other infringes the principle of good faith to such a degree as to outweigh the public interest in the sanctity of contracts” Zimmermann (*supra* at 259 - 60). The task is not to disguise equity or principle but to develop contractual principles in the image of the Constitution. For an instructive insight into this approach, see van der Merwe D [“The Roman-Dutch law: from virtual reality to constitutional resource”] 1998 *TSAR* 1. In short, the constitutional state which was introduced in 1994 mandates that all law should be congruent with the fundamental values of the Constitution. Oppressive, unreasonable or unconscionable contracts can fall foul of the values of the Constitution. In accordance with its constitutional mandate the courts of our constitutional community can employ the concept of *boni mores* to infuse our law of contract with this concept of *bona fides*. See in this regard *Janse van Rensburg v Grieve Trust* CC 2000 (1) SA 315 (C) at 325 - 6.” Quoted with approval in *Brisley v Drotzky* 2002 (4) SA 1 (SCA). The court in this case also notes that: “Ook Hutchison lewer ’n sterk pleidooi dat die *bona fides*, geskraag deur die Grondwet, groter erkenning in ons kontraktereg verdien. In ’n hoofstuk getiteld ‘Good faith in the South African Law of Contract’ in Roger Brownsword, Norma J Hird and Geraint Howells *Good Faith in Contract: Concept and Context* (1999) 213 op 230 - 1 skryf hy: ‘What emerges quite clearly from recent academic writings, and from some of the leading cases, is that good faith may be regarded as an ethical value or controlling principle, based on community standards of decency and fairness, that underlies and informs the substantive law of contract. It finds expression in various technical rules and doctrines, defines their form, content and field of application and provides them with a moral and theoretical foundation. Good faith thus has a creative, a controlling and a legitimating or explanatory function. It is not, however, the only value or principle that underlies the law of contract nor perhaps, even the most important one. In the words of Lubbe and Murray: “It does not dominate contract law but operates in conjunction (and competition) with notions of individual autonomy and responsibility, the protection of reasonable reliance in commerce, and views of economic efficiency in determining the contours of contract doctrine. However, it will ensure just results only if Judges are alert to their task of testing existing doctrines and the operation of particular transactions against the constantly changing mix of values and policies of which *bona fides* is an expression.” On this view of things, which seems to be correct, the influence of good faith in the law of contract is merely of an indirect nature, in that the concept is usually if not always mediated by some other, more technical doctrinal device. Thus, for example, while good faith does not empower a court directly to supplement the terms of a contract, or to limit their operation, it might in appropriate cases enable the court to achieve these same results indirectly, through the use of devices such as implied terms and the public policy rule.”

115

Mafongosi fn 94 *supra*

116

Mafongosi fn 94 *supra* paragraph [17] at 576A/B - B/C

117

Mafongosi fn 94 *supra* paragraph [18] at 576G.

In *Du Preez and Another v Truth and Reconciliation Commission*¹¹⁸ the court observed that it was vital to consider the context of the inquiry and the fact that it is not a civil or criminal trial, or inquest, or other judicial proceeding, but a statutory inquiry. The claim to procedural fairness had to be considered in that context. It noted that in *Administrator, Transvaal v Traub*¹¹⁹, Corbett CJ - following *Ridge v Baldwin*¹²⁰ and subsequent decisions - held that the duty to act fairly 'is simply another, and preferable, way of saying that the decision-maker must observe the principles of natural justice'.

The requirement of procedural fairness does not imply the need in every case for interested parties to be heard before a decision is taken. In *Permanent Secretary, Department of Education and Welfare, Eastern Cape, and Another v Ed-U-College (PE) (Section 21) Inc*¹²¹ the court noted as to the nature of the requirements of procedural fairness and reasonableness that would arise in relation to the exercise of the particular power concerned, that a right of hearing would not accrue to all affected persons simply because a decision reducing the annual subsidy was to be taken. It said that schools and parents could not assume, in the absence of any undertaking by the Department of Education, that subsidies would always continue to be paid at the rate previously established or that they should be afforded a hearing should subsidies have to be reduced because the legislature had reduced the amount allocated for distribution.

With regard to the *audi alteram partem* rule, an element of procedural fairness, the court of appeal in *Nortje en 'n Ander v Minister van Korrektiewe Dienste en Andere*¹²² observed that despite the changing constitutional dispensation brought about by the Constitution, the principles of the common law still afford guidance as to what will be procedurally fair in a specific case. It said that according to the common-law principles in this regard the *audi alteram partem* rule is applicable where an administrative decision can prejudice a person to such extent that, in accordance with that person's legitimate expectation, the decision ought not to be taken unless he is

118 *Du Preez* 1997 (3) SA 204 (A)

119 *Traub* fn 11 *supra*

120 *Ridge* [1964] AC 40

121 *Ed-U College* 2001 (2) SA 1 (CC)

122 *Nortje* 2001 (3) SA 472 (SCA)

heard¹²³. The court held that there is no universally applicable set of requirements for compliance with the *audi alteram partem* rule and that because of the innumerable situations in which it may be applied, the rule is so flexible and adaptable that the requirements for compliance therewith cannot be separated from the context in which it is applied. The touchstone to be utilised in determining whether the rule was complied with in a specific case is intimately connected with the fundamental principle of the rule. The court found that the *audi alteram partem* principle is but one facet, albeit an important one, of the general requirement of natural justice that in the circumstances the public official or body concerned must act fairly. It noted that the duty to act fairly is concerned only with the manner in which the decisions are taken and does not relate to whether the decision itself is fair or not.

Accordingly, said the court, the question to be asked in every case in which the *audi alteram partem* rule is applicable is whether the person who is adversely affected by the decision had a just and fair opportunity to state his or her case. A closer definition of the requirements is neither feasible nor desirable, for the very reason that it would restrict the flexible application of the rule. It held that as a starting point for determining what constitutes a fair opportunity of being heard, the following guideline may be observed: Fairness will often require that a person who may be adversely affected by a decision should have an opportunity of making representations on his own behalf either before the decision is taken, with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests, fairness will often require that he is informed of the main points of the case which he has to answer.

The court said that depending on the circumstances, the *audi alteram partem* rule can also be complied with by allowing the affected person an opportunity of being heard after the decision has already been taken. It cautioned, however, that this should be the exception rather than the rule because a person who is heard only after a decision has been made is in a considerably weaker position than one who is given a hearing

¹²³ *Nortje* fn 122 *supra*, paragraph [14] at 479C - F

before the decision is taken. Therefore, as a rule, a hearing after the decision will suffice only if an earlier hearing was not possible.¹²⁴

Retroactive administrative decisions are particularly problematic because they tend to be subversive of the requirement of procedural fairness. In *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal*¹²⁵ the constitutional court held that though the courts should not as a rule impose obligations upon government that would inhibit its ability to make and implement policy effectively, the principle of procedural fairness was flouted where retroactive decisions were implemented without affording parties an effective opportunity to make representations.

3.7 Public Power and Judicial Review

Section 239 of the Constitution defines ‘organ of state’ as-

- (a) any department of state or administration in the national, provincial or local sphere of government; or
- (b) any other functionary or institution-
 - (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation.’

The term ‘public power’ is central to the concept of administrative law as indicated by the definition of “administrative action” in the PAJA. Administrative law involves the control of the exercise of public power. The nature of public power is not always easy to define. However it is clear that the exercise of public power is subject to judicial review.

In *Korf*¹²⁶ the court provided the following useful summary of jurisprudence concerning organs of state:

¹²⁴ *Nortje* fn 122 *supra*, paragraph [19] at 480G - I.

¹²⁵ *Executive Committee, Association of State-Aided Schools* 1999 (2) SA 91 (CC)

¹²⁶ *Korf v Health Professions Council of South Africa* 2000 (1) SA 1171 (T)

“It must further be noted that the ‘statutory body or functionary’ which previously could have been a component of an organ of State has now been given a much more precise content. In *Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting and Others* 1996 (3) SA 800 (T) it was pointed out that an organ of state is not an agent of the State, it is part of government (at any of its levels). Section 233(1) of the interim Constitution included in the term ‘organ of state’ a statutory body or functionary. In that case I applied a narrower definition of the concept organ of state than that applied in *Baloro and Others v University of Bophuthatswana and Others* 1995 (4) SA 197 (B). The test laid down was whether the State had control. This approach was followed in *Mistry v Interim National Medical and Dental Council of South Africa and Others* 1997 (7) BCLR 933 (D) at 947B - 948C and *Wittmann v Deutscher Schulverein, Pretoria and Others* 1998 (4) SA 423 (T) at 454B in respect of the interim Constitution. *Directory Advertising Costs Cutters (supra)* was also followed in respect of the new Constitution in *ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd* 1998 (2) SA 109 (W) at 113A - G and *Goodman Brothers (Pty) Ltd v Transnet Ltd* 1998 (4) SA 989 (W). In all these cases therefore the test applied in order to determine whether a body or functionary is an organ of state is whether that body or functionary is directly or indirectly controlled by the state.”

The court then considered whether the control test still applied to the meaning of the phrase “organ of state”. It also considered whether the difference in wording between the interim Constitution and the final Constitution constituted a material difference and came to the conclusion that it did not. It asked whether the description set out in subparagraph (b) had extended the meaning of organ of state. Subparagraph (i) limits it to a power or function in terms of the national and provincial constitutions and decided that “this does not bring about a difference”, noting that subsection (ii) limits it to a public power or public function in terms of any legislation but that it does not bring about a difference insofar as the reference to public power is concerned. It observed that the remaining question then is whether the reference to a public function in terms of legislation takes the concept ‘organ of state’ out of the control test and that the answer to this question depended on the meaning given to the words ‘public function’. The court came to the conclusion that the control test still applied to the definition of ‘organ of state’ even under the final Constitution, noting that the more precise definition of ‘organ of state’ in section 239 of the final Constitution was not intended to differ materially from the definition in the 1993 Constitution.

With regard to the definition of “public function”, the court observed¹²⁷ that:

“The three pillars of the state, legislative, executive and judicial, are referred to in s 239. The latter is expressly excluded. The executive arm is expressly mentioned in subpara (a) and the legislative one falls under subpara (b)(i) which can also encompass, for example, the auditor-general, public protector, etc. They are all part of the machinery of state. So is a functionary

¹²⁷

Korff fn 126 *supra* at p1177

(or institution) exercising a public power. There is no reason to give the word ‘public’ when used in conjunction with ‘function’ in para (b)(ii) a meaning that would take it outside the context of ‘engaged in the affairs or service of the public’ and give it the meaning of ‘open to or shared by all the people’. (Both these meanings are given in *The Concise Oxford Dictionary* for the word ‘public’.)”

The court in *Korf* decided on this basis that the Health Professions Council of South Africa was not an organ of state since the state did not control its activities¹²⁸.

In *Pennington v Friedgood and Others*¹²⁹ the court noted that judicial review under the Constitution and under the common law are not different concepts. Prior to the new constitutional dispensation the control of public power by the Courts by judicial review was exercised through the application of common-law constitutional principles. Under the new constitutional dispensation such control is regulated by the Constitution. 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 the judicial review of public power, the two are intertwined and do not constitute separate concepts. It is clear that whether such conduct

¹²⁸ See by way of contrast, however, *Association of Chartered Certified Accountants v Chairman, Public Accountants' and Auditors' Board* 2001 (2) SA 980 (W) in which the court held that the Public Accountants and Auditors Board which fulfils much the same role with regard to public accountants and auditors as does the Health Professions Council fulfils with regard to medical practitioners, dentists, psychologists and other health professionals, is an organ of state. The court then went on to consider whether the decision of the Board within the ambit of section 33 of the Constitution, constituting administrative action and came to the conclusion that it did and that it was therefore reviewable under the administrative justice provision in s 33 of the Constitution. In its judgment the court noted that: “The respondent argues that constitutional review is limited in its application to the review of legislative administrative acts or the exercise of legislative functions by public bodies” and then quoted from its heads of argument as follows: “It is vital to differentiate between two concepts - constitutional review and judicial review of administrative action. Judicial review of administrative action is a control mechanism applied by the High Court in the individual or concretised relationship between the State and the individual - the sphere of administrative law. For this purpose the validity of the enabling legislation is assumed. Constitutional review is similarly based on the need to limit and control governmental power, but challenges primarily legislation - it concerns constitutional law. Administrative review is exercised by the High Court on the basis of its inherent jurisdiction. In the sphere of public law it relates to irregularity or illegality in the performance of a statutory power or duty. Administrative review based upon formal legality puts limitations on the Executive, but does not restrain the Legislature... It is the introduction of constitutional review of legislation which in essence distinguished the new legal dispensation from the old legal order. . . It is submitted that the purpose of item 23 is to create criteria to be complied with by the Legislature and further to enrich the general body of legislation and the common law in terms of s39 of the Constitution. . . . Only if the legislative authority enabling the administrative action is challenged, would it be a matter for constitutional review...” The court went on to comment that the respondent’s argument was contrary to the present case law, noting that the law relating to judicial review had undergone a fundamental change by reason of the introduction of the Constitution. It said that the ambit of constitutional review is now significantly broader than the narrow confines referred to in the case of *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A). It decided that the Board clearly exercised a public power, that it was a creation of statute and the source of its power was to be found in the Public Accountants’ and Auditors’ Act 80 of 1991. The court found that the Board also appeared to fulfil a public function in terms of the said legislation in that it is a regulatory body entrusted with the task of ensuring that proper standards are maintained in the accounting and auditing profession. As such, the Board functions in close co-operation with structures of state authority, its members are appointed by the Minister and include persons selected among the persons holding office as state functionaries, it is also dependent upon the State for infrastructural support. The court did note that there was a dispute on the authorities as to whether these criteria are sufficient to characterise the Board as an institution which performs a ‘public function’, referring in this regard to *Baloro and Others v University of Bophuthatswana and Others* 1995 (4) SA 197 (B) and *Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting and Others* 1996 (3) SA 800 (T). It said, however, that as the Board is an institution which exercises public power, it was unnecessary to decide whether it was an organ of state on the basis that it also performs a public function. The court does not seem to have referred to *Korf* at all.

¹²⁹ *Pennington* 2002 (1) SA 251 (C)

constitutes administrative action falls to be decided by reference to whether the action amounts to the exercise of public power or the performance of a public function¹³⁰. Whether that is so must be determined by reference, *inter alia*, to the source of the power exercised, the nature of such power, its subject-matter, whether it involves the exercise of a public duty and how closely it is related, on the one hand, to policy matters, which are not administrative, and, on the other, to the implementation of legislation, which is.

In *Metro Inspection Services (Western Cape) CC and Others v Cape Metropolitan Council*¹³¹ the court held that that where the act of the state or organ of state complained of (*in casu* the termination of the agreement) was derived from a public power, it amounted to an administrative act. It found that the respondent had appointed the first applicant to fulfil certain of the respondent's functions and duties in terms of the Act. Consequently the terms of the agreement were inextricably bound up with the statute. The decision to terminate the agreement was of the same nature as that which conferred on the respondent the right to contract with the first applicant. The respondent, and decision-maker in regard to the decision to terminate the agreement, was a public authority and, since its authority to appoint the first applicant derived from a public power, it followed that its authority to terminate the agreement with the first applicant similarly derived from a public power. The court held that the principles of administrative law applied to the decision by the respondent to terminate its agreement with the first applicant and that the agreement was thus an administrative agreement in law and the first applicant was entitled to procedural fairness with all that that entailed. The fact that the first applicant had not been given any notice of the case against it or of the decision-making process and had not been afforded any opportunity to be heard was clearly a fatal irregularity and invalidated the administrative act taken by the respondent.

It is thus of particular significance to the relationship between public providers and the patient in the health care context is the fact that apparently where the contract is

¹³⁰ See also *Cronje v United Cricket Board Of South Africa* 2001 (4) SA 1361 (T) in which the court observed with regard to the definition of administrative action in the PAJA that: "As I read this provision, read with the other provisions of the Act, a natural or juristic person will take administrative action only when exercising a public power or performing a public function in terms of an empowering provision. One may assume that this Act did not diminish the ambit of administrative action as it existed prior to its promulgation."

¹³¹ *Metro Inspection Services* 1999 (4) SA 1184 (C)

formulated in the exercise of a public power, it can never be governed solely by the private law of contract. In such circumstances administrative law will always have a bearing on the contract in question. The court said in *Toerien en 'n Ander v De Villiers No en 'n Ander*¹³², that it seemed clear that the administrative law principles of natural justice, including the *audi alteram partem* rule, should in South African law be applied in the termination of contracts of employment where the employer is a public authority whose decision to terminate the contract of employment amounts to the exercise of public power. Where these powers are conferred on the public authority by statute, and a decision is taken which affects the liberty, property or existing rights of another, then the *audi alteram partem* rule applies, unless the statute excludes it. A contract of employment which is partly governed by statute cannot therefore be regarded as merely civil. Similarly in *Van Der Merwe v Smith NO en 'n Ander*¹³³ the court held that the rules of natural justice were indeed applicable. The University was a creature of statute and the 'Service Conditions and Rules' were compiled in terms of s 13 of the Act. A contract of employment partly governed by a statute could not be treated as a contract governed merely by private law. Decisions of the employer in terms of such a contract of employment amounted to the exercise of public power and were necessarily subject to the principles of natural justice and subject to review by the Court. The decisions in these cases are apparently in keeping with the definition of administrative action in the PAJA. Sometimes it is as instructive to look at what is not there as it is to look at what is. In the case of the definition in the PAJA, the exclusions from what constitutes administrative action do not embrace section 82(2)(2) of the Constitution which reflects the power of the President to make any appointments that the Constitution or legislation requires the President to make other than as head of the national executive

3.8 Value of Administrative Law in Health Service Decisions

In a previous chapter it was observed that administrative law can be of considerable benefit to the state in taking decisions involving the delivery of health care services. This is because it is a valuable guide to procedural fairness in many situations

¹³² *Toerien* 1995 (2) SA 879 (C)

¹³³ *Van Der Merwe* 1999 (1) SA 926 (C)

requiring a decision to be taken¹³⁴. It is interesting that Baxter observes that the common law imposes much the same obligations as are imposed upon the state by administrative law upon private bodies who exercise power over individuals¹³⁵. This idea will be explored in more detail at a later stage when examining the law relating to private bodies. This point to note at present is that Baxter's observation is even more apposite within the context of the new constitutional order due to the fact that the

134 Hoexter C 'The Future of Judicial Review in Administrative Law' *SALJ* v117 2000 484 notes at p 485 "Administrative law on the other hand is a much bigger concept that encompasses various non-judicial safeguards against the abuse of administrative discretion, and is as much concerned with ways of generating good primary decisions as it is with detecting the abuse of power." She complains that in the South African context, the terms 'administrative law' and 'judicial review' have often been synonymous and that administrative law for many South Africans is and always has been about the judicial diagnosis of maladministration, about subjecting the actions of governmental bodies to judicial scrutiny and constraint. She observes that the reason is doubtless that South African law has never had much to offer except judicial review and that South Africans have never experienced an integrated system of administrative law in which judicial review is regarded as merely supplementary to the business of making good primary decisions and in which other forms of control and reconsideration – such as administrative adjudication – are taken seriously.

135 Baxter, *Administrative Law* p101: "Even if it is decided that an institution is private and not public the result might not be substantially different. As a general principle, any private institution which exercises powers over individuals is obliged to observe common law requirements which do not differ in principle from those applied to public bodies. Thus the courts have always been prepared to review the decisions of private or 'domestic' bodies such as the disciplinary tribunal of churches, trade unions or clubs and even the decisions of arbitrators. Although the basis upon which the powers of these bodies rest is contractual and not statutory, such bodies are often in a position to act just as coercively as public authorities and their decisions frequently have far reaching effects. Many of the principles of administrative law are designed to protect individuals from abuse of power. For this reason they are applied in almost identical form to private bodies and administrative law has itself drawn much from decisions involving 'domestic tribunals'. Cases involving the exercise of power by both public and private institutions are often cited interchangeably by the courts." In *Transnet Ltd v Goodman Brothers (Pty) Ltd* (fn 35 *supra*), the court held that the fact that Transnet, a state owned company, had recently been privatised and that it was no longer part of the state did not mean that it was not capable of administrative acts and that in providing a general service to the public it was performing a public function and exercising public powers. The state had ultimate control of the company and it was therefore subject to the law requiring lawful administrative action with regard to tender processes. See, however, *Cronje v United Cricket Board of South Africa* 2001 (4) SA 1361 (T) where Kirk-Cohen J observed at p 1374-1375 that: The rules of natural justice are, in the first place, rules of public law. They are part of the rules of administrative law that regulate the exercise of public power. That was so at common law and, in my view, remains so under the Constitution. Compare *Rose-Innes Judicial Review of Administrative Tribunals in SA* (1963) at 1, 89, 90, *Bushbuck Ridge Border Committee v Government of the Northern Province* 1999 (2) BCLR 193 (T) at 199F and *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* (fn 72 *supra*) in paras [33], [37] - [40] and [45]. The *audi alteram partem* rule ordinarily applies only to public bodies in the exercise of their public powers. Thus in *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A) at 10G - I the Appellate Division stated: "(A) rule of natural justice . . . comes into play whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in his liberty or property or existing rights, or whenever such an individual has a legitimate expectation entitling him to a hearing, unless the statute expressly or by implication indicates to the contrary. . ."

and : "In exceptional cases private bodies are vested with public powers by statute. They are then subject to the rules of public law in the exercise of those powers. Those rules may expressly or by necessary implication prescribe the manner in which their powers must be exercised. If the repository of the power does not exercise them in the prescribed way, its conduct is subject to judicial review under public law. But these consequences flow, not from the nature of the body or the impact of its conduct, but from the underlying statute. In *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange and Others* 1983 (3) SA 344 (W) at p 363 et seq, Goldstone J held that certain conduct of the Johannesburg Stock Exchange was subject to judicial review under public law, despite the fact that it was a private body. The learned Judge made it clear that this was so only because its empowering statute required the Johannesburg Stock Exchange to exercise its power in the public interest" and at p 1376, "The rules of natural justice are thus in the first place rules of public law, but they do sometimes apply in the sphere of private law, but then only when they are incorporated by contract. Contracts between private individuals and bodies are ordinarily not governed by the rules of natural justice but they may be incorporated expressly or by necessary implication, depending upon the terms of the contract. Such a right may even be granted to an outsider if a private body by contract extends such a right to an outsider. See, for example, *Marlin v Durban Turf Club and Others* 1942 AD 112 at 126 - 7, *Anschutz v Jockey Club of South Africa* 1955 (1) SA 77 (W) at p 80, *Jockey Club of SA v Transvaal Racing Club* 1959 (1) SA 441 (A) at p 450, *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) at p 645 - 6, *Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere* 1976 (2) SA 1 (A) at p 21D, *Carr v Jockey Club of South Africa* 1976 (2) SA 717 (W) at p 721 - 2, *Government of the Self-Governing Territory of KwaZulu v Mahlangu and Another* 1994 (1) SA 626 (T) at p 634 - 5 and *Lamprecht and Another v McNeillie* 1994 (3) SA 665 (A) at p 668. It is only where the constitution of a voluntary association incorporates the rules of natural justice that they then apply between the association and its members or those with whom it has privity of contract. The rules do not apply to a non-member who is not a party to the contract. See the cases of *Anschutz, Ricardo, Carr and Mahlangu* (at 634D - 635D) *supra*."

underlying values of administrative law, as informed by the Constitution, must of necessity be the same underlying values underpinning the various areas of law that affect the provider-patient relationship in the private sector. One would expect to find few fundamental differences between the legal rules governing the transactions between public and private sector if the underlying values are the same¹³⁶. In the time at which Baxter wrote, prior to the 1996 Constitution, these underlying values would have been reflected, possibly to a lesser degree, in public policy - hence the similarities in the law relating to private bodies and the administrative law governing public bodies. Under the present dispensation, the PAJA expressly throws the net wider than just public bodies to include in its ambit those private bodies exercising a public function. Underpinning even all of this, however, are the fundamental principles set out in the Constitution generally and the Bill of Rights in particular.

It is clearly necessary to consider health care delivery decisions in the light of administrative law both because of its Constitutional importance and because there are certain well established rules in terms of which administrative power must be exercised. Such an examination is of assistance in understanding the provider-patient relationship where the provider is the state because administrative law is very much the law of public administration and public health services are one of the many types of services that fall within the purview of public administration.¹³⁷ Administrative law is notoriously difficult to define. Baxter¹³⁸ writing in 1984 states that the basic format and principles of administrative law have been centuries in the making, yet its recognition as a distinct branch of law is a comparatively recent development. He

¹³⁶ Arguments about the horizontal application of the Constitution, especially the Bill of Rights, do have a bearing on this issue and will be canvassed at a later stage when looking at the provider-patient relationship in the private sector. However it is trite that the values of equality and human dignity, non-racialism and non-sexism upon which the South African Constitution is based are equally applicable within the public and private sectors.

¹³⁷ Stewart C "Tragic Choices and the Role of Administrative Law" *British Medical Journal* 2000 321 p 105-107 notes that: "The United Kingdom... is the only country in the Commonwealth where administrative law is having a major impact on medical decision making. The basic principles of administrative law are, however, shared by all common law jurisdictions and other countries (particularly Australia and New Zealand) are now seeing similar claims arise [in administrative law]. There is a pressing need for medical decision makers to familiarise themselves with the basic principles of administrative law." He comments further that "administrative law is having an increasingly important impact on medical decision making. There are two reasons for this: firstly the process of medical decision making is now indistinguishable from other types of bureaucratic administration. Treatments are dispensed according to clinical guidelines and policies. Decisionmaking is horizontally organised, from macrodecisions made by government departments through to misallocation by health authorities and ending with bedside decision making made collectively by groups of doctors. Secondly the question of whether particular patients should be treated is no longer solely about clinical factors specific to individual patients. The scarcity of resources means that treatment decisions concern questions of allocative efficiency, which include characteristics more properly described as "social". For example medical decision makers might take into account the sexual preference of a patient to determine whether infertility treatment should be provided. In such cases administrative law is able to examine the considerations of the decision maker to see if they have strayed into unlawful areas. Both factors mean that any disputes about treatment decisions are perfectly suited to administrative law and its focus on the legality of the decision making process."

¹³⁸ Baxter, fn 3 *supra* at p45

notes that throughout the world, and especially in Anglo-Saxon countries, the disciplined study of the subject began late and, until recently, progressed slowly. Disagreement as to its definition and proper areas of concern still remain. He comments that a factor retarding the development of administrative law as a significant discipline has been the lack of agreement as to what 'administrative law' is¹³⁹. This dilemma is nowadays possibly easier to resolve in some respects given the existence of the PAJA and the various definitions contained therein¹⁴⁰. The PAJA cannot, however, amend the Constitution. To the extent that the provisions of the Constitution relating to administrative justice are not contemplated or covered by the PAJA recourse must still be had to the Constitution directly. The right to just administrative action is only one aspect of the Constitution which involves administrative law. The right to equality before the law expressed in section nine of the Constitution is an example of another legal principles which is generally regarded as highly relevant to administrative law as is the right of access to information expressed in terms of section 32 of the Constitution.

3.9 Administrative Law Theories

There are a number of administrative law theories that have tended to be ranged along the spectrum of permutations possible on a traffic light. Thus the "red-light" approach to administrative law¹⁴¹ advocates a strong role for the courts to review administrative decisions and holds that the function of this branch of law is to control the excesses of the state. It has been said of this theory of administrative law:

"Behind the formalist tradition, we can often discern a preference for a minimalist state. It is not surprising, therefore, to find that many authors believing that the primary function of administrative law should be to control any excess of state power and subject it to legal and

¹³⁹ Baxter, fn 3 *supra* at p 49

¹⁴⁰ In *Schoonbee and Others v MEC for Education, Mpumalanga and Another* 2002 (4) SA 877 (T) the court observed at p 882 that: "The Act contains in great part what one may regard as partial codification of administrative law with specific reference to administrative actions." Hoexter, (fn 134 *supra*) however, is critical of the PAJA for its focus and emphasis, both directly and indirectly, on judicial review at the expense of other aspects of administrative law. She is of the view that the PAJA could have been used as an opportunity to develop a much more rounded and comprehensive body of administrative law in South Africa which, as a result of its history, has had an unfortunate tendency to regard judicial review as the central concept of administrative law.

¹⁴¹ Devenish, *et al* (fn 15 *supra*) p13 note that the extant protagonists of the 'red-light' theory are of the opinion that administrative power should be restricted to a limited range of social functions involving law and order, internal security and external defence. All the other activities that a community requires should be left to private initiative and the intrinsic forces of the market. The role, they observe, of administrative law is to provide effective legal controls over the exercise of state power and to confine it to its proper jurisdiction.

more especially judicial, control. It is this concept of administrative law that we have called 'red light theory'.¹⁴²

By contrast, the "green light" approach¹⁴³ holds that the function of administrative law is to facilitate the operations of the state and is based on the rationale that bureaucrats will function most efficiently on the absence of intervention. In this regard it has been observed that:

"Because they see their own function as the resolution of disputes and because they see the administrative function from the outside, lawyers traditionally emphasise external control through adjudication. To the lawyer, law is the policeman; it operates as an external control, often retrospectively. But a main concern of green light writers is to minimalise the influence of the courts. Courts with their legalistic values were seen as obstacles to progress, and the control which they exercise as unrepresentative and undemocratic. To emphasise this crucial point in green light theory, decision-making by an elite judiciary imbued with a legalistic, rights-based ideology and eccentric vision of the 'public interest'...was never a plausible counter to authoritarianism."¹⁴⁴

The "amber-light" theory as its name suggests lies between the red-light and green-light theories. Protagonists of this approach, while they favour the extensive use of state power for socio-economic purposes are not prepared to permit political institutions alone to control and monitor the exercise of such power. They maintain that a system of effective administrative law must be used to complement the political and parliamentary control of state power and to ensure accountability and transparency.

Whilst this somewhat linear spectrum of administrative law theory is likely in almost every instance to be an oversimplification, it would seem that the South African constitutional court¹⁴⁵ and indeed the Constitution itself could generally be said to

¹⁴² Harlow C and Rawlings R *Law and Administration* as quoted by Parish K "Administrative Law Theories" http://www.ntu.edu.au/faculties/lba/schools/Law/apl/Homepage/administrative_law_theories

¹⁴³ Devenish *et al* fn 15 *supra* note that the 'green-light' theory is a far more positive and ambitious approach to state power and that protagonists of this theory regard state power as a means of giving effect to beneficial social policies. Quoting from Leyland P, Woods T and Harden J *Administrative Law* p 6 they observe that this theory introduces a political and socio-economic context into the law 'which in essence derives from the utilitarian tradition (usually associated with Bentham and Mill; and the Fabian Society founded in 1884, particularly with the ideas of Sidney Webb), the moral imperative being to promote the greatest good for the greatest number, in this case by means of ameliorative social reform.' They comment that this theory favours accountability and greater democratic and public control over the exercise of power, rather than placing faith exclusively in law as a mechanism of control and accountability.

¹⁴⁴ Harlow and Rawlings fn 142 *supra*

¹⁴⁵ Thus the constitutional court in *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996, 1996 (4) SA 744 (CC) held that the fundamental structures and premises of a new constitutional text contemplated by the CPs were the following: (a) a constitutional democracy based on the supremacy of the Constitution protected by an independent judiciary; (b) a democratic system of government founded on openness, accountability and equality, with universal adult suffrage and regular elections; (c) a separation of powers between the Legislature, Executive and Judiciary with appropriate checks and balances to ensure accountability, responsiveness and openness; (d) the need for other appropriate checks on governmental power; (e) enjoyment of all

favour the amber light approach - particularly with regard to the realisation of the right of access to health care services. The fact that section 27(2) requires the state to take reasonable legislative and other measures within its available resources to progressively achieve the realisation of the right is indicative of an interventionist approach to socio-economic rights with a view to effecting extensive socio-economic and other reforms. At the same time there is a significant emphasis on accountability.¹⁴⁶ Rationality is an important aspect of accountability for decisions¹⁴⁷.

universally accepted fundamental rights, freedoms and civil liberties protected by justiciable provisions in the new text; (f) one sovereign state structured at national, provincial and local levels, each of such levels being allocated appropriate and adequate powers to function effectively; (g) the recognition and protection of the status, institution and role of traditional leadership; (h) a legal system which ensured equality of all persons before the law, which included laws, programmes or activities that had as their objective the amelioration of the conditions of the disadvantaged, including those disadvantaged on grounds of race, colour or creed; (i) representative government embracing multi-party democracy, a common voters' roll and, in general, proportional representation; (j) the protection of the new text against amendment save through special processes; (k) adequate provision for fiscal and financial allocations to the provincial and local levels of government from revenue collected nationally; (l) the right of employers and employees to engage in collective bargaining and the right of every person to fair labour practices; (m) a non-partisan public service broadly representative of the South African community, serving all the members of the public in a fair, unbiased and impartial manner; and (n) security forces required to perform their functions in the national interest and prohibited from furthering or prejudicing party political interests. Also in *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Amended text of Constitution of the Republic of South Africa 1996, 1997 (2) SA 97 (CC)* the court held that section 100, which permitted intervention by the national executive when a province could not or did not fulfil an executive obligation in terms of legislation or the Constitution, complied with CP VI (requiring a separation of powers between the Legislature, Executive and Judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness).

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Sachs A, "The Constitution is Natural Justice Writ Large", *Controlling Public Power: Administrative Justice Through The Law*, p51 writing before the interim Constitution was finalised notes: "The texture of a constitution can in fact be measured by the richness of its systems of accountability". Mureinik, E "Reconsidering Review: Participation and Accountability", *Controlling Public Power: Administrative Justice Through The Law* p31-32 identifies accountability as a great principle of responsive democracy and states that in administrative law terms it means that the government must be able to justify its decisions. He says that this will also mean that decision-makers will be obliged to consider in advance, factors relevant to their decisions and that their decisions will as a result have better justifications and points out that the aspiration to better justified decisions translates into a demand for review for unreasonableness: "rationality review as we most commonly know it".

The Supreme Court of Appeal in *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) held that what is called for when determining whether the law should recognise the existence of a legal duty in any particular circumstances is a balancing against one another of identifiable norms. While private citizens might be entitled to remain passive when the constitutional rights of other citizens are threatened, the State has a positive constitutional duty, imposed by s 7 of the Constitution, to act in protection of the rights in the Bill of Rights. The existence of that duty necessarily implies accountability and s 41(1) expressly demands, inter alia, that all spheres of government and all organs of State 'provide effective, transparent, accountable . . . government'. Where the State, as represented by the persons who perform functions on its behalf, acts in conflict with its constitutional duty to protect rights in the Bill of Rights, the norm of accountability must of necessity assume an important role in determining whether a legal duty ought to be recognised in any particular case. While the norm of accountability need not always translate constitutional duties into private law duties enforceable by an action for damages because there are other remedies available for holding the State to account, where the State's failure to fulfill its constitutional duties occurs in circumstances that offer no effective remedy other than an action for damages, the norm of accountability will ordinarily demand the recognition of a legal duty unless there are other considerations affecting the public interest outweighing that norm. (from headnote). The court held further that in this instance there was no effective way of holding the state accountable other than by way of an action for damages. In the absence of any norm or consideration of public policy outweighing it, the constitutional norm of accountability required that a legal duty be recognised.

Similarly in *Faircape Property Developers (Pty) Ltd v Premier, Western Cape* 2000 (2) SA 54 (C), the Cape High Court held that the determination of the legal convictions of the community on which the test for wrongfulness was based had to take account of the spirit, purport and objects of the Constitution of the Republic of South Africa Act 108 of 1996. The Constitution, it said, embraced the principle of accountability in that a public authority was accountable to the public it served when it acted negligently. Such accountability recognised legal responsibility for the consequences of such action. It thus held, given the absence of a mechanism for holding an authority accountable in terms of the Act and given that the principle of accountability was intrinsic to the legal convictions of the community, that it followed that a remedy should be available to a person wishing to hold an authority accountable for actions which could be shown to have been negligent, to have caused damage and which satisfied the requirements of legal causation. (from headnote)

In *Ngxuzo and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another* 2001 (2) SA 609 (E) the court took the view that the Constitution specifically stated that the public administration had to be governed by democratic values and the principles of the Constitution and that it had to be accountable (s 195) and had appointed the Courts as the final instrument of ensuring the accountability of the exercise of public power. The court in this case

In *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others*¹⁴⁸, the constitutional court pointed out that that the setting of the rationality standard did not mean that the Courts could or should substitute their opinions as to what was appropriate for the opinions of those in whom the power had been vested. As long as the purpose sought to be achieved by the exercise of public power was within the authority of the functionary, and as long as the functionary's decision, viewed objectively, was rational, a Court could not interfere with the decision simply because it disagreed with it or considered the power to have been inappropriately exercised. Thus while there is a constitutional mandate for the state to fulfil in terms of measures to be taken to achieve the realisation of the right of access to health care services, its power to do so will not go unchecked by the judiciary in the sense that it is accountable for its decisions on the basis of principles such as rationality identified by the judiciary.

A more recent theory of administrative law is known as 'managerialism' and is based on the notion that administrative authorities should conduct their affairs and take decisions along such corporate business lines as are commonly encountered within the private sector. It grew from the increasing emphasis on efficiency, productivity and market forces which emerged in the late 1970's and eventually lead to the wholesale privatisation of traditional public sector functions. It has been described as "in many respects at odds with the traditional approach to administrative law". Managerialism treats public sector activities as though they were business enterprises and subjects them to private sector disciplines. It regards efficiency and productivity as central

observed that what was at stake was the accountability of an unelected administrative bureaucracy and a large-scale unlawful deprivation of social grants by way of administrative stealth and that the Courts had been appointed by the Constitution to prevent that from happening. (from headnote).

In *Qozalet v Minister of Law and Order and Another* 1994 (3) SA 625 (E) which involved the interim Constitution (Act 200 of 1993), the court said that the right of access to State information provided for in s 23 of the Constitution is something more than a mere constitutional right to discovery, it is also a necessary adjunct to an open democratic society committed to the principles of openness and accountability. Its application need therefore not be restricted to the exercise or protection of rights by way of litigation, but would extend also to non-judicial remedies aimed at the exercise or protection of such rights.

¹⁴⁷ Thus Murenik (fn 146 *supra*) notes that rationality review calls for far more specific scrutiny than the mere identification of gross error. It requires the reviewing body to ask whether:

- (a) the decision-maker has considered all the serious objections to the decision taken and has answers which plausibly meet them;
- (b) the decision-maker has considered all the serious alternatives to the decision taken and has discarded them for plausible reasons; and
- (c) there is a rational connection between premises and conclusion: between the information (evidence and argument) before the decision-maker and the decision that it has reached.

¹⁴⁸ *Pharmaceutical Manufacturers Association of SA* (fn 72 *supra*)

goals of public administration and assumes that their achievement equates with public interest¹⁴⁹

The nature of the health sector in South Africa, as in many other countries, is problematic when viewed in the context of a 'privatised' or managerialistic approach to the conduct of its business¹⁵⁰. The delivery of health care services does not easily translate into the world of commerce despite the existence of a relatively high profile private health sector in this country. It is complicated by human rights and constitutional issues which do not sit comfortably in a profit-driven, business environment. The main reason for the emphasis in the private sector on efficiency and productivity is profit and its maximisation. Whilst this approach may be perfectly legitimate and workable in the nuts and bolts market, the health care services environment is a different arena. This is evidenced within many forums at both local and international level. At international level one only has to look as far as the increasing pressure on the World Trade Organisation, the holders of and the exercise of intellectual property rights in medicines and other commodities essential to health service delivery to revise international intellectual property conventions and interpretations of patent law to take cognisance of internationally recognised rights to health and health care services¹⁵¹. At local level there are provisions in the Medicines

149 Parish K "Administrative Law Theories" Northern Territory University. But Parish questions the desirability of having the success of public entities with regard to service delivery measured by notions of efficiency and productivity. He observes that while many Australians would give an emphatic "No" to this question, the economist's balance of costs and benefits is "certainly not antithetical to traditional administrative law". He states that the pursuit of desirable ends ought not to be bought at a cost which exceeds their true benefit.
<http://www.ntu.edu.au/faculties/lba/schools/Law/apl/Homepage>

150 Burns Y 'Government Contracts and the Public/Private Law Divide' *South African Public Law* 1998 13 p 234 notes that the privatisation or sale of public assets has become a common occurrence in modern democratic states. She observes that South Africa is also moving in the direction of privatisation of certain services, notably electricity, transport and communication services. Burns also notes the increasing familiarity within South Africa of outsourcing and states: "If one accepts that an outsourcing contract, or service provision contract, is an administrative law agreement (in the sense that the administrative authority retains a measure of state authority with the result that the relationship between the state and the other party is one of inequality) it may be argued that the agreement should be subject to the principles of public law." She refers to the first National Performance Review published in the United States of America in September 1993, which outlined a plan to reinvent the government so that it might better serve its people and continue to lead the world in the new era of globalisation and notes that this new rhetoric involves significant changes in United States Administrative Law including:

- new blends of public and private sectors at all levels of government;
- a redefinition of what is public and what is private;
- greater reliance on bargaining and negotiation in the exercise of discretionary powers;
- increased reliance on privatisation and the delegation of public functions to private concerns;
- a market discourse which narrows the role of public interest values and replaces them with that of cost-benefit analysis.

151 See for instance Baker, 'The incredible shrinking Doha Declaration' *Health GAP* www.healthgap.org/press_releases/03/; Also Tayob R & Loewenson R 'Health Implications of the WTO 5th Ministerial Trade Talks' EQUINET September 2003 in Cancun, Mexico who explain as follows: "The Doha Ministerial Declaration from the 2001 WTO Ministerial Conference clarified the inherent rights countries enjoy under the Agreement on Trade-Related Aspects of Intellectual Property Rights, (TRIPs) to grant compulsory licenses that by-pass patents on medicines to secure public health. Compulsory licenses can be used for parallel importation or domestic production. Countries also enjoy the right under TRIPs to disregard patents on drugs for government use. As many developing countries have little or no drug production

and Related Substances Control Act¹⁵² which allow the Minister of Health, patent rights notwithstanding, to authorise the parallel importation of medicines into South Africa in order to promote access to more affordable medicines. Whilst the utilisation of available resources contemplated in section 27(2) of the Constitution should undoubtedly not be fruitless, wasteful or irregular (in the sense in which these terms are used in the Public Finance Management Act No 1 of 1999), and public officials should be held accountable for efficient and effective use of those resources, it is submitted that policy decisions involving health care will always have to take into account far more than just productivity and efficiency factors. As stated previously, the private sector is profit-driven. This does not necessarily result in effective or even cost-effective health care delivery¹⁵³ as demonstrated in the examples cited below.

capacity, they could only secure drugs from other countries producing compulsory licensed drugs. The catch was that TRIPs Paragraph 31(f) requires that a country produce drugs predominantly for domestic consumption and export a maximum of 49% of its production. This limited the amount of drugs available to developing countries who do not produce drugs. The WTO general council negotiated options for developing countries who lacked manufacturing capacity to access the benefits of the "TRIPs + Doha Declaration". On 30 August 2003 the general council agreed to waiver of TRIPs paragraph 31(f) under the following conditions:

1. The "solution" is not to be used for industrial or commercial policy objectives;
2. Drugs (and active ingredients) shall be specially packed, coloured or shaped and that members understand that this will not have a significant effect on price;
3. Countries shall notify the TRIPs Council of the basis upon which they have decided that do not have productive capacity and need to use the 'solution';
4. The TRIPs Council will be able to hear disputes on the implementation of the solution and take appropriate action.

Some southern governments and NGOs like the Consumer Project on Technology, Third World Network, Medicines Sans Frontiers were not happy with this 'solution'. They felt it compromised the ability of poor countries to provide pharmaceutical drugs. However other developing countries urged for its adoption as they feared that if an agreement was Ministerial Conference. This strategic course has given developing countries an agreement that has unresolved problems in relation to drug access, mainly in its efforts to avoid compulsory licensed drugs being diverted into markets where only patented drugs are available. It excludes "industrial and commercial policy objectives" but does not adequately define what these are, leaving uncertainty for developing countries as to what actions are illegal. The inclusion of active ingredients in the texts means that generic manufacturers may have difficulty in obtaining raw materials for production. It also places significant burdens on countries using the solution to somehow "objectively" show that they lack manufacturing capacity, particularly if they are challenged."

(<http://www.equinet africa.org/Resources/downloads/HealthimplicationsCancun0903.pdf>)

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Act No 101 of 1965

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In "Market Forces Are Bad For Hospital's Health" Kirschenbaum C and LeBow B note that: "We are told that the growth of for-profit hospitals will help contribute to the lower costs of health care and that competition is reducing excess administration. The standard market forces of supply and demand do not apply well to health care unless one gets sick. But free market advocates have repeatedly assured us that a market economy could reduce the spiralling cost of health care. Finally we have some strong data that indicate that the market at least as represented by for-profit hospitals is not so cost-effective as proponents have asserted." (<http://www.ibiblio.org/prism/Apr97/market.html>). They go on to quote from an article in the *New England Journal of Medicine* (March 13) entitled "Costs of Care and Administration at For-Profit and Other Hospitals in the United States" by Woolhandler S and Himmelstein D in which the authors report *inter alia* that:

- For -profit hospitals spent 23% more on administration than private not-for-profit hospitals and 34% more than public hospitals.
- Administrative costs accounted for an average of 26% of total hospital costs in fiscal 1994 which was up 1.2 percentage points from 1990
- Comparative 1994 administrative costs were 34% for for-profit private hospitals, 24.5% for private, not-for-profit hospitals and 22.9% for public hospitals
- There is a pattern of higher costs and reduced clinical staffing at for-profit hospitals.
- The percentage of costs devoted to administration increased between 1990 and 1994 for all three ownership categories resulting in less money for patient care.

South Africans in recent years have experienced a similar problem with regard to medical schemes administration. Although medical schemes are themselves not for profit entities they contract with companies who are to for administration. The Registrar of Medical Schemes has expressed concern at the increasing costs of administration of medical schemes since this is invariably at the expense of funding that could be more effectively and efficiently employed in providing health care services to scheme beneficiaries. The funding cake is limited in size. The bigger the slice that scheme administrators can secure for themselves, the smaller the remainder that is available for payment for

Example 1

The name of the United States of America is virtually synonymous with the phrase “free market”. It is regarded by many as the free market country of the world. The World Health Organisation has released an assessment of health systems throughout the world. Rankings are based on an overall index of performance. The US ranked 37th despite the fact that it ranks as number one in per capita health expenditure at \$2700 on average, per person. Furthermore it ranks 25th in male life expectancy and 19th in female life expectancy compared with 29 other industrialized countries. The Americans claim nevertheless to have some of the finest doctors and hospitals in the world¹⁵⁴.

Example 2

Singapore, in the period from 1984 to 1993 did all it could to encourage market forces in health care in the hope of lowering costs including the promotion of medical savings accounts, catastrophic insurance and competition amongst hospitals. The government offered inducements to its for-profit hospitals and clinics, which were given favoured status. After ten years Singapore’s health care costs had soared and a government white paper concluded that “market forces alone will not suffice to hold medical costs to the minimum. The health care system is an example of market failure. The government has to intervene to structure and regulate the health system.”¹⁵⁵ Robert G Evans, Professor of Economics at the University of British Columbia, writes that “The health status of an individual thus takes on a special importance to the community beyond that of her consumption in general, but similar to political or judicial status...Such special status derives from a general perception

health services. From a public health perspective, this is hardly an efficient or effective utilisation of resources for health care service delivery since it effectively reduces their availability for this purpose. According to a press release by Council for Medical Schemes dated September 04 2003 (available at <http://www.medicalschemes.com>) administration costs for medical schemes increased by 15.7% between 2003 and 2003 according to the Annual Report of the Council. This increase, according to the press release shows a “marked slowing” on the year before when the Registrar expressed concern over an annual increase of 41.7% in 2001. Even 15.7% is well above the Consumer Price Index for this period. Kirschenbaum and LeBow ask whether the market economy is so highly valued that for the sake of the “free market” people will tolerate even more injustice and lack of compassion in the health care system.

¹⁵⁴ *Vermont Health Care For All* <http://www.vthca.org/myths.htm>

¹⁵⁵ Hsiao W, “Marketization – The Illusory Magic Pill” *Health Economics* Vol.3 351-357, 1994 as referred to in *Vermont Health Care For All* fn 154 *supra*

that life, health and freedom are not ordinary commodities, but are prerequisites to the enjoyment of all others.”¹⁵⁶

Example 3

In New Zealand in 1993 the government implemented radical changes to the health services including splitting the “purchasing” role of the state from the “provision” of services. Under the new system, public money for health services was divided between four Regional Health Authorities (RHAs) whose job was to purchase health services for their populations. Having decided what services they would buy they then entered into negotiations with potential providers. The RHAs were expected to encourage competition between public and private hospitals and other service providers. Public hospitals which were previously owned by Area Health Boards became part of new state-owned institutions known as Crown Health Enterprises (CHEs). These latter were required to act in a business-like manner which included earning a return on their capital. The reforms created a “quasi-market environment” which implied that CHEs would have to be efficient and keep costs down in order to beat off competition from private hospitals and with contracts with the RHAs. The reasons for the reforms were perceived weaknesses in the old system such as the inefficiency of public hospitals. There had been a number of reports suggesting that private hospitals could provide the same services as public ones for about 30% less. Another weakness was that waiting lists for public hospital services were growing. Policy makers hoped that if public hospitals were forced to compete for their funding, public hospital management and efficiency would improve and savings from such efficiencies could be ploughed back into the system to shorten waiting lists and treat more people. After three years under the new system, waiting lists were higher than they had been to start with, 23 of the CHEs recorded persistent financial deficits and very few private hospitals won contracts off the RHAs since the latter mostly bought services from the CHEs closest to them with the result that there wasn’t even a great deal of competition between CHEs. The local CHEs ended up having a degree of monopoly power because the RHAs found that the only real option was to buy

¹⁵⁶ Evans R G *Strained Mercy: The Economics of Canadian Health Care*
http://frisch.ecn.uva.nl/ca.guy/11160/Manuel/Strained_Mercy/

services from CHEs closest to them. The costs of setting up the new system and writing and negotiating the purchaser-provider contracts were significant. As a result in 1996 the “experiment with competition” in the New Zealand health system came to an end. The word “competition” was replaced with “co-operation” “commercial profit objectives” became “principles of public service” and CHEs were renamed “hospitals”. Devlin, an economist specialising in health care at the University of Otago states that some would argue that this attempt to harness market forces in health care didn’t work because the competition was “too managed”. She says that the trick is to design a health care system with the right “mix” of “private” and “public” so that the result is a health care system that is both efficient and fair.¹⁵⁷ This statement tends to run counter to the managerialist theory of administrative law which effectively tries to diminish the differences between the way in which services are rendered in the public and private sector by seeking to encourage a more private sector type of approach to activities in the public sector.

Administrative law theories are of assistance in identifying the underlying policy frameworks or principles as to how administrative law should work in practice. The point about the examples given above in relation to administrative law and policy-making is that they illustrate the importance of the underlying assumptions of the system that is formulated and in particular the many different approaches that are embodied in that simple phrase “public interest”. Policy cannot in terms of South African law, be made in a vacuum. It has to be done with reference to certain reasonable and logical assumptions, established facts, and constitutionally recognized values. To the extent that policy informs legislation, the same applies to legislation whether of the principal or subordinate variety.

3.9.1 Application in Case Law

From the judgments in the two leading South African cases on the subject of the right of access to health care, *Soobramoney*¹⁵⁸ and *Treatment Action Campaign*¹⁵⁹, is that policy decisions that are either unreasonable or that are unreasonably taken can be

¹⁵⁷ Source of this example: Devlin N “The experiment with competition in health care: how come market forces didn’t work?” *Econz@Otago* July 1998 <http://www.otago.ac.nz>

¹⁵⁸ *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC)

¹⁵⁹ *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC)

challenged. These cases were not decided on the basis of administrative law no doubt because they involved policy decisions and policy implementation. The PAJA exempts development and implementation of national and provincial policy from its definition of administrative action. However, the reasons why the policy of the national government in the TAC case was declared unconstitutional and why the policy of the KwaZulu-Natal provincial government concerning renal dialysis was not, are remarkably similar to the principles of administrative law. In *Soobramoney*, because of the shortage of resources the hospital followed a set policy in regard to the use of the dialysis resources. Only patients who suffered from acute renal failure, which could be treated and remedied by renal dialysis were given automatic access to renal dialysis at the hospital. A set of guidelines had been drawn up and adopted to determine which applicants who have chronic renal failure will be given dialysis treatment. The court noted that due to the shortage of the available resources, notably dialysis machines, guidelines had to be developed to determine how best to use the existing ones. It observed that by using the available dialysis machines in accordance with the guidelines more patients are benefited than would be the case if they were used to keep alive persons with chronic renal failure, and the outcome of the treatment is also likely to be more beneficial because it is directed to curing patients, and not simply to maintaining them in a chronically ill condition. There was no suggestion that the guidelines were unreasonable or that they were not applied fairly and rationally when the decision was taken by the Addington Hospital that the appellant did not qualify for dialysis.

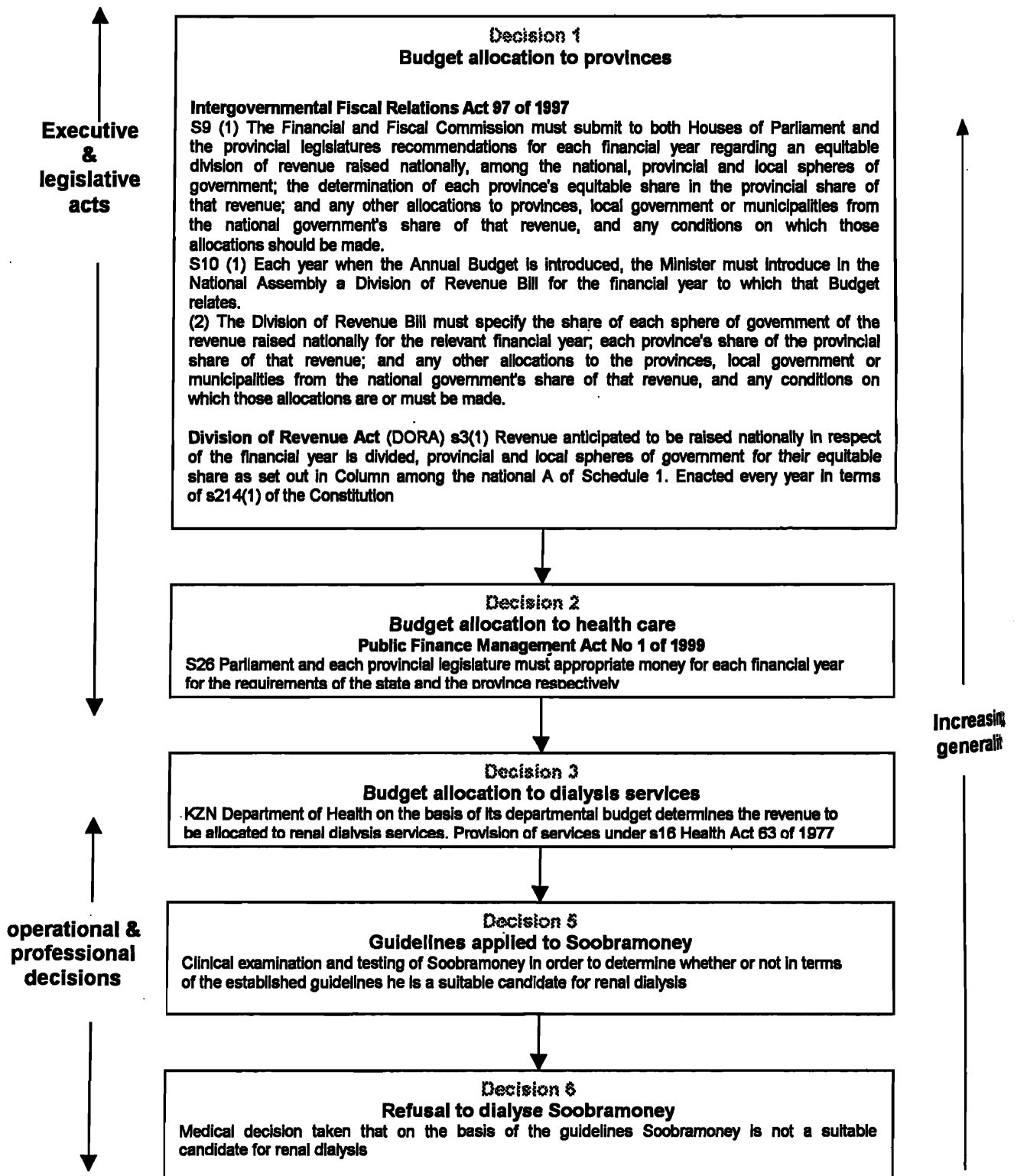
The court stated that the provincial administration which is responsible for health services in KwaZulu-Natal has to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the *political level* in fixing the health budget, and at the *functional level* in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters. The court here distinguished two different levels of decision making. The budgetary allocation decisions are not of an administrative nature but rather of a legislative or executive nature and therefore accountability is to the electorate rather than through a court of law by way of judicial review. The guidelines decision appears to have been

characterized as being at an operational level and therefore more appropriately taken by operational and other experts at that level. The only proviso appears to have been that such decisions were ‘rational’ and taken ‘in good faith’ by the political organs and medical authorities ‘whose responsibility it is to deal with such matters’. Thus the language used by the court to adjudicate a sequence of policy decisions which, technically speaking, fall outside the definition of ‘administrative action’ is clearly the language of administrative law. The lesson to be learned is that the same principles that underpin administrative decisions are applicable to other kinds of decisions – even if they are not administrative in nature. Put differently, whilst principles of reasonableness, fairness and good faith may be particular concerns of administrative law, they are not peculiar to the latter. It is submitted that the reason for this is that the basic values that underlie one area of a legal system cannot differ materially from those that support another if the system is to have any coherence and consistency at the macro-level. The Constitution as the grundnorm of the South African legal system, together with the values it espouses, is likely, if consistently applied, to lead to corresponding consistency across the boundaries of public and private law and the different legal disciplines within the broader legal system. Consequently one must adopt a system approach to law in which every part is seen as simply an element of the whole and must be interpreted consistently with it. In this view of law, the principles of administrative law in relation to the right of access to health care services must be regarded merely as a facet of a larger concept rather than as having an independent and isolated existence of its own.

The *Soobramoney* case illustrates the importance of seeing a particular decision as part of a system of decision-making rather than in isolation. Although this point is not highlighted in the judgment of the constitutional court, there were a number of different decisions that were taken which led up to the refusal to allow the plaintiff access to the provincial renal dialysis facilities. The first decision in the chain was a budgetary allocation decision in terms of which funding was allocated to KwaZulu-Natal province in terms of its equitable share. The second decision was by the provincial government of KwaZulu-Natal as to how much money should be allocated to expenditure on health care. The third decision was taken by the provincial health authorities as to how much of the funding allocated to health should be spent on the renal dialysis facilities and services provided by the province. The fourth decision to

be taken by the provincial health authorities was as to how best to use the renal dialysis facilities, given the available resources, in order to obtain the most benefit from them in terms of public health service delivery. The fifth decision was the application of the guidelines to Mr Soobramoney's particular and individual circumstances. The guidelines that were developed were created on the basis of current medical and scientific knowledge and practice. The sixth decision was not to grant him renal dialysis treatment at Addington Hospital. This decision was a combination of a professional medical decision as to the status of Mr Soobramoney's health and his prognosis, and a decision as to the applicability of the established guidelines to his situation (strictly speaking there may be circumstances where preconceived guidelines, no matter how well conceived, may not be applicable and the administrative process should take cognizance of this possibility if it is to be fair). The principles of rationality, good faith and reasonableness must run through all of them if the judgment of the court in *Soobramoney* is taken at more than just face value. The spectrum of the general to the specific, in terms of the impact of the policy decision taken by the provincial health authorities in *Soobramoney* was not specifically considered by the court in its judgment. However, it is implicit in the judgment that the values of reasonableness, rationality, fairness and good faith are applicable irrespective of the general or specific impact of the decision. Represented diagrammatically the decision chain would be as in Figure 1 below.

Figure1: Sequence Of Decisions Taken In Soobramoney vs The Minister Of Health (KwaZulu-Natal)



The court in refraining from interfering in both the political and operational decisions, and in recognizing the existence of these different levels and the fact that decisions were best left to persons working within those levels, effectively recognized the principle of subsidiarity which holds that decisions are best taken and powers best allocated to those levels of organisation which, by virtue of their nature, are most able and knowledgeable to take such decisions and exercise such powers and which are most directly affected by them¹⁶⁰. The principle of subsidiarity is of particular significance in the field of administrative law since it describes the rationale behind the doctrine of separation of powers. Like the concept of lawfulness, already discussed, subsidiarity implies the concept of a single, unified, underlying order for the distribution of power. Guerin¹⁶¹ describes it as about making sure that decisions are taken at the most appropriate level, for example by those most directly affected, by those best informed and those best placed to deal with the any consequences. In the context of separation of powers and the amber and green light theories of administrative law, the judiciary is the worst possible place to locate budgetary allocation decisions. By its own admission in *Soobramoney* and *TAC*, the constitutional court took the view that such decisions were best left to others¹⁶². What would happen in a situation in which a budgetary allocation decision is challenged as being unconstitutional? How would the constitutional court achieve or maintain the

¹⁶⁰ Subsidiarity has been described, but not mentioned by name, in a papal encyclical entitled "Quadragesimo Anno" (QA) of 1931 as a "weighty principle of social philosophy". The QA reads: "Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every activity ought, of its very nature to furnish help to the members of the body social, and never destroy and absorb them." In the context of information systems, described in *The Principia Cybernetica Web* in its 'Dictionary of Cybernetics and Systems' as follows: "Problems are best solved in the subsystem where they arise. This is similar to the idea of management by exception. Subsystems are encouraged to resolve their conflicts themselves without referring them to higher authority. Whatever the solution is adopted, the subsystem will have to carry it out. Since their consent is essential, the optimum condition is for them to resolve their conflicts independently. If a solution is worked out by the subsystem, appeal to authority is not necessary. (Wheeler, 1970 p 133)".

¹⁶¹ Guerin K 'Subsidiarity: Implications For New Zealand Treasury Working Paper 02/03
<http://www.treasury.govt.nz/workingpapers/2002/>

¹⁶² In *TAC*, (fn 159 *supra*) the court observed that "it should be borne in mind that in dealing with such matters the courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the maximum care standards called for by the first and second amici should be, nor for deciding how public revenues should most effectively be spent... Courts are ill-suited to adjudicate upon issues where court orders have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance." In *Soobramoney* (fn 158 *supra*) the court said "The provincial administration which is responsible for health services in KwaZulu-Natal has to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters."



appropriate constitutional balance between the 3 spheres of government – i.e. the legislature, the executive and the judiciary? It is submitted that the principle of subsidiarity supplied the most workable solution. As the constitutional court itself points out, the courts are ill-suited to this kind of decision. In keeping with the idea that the role of the courts is to require the state to take measures to meet its obligations and to subject the reasonableness of these measures to evaluation, it is submitted that the judiciary, when faced with a claim that a budgetary allocation decision is unconstitutional should approach the matter in much the same way as it did in *Soobramoney* when faced with a complaint that essentially involved decisions taken on the basis of expert knowledge in the field of medicine and public administration. It did not interfere with the substance of those decisions. In fact it could not legitimately do so since judges are, by definition, not health economists, politicians, public health administrators or medical doctors. Instead the court looked at the circumstances of the decisions taken and the needs they sought to address. It considered the rationality of the decisions, their reasonableness and fairness and the purpose for which they were taken. It addressed the framework or substructure of the decision rather than directly scrutinising and critiquing its substance. An analogy can be drawn between this situation and one in which a court is required to decide a claim for medical negligence on the basis of expert medical evidence. In such a situation the court determination will involve the examination of expert opinions and the analysis of their essential reasoning preparatory to the court's reaching its own decision on the issues raised¹⁶³. Carstens¹⁶⁴ points out that the court is faced with a problem in assessing conflicting schools of thought in medical practice. It has no idea what the reasonable, medically qualified person would have done in the circumstances because on the basis of the expert evidence available, there is not one reasonable medical practitioner but two or even more. The court itself lacks the expertise necessary to decide on the most appropriate medical decision that should have been taken under the circumstances which is why there is a need for expert medical evidence in the first place. Carstens postulated that it is conceivable that expert medical opinion based on logic is not necessarily indicative of reasonableness or unreasonableness within the realm of accepted medical practice. He points out that logic refers to a process of

¹⁶³ See for example *Michael v Linksfield Park Clinic (Pty) Ltd* 2001 (3) SA 1188 (SCA). This case is discussed in detail in chapter 9 of this thesis dealing with cases in delict involving the private sector.

¹⁶⁴ Carstens P 'Setting the boundaries for expert evidence in support or defence of medical negligence – *Michael v Linksfield Park Clinic (Pty) Ltd*' *THRHR* 2002 p 430

reasoning/rationality based on scientific or deductive cause and effect whereas reasonableness is a value judgement indicative of or based on an accepted standard or norm. He notes that whilst it is true that logic more often than not is an integral part of reasonableness, it does not necessarily follow that logic can equate to reasonableness. Carstens submits that the true test for expert medical opinion is that the opinion should objectively and clinically reflect the standard or norms of accepted medical practice in the particular circumstances. In the same way, in the case of a budgetary allocation decision, it is submitted that the decision should objectively and clinically reflect constitutional and administrative law standards or norms in the particular circumstances. Carstens states that in the event of conflicting expert opinion or different schools of thought even a conflicting and minority school of thought or opinion will be acceptable provided that such opinion accords with what is reasonable by that branch of the medical profession. The thrust of the argument is that one cannot directly question the expertise or the knowledge base used to make a decision but one can interrogate the conclusions drawn and the actions taken in the light of that expertise or knowledge base. The decisions taken must be in line with or rationally connected to the knowledge base. It must be clear from the particular knowledge base that was used, what the reasons for the decision were. In *Michael* the court outlined an approach to expert evidence which includes-

- the examination of the opinions and the analysis of their essential reasoning;
- the evaluation of expert evidence to determine whether and to what extent the opinions advanced are founded on logical reasoning
- the fact that the logical basis of the opinion must be evident to the court i.e. that the expert has considered the comparative risks and benefits and reached a defensible conclusion.

In much the same way that expert decisions can be meaningfully evaluated by a court of law unversed in the subject matter of the relevant area of expertise, so too budgetary allocation decisions can be meaningfully evaluated by a court on the basis of an examination of the substructure of the decision. Generic evaluation criteria include internal comparisons whereby one aspect of a decision and the logic behind it as given by the decisionmaker is tested against another aspect of the same decision to ascertain whether there is internal consistency, the nature of the logic structures upon



which the decision is based including the quality of their construction in terms of the density and spread of the data upon which conclusions have been reached, the reasons why alternative conclusions or decisions have been rejected, the relationship of the variables involved in the decision to constitutional values and principles, the balancing of any conflicting rights and interests and the method or reasoning by which the perception of balance by the decision maker was achieved. The courts have observed that they may not substitute their own decisions for those of other organs of state simply because they don't like the decision that was taken¹⁶⁵. If the primary object is the preservation of the principle of separation of powers and recognition of the principle of subsidiarity then this is, with respect, correct. The courts may not usurp the powers of the legislature or the executive any more than the national, provincial and municipal spheres of government may encroach upon each other's jurisdictions. This would be contrary to subsidiarity and the constitutional order upon which the South African legal system is based. The distinction between the power of the judiciary and the power of the other branches of government may seem to be a fine one in principle but it is nonetheless important in practice and must be observed. The courts cannot and should not take policy decisions reserved for executive government and the legislature especially in situations involving polycentric spider webs¹⁶⁶ of cause and effect. They can and should pronounce on the constitutionality of the actions of the other branches of government at a level and in a manner which preserves and strengthens the credibility of all three branches.

3.9.2 Administrative "Action"

¹⁶⁵ See the words of Chaskalson P in *Pharmaceutical Manufacturers Association Of SA And Another: In Re Ex Parte President Of The Republic Of South Africa And Others* (fn 72 supra) para 90 "Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately."

¹⁶⁶ Fuller, L "The Forms and Limits of Adjudication" (1978-9) 92, *Harvard Law Review* p 353. The concept of polycentricity as explained by Fuller has been incorporated into South African jurisprudence by way of the judgments in *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* 2002 (3) SA 265 (CC); *Van Biljon and Others v Minister of Correctional Services And Others* 1997 (4) SA 441 (C); *Kolbatschenko v King No and Another* 2001 (4) SA 336 (C).

It has been said that “at the very least ‘administrative action’ includes all action of an administrative nature taken by bodies exercising public power”¹⁶⁷. This begs the question: what is action of an administrative nature and is thus not particularly helpful. According to Klaaren, the exercise of a discretion is administrative action. The process of a government tender is administrative action and action taken by bodies such as parastatal corporations with the status of organs of state is administrative action. He observes that it should be interpreted to cover not only adjudicative administrative decisions but also delegated and subordinate legislation because to restrict the clause to adjudications only would be unthinkable, given the vast bulk of governmental administration undertaken by regulation¹⁶⁸. In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council*¹⁶⁹ the constitutional court held that the right to administrative justice contemplated in section 24 of the Interim Constitution did not apply to by-laws made by a municipal council. The court said that the proper form of accountability for this type of governmental action was political to the electorate rather than judicial through the courts. In *Cekeshe & Others v Premier of the Eastern Cape & Others*¹⁷⁰ the court held that as a general rule ‘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”’.

3.9.3 Summary

In summary, it must be noted that the grounds rules that are emerging from court decisions involving administrative law are-

¹⁶⁷ Devenish *et al* (fn 15 *supra*) p 126. At footnote 71, they refer to *Jeeva v Receiver of Revenue, Port Elizabeth* 1995(2) SA 433 (SE) 441 in this regard where the court held that “a Commission of inquiry authorized by the Master of the Supreme Court and held under the machinery of the Companies Act is administrative action”. They also refer to Klaaren J “Administrative Justice” in the *Constitutional Law of South Africa* (original service 1996) (eds) Chaskalson *et al* 25-2.

¹⁶⁸ See Klaaren J (fn 9 *supra*). He notes that in *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* (fn 13 *supra*) the constitutional court clearly supported coverage by the administrative justice clause beyond administrative adjudications. The court, notes Klaaren, was willing to go beyond the bounds of *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A) where Milne JA elaborated upon a distinction between those government decisions applying generally (termed ‘legislative’) and those applying in a particular situation. The court in *Fedsure* commented that the cases referred to by Milne JA in exempting the impact of natural justice upon legislative decisions were of ‘little assistance’ in determining the content of administrative action in terms of the Constitution. Klaaren quotes from the judgment as follows: “Laws are frequently made by functionaries in whom the power to do so has been vested by a competent legislature. Although the result of the action taken in such circumstances may be ‘legislation’, the process by which the legislation is made is in substance ‘administrative’.” (para 27 of the judgment). He notes that the action of making delegated and subordinated legislation is thus administrative action. He notes further that “not only the decisions or rules promulgated under a statute but also the statutory regulatory framework itself falls within the substantive reach of section 33 of the Constitution. One does not only have a right to procedures laid down in legislation. Such procedures themselves will be scrutinized under s 33 (and s34).”

¹⁶⁹ *Fedsure Life* (fn 13 *supra*)

¹⁷⁰ *Cekeshe* 1999 (3) SA 56 (Tk)

- The source of the power though not necessarily decisive, is a relevant factor;¹⁷¹
- The nature of the holder of the power does not determine whether a decision is administrative or otherwise;¹⁷²
- The nature of the power is also an important factor;¹⁷³
- The subject-matter of the power is significant in determining whether the exercise of the power constitutes administrative action;¹⁷⁴
- whether it involves the exercise of a public duty; and
- how closely it is related on the one hand to policy matters, and on the other to the implementation of legislation .

In the sequence of decisions that led to *Soobramoney*, it is clear that not all of them could be categorised as administrative. The enactment of the Division of Revenue Act that applied in the year that Mr Soobramoney applied for renal dialysis to the provincial authorities, for instance, is not administrative action. The decision within the province to allocate a certain amount of funding to health is not administrative action and neither is the decision as to how the amount so allocated should be utilised in order to best deliver all of the health services for which the provincial department of health is responsible¹⁷⁵.

171 *President Of The Republic Of South Africa And Others v South African Rugby Football Union And Others* fn 51 *supra*

172 The focus of the enquiry as to whether conduct is 'administrative action' is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising (*President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC)). In *Hayes and Another v Minister Of Finance and Development Planning, Western Cape, And Others* 2003 (4) SA 598 (C) the court said that what has to be taken into consideration is, inter alia, the source of the power, the nature of the power, its subject-matter, whether it involves the exercise of a public duty and "how closely it is related on the one hand to policy matters which are not administrative, and on the other hand to the implementation of legislation, which is."

173 Determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will, as we have said above, depend primarily upon the nature of the power. See *President Of The Republic Of South Africa And Others v South African Rugby Football Union And Others* fn 51 *supra*. See also *Pennington v Friedgood And Others* (fn 129 *supra*) in which the court stated: "The question relevant to s 33 of the Constitution is not whether the action is performed by a member of the executive arm of Government, but whether the task itself is administrative or not and the answer to this is to be found by an analysis of the nature of the power being exercised."

174 "Determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will, as we have said above, depend primarily upon the nature of the power. A series of considerations may be relevant to deciding on which side of the line a particular action falls.... While the subject-matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of s 33." *President Of The Republic Of South Africa And Others v South African Rugby Football Union And Others* fn 51 *supra*.

175 Section 1 of the PAJA exempts from the definition of administrative action the executive powers or functions of the Provincial Executive including the powers or functions referred to in section 125 (2) (d), (e) and (f) of the Constitution. This section states that the Premier exercises the executive authority together with the other members of the Executive Council, by (d) developing and implementing provincial policy; (e) co-ordinating the functions of the provincial administration and its departments; (f) preparing and initiating provincial legislation.

Each decision in the *Soobramoney* sequence, except the final one, has the potential effect of rendering Mr Soobramoney and others in his position eligible for renal dialysis. From a practical point of view, the underlying constitutional values and principles are the same irrespective of the level of the decision – the values of human dignity, equality, non-racialism and non-sexism and the constitutional rights to equality, life and access to health care services are relevant to every decision in the chain.

In *Premier, Mpumalanga & Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal*¹⁷⁶ O'Regan J held as follows:

“In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognised in our common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the executive to act efficiently and promptly. On the other hand, to permit the implementation of retroactive decisions without, for example, affording parties an effective opportunity to make representations would flout another important principle, that of procedural fairness.”

The fact that there is in many instances a fine line within the current constitutional order, between an “administrative” decision and a “policy” decision, makes it advisable from the perspective of the policymaker for the same considerations of lawfulness, rationality, fairness, transparency, reasonableness, and the absence of arbitrariness and bias to apply in health policy decisions.

3.10 Different Kinds of Power

The question as to when the state is exercising a public power and when it is exercising some other power, for instance contractual power or political power, is of considerable importance in a consideration of the nature of the relationship of the provider of public health care services to the patient. When the state is providing health care services is it providing those services in terms of a purely constitutional obligation or does the patient contract with the state for the relevant services? Is the

¹⁷⁶ *Premier, Mpumalanga & Another* 1999 (2) SA 91 (CC)

state providing health services in fulfilment of a statutory obligation or in terms of the exercise of a function or power of government? If so does this preclude the existence of a contractual relationship between public provider and patient? Is the fact that in terms of section 27(1) people have a right of *access* to health care services rather than a right to health care services *per se* of significance in this context? The state has many different legal bases for its many and varied transactions and it is important to ascertain the nature of the legal basis upon which it provides health care services¹⁷⁷. There is the possibility that the provision of health care services is based upon more than just one particular area of law for example constitutional law, and that it is a mixture of constitutional, administrative, contractual and statutory law depending upon the circumstances of each case. Not every act by the state constitutes an administrative act¹⁷⁸. For instance it has been held that the cancellation of a contract

¹⁷⁷ See for instance *Shoprite Checkers (Pty) Ltd v Ramdau No And Others* 2001 (4) SA 1038 (LAC) where Zondo JP stated at p 1044 that: "In para [18] of the judgment in *Carephone Froneman DJP* does not seem to have appreciated that the administrative justice section could only apply if the action in question was an administrative action and that, because of this, a court would have no choice but to have to satisfy itself that such action was an administrative action before it could apply the provisions of the administrative justice section to it. This means that, however regrettable or even unpalatable it may be to have to classify actions according to whether they are administrative, judicial or quasi-judicial, courts have no choice but to classify actions according to such categories in certain circumstances under the new constitutional order in order to give effect to certain constitutional provisions."

¹⁷⁸ In *Permanent Secretary, Department of Education and Welfare, Eastern Cape, and Another v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA 1 (CC), the constitutional court noted that: "The applicants argued, in the alternative, that the exercise of the statutory power by the MEC involved a policy decision which either does not constitute administrative action or, if it does, was administrative action not subject to administrative review in this case. The applicants argued that the power conferred by s 48(2) of the Schools Act was political in nature and therefore its exercise does not constitute administrative action as contemplated by s 33 of the Constitution. In this regard, the applicants relied on the following dictum in the case of *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal*: 'In my view, the learned Judge did not consider sufficiently the fact that s 32 of the Act reserves the decision as to what grants should be made to state-aided schools to the second applicant, a duly elected politician, who is a member of the executive council of the province. By definition, therefore, the decision to be made by the second applicant was not a judicial decision but a political decision to be taken in the light of a range of considerations... (A) Court should generally be reluctant to assume the responsibility of exercising a discretion which the legislature has conferred expressly upon an elected member of the executive branch of government.'

To the extent that the applicants relied upon this case to establish that a decision to allocate subsidies is not reviewable as administrative action in terms of the Constitution, they were mistaken. The case is authority for the contrary proposition. This *dictum* is concerned not with the question of the character of the power exercised by the official and whether it was administrative action or not but with the question of when it is appropriate for a court to substitute its decision for that of an administrative official." The constitutional court continued at para 18 to observe that: "In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* this Court held that, in order to determine whether a particular act constitutes administrative action, the focus of the enquiry should be the nature of the power exercised, not the identity of the actor. The Court noted that senior elected members of the Executive (such as the President, Cabinet Ministers in the national sphere and members of executive councils in the provincial sphere) exercise different functions according to the Constitution. For example, they implement legislation, they develop and implement policy and they prepare and initiate legislation. At times the exercise of their functions will involve administrative action and at other times it will not. In particular, the Court held that when such a senior member of the Executive is engaged upon the implementation of legislation, this will ordinarily constitute administrative action. However, senior members of the Executive also have constitutional responsibilities to develop policy and initiate legislation and the performance of these tasks will generally not constitute administrative action. The Court continued as follows: "Determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will, as we have said above, depend primarily upon the nature of the power. A series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. So, too, is the nature of the power, its subject-matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. While the subject-matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of s 33. Difficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of s 33. These will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and

by an organ of state was not an administrative act¹⁷⁹. Decisions which are made in fulfilment of statutory obligations have been held not to be administrative acts.¹⁸⁰ A decision to issue summons for recovery of arrear payments for services rendered was held as not falling within ambit of administrative action as contemplated in s 33 of Constitution¹⁸¹. The Supreme Court of Appeal has observed that:

“It is patently clear that the fundamental right created by s 33(1) and (2) of the Constitution is that of lawful and procedurally fair administrative action. I emphasise the words ‘administrative action’, because they emphasise the very first question to be asked and answered in any review proceeding: what is the administrative act which is sought to be reviewed and set aside? Absent such an act, the application for review is stillborn.”¹⁸²

179 ethical public administration. This can best be done on a case by case basis.”(Footnotes omitted.) It should be noted that the distinction drawn in this passage is between the implementation of legislation, on the one hand, and the formulation of policy on the other. Policy may be formulated by the Executive outside of a legislative framework. For example, the Executive may determine a policy on road and rail transportation or on tertiary education. The formulation of such policy involves a political decision and will generally not constitute administrative action. However, policy may also be formulated in a narrower sense where a member of the Executive is implementing legislation. The formulation of policy in the exercise of such powers may often constitute administrative action.” O’Regan J at para 19 pointed out that: “If it is decided that the exercise of the statutory power does constitute administrative action, the enquiry is not ended. It is necessary then to determine what the Constitution requires. For example, it will be necessary to decide whether the action has been conducted in a procedurally fair manner, whether it is reasonable and lawful. Determining what procedural fairness and reasonableness require in a given case will depend, amongst other things, on the nature of the power.” (Footnotes omitted)

Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC And Others (fn 48 *supra*). The court noted at para 18 p 1023 - 1024 that: “The appellant is a public authority and, although it derived its power to enter into the contract with the first respondent from statute, it derived its power to cancel the contract from the terms of the contract and the common law. Those terms were not prescribed by statute and could not be dictated by the appellant by virtue of its position as a public authority. They were agreed to by the first respondent, a very substantial commercial undertaking. The appellant, when it concluded the contract, was therefore not acting from a position of superiority or authority by virtue of its being a public authority and, in respect of the cancellation, did not, by virtue of its being a public authority, find itself in a stronger position than the position it would have been in had it been a private institution. When it purported to cancel the contract it was not performing a public duty or implementing legislation; it was purporting to exercise a contractual right founded on the consensus of the parties in respect of a commercial contract. In all these circumstances it cannot be said that the appellant was exercising a public power. Section 33 of the Constitution is concerned with the public administration acting as an administrative authority exercising public powers, not with the public administration acting as a contracting party from a position no different from what it would have been in had it been a private individual or institution.” At para 19 p 1024, it distinguished the situation termination of the contract from the conclusion of a contract on the following basis: “In support of the contention that the appellant’s cancellation of the contract constituted ‘administrative action’ the first respondent’s counsel, in argument before us, referred to the decision in *Umfolozo Transport (Edms) Bpk v Minister van Vervoer en Andere* [1997] 2 B All SA 548 (SCA) at 552j - 553a, in which this Court held that the State Tender Board’s handling of tenders for transport for the government constituted administrative action. They also referred to the decision in *Transnet Ltd v Goodman Brothers (Pty) Ltd* (fn 35 *supra*) at 870D - F, in which this Court held that the actions of Transnet in calling for and adjudicating tenders constituted administrative action. In those cases the Court reasoned that the conclusion of a contract was preceded by purely administrative actions and decisions by officials in the sphere of the spending of public money by public bodies in the public interest. Different considerations apply in those circumstances. Section 217(1) of the Constitution specifically provides that when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.”

180 In *Steele And Others v South Peninsula Municipal Council And Another* 2001 (3) SA 640 (C) it was held that a decision of a municipality to remove half of the speed bumps constructed in certain suburban roads was not a legislative or an administrative act but rather the exercise of the municipal council’s constitutional authority and right to govern the local government affairs of its community. The resolution was not an implementation of any law but rather fulfilment of council’s statutory obligation to see to traffic control and road safety. This decision seems to make a fairly fine distinction between implementation of law versus fulfilment of a statutory obligation. In many circumstances the distinction may be difficult to draw at all since the distinction between a power and an obligation is not necessarily always clear-cut.

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

182 *Gamevest (Pty) Ltd v Regional Land Claims Commissioner, Northern Province and Mpumalanga, and Others* 2003 (1) SA 373 (SCA) at p 382

Only administrative action is subject to the Promotion of Administrative Justice Act¹⁸³ and the remedies laid down in that Act are only available therefore, in respect of administrative action as defined therein. In terms of s 1 of the PAJA, the phrase ‘administrative action’ is defined as meaning-

“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, but does not include –
 - (aa) the executive powers or functions of the National Executive, including the powers or functions referred to in ss 79(1) and (4), 84(2)(a), (b), (c), (d), (f), (g), (h), (i) and (k), 85(2)(b), (c), (d) and (e), 91(2), (3), (4) and (5), 92(3), 93, 97, 98, 99, and 100 of the Constitution;”¹⁸⁴

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Fn 8 *supra*

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The intention behind some of these exclusions is not altogether clear. Closer analysis yields some anomalous results. In some of the sections of the Constitution referred to there are two basic types of powers and functions as opposed to just one. It is not clear whether the PAJA intends both types in every case. For example in terms of section 91(2) the President appoints the Deputy President and Ministers, assigning their powers and functions, and may dismiss them. The first type of power and function in this provision is the powers and functions that are assigned to the Deputy President and the Ministers by the President. The second type is the power and function of the President in this section to appoint the Deputy President and the Ministers and dismiss them and to assign to them their powers and functions. Which are the powers and functions “referred to” in section 91(2)? Is it only the former? Only the latter? Or both types? If the act of the President in assigning to the Deputy President and the Ministers their powers and functions is an administrative act then it falls within the definition of “administrative action” in the PAJA and the same rules apply to it. Section 84(2)(i) which relates to the appointment of ambassadors, plenipotentiaries, and diplomatic and consular representatives by the President is excluded from the definition of “administrative action” in the PAJA but section 84(1)(e) referring to the making of any appointments that the Constitution or legislation requires the President to make, other than as head of the national executive, is not. In view of the fact that section 91(3) and (4) are included in the PAJA’s list of exclusions it would seem that the President’s appointment of the Deputy President and the Minister’s does not constitute administrative action in terms of the PAJA. The question then returns the focus to the first type of powers and functions in section 91(2), i.e. those assigned to the Deputy President and the Ministers by the President. Do they also fall outside of the definition of administrative action given in the PAJA or not? The fact that section 91(3) and (4) of the Constitution are part of the exclusions to the definition inclines one to the interpretation that they do not fall outside of the definition. This conclusion is strengthened by the fact that the PAJA excludes from the definition of administrative action those powers and functions referred to in section 92(2) of the Constitution but not sections 92(1) and 92(3). These subsections refer respectively to the responsibility of the Deputy President and the Ministers for the powers and functions of the executive assigned to them by the President and the requirement that members of Cabinet must act in accordance with the Constitution and provide Parliament with full and regular reports concerning matters under their control. However an obvious counterargument is that the reason the powers and functions in section 92(1) are not excluded from the definition of administrative action in the PAJA is simply that it would constitute unnecessary repetition of what was already excluded by way of the reference to section 91(2). The confusion is further compounded by the fact that section 93 is excluded from the PAJA’s definition of administrative action. This section confers upon the President the power to appoint Deputy Ministers from among the members of the National Assembly. If the appointment of Deputy Ministers is not an administrative action in terms of the PAJA then how can the appointment of Ministers and the Deputy President be otherwise? Section 99 of the Constitution, also excluded by the PAJA definition of administrative action, is another section that refers to two kinds of powers and functions. It refers to the power of a Cabinet Minister to assign any power



- (bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in ss 121(1) and (2), 125(2)(d), (e) and (f), 126, 127(2), 132(2), 133(3)(b), 137, 138, 139 and 145(1) of the Constitution;
- (cc) the executive powers or functions of a municipal council;
- (dd) the legislative functions of Parliament, a provincial legislature or a municipal council;

or function that is to be exercised or performed in terms of an Act of Parliament to a member of a provincial Executive Council or to a Municipal Council. It also refers to the powers and functions assigned. If one looks at section 100 (another exclusion in the PAJA definition of administrative action) the confusion deepens. In terms of subsection (1)(b) of section 100, when a province cannot or does not fulfil an executive obligation in terms of legislation or the Constitution, the national executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation including assuming responsibility for the relevant obligation in that province to the extent necessary to *inter alia* maintain essential standards or meet established minimum standards for the rendering of a service. Must one come to the conclusion in the light of the PAJA definition of administrative action and the exclusion of section 100 that all executive action whether in terms of the Constitution or other legislation is not administrative action? If this is indeed the intention of the PAJA then the question becomes: how one distinguishes administrative action from executive action? Section 101 of the Constitution is headed 'Executive Decisions'. It refers to decisions taken by the President and requires them to be in writing if taken in terms of legislation or if they have 'legal consequences'. The section also requires that proclamations, regulations and other instruments of subordinate legislation must be accessible to the public. This discussion may seem overly technical but it is important to establish whether decisions of the state involving the provision of health care services are executive decisions or administrative ones. The decision of the court in *Steele's* case (fn 13 *supra*) suggests that decisions taken in the course of the exercise of a constitutional or statutory obligation are not administrative decisions. If decisions involving health care service delivery are not administrative decisions they cannot be challenged on the grounds of administrative law. Two concrete examples may help to illustrate the point. Cabinet takes a decision in principle that a programme involving the use of antiretroviral drugs in the treatment of AIDS must be developed and implemented. The decision is not taken in terms of any specific law except that it is within the parameters of the Constitution, more particularly section 27(2). The programme is duly developed by the National Department of Health, with the Minister of Health approving the various steps and aspects of the programme proposed by the Department. The provincial departments of health are tasked by Cabinet with implementing the programme in their respective provinces which means they will have to decide on human resources issues, at which facilities the programme can begin immediately as opposed to others to whom it must later be extended and how much funding to request from the central fund established for the purpose of the programme. In terms of the programme, doctors and medical superintendents of state hospitals employed by the provincial departments of health are empowered to take decisions concerning the stocks of the drugs they will maintain within their facility, the number of patients they will be able to treat effectively, whether or not a particular patient is eligible for the antiretroviral programme etc. Which of the various decisions taken at the different levels is executive and which, if any, are administrative? The decision by Cabinet is likely to be classified as an executive decision due to the nature of Cabinet itself but also due to the fact that Cabinet is acting in fulfilment of a constitutional obligation to achieve the progressive realisation of the right of access to health care services. The decisions by the Minister of Health in approving the various steps and aspects of the programme developed by the national Department of Health are likely to be executive for the same reason that those of Cabinet are executive. They are taken in the execution of the constitutional obligation expressed in section 27(2). In terms of section 85(2) of the Constitution the President exercises executive authority, together with other members of the Cabinet by *inter alia* developing and implementing national policy. The Cabinet decision to provide antiretroviral drugs is very much a national policy decision. What about the decisions taken by various officials of the provincial health departments, for instance in deciding how much funding to apply for, at which facilities the programme will be offered immediately and the redeployment of human resources for purposes of the programme? It is clear that at least some of these decisions will verge on administrative as opposed to executive ones. The decisions of the medical superintendents and medical doctors at each public health facility may be administrative where they involve questions of logistics but not necessarily where they are based on professional medical opinions or judgments in relation to individual patients. The irony is that were Cabinet to have legislated the programme into being rather than left it at the level of a policy decision, the implementation of the relevant national legislation is included under administrative action in terms of the PAJA definition since section 85(2)(a) is not one of the exclusions in the definition of administrative action in that Act. It would seem that the were the programme itself to be legislated, even though it was developed by the National Department of Health in exactly the same way, its implementation by the provinces would become administrative action on their part as might even the professional decisions of the medical practitioners attending the AIDS patients depending upon the level of detail to which the programme is legislated. The fact that the legislation itself is in terms of a constitutional obligation just as much as is the policy decision taken by Cabinet, does not, apparently, make a difference. Decisions taken in the implementation of legislation fall under the heading of administrative action while decisions taken in the implementation of a documented policy directive of Cabinet apparently do not necessarily. In the latter case one would have to examine the particular decision in question, the level at which it is taken, the nature of the knowledge base and circumstances informing it and its legal basis. The importance of the distinction between law and policy will further emerge in subsequent discussion.



- (ee) the judicial functions of a judicial officer of a court referred to in s 166 of the Constitution or a Special Tribunal established under s 2 of the Special Investigation Units and Special Tribunals Act¹⁸⁵, and the judicial functions of a traditional leader under customary law or any other law;
- (ff) decision to institute or continue a prosecution;
- (gg) a decision relating to any aspect regarding the appointment of a judicial officer, by the Judicial Service Commission;
- (hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act¹⁸⁶; or
- (ii) any decision taken, or failure to take a decision, in terms of s 4(1)'.

It is clear from this definition that administrative action is not confined to the state but can also be taken by private bodies¹⁸⁷. It is also clear that not all action by organs of state constitute administrative action or the exercise of administrative power¹⁸⁸. The Constitution gives a very broad definition of the term 'organ of state'¹⁸⁹. It is

¹⁸⁵ Act No 74 of 1996

¹⁸⁶ Act No 2 of 2000 .It is somewhat ironic that decisions taken in terms of the Promotion of Access to Information Act are not administrative action as defined in the PAJA given that access to information – especially state held information - is one of the primary concerns of administrative law. (See for instance Hoexter (fn 134 *supra*) at p 498 where in criticising the PAJA she observes that “the statute contains no duty on administrators to communicate their rules and standards in an appropriate manner to those likely to be affected by them.” It is, however, logical if one takes the view that the fulfilment of a statutory obligation does not amount to administrative action as the court did in *Steele* (fn 180 *supra*)

¹⁸⁷ *Devenish et al* (fn 15 *supra*) observe at p 25 that: ““Administrative action” is the conduct of public authorities and indeed private entities when they exercise public powers, perform public functions or are obliged to exercise authority in the public interest. This means that common law review no only applies in a very narrow field in relation to private entities that are required in their domestic arrangements to observe the common law principles of administrative law. This applies in relation to voluntary associations, such as sporting clubs and religious organisations.”

¹⁸⁸ *Devenish et al* (fn 15 *supra*) note that administrative acts are neither legislative nor judicial. They state that an administrative decision is one made according to administrative policy whereas a judicial one is made according to the law.

¹⁸⁹ Act 108 of 1996, section 239 states: ““organ of state’ means-

- (a) any department of state or administration in the national, provincial or local sphere of government; or
- (b) any other functionary or institution-

- (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
- (ii) exercising a public power or performing a public function in terms of any legislation,

but does not include a court or a judicial officer;”. In fact the vagueness of this language in the interim Constitution (Act 200 of 1993) has been criticised. See Woolman S, Chaskalson M, Kentridge J, Klaaren, Marcus G, Spitz D and Woolman S *Constitutional Law of South Africa* p10-35 who points out that: “The text also fails to make clear when the state is present in other guises. According to s7(1), the ‘Chapter binds all legislative or executive organs of state’. But what counts as organs of state? According to the definition in s 233(1)(ix), organs of state are understood to include ‘any statutory body of functionary’. While this definition of an organ of state prevents too unduly narrow an interpretation of those state actors bound by the Chapter, it still begs two questions. First, what counts as a statutory body? Is it enough that the institution has been created by statute for it to be a statutory body? Or must it possess additional special properties to deserve subjection to constitutional scrutiny? Secondly, what counts as a functionary? Is it enough that such functionary exercise what are generally recognised as state powers and prerogatives without any further imprimatur of the state? Or must the state be present in some other tangible way?” In passing it must be noted that the courts seem to prefer the secondary view. In *Nextcom (Pty) Ltd v Funde No And Others* 2000 (4) SA 491 (T), Bertelsmann J observed that: “In *Directory Advertising Cost Cutters v Minister of Posts Telecommunications and Broadcasting and Others* 1996 (3) SA 800 (T) ([1996] 2 All SA 83) Van Dijkhorst J investigated the circumstances which determine whether a body or functionary is an organ of State or not. In holding that Telkom, a statutory body, had to be qualified as such, he stated that an organ of State includes an institution which is ‘. . . an intrinsic part of government - i.e. part of the public service or consisting of government appointees at all levels of government - national, provincial, regional, and local - and those

important to note that it does not mean only public sector entities but includes other entities that exercise a public power or perform a public function. Other types of powers identified in the definition are judicial powers, legislative powers and executive powers. The decision of the Cape High Court in *Steele's case*¹⁹⁰ to the effect that a decision of a municipality to remove speed bumps was not a legislative or an administrative act but rather the exercise of the municipal council's constitutional authority and right to govern the local government affairs of its community and that the resolution was not an implementation of any law but rather fulfilment of council's statutory obligation to see to traffic control and road safety would appear at first glance to be at odds with the definition of "administrative action" in the PAJA quoted above until one refers to paragraph (cc) of the exclusions section of the definition

institutions outside the public service which are controlled by the state - i.e. where the majority of the members of the controlling body are appointed by the State or where the functions of that body and their exercise is prescribed by the state to such an extent that it is effectively in control. In short, the test is whether the state is in control.' (At 810F - H.) This test has been repeatedly applied since, compare *Korf v Health Professions Council of South Africa* 2000 (1) SA 1171 (T) and authorities there cited, as well as *Mistry v Interim National Medical and Dental Council of South Africa and Others* 1999 (7) BCLR 933 (D) and *ABBM Printing & Publishing (Pty) Ltd v Transnet Ltd* 1998 (2) SA 109 (W)."

In *Korf*, (fn 126 *supra*) the court had to decide whether the Health Professions Council was an organ of state for the purposes of the Constitution. It is a statutory body created by the Health Professions Act No 54 of 1973. Van Dijkhorst J made the following important observations at p 1177 to 1178: "Judgment in *Directory Advertising Cost Cutters (supra)* was delivered on 29 February 1996. The Constitution was promulgated on 18 December 1996 after having been adopted by the Constitutional Assembly on 8 May 1996. It must therefore be accepted that the drafters were aware of the different interpretations placed upon the predecessor of item 23(2) of Schedule 6 by the Courts in *Directory Advertising Cost Cutters* on the one hand and *Baloro* on the other. One is therefore enjoined to ascertain whether the Constitutional Assembly made a choice between the wider test of *Baloro* and the narrower one of *Direct Advertising Cost Cutters*. There is no evidence of such a choice for the interim period pending legislation in the mere re-enactment of item 23 of Schedule 6 to the interim Constitution. But even item 3(2) of Schedule 6 with its limited lifespan has to be interpreted in the light of the definition of organ of state in s 239 of the Constitution. It is more precise than the previous one, but is it wider? The 1993 definition 'statutory body or institution' has now become 'any other functionary or institution'. I do not think that therein lies a material difference. The latter phrase is further limited in the definition, whereas the 1993 definition was limited by the nature of an organ of State as explained in *Direct Advertising Cost Cutters*. Has the description set out in subpara (b) now extended the meaning of organ of state? Subparagraph (i) limits it to a power or function in terms of the national and provincial constitutions. This does not bring about a difference. Subsection (ii) limits it to a public power or public function in terms of any legislation. It does not bring about a difference insofar as the reference to public power is concerned. The remaining question then is whether the reference to a public function in terms of legislation takes the concept 'organ of state' out of the control test. The answer depends on the meaning given to the words 'public function'. The three pillars of the state, legislative, executive and judicial, are referred to in s 239. The latter is expressly excluded. The executive arm is expressly mentioned in subpara (a) and the legislative one falls under subpara (b)(i) which can also encompass, for example, the auditor-general, public protector, etc. They are all part of the machinery of state. So is a functionary (or institution) exercising a public power. There is no reason to give the word 'public' when used in conjunction with 'function' in para (b)(ii) a meaning that would take it outside the context of 'engaged in the affairs or service of the public' and give it the meaning of 'open to or shared by all the people'. (Both these meanings are given in *The Concise Oxford Dictionary* for the word 'public'.) It follows that the more precise definition of 'organ of state' in s 239 of the Constitution was not intended to differ materially from the 1993 definition. That definition was interpreted in *Direct Advertising Cost Cutters* to include the element of control. I adhere to that decision. The Supreme Court of Appeal also appears to favour the control test (in a different context) in the unreported judgment in *Umfolozai Transport (Edms) Bpk v Die Minister van Vervoer en Andere*, case No 231/95 in which judgment was delivered on 13 March 1997 (p 16). As stated, the decision in *Direct Advertising Cost Cutters* was followed and the control test was applied by other Courts in respect of both the interim Constitution and item 23(2)(a) of Schedule 6 to the Constitution. It was not argued that *Direct Advertising Cost Cutters* or these other cases are either inapplicable or wrong. It follows that the control test has to be applied in this case. The issue whether or not the respondent is an organ of state arose squarely in *Mistry v Interim National Medical and Dental Council of South Africa and Others (supra)*. In that case both Booysen J, who dismissed the applicant's claim for interim relief, and McLaren J, who dismissed the applicant's claim for final relief, applied the control test and concluded that the respondent's predecessor was not an organ of state. It will serve no purpose to repeat the facts set out at 947 - 8 of the judgment which led the Court to come to this conclusion. There has been no material change. The state is not in control of the respondent. The respondent is not an organ of state."

Korf was also applied in *Van Rooyen and Others v the State and Others* 2001 (4) SA 396 (T) and *Lebowa Mineral Trust v Lebowa Granite (Pty) Ltd* 2002 (3) SA 30 (T).

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Steele fn 180 *supra*



which mentions the executive power or functions of a municipal council. The court in *Steele* apparently decided that the decision of the municipal council in question was not an administrative one because it constituted the exercise of the municipal council's executive powers or functions. Where then does this leave decisions involving the delivery of health care services? The definition in the PAJA excludes the executive powers or functions of the National Executive, including the powers or functions referred to in various sections of the Constitution. Some of the powers and functions reflected in section 85(2) of the Constitution are excluded from the definition of "administrative action". These are the exercise of executive authority by the President together with other members of the Cabinet by -

- (b) developing and implementing national policy;
- (c) co-ordinating the functions of state departments and administrations;
- (d) preparing and initiating legislation; and
- (e) performing any other executive function provided for in the Constitution or in national legislation.

Subparagraph (a) of section 85(2) refers to the implementation of national legislation except where the Constitution or an Act of Parliament provides otherwise. Significantly, the PAJA omits this section from its exclusion of what constitutes administrative action. This creates something of a problem in legal logic with regard to the provision of health care services. In terms of section 27(2) of the Constitution the state is required to take reasonable *legislative and other measures* to achieve the progressive realisation of the right of access to health care services within its available resources. Implementation of the legislative measures comprises administrative action whereas implementation of policy and other measures may or may not constitute administrative action depending upon the nature of the decision. It is important to note that it is only decisions taken by organs of state when exercising a *power* in terms of the Constitution or exercising a public *power* or performing a public *function* in terms of any legislation that fall within the definition of administrative action in the PAJA. Where the decision is taken in fulfilment of a constitutional *obligation* or in the fulfilment of an *obligation* in terms of legislation, it does not apparently constitute administrative action. The logic behind the fact that the fulfilment of a statutory obligation does not constitute an administrative action where the obligation in question is so specific that it leaves no room for discretion on the part of the official concerned is fairly obvious. One cannot subject to judicial review an act by a state

official which is done in the fulfilment of a clear and unambiguous instruction by the Legislature expressed in terms of law. Where, however there is room for discretion on the part of the official, for instance, as to the manner in which the obligation is fulfilled, it is submitted that there is scope for argument that the decision of the official in exercising that discretion could and in certain circumstances should be reviewable administrative action. For example a legislative obligation that a National Consultative Health Forum consisting of “relevant stakeholders” must be convened “at least once a year” in order to promote transparency and to involve the private sector and other interested parties in issues affecting health service delivery leaves a fair amount of discretion. Who are the relevant stakeholders? How are they identified and issued with invitations? When and in what circumstances should the minimum of one meeting a year be exceeded given the stated purpose of the Forum?

Since there is a constitutional *obligation* upon the state with regard to access to health care services in terms of section 27(2), it may well be argued that decisions taken in fulfilment of this obligation fall outside of the scope of the definition of administrative action and outside of the scope of the PAJA. A macroscopic consideration of the definition of administrative action in the PAJA reveals that it does not consist of the exercise of all types of power. It excludes certain types of power notably, executive, legislative and judicial in relation to the activities of the three spheres of government in exercising these types of power and functions. Thus the legislative functions and the executive powers or functions of a municipal council are excluded.

In terms of Part A of Schedule 4 of the Constitution, the national and provincial governments have concurrent legislative competence in the functional area of health services. Decisions taken in the exercise of this competence would therefore be excluded from the definition of administrative action. Since executive power follows legislative power it is logical that the executive powers of national and provincial governments are also excluded from the definition of administrative action. It is nevertheless not a simple matter to determine whether or not a particular action or decision amounts to an administrative rather than an executive action or decision. In the health context decisions are taken at many different levels and on many different bases. The injunction from the courts is not to look at the nature of the decision maker

but rather at the nature and impact of the decision itself in trying to decide whether or not it is an administrative decision. There is a further problem with the review of administrative decisions in the health context especially. Review tends to focus on irregularities in procedure albeit with a view at times to the substance of the case, depending on the circumstances. As long as the distinction between review and appeal remains, there will be an inevitable focus in review proceedings on procedural fairness. In the context of health care the setting aside of a decision on grounds of a procedural regularity can literally be hazardous to health. For example, the Medicines Control Council has the power to register medicines in South Africa in order for them to be sold here. The general rule is that unlicensed medicines may not be sold in South Africa. In deciding whether or not to register a medicine, the Council must look at the safety, efficacy and quality of the medicine. These criteria are scientific in nature. Should a decision of the Medicines Control Council not to register a medicine be set aside because although the Council acted incorrectly with regard to some procedural rule, the medicine is patently dangerous and it would not be in the public interest to have it registered here? Usually the court will refer the matter back to the decision making body when reviewing a decision of a public body. In this present example the outcome will inevitably be the same if the medicine is defective with regard to its safety, efficacy or quality. The only difference will be the procedural correctness in taking the decision. A court is not itself competent to decide on the safety, efficacy or quality of a medicine. For it to even attempt to interfere with the substance of a decision of the Medicines Control Council could be harmful to public health. In the case of a province deciding not to purchase a particular piece of expensive but highly effective emergency medical equipment for a major provincial hospital that deals regularly with road accident victims, the power of a court to refer the matter back to the provincial authorities once the victim has died is of little assistance to the victim. Is such a decision an administrative decision in any event given the Constitutional obligation to achieve the progressive realisation of the right of access to health care services?

A unilateral administrative act is referred to as a disposition.¹⁹¹ Wiechers¹⁹² defines a disposition as a unilateral act (other than a legislative or judicial act) whereby, in

¹⁹¹ Devenish *et al* (fn 15 *supra*) p 104.

given circumstances, an individual legal relationship is created, fixed, varied or terminated or whereby such creation, determination, variation or termination of a legal relationship is refused. It takes place by virtue of authoritative power vested in the administrative body. It is a rule of administrative law that an administrative organ may not regulate a general relationship by way of a disposition.¹⁹³ An example of a unilateral administrative act is the grant or refusal of a licence. The granting of a licence does not constitute a contract between the administrative body and the applicant. A licensing decision must take into account broader issues than just the benefit of the licence to the applicant. The public interest and the constitutional rights and obligations of both the applicant and of those who will be affected by the licensing decision must be taken into account. The relationship between the applicant for a licence and the licensing body is one founded upon administrative law and bounded by the particular statute granting the administrator the power to grant licences.

Where an administrative body enters into a contractual relationship, the contract is governed by principles of the private law of contract. However, Devenish *et al* point out that apart from a private law contract, the state can contract with private persons using an “authoritative contract”, the distinction between this type of contract and a private law contract being that the former contains an element of authoritative power whereas the latter is based on the principle of equality between contracting parties. The consent of the private party determines the extent and scope of the authoritative power. They observe that a bilateral administrative contract arises in a situation where the state renders an essential service such as the provision of electricity. A further example of a bilateral agreement is that of a collective labour agreement concluded by organised employers and employees organisations and then approved by the administrative authority and published in the form of subordinate legislation. According to Devenish *et al*, Wiechers is of the view that this type of contract provides the state with one of the best and most democratic methods of entering into the trade, labour and social life of the individual and so provides clear evidence of the fact that the functions performed by the administration are not only regulatory. They point out that such agreements must not be prohibited whether expressly or by

¹⁹² Wiechers *M. Administrative Law* p 122

¹⁹³ Devenish *et al* (fn 15 *supra*) p 104

necessary implication by common law or statute. They must also not amount to an obstruction of the authoritative function since an administrative authority may not fetter its powers of discretion or restrict its authoritative function. Such contracts may also not conflict with general peremptory provisions of the empowering Act or any other statute and in the absence of statutory authority they may not automatically impose coercive duties on third parties. They can however, confer rights and privileges on third parties. Finally they must be concluded in the general interest for a public purpose.¹⁹⁴

The term “public interest” is commonly found in administrative law but its meaning is not always easily determined or ascertained¹⁹⁵.

3.11 Decisions Involving Rationing

Health care service delivery often requires decisions involving rationing. South African examples include a decision to implement a clinical protocol that prohibits the ventilation of neonates weighing less than one kilogram or a decision that HIV/AIDS positive persons are not suitable candidates for organ transplantation.

The case of *Child B* in the United Kingdom is an example of an administrative decision involving the rationing of health care. In the United Kingdom the possibility of a contractual relationship between the patient and the provider of public health care is excluded¹⁹⁶. The National Health Service (NHS) introduced a full and

¹⁹⁴ See generally Devenish *et al* (fn 15 *supra*) at p105-106

¹⁹⁵ The court in *Asko Beleggings v Voorsitter Van Die Drankraad No En Anders* 1997 (2) SA 57 (NC) held that the meaning of the term 'public interest' was a wide and uncertain term. The term 'public interest' in s 22(2)(d)(i)(ee) had to be interpreted in this case to mean that the granting of the licence had to be in the interest of the community. In *Ex Parte North Central And South Central Metropolitan Substructure Councils Of The Durban Metropolitan Area And Another* 1998 (1) SA 78 (LCC) the court held that that in deciding whether the agreement complied with ss (6) of s 34 it was necessary to investigate the concept of 'public interest'. It found that though the Courts had never defined the concept it was clear that in arriving at what was in the public interest they compared the deprivation of some private convenience with the benefit that was likely to result therefrom for the general public or part thereof. The constitutional court in *President Of The Republic Of South Africa And Others v South African Rugby Football Union And Others* 2000 (1) SA 1 (CC) distinguished between “public concern” and “public interest”. It held that a matter of public concern was, therefore, not a matter in which the public merely had an interest, it was a matter about which the public was also concerned. ‘Public concern’ in this context aid the court was therefore a more restricted notion than that of public interest.

¹⁹⁶ Kennedy I and Grubb *A Medical Law* p272 state that “The conventional understanding of the doctor-patient relationship within the NHS is that it is not contractual. However the orthodoxy has been challenged.” They note that until the NHS was created in 1948, treatment was either provided privately or on a charitable basis...”Within the NHS today it is generally accepted that there is no contractual relationship between a doctor (whether general practitioner or hospital doctor) and the patient (*Pfizer Corp v Ministry of Health* [1965] AC 512 (HL)). Equally, there is no contractual relationship between the patient and the hospital such as the NHS Trust, where the patient is cared for. Any claim for damages based upon a breach of duty lies only in tort and, in particular, in action for negligence.” They observe that the basis for the orthodoxy is two-fold. First, medical services within the NHS are provided to the patient pursuant to a



comprehensive public service of healthcare provision free at the point of consumption.¹⁹⁷ There is a legal duty upon every Health Authority in the NHS to arrange with regard to their area, personal medical services for all persons wishing to take advantage of the arrangements¹⁹⁸. The Health Authority contracts with general practitioners and other providers of health care services for the provision of services to patients. In terms of the British National Health Service Act every person is entitled to have a general practitioner as their doctor. The mechanism by which the relationship is created between a general practitioner and a patient is through an individual applying by delivery of his medical card or making an application for inclusion on the general practitioner's list of patients¹⁹⁹. It is largely governed by statute and the obligations of the general practitioners towards their patients are themselves defined by statute or subordinate legislation²⁰⁰. This means that the relationship between the patient and a public provider of health care services is based on administrative law as opposed to the law of contract which renders it of particular interest in the present context.

The case of *Child B* illustrates the relatively unique issues involving administrative decisions in this field. Child B was diagnosed with non-Hodgkin's lymphoma in 1990 for which she was treated at Addenbrooke's Hospital in Cambridge. In 1993 she was diagnosed with a second cancer, acute myeloid leukaemia. She underwent treatment at the Royal Marsden Hospital in London. Nine months later she relapsed and the paediatricians treating her advised that she had a further six to eight weeks to live. They expressed the view that a child with her medical history was unlikely to benefit from further intensive treatment and should be placed on palliative care only. Her

statutory obligation. Such compulsion to provide a service is considered to be inconsistent with a contractual arrangement. Secondly, the patient fails to provide the necessary consideration in return for the doctor (or other's) promise to treat which is necessary if a contract is to exist. However the statutory context within which a general practitioner functions is not necessarily inconsistent with a contractual arrangement. The authors cite the arguments in favour of a contractual relationship but then go on to point out that there are two factors which tell against them. They state that there is in truth no real reason for an English court to "divine a contract" between the parties. The structure of health care provision within the internal market of the NHS is antithetical to contractual arrangements. As an example, they give the fact that the National Health Service and Community Care Act 1990 specifically states that agreements between 'purchasers' and 'providers' are not legally enforceable contracts. Secondly the statutory and regulatory context in which health services are provided may lead a court to infer that the parties had no intention to create legal relations in the form of a contract. The South African law of contract does not subscribe to the doctrine of consideration and so the absence of a system of payment in the public sector would not be an obstacle to the formation of a contract. In any event in South Africa, public sector patients are classified on the basis of a means test and charged accordingly so except for the indigent, there is likely to be some form of 'consideration'.

197 Kennedy and Grubb (fn 196 *supra*) p53

198 British National Health Service Act 1977

199 Kennedy and Grubb, (fn 184 *supra*) p77.

200 E.g. National Health Service (General Medical Services) Regulations 1992 (SI 1992 No 635) and National Health Service (Pharmaceutical Services) Regulations 1992 (SI 1992 No 662)

father was not willing to accept this advice. He found two doctors in California who were willing to recommend that Child B should receive a second bone marrow transplant. The advice from the American doctors was far more optimistic than that of the British paediatricians and the latter were surprised by it. They did not accept the American view and reiterated their opinion that only palliative care should be given. The father then approached a leukaemia specialist at Hammersmith Hospital who also gave more positive advice than that of the paediatricians. The health authorities, when approached for permission for Child B to be treated at Hammersmith Hospital declined, arguing that the paediatricians caring for the child were in the best position to assess treatment options and that the authorities were not prepared to use resources on experimental procedures with only limited chances of success. The father consulted his solicitors who sought leave for judicial review to challenge the decision of the health authorities. This was granted. The High Court took the view that the health authority should reconsider its decision because the right to life was precious even though the chances of success were acknowledged to be low. The judgment was overturned on appeal. The judges in the Court of Appeals reaffirmed the reluctance of English courts to challenge health authority decisions on the funding of treatment and ruled that the authority had weighed the advice it had been given and there was no basis for its decision to be referred back for reconsideration. In response to the media coverage of the court case, an anonymous donor offered to provide funds for the treatment. The offer was accepted and treatment started in the private sector. The specialist who took over the treatment of the child decided not to undertake a second transplant but instead used an experimental form of treatment known as donor lymphocyte infusion. The treatment enabled the child to enjoy a few extra months of life. She eventually became ill again and died in May 1996²⁰¹. In discussing this case Ham notes that it demonstrates the tension between a concern to use resources for the benefit of the population as a whole and the urge to respond to the needs of individuals faced with the prospect of death.

In South African constitutional terms this case would be balancing the right to life of one individual against that of many others. The constitutional court in *Soobramoney v*

²⁰¹ Ham C "Tragic Choices in health care: Lessons form the *Child B Case*" *British Medical Journal* 1999; 319 p1258-1261 (6 November).

*Minister Of Health, Kwazulu-Natal*²⁰² was faced with a similar issue. It was a question of allowing one man who was essentially terminally ill due to a number of reasons to have renal dialysis at the expense of others who were likely to recover. The facts of this case and the judgement of the court have already been discussed in a previous chapter and so will not be repeated here. However it is worth considering from an administrative law point of view the circumstances of Soobramoney's case and that of *Child B* since in both cases the administrative authority successfully met the challenge to its decision. In both cases the ethical challenge was to meet the needs of all individuals within the available resources. As Ham points out, although health authorities have a particular responsibility to ensure justice in the allocation of these resources, they are also expected to respect each individual as a person in his or her own right. The Cambridge and Huntingdon Health Authority in the case of *Child B* was in a somewhat different position to the provincial health authority in KwaZulu-Natal in *Soobramoney* because in the former, the adult cancer specialists viewed the balance between the harm and benefit of the treatment differently from the paediatricians. In other words there was a dispute between the experts as to the efficacy of the treatment and the benefit Child B would derive from it. In *Soobramoney* there was no question that the patient would benefit from the renal dialysis. It was whether or not to give him preference over other patients who were undoubtedly likely to benefit more from it in terms of both quality of life and longevity. Ham makes reference to the "rule of rescue" which effectively states that when individuals are suffering from life-threatening conditions there is an obligation to intervene even when this may run counter to the concerns of the community as a whole²⁰³. This is apparently not in direct alignment with the views of Sachs J in

²⁰² *Soobramoney* fn 158 *supra*

²⁰³ Richardson J and McKie J "The Rule of Rescue" *Centre for Health Program Evaluation Working Paper 112* express the rule of reason concept as follows: "Why do we mount expensive searches – for sailors lost at sea, for example – when the likelihood of finding those missing is slim? (Creadon, 1997). Why do we offer critically ill patients intensive care, when the likelihood of it being effective is negligible? (Osborne and Evans 1994 p779). Why do some patients receive a second or third heart or liver transplant, when first-time recipients have a higher one-year survival rate? (Ubel *et al*, 1998 p 276–9). Is it possible to justify such practices when there are better uses for our resources? One consequence is that these practices manifest a psychological imperative that is hard to resist: namely, the urge to rescue identifiable individuals facing avoidable death, without giving too much thought to the opportunity cost of doing so. Jonsen dubbed this the 'Rule of Rescue' (Jonsen, 1986, pp172–4)." They explain that rule of rescue is not consistent with putting available resources to the best alternative use as follows "Whatever the explanation for the counter-intuitive ordering of Oregon's initial list, the Rule of Rescue (RR) is clearly at odds with CEA as ordinarily understood, and in particular with that form of CEA which uses the quality-adjusted life year or QALY as the measure of effectiveness. In its simplest form the QALY represents a year of life that has been weighted, or discounted, by an index of the quality of life. By convention, full health has a weighting of 1 and death has a weighting of zero. So, for example, if a year of life on hospital dialysis is considered to be worth only 60 per cent as much as a year of normal health, other things being equal, then 20 years of life on dialysis would be equivalent to 20 × 0.60 = 12 QALYs. In conventional CEA it is only the change in the length and quality of life that are of importance and QALYs combine these two dimensions of outcome. QALYs therefore provide a (conceptually) simple method for prioritizing health care: all else equal, the lower the cost of a



*Soobramoney*²⁰⁴ where he stated that health care rights by their very nature have to be considered not only in a traditional legal context structured around the ideas of human autonomy but in a new analytical framework based on the notion of human interdependence. Sachs J observed that a healthy life depends upon social interdependence: the quality of air, water and sanitation which the state maintains for the public good; the quality of one's caring relationships which are highly correlated to health; as well as the quality of health care and support furnished officially by medical institutions and provided informally by family, friends and the community. He pointed out that "When rights by their very nature are shared and inter-dependent, striking appropriate balances between the equally valid entitlements of expectations of a multitude of claimants should not be seen as imposing limitations on those rights (which would then have to be justified in terms of section 36) but as defining the circumstances in which the rights may most fairly and effectively be enjoyed. The rule of rescue approach apparently favours the right to life of an individual above the broader rights and interests of the community but it seems overly simplistic in the light of Sachs J's observations which suggest that one cannot entirely extricate the rights of an individual from the rights and interests of the community. A single individual's right to life or health cannot be seen independently of that of others in the context of limited, shared resources produced by the community as a whole. The rule of rescue approach, by contrast, states that there comes a point at which the rights and interests of the individual must be considered in isolation from the community in which he or she lives and functions. It is unhelpful in situations where the right to life of one person must be balanced against the same right to life of another such as was the case in *Soobramoney*."

QALY the greater the value for money offered by a programme or treatment, and thus the higher a priority it should be. But the RR conflicts with this logic. Decisions influenced by the RR show a strong tendency to disregard CEA when this is necessary to save an identifiable individual facing avoidable death. Allocative efficiency – maximizing utility per unit cost – is simply not the only, or even the major, factor when someone's life is visibly endangered." This illustrates the complexity of health rationing decisions and the importance of the sometimes emotionally laden values of the community (in the case of South Africa community values are reflected to a significant extent in the Constitution) as well as the more utilitarian approaches of economics theory. They make an important point in observing that: "If the total social utility gained from the Rule of Rescue, including the utility gained from having reinforced within the community the belief that life is valuable and worth great effort to preserve, outweighs the utility sacrificed by not putting resources to the best alternative use, then the Rule of Rescue would be justifiable from a utilitarian point of view. On the other hand, fairness requires that we do not discriminate between individuals on morally irrelevant grounds, and being 'identifiable' – being in a context that evokes the 'Rule of Rescue' response in others – does not seem to be a morally relevant ground for discrimination. We conclude by observing that utilitarians can make their case stronger by distinguishing between cases where the societal demand for rescue measures is contrived by media coverage, and cases where it is not. Discrimination against anonymous individuals is more objectionable in the former cases than in the latter."

In language reminiscent of the South African Constitution, Ham observes that decision-makers have to ensure “accountability for reasonableness” in taking decisions on healthcare coverage. He notes that Daniels and Sabin²⁰⁵ proposed four conditions that need to be met in order to ensure accountability for reasonableness:

- (1) **Publicity condition:** decisions regarding coverage for new technologies (and other limit setting decisions) and their rationales must be publicly accessible;
- (2) **Relevance condition:** these rationales must rest on evidence, reasons and principles that all fair minded parties (managers, clinicians, patients and consumers in general) can agree are relevant to deciding how to meet the diverse needs of a covered population under necessary resource constraints;
- (3) **Appeals condition:** there is a mechanism for challenge and dispute resolution regarding limit setting decisions, including the opportunity for revising decisions in light of further evidence or arguments;
- (4) **Enforcement condition:** there is either voluntary or public regulation of the process to ensure that the first three conditions are met.

With reference to the decision taken by the Cambridge and Huntingdon Health Authority in the case of *Child B*, Ham notes that not all of these conditions were met. For example, the application of a set of values to the *Child B* case met the relevance condition but the manner in which the authority’s decision was communicated only partly fulfilled the publicity condition. He points out that more effort could have been made to explain the basis of the decision not to fund intensive treatment in advance of media attention. Similarly he points out that the appeals condition was not met in that there was no mechanism for challenge and dispute resolution other than a request to the health authority to reconsider its decision. The absence of such a mechanism meant that legal action was the only formal recourse available to the family of Child B. The enforcement condition, says Ham, was met through judicial review of the health authority’s decision but the restrictive scope of such reviews in the English legal system means that only some aspects of the process proposed by Daniels and Sabin were scrutinised by the courts. In particular, notes Ham, the courts looked only at the health authority’s decision-making process and did not require an explanation

²⁰⁵ Daniels N and Sabin J, “The ethics of accountability in managed care reform”, *Health Affairs* 1998; 17 p 50-64 [Medline]



or justification of the decision or an assessment of the evidence on which it was based. According to Daniels and Sabin a commitment to transparency that case law requires improves the quality of decision-making. An organisation whose practice requires it to articulate explicit reasons for its decisions becomes focused in its decision-making²⁰⁶.

Ham goes on to observe that Hadorn has drawn parallels between decision making processes in health care and in the legal system saying that “the need to make relatively consistent case-by-case decisions amidst profound complexity is clearly one of the forces that has driven the health care system to adopt quasi-judicial features.” He notes that Hadorn argues that consistent procedures need to be adopted in health care, and he contends that these procedures should be centred on the consideration of economic evidence concerning the outcomes of care and the formulation of judgements based on this evidence. Hadorn maintains that judgements should be based on a standard of proof that might be more or less stringent depending on the availability of resources and the views of policy makers. He makes the point that “in the selection of a standard of proof...the fundamental balance between individual claims of need (that is, pursuit of individual good) and the greater public good is achieved.

Many of the principles and points identified above are inherent in the South African constitutional order and have been re-enforced and expounded by the constitutional court and constitutionally mandated legislation.²⁰⁷ The PAJA requires reasons for decisions to be given in writing for instance. It takes a conscious and sustained effort, however, on the part of administrative entities such as government departments to maintain a body of knowledge relevant to the decisions that must be taken, to keep record of decisions in order to ensure consistency with previous decisions, to formulate rules for the setting of policy and for the taking of decisions in such as

²⁰⁶ Daniels N and Sabin J, “Limits to health care: fair procedures, democratic deliberation and the legitimacy problem for insurers. *Philosophy of Public Affairs* 1997; 26 p 327-328 as quoted in Ham “Tragic Choices in Health Care: lessons from the Child B case” fn 201 *supra*.

²⁰⁷ See for instance the constitutional court’s emphasis on relevance (the court held that although the concerns raised on behalf of the appellants were relevant to the ability of government to make a ‘full package’ available throughout the public health sector, they were not relevant to the question whether Nevirapine should be used to reduce mother-to-child transmission of HIV at those public hospitals and clinics outside the research sites where facilities in fact existed for testing and counselling) and transparency in *Minister of Health and Others v Treatment Action Campaign and Others* fn 159 *supra*.

manner as to ensure consistency in the future and to foster a culture in which decisions are taken on the basis of and in accordance with all of the foregoing.

3.12 The Right to Fair Administrative Action vs the Right to Health

Should a decision by an inspector acting in terms of the Medicines and Related Substances Act to confiscate a shipment of hair product containing dangerously high quantities of lead be reversed by a court on the grounds that the decision was not taken in accordance with the prescribed procedures? This question essentially juxtaposes the constitutional right to fair administrative action and the constitutional rights to life, freedom and security of the person, including the right to bodily and psychological integrity, and to an environment that is not harmful to their health or well-being and requires a balancing of rights exercise. It seems fairly obvious which rights should win in this example. The problem arises in that the decision to confiscate the goods, even if it means that this constitutes a violation of the right to fair administrative action is not one that is initially made by a court of law the members of which are well trained and hopefully versed in these delicate balancing exercises. It must be taken by an administrative official often “on the spot”. An obvious solution to the problem is to give the administrative official sufficient power in subordinate or even principal legislation, containing the necessary guidelines and parameters for the exercise of that power, so as to protect the right and interests of both the public and the importer of the hair products. Unfortunately, even if such legislative provisions overcame all of the hurdles of lawmaking, it is not always possible to anticipate in law every permutation of practical life. Legislation is not necessarily an ideal remedy in every instance. The fact remains that “[C]omplex policy decisions should be made by accountable decision makers...Citizens must accept that the state should have the power to affect their interests, and that it makes decisions through rational processes.”²⁰⁸

Is a decision taken by the provincial government of a province not to supply antiretroviral drugs to pregnant mothers and their children an administrative or an executive decision? Is a decision by a medical superintendent to allow a non-governmental organisation access to the premises of the public hospital he runs in

²⁰⁸ O'Regan C “Rules for Rule-Making” *Controlling Public Power: Administrative Justice Through The Law* at p 106



order to assist rape victims an administrative decision or is it a business decision based on the fact that they are leasing some of the space in the hospital? Is a decision by a National Blood Transfusion service to screen blood for diseases using a much more expensive but also much more reliable laboratory test an administrative decision?

To the extent that the Constitution itself protects and recognises the right to just administrative action, a legislative classification of certain decisions as falling outside of the definition of administrative action has the power to subvert the right. Furthermore, the exclusion from the definition of decisions involving the implementation of policy, while at the same time including in the definition decisions involving the implementation of legislation, is potentially an undesirable discouragement of legislative action on the part of government entrenching in law critical policy initiatives derogation from which should be actionable by affected persons and possible even criminalized in certain instances. The doctrine of legitimate expectation cannot fill such a gap. It is important to note that the Constitution itself does not define the term 'administrative action' either in section 33, which declares that everyone has the right to administrative action that is lawful, reasonable and procedurally fair, or elsewhere. While it is clearly not feasible that all forms of public action should be regarded as administrative action, there is inherent within any legislative attempt at definition of the term 'administrative action', the potential for legal challenge to that definition on constitutional grounds.

A decision by the state to give priority to certain health services or to shut down a particular public health establishment or to provide certain health services at the level of a rural clinic rather than a regional hospital could be seen as an administrative decision or exercise of public power. There is however, a significant difference between an administrative act and other acts on the part of the state.²⁰⁹ Not all acts of

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In *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC And Others* (fn 48 *supra*), Streicher JA noted at p 1023 to 1024: "The section [33] is not concerned with every act of administration performed by an organ of State. It is designed to control the conduct of the public administration when it performs an act of public administration ie when it exercises public power (see *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) ('SARFU') at para [136] and *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* [fn 72 *supra*] at paras [20], [33], [38] - [40]). In paras [41] and [45] of the *Pharmaceutical Manufacturers Association* case Chaskalson P said: '[41] Powers that were previously regulated by common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution. . . .' '[45] Whilst there is no bright line between public and private law, administrative law, which forms the core of public law, occupies a special place in our jurisprudence. It is an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government. It is built on constitutional principles which define the authority of each branch of government, their interrelationship and the boundaries between them. . . . Courts no longer



administration constitute the exercise of public power. Consequently the circumstances of each decision in the chain must be carefully considered in order to establish whether or not the exercise of a public power was involved and also whether it was taken in the course of the implementation of legislation as opposed to government policy. A practical example is the legislative provisions with regard to certificate of need in the National Health Act. The policy objective behind this licensing system is to achieve a better distribution of health service providers and facilities throughout the country with a view to improving access to health care services in underserved areas. As such, is it directly aligned with the state's section 27(2) obligations. The Act requires all providers and would be providers of health care services to apply to the Director-General for a certificate of need in order to be able to provide health care services. Persons not in possession of a certificate of need may not provide health care services. Few would argue that the decision of the Director-General as to whether or not to grant a certificate of need is an administrative decision. There is a considerable body of administrative law around the granting of various kinds of licenses. By contrast, a policy decision of the Minister of Health to establish a chain of community health clinics in deep rural areas where there are no other health facilities is unlikely to be a decision of an administrative nature.

It would seem that professionals or experts who are required to give an expert or professional opinion in terms of a statute may not be engaged in administrative action²¹⁰. If one looks more closely at the activities of a health professional employed

have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution, which defines the role of the courts, their powers in relation to other arms of government and the constraints subject to which public power has to be exercised. . . .'

It follows that whether or not conduct is 'administrative action' would depend on the nature of the power being exercised (SARFU at para [141]). Other considerations which may be relevant are the source of the power, the subject-matter, whether it involves the exercise of a public duty and how closely related it is to the implementation of legislation (SARFU at para [143]). The appellant is a public authority and, although it derived its power to enter into the contract with the first respondent from statute, it derived its power to cancel the contract from the terms of the contract and the common law. Those terms were not prescribed by statute and could not be dictated by the appellant by virtue of its position as a public authority. They were agreed to by the first respondent, a very substantial commercial undertaking. The appellant, when it concluded the contract, was therefore not acting from a position of superiority or authority by virtue of its being a public authority and, in respect of the cancellation, did not, by virtue of its being a public authority, find itself in a stronger position than the position it would have been in had it been a private institution. When it purported to cancel the contract it was not performing a public duty or implementing legislation; it was purporting to exercise a contractual right founded on the consensus of the parties in respect of a commercial contract. In all these circumstances it cannot be said that the appellant was exercising a public power. Section 33 of the Constitution is concerned with the public administration acting as an administrative authority exercising public powers, not with the public administration acting as a contracting party from a position no different from what it would have been in had it been a private individual or institution."

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S v Dobson (fn 31 *supra*). This case involved the question of whether the actions of psychiatrists performing an evaluation in terms of sections 77,78 and 79 of the Criminal Procedure Act were administrative in nature. Zietsman JP observed at p61 that: "In this case the psychiatrists in question were not performing an administrative, a judicial or a quasi-judicial function. They were conducting their own enquiry in their own way to enable them to furnish an opinion concerning the mental capacity of the accused. They were also not furnishing advice based on information received to an

by the state, one must ask in what way his or her functions differ from those of a government official who is qualified as an accountant and must assess the tax payable by a member of the public or whether someone qualifies for a welfare grant or a Director-General who must bring his or her expertise in public health administration to bear on a decision involving the granting of a certificate of need? The state employs professionals of different kinds to perform its functions. These functions are generally speaking public functions in terms of legislation as contemplated in the definition of administrative action in section 1 of the PAJA. Why should health professionals making treatment decisions in their capacity as public sector employees be different to accountants, lawyers and public health administrators employed by the state making decisions based on their professional skill and knowledge? The rationale for granting a public official an administrative discretion and assigning to such person the power and responsibility to make the relevant decision is tied up in the fact that such official has or has access to the requisite expert knowledge and skill.

The rendering of health services by the state is mandated by legislation – not necessarily the Constitution which only obliges the state to ensure the progressive realisation of the right rather than to deliver health care services itself – but the Health Act²¹¹ and the soon to be proclaimed National Health Act²¹² which is to be replace the former. The question before the court in *Dobson*²¹³ was whether the psychiatrists performing the evaluation were obliged to observe the *audi alteram partem* rule and there seems to be the underlying assumption that if the psychologists were engaged in administrative action they would have to do so. It is not true, however, that every administrative act must be subject to the *audi alteram partem* rule and that someone is always entitled to a hearing when an administrative power is exercised²¹⁴. When a

administrative body about to take an administrative decision. To enable them to perform their functions it was necessary that they obtain information from various sources and the information they could obtain from the prosecutor was important to them. They did not then accept the information as being correct, and act upon it. It was information they put to the accused to assess his reactions thereto, and they then had to form their own opinion regarding his mental condition. In such a case what the psychiatrists are required to do is to form an opinion and to advise the Court of their opinion and findings and, if their findings are disputed, the Act gives the accused the right to have the psychiatrists subpoenaed and submitted to cross-examination. I do not believe that the *audi alteram partem* principle, to be applied in the manner submitted by Mr Bursey, is applicable in such a case.

211 Act No 63 of 1977

212 Act No 61 of 2003

213 *Dobson* fn 31 *supra*

214 In *Gardener v East London Transitional Local Council and Others* 1996 (3) SA 99 (E) the court held that: "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 to the executive or administration acting in the public interest. I do not understand s 24(b) to mean that the audi-principle is absolutely applicable to every administrative act. Such an interpretation would make possible the misuse of the Constitution to hold



person is exercising professional skill and judgment in taking a decision, it could, in certain circumstances, be argued that laypersons should not be included in the decision-making process because by definition they have nothing to add to the debate. Thus in *Dobson*²¹⁵, it was not for the prisoner to state whether or not he was mentally unfit for trial as his opinion was neither of a professional nature nor objective. This said, in the case of the provision of health care services by a health professional, the patient would as a general rule in any event have to be consulted and his or her consent obtained to treatment that was proposed due to the requirements of informed consent and the constitutional right to bodily and psychological integrity. Admittedly in a situation where treatment is withheld, the informed consent requirement may not necessarily assist the patient unless treatment had already commenced²¹⁶. It must be borne in mind, however, that this case pre-dates the Constitution. People now have a constitutional right of access to health care services. They also have a constitutional right to administrative justice. A decision not to administer medical treatment of a particular kind to a particular patient could well constitute a decision 'which adversely affects the rights of any person and which has a direct, external legal effect' in the words of the PAJA. In its definition of administrative action the PAJA includes any decision or failure to take a decision by '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'. Thus even where a health professional was not an employee but was contracted to the state to provide health care services, a decision to refuse treatment could constitute administrative action in terms of the PAJA.

up necessary social reform measures, or for that matter any executive or administrative act. In deciding whether the principle applies to an administrator acting in terms of s 7(2)(b) of the Act, one must have regard to the objects of the Act, as well as to the fact that application of the audi-principle to the administrator's acts could delay the proclamation of the agreement and possibly frustrate the implementation of the transitional local council." This is affirmed by section 3(2)(a) of the PAJA which states that "A fair administrative procedure depends on the circumstances of each case." The Appellate Division has observed that: "There is a presumption that the *audi alteram partem* rule applies to the exercise of judicial and quasi-judicial power to affect prejudicially the interests of the individual. It will be held to have been implicitly excluded if that implication is 'necessary' or emerges from the 'clear intention' of Parliament. *Omar and Others v Minister of Law and Order and Others; Fani and Others v Minister Of Law and Order and Others; State President and Others v Bill* 1987 (3) SA 859 (A). In *Cekeshe* the court said: "I accept, for present purposes, that in an appropriate case the audi alteram partem rule may not find application (see *Gardener v East London Transitional Local Council and Others* 1996 (3) SA 99 (E) at 116E - F. The fact that in that case Erasmus J was dealing with the position in terms of s 24(b) of the interim Constitution (the Constitution of the Republic of South Africa Act 200 of 1993) does not, in my view, affect the position: *South African Roads Board v Johannesburg City Council* (supra at 13D); *Van Zyl J's judgment in the Court a quo*)." *Premier, Eastern Cape, and Others v Cekeshe and Others* 1999 (3) SA 56 (TK)

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Dobson (fn 31 supra)

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Technically speaking the patient should, in the course of the process of being informed with a view to obtaining his or her consent, also be told of reasonable and treatment alternatives so that he or she is given the opportunity to question or even challenge the health professional recommendation of a particular method of treatment and opt for an alternative where this is reasonable and available. In the National Health Act provision is made in Chapter 2 for the user to be informed of "the range of diagnostic procedures and treatment options generally available to the user".



The formulation of policy by an official is generally unlikely to constitute administrative action although the formulation of policy may in the narrower sense amount to administrative action if the policy is formulated within a legislative framework²¹⁷. There is a National Policy for Health Act²¹⁸ which empowers the Minister to “determine the national policy to be applied in respect of any matter which in his opinion will promote the health of the inhabitants of the Republic”. It is unlikely that this type of policymaking could be regarded as an administrative act due to the broad and general nature of the power that is conferred by the Act. The Act provides an example of a situation in which the implementation of legislation will not constitute administrative action under the PAJA because the legislation is in fact mandating the exercise of executive, rather than administrative, powers. This kind of legislation is generally speaking not only unnecessary because the executive powers of the state derive fundamentally from the Constitution and any attempt to further describe them in legislation could unintentionally but unconstitutionally result in a fettering of such powers, but also because of the confusion that can result from the power to set policy in terms of legislation. A case in point is that of *Minister of Education v Harris*²¹⁹. In that case the National Education Policy Act²²⁰ empowered the Minister of Education to determine national policy for education, including, in s 3(4)(i), national policy for ‘the admission of students to education institutions which shall include the determination of the age of admission to schools’. Sections 6 and 7 of the Act make it clear that national legislation, as opposed to national policy, can be introduced only after a process of extensive consultation and publication has been completed. On 18 February 2000 the Minister of Education published a notice 1 under s 3(4) of the National Education Policy Act (the National Policy Act) stating that a

²¹⁷ *Permanent Secretary, Department of Education and Welfare, Eastern Cape, and Another v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA 1 (CC)

²¹⁸ Act No 116 of 1990 to be repealed by the National Health Act. The Act in section 2 sets out guidelines for the policy to be made by the Minister in the following terms:

Provided that such policy shall be determined within the framework of the following guidelines:

- (i) That an inhabitant of the Republic, if he is capable of doing so, shall primarily be responsible for his own and his family's physical, mental and social well-being, but that the state and local authorities shall share responsibility in this regard by providing an efficient and comprehensive health service;
- (ii) that such inhabitant shall pay the costs incidental to his medical treatment, but that the financial circumstances of a patient shall not take precedence over the necessity for treatment, and that indigent persons shall be accommodated;
- (iii) that the provision of a comprehensive health service by the state and local authorities shall be directed in a responsible manner at the needs of the individual and those of society, but that the available financing sources, natural resources and manpower of the Republic shall be taken into account;
- (iv) that the private sector shall be encouraged to provide health services in the Republic, but that the provision of such services shall be in the public interest.

²¹⁹ *Minister Of Education v Harris* 2001 (4) SA 1297 (CC)

²²⁰ Act No 27 of 1996

learner may not be enrolled in grade one in an independent school if he or she does not reach the age of seven in the same calendar year. Talya Harris was part of a group of children who had enrolled at the age of three in the King David pre-primary school, and had spent three years being prepared for entry to the primary school in the year 2001. Her sixth birthday was due to fall on 11 January 2001, a short while before the school year would begin. Challenging the validity of the notice, her parents sought an order of court permitting her to be enrolled in grade one in the year she turned six. The constitutional court noted that policy made by the Minister in terms of the National Policy Act does not create obligations of law that bind provinces, or for that matter parents or independent schools. It said that the effect of such policy on schools and teachers within the public sector is a different matter. For the purposes of present case, the court said it was necessary only to determine the extent to which policy formulated by the Minister may be binding upon independent schools. It then went on to point out that there was nothing in the Act which suggested that the power to determine policy in this regard conferred a power to impose binding obligations. The court observed that in the light of the division of powers contemplated by the Constitution and the relationship between the Schools Act and the National Policy Act, the Minister's powers under s 3(4) are limited to making a policy determination and he has no power to issue an edict enforceable against schools and learners. It held that in issuing the notice the Minister exceeded the powers conferred upon him by s 3(4) of the National Policy Act and accordingly infringed the constitutional principle of legality. The appeal failed.

The distinction between policy and law seems to have escaped the notice of the Minister and officials of the Department of Education in this instance. It is submitted that the fact that legislation empowered the Minister to make policy had something to do with this. There is unfortunately no clear definition of what policy is. In *Harris* the court referred to the dicta of Harms JA in *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd*²²¹ noting that the word 'policy' is inherently vague and may

²²¹ *Akani* 2001 (4) SA 501 (SCA). The court stated: "As Harms JA pointed out in *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd*, the word 'policy' is inherently vague and may bear different meanings: 'It appears . . . to serve little purpose to quote dictionaries defining the word. To draw the distinction between what is policy and what is not with reference to specificity is, in my view, not always very helpful or necessarily correct. For example, a decision that children below the age of six are ineligible for admission to a school can fairly be called a "policy" and merely because the age is fixed does not make it less of a policy than a decision that young children are ineligible, even though the word "young" has a measure of elasticity in it. Any course or program of action adopted by a government may consist of general or specific provisions. Because of this I do not consider it prudent to define the word either in general or in the

bear different meanings. One thing is clear, however, and that is that policy is not law and as such is not applicable within or binding upon the private sector. The court in Harris did suggest that policy may be ‘binding’ upon public schools and teachers within the public sector but held that it could not bind the provinces or independent schools. If the same operational situation holds for schools as it does for hospitals however, then this suggestion is something of an illusion because in the health sector the provinces ‘own’ and run public hospitals and health facilities. The national Department of Health does not as a rule provide health care services although it does have the power to do so in terms of the Health Act²²². Any policy decision that was not binding on the provinces would thus effectively not be implemented unless the provinces chose to do so. This further diminishes the need for and significance of legislation empowering a Minister to make policy especially in areas of concurrent legislative competence on Schedule 4 of the Constitution such as health services and education.

3.13 Manner of exercise of public power

There have been a number of important judicial pronouncements upon the manner in which public power must be exercised.²²³ The emphasis of the constitutional court

context of the Act. I prefer to begin by stating the obvious, namely that laws, regulations and rules are legislative instruments whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments. Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation). Otherwise the separation between Legislature and Executive will disappear. In this case, however, it seems that the provincial legislature intended to elevate policy determinations to the level of subordinate legislation, but leaving its position in the hierarchy unclear. . . .’

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Fn 211 *supra*

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In *Shoprite Checkers (Pty) Ltd v Ramdau NO and Others* 2001 (4) SA 1038 (LAC) at p1045-1047, Zondo JP made the following observations: “It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action. The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle.’ In the course of para [89] of his judgment [in *Pharmaceutical Manufacturers of SA and Another: In re Ex parte President of the Republic of South Africa and Others* [fn 72 *supra*]] Chaskalson P also said: ‘What the Constitution requires is that public power vested in the Executive and other functionaries be exercised in an objectively rational manner.’

He continued thus in para [90]: ‘[90] Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary’s decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made only rarely but, if this does occur, a Court has the power to intervene and set aside the irrational decision.’ What is clear from the judgment of the Constitutional Court is that:

(1) as long as a particular decision is the result of an exercise of public power, such a decision can be set aside by a court if it is irrational;

referred to in the previous chapter on the reasonableness of decisions taken by the state is echoed strongly by the emphasis on rationality in the exercise of public power in cases such as *Pharmaceutical Manufacturers of SA and Another: In re Ex parte President of the Republic of South Africa and Others*²²⁴.

It has been observed that -

“[T]he problem with subordinate legislation in a democracy is easy to state, but difficult to resolve... To date the key legal mechanism for the control of bureaucracy has been judicial review, but judicial review, even if well-developed, is not all that the law should do to structure and control bureaucracy.”²²⁵

O'Regan distinguishes between rule-making and decision-making by quoting Schwartz²²⁶ who observes that rule-making is normally general and looks only to the future; adjudication is particular and looks also to the past. She notes that administrative rule-making is not comprehensively regulated in South Africa but its extent cannot be understated and points out that bureaucratic power must not only be subject to the will of parliament but its exercise must also be fair, efficient and accountable. According to O'Regan, these are the three normative requirements which should guide the development of administrative law.

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- (2) the *bona fides* of the person who made the decision do not by themselves put such a person's decision beyond the scrutiny of the Court;
 - (3) the rationality of a decision made in the exercise of public power must be determined objectively;
 - (4) a court cannot interfere with a decision simply because it disagrees with it or it considers that the power was exercised inappropriately;
 - (5) a decision that is objectively irrational is likely to be made only rarely;
 - (6) decisions (of the Executive and other functionaries) must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with (the requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary).

[20] Having set out above part of what was made clear by the Constitutional Court in the *Pharmaceutical Manufacturers'* case about the reviewability of decisions made in the exercise of public power on grounds of irrationality, it seems to me that it would also be useful to have regard to what was made clear by this Court in *Carephone* about the reviewability of CCMA awards on grounds of unjustifiability. In this regard this Court made it clear that:

- (a) the constitutional provision that administrative action must be justifiable in relation to the reasons given for it 'introduces a requirement of rationality in the merit or outcome of the administrative decision . . . [which] goes beyond mere procedural impropriety as a ground for review, or irrationality only as evidence of procedural impropriety'(at para [31] at 1434);
- (b) 'it would be wrong to read into the administrative justice section an attempt to abolish the distinction between review and appeal' (at para [32] at 1434);
- (c) 'whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the "merits" of the matter in some way or another but, as long as the Judge determining this issue is aware that he or she enters the "merits" not in order to substitute his or her own opinion on the correctness thereof, [but] to determine whether the outcome is rationally justifiable, the process will be in order' (at para [36]);
- (d) the question to be asked in order to determine whether or not a decision is justifiable or rational is: 'is there a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at?'"

224 *Pharmaceutical Manufacturers* fn 72 *supra*

225 O'Regan C fn 206 *supra*

226 *Administrative Law* p 190

Subsequently, the constitutional court, of which O'Regan was a member, decided in *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others*²²⁷ that there was a difference between requiring a court or tribunal in exercising a discretion to interpret legislation in a manner that was consistent with the Constitution and conferring a broad discretion upon an official, who may have been quite untrained in law and constitutional interpretation, and expecting that official, in the absence of direct guidance, to have exercised the discretion in a manner consistent with the provisions of the Bill of Rights. It observed that officials were often extremely busy and had to respond quickly and efficiently to many requests or applications. The nature of their work did not permit considered reflection on the scope of constitutional rights or the circumstances in which a limitation of such rights was justifiable. The court said that it was true that as employees of the state they bore a constitutional obligation to seek to promote the Bill of Rights as well but it was important to interpret that obligation within the context of the role that administrative officials played in the framework of government, which was different from that played by judicial officers. According to the judgment of the court, the fact that the exercise of a discretionary power might have been challenged subsequently and successfully on administrative grounds, for example, that it was not reasonable, did not relieve the Legislature of its constitutional obligation to promote, protect and fulfil the rights entrenched in the Bill of Rights. The court held that in a constitutional democracy the responsibility to protect constitutional rights in practice was imposed both on the Legislature and on the Executive and its officials. It said the Legislature had to take care when legislation was drafted to limit the risk of an unconstitutional exercise of the discretionary powers it conferred and that guidance would often be required to ensure that the Constitution took root in the daily practice of governance. Where necessary, said the court, such guidance had to be given. Guidance could be provided either in the legislation itself or, where appropriate, by a legislative requirement that delegated legislation be enacted properly by a competent authority. It was for the Legislature, in the first place, to identify the policy considerations that would render a refusal of a temporary permit justifiable.

²²⁷ *Dawood* 2000 (3) SA 936 (CC)

In *Schoonbee and Others v MEC for Education, Mpumalanga and Another*²²⁸ the court observed that an administrative action should not be taken on account of bias or a reasonable suspicion of bias. The action has to fall within the parameters of the law, in other words, where there is a material procedure or condition which the law prescribes, the wielder of power is obliged to have regard to that. Administrative action has to be procedurally fair and it should not be undermined by an error of law or, put otherwise, an error of understanding or application of the law. The official who takes the administrative action should not be persuaded by matters other than those which are relevant for purposes of the decision before it; he or she should not have regard to or be persuaded or moved by some ulterior purpose or motive or make considerations which are irrelevant. He or she must act honestly and rationally and not arbitrarily, or capriciously.

In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*²²⁹ the court observed that -

“The requirement of procedural fairness, which is an incident of natural justice, though relevant to hearings before tribunals, is not necessarily relevant to every exercise of public power. *Du Preez's* case is no authority for such a proposition, nor is it authority for the proposition that, whenever prejudice may be anticipated, a functionary exercising public power must give a hearing to the person or persons likely to be affected by the decision. What procedural fairness requires depends on the circumstances of each particular case.”

3.14 Case Law

In the context of administrative law and access to health care services the case of *Applicant v Administrator, Transvaal, and Others*²³⁰ is of relevance although it predates the Constitution.

3.14.1 *Applicant v Administrator, Transvaal, And Others*

Facts

The applicant was a patient at a provincial hospital (“the hospital”) operated by the first, second and third respondents. The second respondent was the Director of

²²⁸ *Schoonbee* 2002 (4) SA 877 (T) at 882

²²⁹ *President of the Republic of South Africa* fn 51 *supra* at para 219 p 97

²³⁰ *Applicant v Administrator, Transvaal, and Others* 1993 (4) SA 733 (W)

Hospital Services, Transvaal, and the third respondent the Chief Medical Superintendent at the hospital. The applicant, who was a non-paying patient at the hospital's HIV clinic, had been diagnosed as having CMV-retinitis and given a prescription for a drug called Ganciclovir on 28 January 1992. After having been fitted with a special catheter to facilitate the administration of the drug, he was informed that the Provincial Administration had decided not to supply him with it. Ganciclovir was the only effective treatment for CMV-retinitis which, if untreated, inevitably results in blindness. Despite its not having been approved by the Medicines' Control Council and accordingly not registered in terms of the Medicines and Related Substances Control Act 101 of 1965, five other AIDS patients had been treated with Ganciclovir at the hospital's HIV clinic. This treatment had subsequently been approved by the second respondent *inter alia* because the drug was at the time being supplied free of charge by the manufacturer. (An unregistered drug for which *ad hoc* approval from the Medicines' Control Council had been obtained could be administered at the hospital with the approval of the second or third respondent.) The free supply of the drug ended in October 1991 and in February 1992 the second respondent had taken a policy decision that Ganciclovir would no longer be supplied to AIDS patients. This decision led to the refusal to provide the applicant with the drug and had been motivated on the grounds, *inter alia*, that it (1) was not a registered drug; (2) was toxic and had severe side-effects; and (3) was expensive and the costs of supplying it to an increasing number of AIDS patients would drain available funds. The applicant applied for an order (1) setting aside the decision of the respondents not to supply him with Ganciclovir, a drug used to treat CMV-retinitis, an eye disease relatively common in AIDS patients; and (2) directing the respondents to make the drug available to him as soon as reasonably possible.

Judgment

The court made the following observations as to the reasons for the decision taken by the respondents:

1. The fact that the drug was not registered was not *per se* decisive. Firstly, the drug was the first anti-viral drug to be licensed in the United States of America for the treatment of the disease caused by CMV infection. Ganciclovir therapy

has been approved by the Food and Drug Administration in the United States for the treatment of CMV-retinitis. Secondly, the drug, which was obtainable from Pharmatex Pharmaceuticals, was in the process of being registered. According to that company the drug was registered in most countries in the world, where it was available. Thirdly, the second respondent permitted the use of the drug on an *ad hoc* basis.

2. The fact that the drug was toxic and had severe side-effects was not per se decisive. The doctors who recommended it, Drs Miller and Spencer, were aware of the risk of using it, as was the applicant, who had been informed of that risk and those doctors and the applicant were willing to take the risk. While the drug was available to the TPA at no cost to the TPA, the second respondent permitted its use. The drug did not undergo a metamorphosis when a price was attached to it.
3. The cost of the drug was relevant, particularly if regard was had to the potential number of AIDS patients who would have to be treated in the years to come. The court said that it was proper that the second respondent weigh up that cost in relation inter alia to a budget, the drug's efficacy and the needs of other patients. Yet, said the court, the cost of the drug could not be said to be unacceptable if it was to be administered only to the applicant.

The court considered the question as to whether, when the second respondent took the policy decision that the drug was not to be administered to AIDS patients, he should have taken into account factors peculiar to the applicant and the history of the use of the drug at the HIV clinic at the Johannesburg Hospital. It identified these factors as follows:

1. The applicant was terminally ill. He had a few months to live. While the drug might not prolong or save the life of the applicant, it would improve the quality of his life by retarding the progression of the CMV-retinitis.
2. The applicant had an expectation that he would be treated with the drug. Five other patients were so treated. That treatment was ratified by the second

respondent. The applicant was not to know that that treatment was administered at a time when the Transvaal Provincial Administration was not paying for the drug. It did not lie in the mouth of the respondents to say that the applicant's expectation was irrelevant. One of the considerations the second respondent took into account when he decided to ratify the use of the drug on the five patients was the expectation of the five patients.

3. The Hickman-line was surgically implanted into the applicant's left sub-clavian vein by a surgical registrar at the Johannesburg Hospital. The applicant remained in hospital for a week. The catheter was removed as it had become infected. Treatment of a particular kind - the administration of the drug - was commenced at a provincial hospital to a terminally ill patient, creating in his mind the expectation that the treatment would be continued until completion.

The court gave the order sought by the applicant.

Discussion

Even though this judgment predates the Constitution, it is still of considerable significance for a number of reasons. Although the court did not expressly say as much, the applicant seems to have succeeded at least partially on the basis of the doctrine of legitimate expectation²³¹. In practice the two forms of expectation may be 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 an adverse decision is taken he will be given a fair hearing.' Corbett CJ went on to explain that the doctrine of legitimate expectation is an offshoot of the obligation on the part of a decision-maker to 'act fairly'.²³²

²³¹ This concept of a legitimate expectation is summed up by Corbett CJ at 758D as follows: "As these cases and the quoted extracts from the judgments indicate, the legitimate expectation doctrine is sometimes expressed in terms of some substantive benefit or advantage or privilege which the person concerned could reasonably expect to acquire or retain and which it would be unfair to deny such person without prior consultation or a prior hearing; and at other times in terms of a legitimate expectation to be accorded a hearing before some decision adverse to the interests of the person concerned is taken. As Prof Riggs puts it in the article to which I have referred (at 404): 'The doctrine of legitimate expectation is construed broadly to protect both substantive and procedural expectations.'" *Administrator, Transvaal, and Others v Traub and Others* fn 11 *supra*

²³² At 758G-759A of *Traub* (fn 11 *supra*) Corbett CJ observed that: "A frequently recurring theme in these English cases concerning legitimate expectation is the duty on the part of the decision-maker to 'act fairly'. As has been pointed out, this is simply another, and preferable, way of saying that the decision-maker must observe the principles of natural justice (see O'Reilly's case *supra* at 1126j-1127a; *Attorney-General of Hong Kong* case *supra* at 350g-h; *Council of Civil Service Unions* case *supra* at 954a-b). Furthermore, as Lord Roskill explained in the last quoted case, the phrase, "a



The fact that the medicine was not registered, the fact that the free supplies ended and the fact that the drug in question would not save the life of the patient were not relevant. This case contains a number of important lessons for those involved in health care delivery and illustrates the caution with which delivery of services should be approached. Donations of free drugs for a limited period, for instance in the context of HIV/AIDS, by drug companies wishing to establish a foothold in the market in circumstances where the treatment or the nature of the drug is such that it is lifelong and once commenced should not be withdrawn can be problematic for the public health sector since once it starts using the treatment or drug on patients, it cannot necessarily use the fact that the free supply has dried up as a basis for discontinuing the treatment. The creation in the minds of patients of an expectation that they will now receive antiretroviral drugs or other medication for a chronic health condition, eg asthma, diabetes, cardiovascular disease etc, is likely to preclude the possibility of suddenly discontinuing the treatment for those particular patients for funding reasons. The court in the Ganciclovir case²³³ took the view that for the particular patient in whose mind the expectation of receiving the drug had been created, there were different considerations than for other patients in whose minds no such expectation had been created²³⁴. If one creates an expectation in the minds of a multitude of patients suffering from a particular condition that they will be treated for that condition in a certain way or using a particular intervention, for instance by way of media announcements and publicity campaigns, then from a public health point of view one could be obliged, on the basis of the doctrine of legitimate expectation, to put one's money where one's mouth is and ensure that the treatment is made available. Health administration is logistically speaking a complex and difficult task and it is conceivable that in isolated instances a patient may present at a health facility where stocks have run out. This kind of administrative glitch need not have legal

duty to act fairly", must not be misunderstood or misused. It is not for the Courts to judge whether a particular decision is fair. The Courts are only concerned with the manner in which the decisions were taken and the extent of the duty to act fairly will vary greatly from case to case. Many features will come into play including the nature of the decision and the relationship of those involved before the decision was taken (see at 954b-c); and a relevant factor might be the observance by the decision-maker in the past of some established procedure or practice. It is in this context that the existence of a legitimate expectation may impose on the decision-maker a duty to hear the person affected by his decision as part of his obligation to act fairly. (See at 954e; cf *Lloyd and Others v McMahon* [1987] 1 All ER 1118 (HL) at 1170f-g)"

²³³ *Applicant v Administrator, Transvaal, And Others* fn 230 *supra*

²³⁴ The court said at p 741 (fn 230 *supra*): "I must make it clear that I do not say that the policy decision was wrong, nor must this judgment be read to create a right for all AIDS sufferers with CMV-retinitis to receive the drug. My finding is that, on the facts of this case and this case only, the second respondent was obliged to continue with the treatment that had commenced with the insertion of the Hickman-line and which the applicant was led to believe he would continue to receive from the Johannesburg Hospital."

consequences if there are adequate referral mechanisms in place to send the patient to other centres or to ensure that restocking will take place within a short period of time. However, large-scale failure to make good on public promises, could well have legal implications for the promisor. It is much easier not to make those promises than to make them. An example would be free cataract operations for people whose vision is impaired as a result of cataracts. It is not reasonable for people to expect that they will all have their cataracts surgically removed immediately. They may have to join long waiting lists and be prepared to travel to other facilities over which the caseload has been spread in order to have their operations. These kind of logistical problems are unavoidable and cannot be challenged legally unless the delays are unnecessary and unjustified. However, a decision to stop the free cataract surgery program halfway through the waiting list may well attract litigation. This is in effect what happened in microcosm to the HIV/AIDS patient in the Ganciclovir case²³⁵.

A further lesson to be learned from this case is that quality of life is as material an issue to the patient as length of life. The drug Ganciclovir would not have extended the patient's life or cured his condition. However it was crucial to the quality of the remaining length of life left to him. The court regarded this factor as significant in its judgement. One cannot hide behind an argument that states because the treatment or medication does not serve a particular narrow purpose such as the preservation or prolongation of life, a purpose for which it was never in any event designed, that there is no obligation to provide the treatment. In the case of medication in particular, it is usually registered for each specific indication for which it may lawfully be used. Even if a medicine is registered in South Africa this does not mean that it can be used for the treatment of just any health condition²³⁶. If one starts using the drug in the treatment of a patient for an indication for which it is registered and creates the expectation of further treatment with that drug in the mind of the patient health provider cannot argue that the patient must no longer be treated with the drug because

²³⁵ *Applicant v Administrator, Transvaal, And Others* fn 230 *supra*

²³⁶ For example, Misoprostol (Cytotec) is a synthetic prostaglandin analogue registered in many countries for the prevention of peptic ulceration in patients taking non-steroidal anti-inflammatories. According to Rees, 'Misoprostol - Benefit or Caution', *IPPF Medical Bulletin* p5 www.ippf.org, the medication has received much attention in recent years because of its widespread unregistered use in obstetrics and gynaecology for various conditions and interventions. She says that while the manufacturer (Searle) is uncomfortable about this aspect of its use, clinicians all over the world are researching the drug's potential for revolutionizing the management of several common conditions in women and that it has many characteristics that make it an attractive prospect for use in obstetrics and gynaecology, particularly for developing countries. If it is not registered for terminations of pregnancy then prescribing and dispensing it for such purpose is illegal.

it does not serve a different purpose for which it was never registered as an indication. Ganciclovir would never have been registered for the treatment of HIV/AIDS because it was never developed for that purpose. The indication for which it would have been registered was CMV-retinitis, an opportunistic infection common in AIDS sufferers. In the *Administrator Transvaal* case²³⁷ the fact that it had not been registered with the Medicines Control Council was irrelevant because the law permitted its use upon *ad hoc* approval by the Council.

An additional lesson to be learned is that although there is a general rule, in the words of Denning LJ, “(t)he hospital authorities are under a duty to take reasonable care of him. Whenever they accept a patient for treatment, they must use reasonable care and skill to cure him of his ailment.”²³⁸ It did not follow, however, that if the court was of the view that it would be reasonable for the applicant to receive the drug, the respondents could be compelled to supply it to the applicant. The discretion to allow the use of a non-registered, non-coded, drug in a provincial hospital, said the court, rests on the second respondent, not on the court. It is submitted that in each case what constitutes ‘reasonable care’ will depend on the particular circumstances but that it is important to note that where an official has a discretionary power the court may not simply substitute its own decision for that made by the official in the exercise of that discretionary power.

3.15 Remedies

The remedy for bilateral administrative acts may be based either on private law or administrative law depending upon the nature of the act²³⁹. If the state is given the power to unilaterally alter the content of an agreement then the remedy becomes an administrative one rather than one based on contract. The authority or power of the state cannot be fettered by a contract and so a contractual term purporting to do so is unlikely to be upheld by a court.²⁴⁰ Administrative action may be challenged on the

²³⁷ *Administrator Transvaal* fn 230 *supra*

²³⁸ *Cassidy v Minister of Health* [1951] 2 KB 343 (CA) at 360. See too *Mtetwa v Minister of Health* 1989 (3) SA 600 (N) at 606E.

²³⁹ *Devenish et al* (fn 15 *supra*) p 514

²⁴⁰ Thus in *Southern Metropolitan Substructure v Thompson And Others* 1997 (2) SA 799 (W) the court held that the Johannesburg City Council and its successors in title would not be empowered to bind themselves by contract to the moratorium alleged as such a contract would clearly be incompatible with the proper exercise of the applicant's statutory power to allocate housing to those who qualified or had already qualified for it: such a contract would be an unreasonable and incompetent fetter on its powers and duties. The constitutional court in *President Of The Republic Of*

grounds of unreasonableness²⁴¹. Section 33 of the Constitution states that everyone has the right to administrative action that is, *inter alia*, reasonable. An action for damages flowing as a consequence of an administrative decision will not, however, always be permitted by the courts. In *Knop v Johannesburg City Council*²⁴² the court held that the fact that the legislature had in section 139 of the Town-Planning and Townships Ordinance 15 of 1986 (T) prescribed a particular form of procedure by which an aggrieved applicant, in an application under s 92 of the ordinance for the subdivision of an erf in a township, could obtain relief against the refusal of his application showed by necessary implication that it did not intend a negligently incorrect refusal to give rise to an action for damages. As to the broader considerations of policy, it held that on the one hand an aggrieved applicant did not need an action for damages to protect his interests since he had readily at hand the appeal procedure provided within the legislative framework. On the other hand, said the court, considerations of convenience militated strongly against allowing an action for damages as the threat of such an action would unduly hamper the expeditious consideration and disposal of applications by the local authority in the first instance. It cautioned that this was not to say that the local authority need not exercise due care in dealing with applications. It had to exercise such care but the point was that it would be contrary to the objective criterion of reasonableness to hold the local authority liable for damages if it should turn out that it acted negligently in refusing an application, when the applicant had a convenient remedy at hand to obtain the approval he was seeking. It was the view of the court that to allow an action for damages in those circumstances would offend the legal convictions of the community. Consequently, it held that the refusal of an

South Africa And Others v South African Rugby Football Union And Others 2000 (1) SA 1 (CC) held that, although there was some uncertainty as to the precise ambit of the principle that a public authority could fetter, by contract, the exercise of its own discretion, there was little doubt that a public authority could not enter into a contract which was wholly incompatible with the discretion conferred upon it. More conclusively, one member of the Cabinet could not of her or his own accord enter into a contract with a third party which would have precluded or constrained the President from exercising powers conferred upon her or him directly by the Constitution.

In *Durban Add-Ventures Ltd v Premier, Kwazulu-Natal, And Others* (No 2) 2001 (1) SA 389 (N) the court held that that, if the applicant enjoyed a legitimate expectation, at best this would have afforded it a right to be heard before the regulations were promulgated. The doctrine of legitimate expectation could not be employed so as to place substantive constraints on the power of a lawmaker to enact delegated legislation and, in particular, could not operate in the present circumstances so as to inhibit the formation of government policy. For good reasons the Courts were reluctant to fetter government from implementing changes to policy. The doctrine of legitimate expectation could not be applied to hinder the formation of government policy in circumstances where a change of direction was in the public interest. (from headnote)

²⁴¹ The constitutional court in *Minister Of Health And Others v Treatment Action Campaign And Others* (No 2) (fn 159 *supra*) observed that the Constitution contemplates rather a restrained and focused role for the Courts, namely to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. In *Govender v Minister Of Safety And Security* 2001 (4) SA 273 (SCA) the Supreme Court of Appeal held that it was the requirement of reasonableness that required interpretation in the light of constitutional values. It held that conduct unreasonable in the light of the Constitution could never be 'reasonably necessary' to achieve a statutory purpose.

²⁴² *Knop* fn 33 *supra*

application for the subdivision of an erf in a township, through an error due to negligence, was not a wrongful act giving rise to a delictual claim for damages²⁴³.

Judicial review is the most obvious remedy. In terms of section 6(1) of the PAJA any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action. In terms of subsection (2) of section 6 –

A court or tribunal has the power to judicially review an administrative action if-

- (a) the administrator who took it-
 - (i) was not authorised to do so by the empowering provision;
 - (ii) acted under a delegation of power which was not authorised by the empowering provision; or
 - (iii) was biased or reasonably suspected of bias;
- (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
- (c) the action was procedurally unfair;
- (d) the action was materially influenced by an error of law;
- (e) the action was taken-
 - (i) for a reason not authorised by the empowering provision;
 - (ii) for an ulterior purpose or motive;
 - (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
 - (iv) because of the unauthorised or unwarranted dictates of another person or body;
 - (v) in bad faith; or
 - (vi) arbitrarily or capriciously;
- (f) the action itself-
 - (i) contravenes a law or is not authorised by the empowering provision; or

²⁴³

See also *Oltzki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA) in which the court observed that where the legal duty to prevent loss sought to be invoked by a plaintiff derives from the breach of a statutory provision, the question whether the statute imposed such a duty must be assessed not on broad or even abstract questions of liability, but on a general criterion of reasonableness, based on considerations of morality and policy, and taking into account the legal convictions of the community and constitutional norms, values and principles. The focal question, said the court, remains one of statutory interpretation, since the statute may on a proper construction thereof itself confer a right of action, or alternatively provide the basis for inferring that a legal duty exists at common law. The process in either case requires the consideration of the statute as a whole, its objects and provisions, the circumstances in which it was enacted, and the kind of mischief it was designed to prevent. But where a common-law duty is at issue, the answer depends less on the application of formulaic approaches to statutory construction than on a broad assessment of whether it is 'just and reasonable' that a civil claim for damages should be granted. The determination of reasonableness here in turn depends on whether affording the plaintiff a remedy is congruent with the Court's appreciation of the sense of justice of the community (from headnote).

- (ii) is not rationally connected to-
 - (aa) the purpose for which it was taken;
 - (bb) the purpose of the empowering provision;
 - (cc) the information before the administrator; or
 - (dd) the reasons given for it by the administrator;
- (g) the action concerned consists of a failure to take a decision;
- (h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or
- (i) the action is otherwise unconstitutional or unlawful.

Section 8 of the PAJA describes the remedies that are available under judicial review proceedings as follows –

- (1) The court or tribunal, in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable, including orders-
 - (a) directing the administrator-
 - (i) to give reasons; or
 - (ii) to act in the manner the court or tribunal requires;
 - (b) prohibiting the administrator from acting in a particular manner;
 - (c) setting aside the administrative action and-
 - (i) remitting the matter for reconsideration by the administrator, with or without directions; or
 - (ii) in exceptional cases-
 - (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or
 - (bb) directing the administrator or any other party to the proceedings to pay compensation;
 - (d) declaring the rights of the parties in respect of any matter to which the administrative action relates;
 - (e) granting a temporary interdict or other temporary relief; or
 - (f) as to costs.

- (2) The court or tribunal, in proceedings for judicial review in terms of section 6 (3), may grant any order that is just and equitable, including orders-
- (a) directing the taking of the decision;
 - (b) declaring the rights of the parties in relation to the taking of the decision;
 - (c) directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or
 - (d) as to costs.

It is clear from this section that the remedy is dependent for its appropriateness on the context of the claim. Only in exceptional cases may the court substitute its own decision for that of the administrator. In view of the dicta of the courts on this subject discussed previously it is submitted that the courts will be extremely reluctant to use section 8(1)(c)(ii). It is questionable whether this provision is even constitutional in view of the doctrine of separation of powers. Even in *TAC*²⁴⁴ the court acknowledged that whilst it had the authority to pronounce upon the constitutionality of an executive decision and even make an order that would have a budgetary implication, the courts are ill-equipped to make decisions of an executive or administrative nature. It is also noteworthy that it is only in exceptional cases that the administrator or any other party to the proceedings can be ordered to pay compensation. In the context of the provision of health care services, this may mean that if a plaintiff chooses to base his or her claim on provider-patient relationship founded in administrative law, he or she should not be looking for compensation but rather an order of court instructing the administrator to revisit its decision, prohibiting the administrator from acting in a particular manner, eg closing down a hospital etc. In practice a claim is unlikely to be brought only on the basis of administrative law given the fact that access to health care services is a constitutional right²⁴⁵.

²⁴⁴ *TAC* fn 159 *supra*

²⁴⁵ Liebenberg, in Chaskalson *et al* (eds) *Constitutional Law of South Africa*, points out at 41-28 to 41-29 that "administrative conduct under a statute may amount to the deprivation of a substantive constitutional guarantee and that legitimate reasons for depriving an individual to a particular socio-economic right must be justified under the general limitations clause. In the absence of justification, administrative action that deprives people of their access to socio-economic rights is unconstitutional." She notes further that unreasonable administrative action and procedural unfairness also infringe the right to just administrative action, and will require independent justification under the limitations clause. This illustrates the interrelationship between socio-economic rights and the right to just administrative action." She points out, however that not every scaling down or even abolition of a programme of state support will amount to a negative infringement of the rights in sections 26(1) and 27(1) of the Constitution and that a violation will not arise if

There may be remedies provided by statute in specific instances. Apart from this it seems that the administrative law relationship will in many instances give rise to a duty of care on the part of the public provider and that failure to observe such duty will ground a claim on the basis of the law of delict. This aspect will be discussed in more detail in the section on the law of delict.

3.16 Conclusions

A relationship between public providers of health care services and patients based on administrative law as opposed to the law of contract would therefore have the following elements:

At the general level –

It must be borne in mind that although policy decisions are not within the scope of administrative law, decisions involving the implementation of legislation are and so the nature of the decision taken would have to be ascertained before it could be challenged. It is important to remember, however, that in the context of health care access to health care services is a constitutional right. Even if the relationship between public provider and patient were only administrative one cannot see it in isolation from the Constitution which will always be present in and relevant to such a relationship. Constitutional principles suffuse every branch of law.

- (1) An administrative decision to close down a public health care establishment, or to remove health care services from a particular area, especially when there is no reasonably accessible alternative, would have to be taken on the basis of the administrative law principles of procedural fairness, reasonableness and legality or lawfulness. This may mean that there will have to be adequate notice of the proposal to do so and also that a reasonable opportunity must be given to make representations. It will be subject to constitutional and administrative law review.

suitable alternative programmes exist or if the beneficiary can gain access to the right through his or her private resources.

- (2) Reasons for an administrative decision to remove health care services or close down a health establishment would have to be given.
- (3) Treatment protocols and guidelines must be developed in a manner that is lawful, procedurally fair and reasonable and that adequately takes into account the rights and interests of all patients.
- (4) Where of necessity the interests of some patients must be preferred over those of others, the basis for the preference must be fair, rational and reasonable under the circumstances.
- (5) Cognisance must be taken of any legitimate expectations that may have been created in the minds of the community when taking an administrative decision to provide or withdraw health care services.
- (6) Treatment programmes should not be unfairly discriminatory either in terms of the nature of the treatment administered to patients or groups of patients or in terms of the procedure in which the treatment is administered
- (7) Where an administrative decision involves the granting of a licence to deliver health care services or sell health care goods, this must done with regard to the rules of administrative justice, the applicant must have an opportunity to make representations, the decision must be unbiased and all applicants must be treated equally. There may not be undue delays in the communication of the licensing decision.

At the specific level-

- (1) Where treatment guidelines exist, these must be applied to each patient fairly and rationally.
- (2) The constitutional rights of the patient to bodily and psychological integrity must be respected when treating him or her. This implies that the patient's

informed consent will be obtained in every instance where this is reasonably possible.

- (3) Payment may be claimed from the patient in accordance with regulations or other subordinate legislation determining such fees and their applicability to various categories of patient.
- (4) Administrative procedures for the delivery of health care services must be efficient and avoid undue or unnecessary delays²⁴⁶.
- (5) Treatment may not suddenly and without sound medical reasons be withdrawn or discontinued once it has commenced especially where a legitimate expectation of continuing treatment has been created in the mind of the patient or where the treatment or health condition of the patient is itself of an ongoing or continuous nature.
- (6) Deviation from recognised and accepted treatment guidelines and protocols must be lawful, procedurally fair and reasonable under the circumstances. Where a patient has already commenced a different course of treatment and has come to expect a certain kind of treatment, informed consent considerations aside, he or she must be informed of any decision to deviate from the accepted course of treatment and the reasons therefor.

Decisions of health professionals working in the public sector could constitute administrative action especially in circumstances where treatment standards, guidelines and protocols are promulgated in subordinate legislation. The implementation of legislation is one determining factor for administrative action. To the extent that the delivery of health services is mandated by legislation and public sector health professionals are implementing said legislation, their activities are likely to fall within the definition of administrative action. The fact that fees are determined by way of regulations, that the nature of the services to be rendered in respect of such fees is also determined by regulation, that the delivery of various kinds of health

²⁴⁶ *Mahabehlala v MEC For Welfare, Eastern Cape, And Another* 2002 (1) SA 342 (SE)

services is mandated by legislation such as the Health Act No 63 of 1977 and that in the delivery of such services, a discretion is often exercised all strongly suggest that the relationship between public providers and patients are largely of an administrative nature. Even if it could be argued that in certain circumstances a contract existed between the provider and the patient, it is highly unlikely that administrative law considerations will ever be completely excluded from the relationship.

B PRIVATE SECTOR

3.17 Introduction

It has already been pointed out that the traditional divisions between public and private sector are no longer as well defined as they once were. Private entities in some cases have more power relative to the individual than do government agencies and their activities can have an equal or greater impact than those of government agencies on constitutional rights²⁴⁷.

The Public Finance Management Act and more specifically its regulations make express provision for public private partnerships (PPPs) with a view to fulfilling public functions²⁴⁸. Although a private party may be contracted to perform a public function in terms of a public-private partnership, the regulations²⁴⁹ stipulate that a PPP agreement involving the performance of an institutional function does not divest the accounting officer or accounting authority of the institution concerned of the responsibility for ensuring that such institutional function is effectively and efficiently performed in the public interest or on behalf of the public service. In terms of the regulations, PPP agreements have to be approved by the relevant treasury with regard

²⁴⁷ Freeman J 'Private Parties, Public Functions and the New Administrative Law' <http://ssrn.com> notes: "In fact many private actors participate in governance in ways that are rarely recognized by the public, acknowledged by politicians or carefully analysed by legal scholars. The contributions of private individuals, private firms, financial institutions, public interest organizations, domestic and international standard-setting bodies, professional associations, labour unions, business networks, advisory boards, expert panels, self-regulating organizations and non-profit groups belie administrative law's pre-occupation with agency discretion. Private individuals serve on influential government boards; "expert" private committees exercise important powers on accreditation; private producer groups may directly negotiate regulations together with other interested parties and the agency; non-profit and for-profit organizations contract to provide a variety of government services and perform public functions ranging from garbage collection to prison operation; individuals...private standard setting organisations generate health and safety standards that agencies automatically adopt. Contemporary governance might best be described as a regime of "mixed administration" in which private and public actors share responsibility for both regulation and service provision."

²⁴⁸ Act No 1 of 1999. The Treasury Regulations For Departments, Trading Entities, Constitutional Institutions And Public Entities as published in Government Notice R740 in Government Gazette No23463 of 25 May 2002 as amended by General Notice 37 in Government Gazette No 25915 of 16 January 2004 define 'public-private partnership' as follows: 'public-private partnership' or 'PPP' means a commercial transaction between an institution and a private party in terms of which the private party-

- (a) performs an institutional function on behalf of the institution; and/or
- (b) acquires the use of state property for its own commercial purposes; and
- (c) assumes substantial financial, technical and operational risks in connection with the performance of the institutional function and/or use of state property; and
- (d) receives a benefit for performing the institutional function or from utilising the state property, either by way of:
 - (i) consideration to be paid by the institution which derives from a revenue fund or, where the institution is a national government business enterprise or a provincial government business enterprise, from the revenues of such institution; or
 - (ii) charges or fees to be collected by the private party from users or customers of a service provided to them; or
 - (iii) a combination of such consideration and such charges or fees;

²⁴⁹ Treasury Regulations fn 233 *supra*, reg 16.7.2

to value for money, affordability and substantial technical, operational and financial risk transfer to the private party²⁵⁰.

There is an increasing statutory emphasis on the activities of a particular entity or person in terms of the nature of their functions i.e. public functions as opposed to private functions, rather than their identity or the method of their origination. Thus a statutory body can enter into private contracts as can a government department while private companies can perform public functions.

In terms of section 28 (3) (a) of the Promotion of Equality and Prevention of Unfair Discrimination Act²⁵¹ the state, institutions performing public functions *and all persons* have a duty and responsibility, in particular to-

- (i) eliminate discrimination on the grounds of race, gender and disability;
- (iii) promote equality in respect of race, gender and disability.

Section 239 of the Constitution defines an organ of state as –

- (a) any department of state or administration in the national, provincial or local sphere of government; or
- (b) any other functionary or institution-
 - (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation,

In terms of the Promotion of Access to Information Act²⁵² -

‘public body’ means-

- (a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or
- (b) *any other functionary or institution when-*

²⁵⁰ Treasury Regulations fn 248 *supra*

²⁵¹ Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000

²⁵² Promotion of Access to Information Act No 2 of 2000

- (i) exercising a power or performing a duty 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.*

The Public Protector is competent *inter alia* to investigate, on his or her own initiative or on receipt of a complaint, any alleged -

- abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay *by a person performing a public function;*
- improper or unlawful enrichment, or receipt of any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in the public administration or in connection with the affairs of government at any level *or of a person performing a public function;*
- act or omission by a person in the employ of government at any level, *or a person performing a public function*, which results in unlawful or improper prejudice to any other person.²⁵³

In terms of the Promotion of Administrative Justice Act, 'administrative action' means 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.

²⁵³ Section 6 (4) of Act No 23 of 1994

3.18 Private Entities, Public Functions

It is submitted that whilst organs of state perform public functions this does not necessarily mean that if the function is a public one it is an organ of state that is performing it. The Promotion of Administrative Justice Act and the other legislation referred to above makes it clear that persons other than organs of state can also perform public functions. It must also be inferred from the Promotion of Administrative Justice Act that administrative action and public functions are not, at least for the purposes of this Act, mutually interchangeable concepts.

There are considerable legal concerns around the performance of public functions by entities and persons within the private sector not least of which is the problem of accountability and the threat posed by delegation to the doctrine of the separation of powers²⁵⁴. There are also problems, however with the creation of for profit public entities that have objectives more comparable to those of the private sector than those the public sector.

The creation of public entities such as the National Health Laboratory Service (NHLS), the Medical Research Council (MRC) and the Council for Medical Schemes (CFMS) has the effect of removing the areas in which they operate from direct state control in many instances. For example provided that the MRC remains within the boundaries of its statutory mandate, it is free to decide which business to take on and which to reject in terms of research projects. This is problematic for government because public health research has always been something of a cinderella in the worlds of academic and, particularly, commercial medical research yet it is vital for informing policy making, health resources planning and the fulfilment of the state's constitutional mandate to achieve the progressive realisation of the right to health care within available resources. In the implementation of an HIV and AIDS management and treatment programme a large and reliable laboratory facility is required in order to ensure that essential blood and other tests are conducted as part of the treatment regimen. The NHLS as an independent body over which the state has no direct control

²⁵⁴ Freeman J fn 247 *supra* states that: "In legal theory this degree of private delegation raises concerns about both the accountability of private groups and the threat delegation poses to separation of powers principles." She refers to Krent H J, 'Legal Theory: Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government' (1980) 85 *Nw U. L. Rev.* 62

is essential to the delivery of the programme countrywide yet it is technically free to take its own business decisions.

In South Africa there are shortages of health research personnel, trained laboratory technicians and other human resources that are necessary for medical research. Those resources that are available to the state for these activities should thus be carefully husbanded rather than given away.

It is submitted that delegations of public functions to private sector entities and the creation of public entities that are not under the control of the state to perform essential public functions could in some instances even be unconstitutional given the fact that section 27(2) of the Constitution requires the state to achieve the progressive realisation of socio-economic rights within *its* available resources. If it alienates its resources or fragments them to the extent that it has largely abdicated its powers and responsibilities in terms of section 27(2), it is submitted that this could be seen as a subversion of its constitutional role. The danger is that this subversion is likely to take place gradually and in a piecemeal fashion so that a government that is not alert to the bigger picture could one day find that it has castrated itself without realising it. The private sector is not as stable as the public sector in many respects. It is income driven, if not profit driven. It is subject to the whims and fancies of shareholders, fluctuations in foreign exchange rates, competition and other market forces.

Even certain non-governmental organisations (NGOs) are hungry for power and control over their area of interest. Whilst the needs of other groupings may be just as significant, the more powerful NGOs have the resources to make themselves heard and are thus likely to receive more attention for themselves and the interests they represent. Individuals within private entities seek personal power, aggrandisement and the furtherance of their personal interests and there are no guarantees that in five years time they will be answerable to their constituencies in a general election.²⁵⁵ It is

²⁵⁵ Freeman J in 247 *supra* notes that: "Private actors remain relatively insulated from legislative, executive and judicial oversight. To the extent that private actors perform traditionally public functions unfettered by the scrutiny that normally accompanies the exercise of public power, private participation may indeed raise accountability concerns that dwarf the problem of unchecked agency discretion. In this view private actors do not raise a new democracy problem; they simply make the traditional one even worse because they are considerably more unaccountable than agencies. In addition private agencies threaten other public law values that are arguably as important as accountability. Their participation in governance may undermine features of decision making that administrative law demands of public actors, such as openness, fairness, participation, consistency, rationality and impartiality."



submitted that there is a fundamental and inescapable conflict of interest in the delegation of public functions to private entities. Since funding must follow the function such delegation means putting public money into private hands that are seeking to make a profit and to serve, not the public interest, but self interest²⁵⁶. Health care services are a public good and access to them, a constitutional right. To place responsibility for the delivery of health care services solely in the realm of the private sector would be problematic unless, there was some assurance of funding for those services. This is often the case in other countries with strong social or national health insurance systems for example France and Australia. The state retains the financial and purchasing power which assures access to health services sourced from the private sector as well as state owned institutions. In South Africa at present no such powerful state funding mechanism exists to balance the scales of power in a scenario where health care is provided largely by the private sector. However if such a scenario could come into play, it is submitted that the question of whether the delivery of health care services was a public or a private function would become very real indeed. Rationing and resource allocation decisions taken by providers in such a scenario could not be dictated purely by private sector motives. They would either have to be managed by way of contractual relationships between a state funder and the providers or by administrative law principles. Health care goods and services are not ordinary commodities the distribution of which can be adequately ensured and regulated by commercial law and common market forces.

It would seem that the US offers significant opportunities for fruitful study of when and how not to give away public power²⁵⁷ although it is submitted that the South

²⁵⁶ Merusak K argues in 'Limitations to the transfer of public functions to persons in private law: aspects of constitutional law and administrative law' 2000 *Juridica* VIII 499-507 that on the basis of the Constitution of Estonia, the state must perform its essential functions itself and that the transfer of public functions related to the exercise of authority to persons in private law is only possible to a certain extent. However, Merusak states that social functions need not, as a rule be performed by the state or local governments, who may transfer such functions to persons in private law although they must ensure their performance. It is submitted that there are similar arguments that can be raised with the regard to the South African Constitution and the outsourcing of public functions to the private sector in South Africa. The fact of the matter is that the Constitution unequivocally imposes certain obligations on the state with regard to its powers and functions and that the statutory assignment of such powers and functions to the private sector in an attempt to transfer the risk or obligation imposed by the Constitution is likely to be unconstitutional. Furthermore contractual arrangements which outsource public functions, whilst not necessarily unconstitutional, cannot succeed in absolving the state of its ultimate responsibility, for instance in terms of section 27(2) to take reasonable legislative and other measures to progressively achieve the realisation of the rights in section 27(1).

²⁵⁷ Freeman J, in 247 *supra* observes: "Beyond the familiar literature on agency capture, one struggles to find careful analyses of how traditional command and control regulation depends so heavily upon private self-reporting, negotiation and industry co-operation in enforcement...while my illustrations are mostly federal or state, one can find public-private arrangements functioning at every level of government. Indeed the blending of public-private actors is likely to be especially complex at the state and local level." Freeman points out that economists and policy makers usually justify privatisation on the theory that private control will provide efficiency gains but that John D. Donahue in *The*

African Constitution is much stronger in terms of its potential for curbing this trend than is the older US Constitution.

3.19 Public Private Entities

There are a number of permutations that arise within the public-private interface. At one end of the spectrum one finds public entities that operate rather more in the private sector than they do in the public sector - what one might call, public private companies. These are entities that have usually been converted into private entities from their previous status as government entities. The State Information Technology Agency is an example of such an entity. At the other end of the spectrum one finds essentially private entities that are fulfilling mostly public functions. An example of these would be private waste disposal companies that are contracted to various municipalities to remove waste. The question arises what the position would be of a private provider of health care services that is contracted by the state to operate a state owned health establishment that is serving non-paying public sector patients. Conversely what would be the position of a state owned and operated facility that is contracted to a medical scheme to service its beneficiaries. Would administrative law apply to the former? Would it apply to the latter? If the answers are different in each instance then what is the reason for such difference?

Freeman²⁵⁸ observes that the most common example of public-private cooperation in governance takes the form of agencies contracting with private non-profit and for profit firms to provide social services or perform public functions. She states that in most cases public agencies engaged in contracting out believe that they are surrendering only policy *implementation* while retaining authority over policy *making* but that this distinction is tenuous at best. Freeman uses the example of private management of prisons but it is just as apposite in the context of public health service delivery by private contractors. She points out that private prison guards exercise discretion that affects prisoner's most fundamental liberty interests (over meals, showers, exercise time, cell conditions, transportation, work assignments, visitation).

Privatization Decision argues that the presence of competition is more important than the public or private nature of the decision maker. She notes that privatisation proponents also argue that the capital market and the company meeting provide more direct accountability than public agencies. She states that privatisation does not guarantee accountability, however. It often enables secrecy

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Freeman fn 247 *supra*

Prison officials judge when infractions occur, impose punishments and make recommendations to parole boards. Even where an agency retains the authority to accept or reject rules by the private provider, the latter interprets and puts those rules into operation, giving them practical meaning and blurring the line between policy making and implementing functions. She notes that authority over day to day operation confers upon the private manager a “governmental” power to both legislate and adjudicate. Freeman states that a contractual system relies on judicial enforcement of the private law of contract rather than judicial enforcement of administrative law principles at the behest of private citizens. There is thus a possibility that a contractual regime might undermine public participation in decision making and impede public access to relief for injuries suffered by the intended beneficiaries of the contract. The private contractor may provide poor service, injure consumers or engage in anti-competitive behaviour, for example, with little fear of reprisal.

In the private health sector, which in South Africa, is largely profit driven, private contractors to the state may provide health care services that offer the highest returns rather than those that give the best health outcomes or that address the most urgent needs of the communities served. They would also have many different kinds of perverse incentives which revolve largely around the promotion of self-interest. In the absence of highly specific service level agreements that are closely managed by the public sector, public-private arrangements that, in the interests of the promotion of efficiency, provide for financial rewards that are directly related to under expenditure by the contractor are likely in the long run to end up short changing patients in terms of quality of care. Price fixing has been a feature of the private health sector for many years. It is a relic of a previous legal dispensation that actively promoted it in the form of gazetted tariffs for various health services but despite the change in legislation some years ago, the Competition Commissioner ruled as recently as last year that private hospitals, medical practitioners and medical schemes were guilty of anti-competitive practices and fined them substantial amounts of money. The Supreme Court has held that a private hospital could freely insert the most exclusionary indemnity clauses in patient admission documentation which constitutes a record of the contract between a patient and a hospital in order to avoid claims of even gross

negligence on the part of its staff²⁵⁹. The court expressly upheld and preferred the principle of freedom of contract over the constitutional right of access to health care services and despite the obvious imbalance of bargaining power between the contracting parties. If the private sector is entitled to enter into such contracts why should a private contractor managing a government owned health establishment not do the same? If such a contractor refuses to provide a drug in circumstances similar to those in *Applicant v Administrator, Transvaal, And Others*²⁶⁰ what recourse does the patient have? Against the state he would be able to invoke the provisions of the Promotion of Administrative Justice Act. Against the private contractor he would only be able to do so if the provision of health care services was found to be a public function. Since the provision of health services within the public and private sectors is not materially different in terms of the needs served, the nature of the services provided and the circumstances in which they are provided, it is difficult to find justifications for distinctions between the one as being a public function and the other not. One could argue that private patients have a choice that public patients do not, but the realities of the situation of private patients indicate that such choices are often notional rather than real.

In the health care context patient choices are generally limited whether they are private or public sector patients. Many medical schemes restrict patient choice in the private sector when it comes to high cost health interventions such as hospitalisations and there are some that even indirectly compel their members to use public sector facilities. Schemes also restrict, directly or indirectly, the number of visits to medical and dental practitioners per year and access to medication in terms of benefit ceilings. The patient can go to a private provider if he or she is able and prepared to pay the difference in rates. Many medical scheme members cannot afford to do so. Many medical scheme contributions are based on earnings levels as are the fees payable to public hospitals by employed patients who have an income. Those who earn more pay more in both instances. The consumption of health care goods and services entails very little choice on the part of consumers whether they are public or private sector patients. They are not experts trained in the relative merits of the many different brands of medication on the market or the effective use of medical devices. They

²⁵⁹ *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA)

²⁶⁰ *Applicant v Administrator, Transvaal, And Others* fn 230 *supra*

cannot, in the majority of cases, assess for themselves whether they are being led up the garden path or whether what they are being told about their health needs and the management of their health condition is true. They are not in a position to know about alternative therapies that may be just as effective but less costly unless they are told by the provider of health care services. These are vulnerabilities of public and private sector patients alike. Second opinions in the private sector are dependent on the availability of funding and are not necessarily easily obtained. If one obtains conflicting medical opinions then a second opinion can yield more questions than answers for the unfortunate, and medically illiterate, patient.

A contractual regime in the health care context tends to the assumption that there is equal bargaining power between the contracting parties when, particularly in this context, this is the exception rather than the norm. The distinction between the largely administrative law relationship between patients in the public sector and public sector providers on the one hand, and the contractual relationships between private patients and private providers on the other, in respect of services that are essentially the same, throws into stark relief the dilemma created by classifying health services rendered in the private sector as a private function rather than a public one. It is submitted that there are useful analogies that can be drawn between waste disposal and health service delivery. Waste disposal is essentially a public function in the sense that it is necessary not only for the good of the individual who generates the waste but also for the broader community that is likely to suffer the hazards that an accumulation of such waste would create. Health services are also essentially a public function since they are necessary not only for the good of the individual but also for the society in which that individual functions. There are a variety of reasons apart from the obvious ones that relate to contagious diseases. Sick parents cannot support their children. Children in poor health cannot be properly educated. Adults in poor health cannot attend at work or when they do cannot perform to the full capacity. The HIV and AIDS pandemic has brought these truths to light in a way that few other health conditions can. Like waste disposal, health care services are in many senses a 'grudge' purchase generated by a need for the opposite of one's current situation. One has to purchase health services because one is in poor health – an undesirable state of affairs. In the case of both waste disposal and health care services, people are usually not in a position to perform these services for themselves. They are dependant upon

broader societal structures for these arrangements. In short they are public goods. The idea of health care services as a public good is explored more fully in a subsequent chapter.

What then are the arguments for not regarding all health services as a public function regardless of where they are rendered? Why should administrative law, which is after all preoccupied with procedural fairness not apply equally in the public and private health sectors? This is a particularly relevant question in the light of the constitutional values of equality and freedom upon which the legal system must be structured.

Freeman states that an emerging literature in administrative law suggests that the pressing challenge for the field is to determine when and how to extend legal requirements to private actors performing public functions²⁶¹. She states that the trend away from government shifts the administrative law terrain so much that failure to constrain discretion is not the crucial problem in the field. Instead the challenge is ensuring that privatisation, contracting out and other measures designed to yield authority to private parties do not eviscerate the public law norms of accountability, procedural regularity and substantive rationality that administrative law has laboured so hard to provide.²⁶² She states that although laudable for its focus on private actors and its bold assertion that discretion is no longer the central issue in the field, the emerging privatisation literature does not go far enough. According to Freeman the new privatisation literature in administrative law is marked by debates over whether judicial review will subside or intensify as the private role in administration increases. Some scholars argue, she says, that a proliferation of private activity will weaken the executive and legislative capacity to exert control over public decisions which will invite greater judicial oversight.²⁶³ Courts may then choose to regulate private actors either by expanding the state action doctrine or by infusing common law doctrines with public norms, such as good faith obligations in contract. Indeed, she says, there

²⁶¹ Freeman fn 247 *supra*

²⁶² Freeman observes that viewed in this light, a continued emphasis on constraining agency discretion is like shuffling the deck chairs on the Titanic and notes that it is not surprising that such concerns have arisen first and most forcefully in the United Kingdom, Australia and New Zealand, countries that already impose far fewer legal and procedural constraints on ministerial discretion, and which have witnessed very significant degrees of public sector re-structuring in the last two decades.

²⁶³ Freeman, fn 247 *supra*, refers to Mullan D 'Administrative Law at the Margins' in *The Province of Administrative Law*, M Taggart ed in this regard.

is ample precedent for imposing procedural requirements on private parties performing public functions when they act in derogation of the public interest.

Freeman points out that the task for administrative law is more complicated than delineating a threshold test to determine when a private actor is performing a sufficiently public function to justify the imposition of public law constraints. Other questions are –

- Do private actors have any obligation to be “public-regarding” in setting standards that are then incorporated by reference by a government agency or is the agency’s stamp of approval an adequate guarantee of accountability?
- Should courts review the exercise of enforcement discretion to approve voluntary self-regulation more carefully than when it is exercised for other purposes?

Significantly she observes that the necessary inquiry will require highly specific analyses of the dangers (self-dealing, conflicts of interest, secrecy, irrationality, lack of representation, and procedural irregularity, to name some) posed by different regulatory arrangements. Freeman states that before imposing traditional (administrative law) constraints on private actors one should look at whether other actors or different mechanisms might play a role in providing accountability and ensuring compliance with public law norms. In other words, she says, the impulse to respond to private activity by constraining private actors merely shifts the focus to the private side of the equation rather than re-orienting the administrative law enquiry to the public-private regime as a new entity. She points out that the public acceptability or legitimacy of a decision making regime turns in part upon the expectations of how the actors in that regime ought to behave when they play certain kinds of roles. For example when they function in an advisory capacity in which they purport to be neutral, one might rightly expect disinterested decision making. Freeman suggests that a mixed administrative regime might rely on numerous informal accountability mechanisms and non-governmental actors to control the dangers posed by public-private arrangements and that public-private arrangements can be more accountable because of the presence of powerful independent professionals within private

organizations or because the agency's threat of regulation provides the necessary motivation for effective and credible self-regulation which involves non-government actors. She says that informal regulatory regimes can emerge in a context where there is no formal government participation. Freeman proposes a concept of mixed administration but points out that there are some significant obstacles not least of which is the fact that the public-private distinction is central to constitutional law. Whilst this may be true of the US Constitution it is submitted that it is less true of the South African Constitution which expressly acknowledges for instance the possibility of the horizontal application of the rights in the Bill of Rights. However the South African Constitution does make it clear that certain actions are the exclusive domain of government whose role, after all is to govern. Freeman does note that in a handful of cases both American and Commonwealth courts have imposed procedural requirements on public actors by reasoning that they are in effect behaving as private actors and points out that doctrinal mechanisms like "the source of power" or "public function" tests enable courts to characterize traditionally private actors as public whenever they exercise a sufficiently important and traditionally public regulatory function. She points out that such doctrinal innovations continue to rely heavily on the formalistic and conceptually dubious characterization of activity as essentially public or private and that this divide remains resilient in the face of withering attacks from critical legal studies, feminist legal theory, legal postmodernism and outsider legal scholarship. Freeman states that no matter how blurred the line between public and private and no matter how difficult to design an intellectually defensible test to distinguish them, most scholars agree that there ought to be a meaningful difference between the two and that constitutional constraints should apply *only* to the former. She observes that one finds a similar commitment to the public-private distinction in administrative law.

Freeman's approach to the extent that it supports regulation by private entities is not supported in this thesis not only because of the problems that seem to accompany over privatisation given the American experience but because of the approach of the South African Constitution itself²⁶⁴. Moreover, the imposition of specific obligations such as

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Thus section 43 stipulates that -

In the Republic, the legislative authority-

(a) of the national sphere of government is vested in Parliament, as set out in section 44;

(b) of the provincial sphere of government is vested in the provincial legislatures, as set out in section 104; and

is contained in section 27(2) upon the state renders it unconstitutional for the state to privatise to the point where it is incapable of fulfilling those obligations because it has given away the mechanisms and resources necessary to do so. This is not to suggest that the state must provide all health care services itself. However, if the state gives away even the power to regulate health service delivery, the power to set standards for quality, safety and efficacy and to legislate mechanisms which can counteract the negative impact on access by market forces and other social factors then it is submitted that it will effectively have undermined its capacity to fulfil its constitutional obligations. What is interesting about Freeman's views is that the line between public and private function is not as clear as might first appear and that she provides some useful arguments for the application of certain principles of administrative law in the health care sector. In South Africa, fairness is a constitutional and legislative preoccupation due to largely to its history. Fairness is also a preoccupation of administrative law. Equality is a constitutional value that supports and underlies fairness. In South Africa there is legislation such as the Promotion of Equality and Prevention of Unfair Discrimination Act²⁶⁵ for instance which states in section 24 that (1) The State has a duty and responsibility to promote and achieve equality and (2) All persons have a duty and responsibility to promote equality. In terms of this Act, limiting women's access to social services or benefits, such as health, education and social security constitutes unfair discrimination on the ground of gender. It is submitted that where the activities of the private sector impact or have the potential to negatively impact upon constitutional values and the capacity of persons to realise their constitutional rights there are strong arguments in favour of the principles of administrative law in those situations. In fact this is one of the key identifiers of administrative action in terms of the Promotion of Administrative Justice Act²⁶⁶ which states in the definition of this term it is any decision taken, or any failure to take a decision...which adversely affects the rights of any person and which

(c) of the local sphere of government is vested in the Municipal Councils, as set out in section 156.
In terms of section 85 -

(1) The executive authority of the Republic is vested in the President.

(2) The President exercises the executive authority, together with the other members of the Cabinet, by-

- (a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;
- (b) developing and implementing national policy;
- (c) co-ordinating the functions of state departments and administrations;
- (d) preparing and initiating legislation; and
- (e) performing any other executive function provided for in the Constitution or in national legislation.

²⁶⁵ Promotion of Equality Act fn 251 *supra*

²⁶⁶ Promotion of Administrative Justice Act fn 8 *supra*

has a direct, external legal effect. This section of the Act also introduces the public function test as discussed previously.

In the Netherlands administrative law, as in South Africa, is applicable to any action with regard to the execution of public law power. Public law power is defined in that country as authority to decide on the behaviour of another person²⁶⁷. In the Netherlands privatised organisations are largely regulated by administrative law and the process of conversion from a state organisation to a privatised company is governed by administrative law in all stages.

What is interesting is that van der Vlies *et al* observe with regard to methods of safeguarding public interest that the latter may be served by competition but only under specific conditions. They state that even if the competition is real, the public interest might need more guarantees, noting that if privatisation leads to competition *for* the market only and not to competition *in* an open market, competition is in fact void. It is widely acknowledged that in the health sector, competition does not work very well due to the captive nature of the consumer and the high levels of necessary regulation of health professionals and products. The Research Council for Government Policies (WRR) in the Netherlands developed five main checkpoints for good governance in privatisation namely democratic legitimisation; equity before the law; legal certainty; efficiency and efficacy. Democratic legitimisation requires democratic steering and democratic accountability. The authors note that competition and equity before the law are not entirely compatible concepts and that competition may cause companies to infringe the principle of equity before the law. Thus an insurance company may exclude certain high risk groupings (as happened in the South African medical schemes industry prior to the introduction of the Medical Schemes Act in 1998) although such behaviour does not observe the principle of equity before the law. Legal certainty, they state, is partly connected to predictability of actions of the administration. However, they say, public law does not have the monopoly on certainty and is itself limited in this regard in that rules are open to interpretation and officials are awarded certain discretionary powers.

²⁶⁷ Van der Vlies IC, Stoter S W and Lubach DA 'Application of Administrative Law to Privatization In The Netherlands' *European Journal of Comparative Law* <http://www.ejcl.org/64/art64-24.html>

Van der Vlies *et al*²⁶⁸ comment that whether a public or a private organisation of a service is effective or efficient depends mainly on the character of the service. Thus electricity was traditionally traded in a monopoly market because the infrastructure required to provide it was too technically sophisticated to allow competition. Nowadays, infrastructure is less complex and allows competition without the risk of losing the availability of electricity to everyone. This observation is very interesting in the context of the South African health sector in which the infrastructure is not such that health care services are available to everyone. It seems that where there is a well established infrastructure that is readily accessible, competition is feasible but where the infrastructure is insufficient competition will have the effect of excluding from access to resources altogether those who are less able to compete for them. This usually means the poor. In other words, infrastructure needs to reach a certain critical mass before competition becomes a positive factor.

3.20 Case Law

3.20.1 *Pennington v Friedgood And Others*²⁶⁹

Facts

During 1999 Fedsure Health (Pty) Ltd (Fedsure) became the administrator of the Erica medical scheme; the board of trustees of the scheme (the board) became dissatisfied with the service that the scheme was receiving from Fedsure and in due course cancelled its administration agreement with Fedsure and transferred its administration to Old Mutual Healthcare (Pty) Ltd, the fifth respondent, although no formal administration agreement was concluded with the fifth respondent. The board was not satisfied with the manner in which the scheme was being administered under this arrangement and on 8 May 2001 it resolved to terminate its administration agreement with the fifth respondent with effect from 30 June 2001 and to appoint Bensure Management Services (Pty) Ltd, the sixth respondent, as administrator of the scheme with effect from 1 July 2001. The annual general meeting of the scheme was held on 29 June 2001; the first respondent chaired the meeting and the second, third and fourth respondents and representatives of the fifth and sixth respondents were also

²⁶⁸ *Van der Vlies et al* fn 267 *supra*

²⁶⁹ *Pennington* fn 129 *supra*

present, as was the applicant; the first to fourth respondents were elected as the trustees of the scheme at the meeting. The applicant was unhappy with the manner in which the annual general meeting was conducted on 29 June, and on 3 July 2001 he launched an application as a matter of urgency to be heard the next day, 4 July 2001. He claimed the following relief:

“2 That a rule *nisi* be issued calling upon the first through the fourth respondents, in their capacity as trustees of the Erica Medical Aid Society (the scheme) and all interested parties, to appear at 10:00 on Tuesday, 31 July 2001, alternatively at a date to be determined by the above honourable Court, to show cause, if any, why the decision set out in para 2.1 through 2.10 herein below, exercised at the annual general meeting (the AGM) of the scheme, held on 29 June 2001, should not be reviewed and set aside and why an order should not be given in terms of para 2.11 and 2.12 herein below.

- 2.1 The refusal of the first respondent to stand the meeting down to allow arrangements to be made to electronically record the minutes of the meeting.
- 2.2 The refusal of the first respondent to stand the meeting down pending an application to the High Court for an order to compel the electronic recording of the minutes of the meeting.
- 2.3 The appointing of an agent or servant of the consulting firm Jacques Malan & Associates to take the minutes of the meeting.
- 2.4 The refusal of the first respondent to recuse himself as chairperson of the meeting.
- 2.5 The refusal of the first respondent to stand the meeting down pending an application to the High Court for an order to recuse himself from the meeting.
- 2.6 The refusal of the first and second respondents to recuse themselves from participating or voting at the meeting.
- 2.7 The ruling by the first respondent that the eight motions tabled by the applicant in terms of the scheme rules were out of order and therefore would not be dealt with at the meeting.

- 2.8 The stated action by the first respondent that he had disqualified two nominations for trustees because they had not been completed properly.
 - 2.9 The refusal of the first respondent to call for a poll of the members present or by proxy for the election of trustees of the scheme.
 - 2.10 The refusal of the first through fourth respondents to give an undertaking that the administration of the scheme would not be transferred from the fifth respondent to the sixth respondent pending the lodging of this application.
 - 2.11 Why an order should not be given directing that the costs of this application be paid jointly and severally by the first through the fourth respondents in their personal capacity and by the fifth and sixth respondents only in the event that said respondents oppose this application.
 - 2.12 Declaring that, because of the aforesaid irregularities, the continuation of the meeting and any decisions made and resolutions passed at the meeting are invalid.
3. That pending a decision of this honourable Court for the review and setting aside of the aforementioned decisions, the respondents be interdicted and restrained from transferring the administration of the scheme from the fifth respondent to the sixth respondent.
 4. Ordering that any and all records of the members of the scheme in the possession of the sixth respondent be returned to the scheme immediately and that the sixth respondent be restrained and interdicted from contacting the members of the scheme or in any way interfering with the business of the scheme.”

The matter came before Van Zyl J on 4 July 2001. He granted no relief, but postponed the matter for hearing on the semi-urgent roll on 3 September 2001 and gave directions for the filing of answering and replying affidavits and heads of argument by all the parties bar the fifth respondent, and ordered that costs would stand over for later determination. He specifically stated that no order was made in respect of the fifth respondent. Van Zyl J did not grant the interim interdict sought in para 3 of the notice of motion.

The fifth respondent abided the decision of the Court. During the first morning of the hearing, the applicant and the sixth respondent, represented by Mr Sholto-Douglas, reached an agreement in terms of which the former withdrew his application against the sixth respondent and tendered to pay its costs. At a far later stage of the argument, it was also agreed between the applicant and the first to fourth respondents that the applicant would withdraw his claim for interdictory relief against the first to fourth respondents as contained in paragraph 3 of the notice of motion. The following issues accordingly arose for decision: whether the first respondent's rulings and the other conduct referred to in paragraph 2 of the notice of motion fell to be reviewed, viz whether such conduct was indeed reviewable as a matter of law; whether on the facts a case was made out for the review and the setting aside of the conduct complained of; a striking out application; and the appropriate relief.

Judgment

The court referred to *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others*²⁷⁰ as being of great importance. It observed that since the advent of the Constitution and, pursuant thereto, the PAJA, a requisite jurisdictional fact for success on judicial review is that the impeached conduct must constitute administrative action and said that from the dicta from *Pharmaceutical Manufacturers* and from the PAJA, it was clear that whether such conduct constitutes administrative action falls to be decided by reference to whether such action amounts to the exercise of public power or the performance of a public function. Referring to the decision in *Transnet Ltd v*

²⁷⁰ *Pharmaceutical Manufacturers Association of SA* (fn 72 *supra*) in which Chaskalson P, speaking for the Full Constitutional Court, said: "I take a different view. The control of public power by the Court through judicial review is and always has been a constitutional matter. Prior to the adoption of the interim Constitution this control was exercised by the Courts through the application of common-law constitutional principles. Since the adoption of the interim Constitution such control has been regulated by the Constitution which contains express provisions dealing with these matters. 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 the judicial review of public power, the two are intertwined and do not constitute separate concepts" and

"The exercise of public power was regulated by the Court through the judicial review of legislative and executive action. This was done by applying constitutional principles of the common law, including the supremacy of Parliament and the rule of law. The latter had a substantive as well as a procedural content that gave rise to what Courts referred to as fundamental rights, but because of the countervailing constitutional principle of the supremacy of Parliament, the fundamental rights could be, and frequently were, eroded or excluded by legislation. Judicial review served the purpose of enabling Courts, whilst recognising the supremacy of Parliament, to place constraints upon the exercise of public power."

*Goodman Brothers (Pty) Ltd*²⁷¹ Hodes AJ noted that what falls to be considered is, *inter alia*, the source of the power exercised, the nature of such power, its subject-matter, whether it involves the exercise of a public duty, and how closely it is related on the one hand to policy matters which are not administrative, and on the other to the implementation of legislation, which is. The court also referred to the cases of *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange and Others*²⁷², *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another*²⁷³, *Herbert Porter & Co Ltd and Another v Johannesburg Stock Exchange*²⁷⁴ and *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others*²⁷⁵ and compared the first two decisions with the last two.

Hodes AJ observed that a medical scheme is a body corporate. In terms of the Medical Schemes Act it acquires such status upon registration. It is governed by the Act, the regulations and the scheme rules. Such rules constitute the contract between the scheme and its members.²⁷⁶ A meeting of the members of a scheme is thus similar to a meeting of the members of a company. Both acquire status in terms of an Act of Parliament. In this case, the Act and, in the case of a company, the Companies Act.

In the instant case, as in *Herbert Porter*, the relationship between the trustees (the first to fourth respondents) and the members of the scheme is governed by the Act, the regulations and the rules. In the case of a company the relationship between members and the company is governed by the Companies Act and the articles of association of that company. The court said that just as a meeting of shareholders of a company is not subject to the review of the High Court (*Dawnlaan Beleggings; R v Disciplinary Committee of the Jockey Club, ex parte Massingberd-Mundy*²⁷⁷), so too the proceedings of an annual general meeting of a medical scheme are also not subject to the review of the High Court, for they do not constitute administrative action. The court stated that judicial review is a remedy to curb improper or inappropriate exercise of public power.

271 *Transnet* fn 35 *supra*

272 *Dawnlaan* fn 135 *supra*

273 *Johannesburg Stock Exchange* 1988 (3) SA 132 (A)

274 *Herbert Porter* 1974 (4) SA 781 (T)

275 *Cape Metropolitan* fn 48 *supra*

276 *Meaker NO v Roup, Wacks, Kaminer & Kriger and Another* 1987 (2) SA 54 (C) at 61G - 62C.

277 *Ex parte Massingberd-Mundy* [1993] 2 All ER 207 (QB) at 221b - e

Hodes AJ noted that in *Transnet Ltd v Goodman Brothers (Pty) Ltd*²⁷⁸ in a concurring judgment, Olivier JA gleaned the following from decisions of the Constitutional Court:

- (a) Administrative law is an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of Government.
- (b) The question relevant to section 33 of the Constitution is not whether the action is performed by a member of the executive arm of Government, but whether the task itself is administrative or not and the answer to this is to be found by an analysis of the nature of the power being exercised.
- (c) What falls to be considered is, *inter alia*, the source of the power exercised, the nature of such power, its subject-matter, whether it involves the exercise of a public duty, and how closely it is related on the one hand to policy matters which are not administrative, and on the other to the implementation of legislation, which is.

He quoted the following words of Devenish, Govender and Hulme²⁷⁹ :

““Administrative action” is the conduct of public authorities and indeed private entities when they exercise public powers, perform public functions or are obliged to exercise authority in the public interest. This means that common-law review now only applies in a very narrow field in relation to private entities that are required in their domestic arrangements to observe the common-law principles of administrative law. This applies in relation to voluntary associations, such as sporting clubs and religious organisations.”

and stated that he was in agreement with them.

The court concluded that nothing contained in the Act, the regulations or the scheme rules imports a requirement by the trustees to observe the common-law principles of administrative law. Accordingly, it held that the conduct of the first to fourth respondents which the applicant sought to impeach by way of review was not in law susceptible to this Court’s review jurisdiction and that the application for review falls to be dismissed.

²⁷⁸ *Transnet* (fn 35 *supra*) para [34] at 865A - J

²⁷⁹ *Devenish et al* fn 15 at p 25

Discussion

Although the finding of the court in this particular case is, it is submitted, correct, it cannot necessarily be used as a precedent to show that medical schemes do not perform public functions and are thus not subject to considerations of administrative law. The court did recognise the possibility of the performance of a public function by a private entity.

With regard to medical schemes and their more day to day activities involving the funding of medical expenses and the enrolment of members the following should be born in mind-

- (1) Medical schemes are creatures of statute in the sense that they have to be registered in terms of procedures required by the Medical Schemes Act²⁸⁰ and that only when registered are they lawfully able to conduct the business of a medical scheme as defined.
- (2) The content of the rules of medical schemes are closely regulated. Not only are they largely dictated by section 29 of the Medical Schemes Act²⁸¹ but they are

280 Medical Schemes Act No 131 of 1998 section 22 and 24

281 According to section 29: (1) The Registrar shall not register a medical scheme under section 24, and no medical scheme shall carry on any business, unless provision is made in its rules for the following matters:

- (a) The appointment or election of a board of trustees consisting of persons who are fit and proper to manage the business contemplated by the medical scheme.
- (b) The appointment of a principal officer by the board of trustees who is a fit and proper person to hold such office.
- (c) The appointment, removal from office, powers and remuneration of officers of a medical scheme.
- (d) The manner in which contracts and other documents binding the medical scheme shall be executed.
- (e) The custody of the securities, books, documents and other effects of the medical scheme.
- (f) The appointment of the auditor of a medical scheme and the duration of such appointment.
- (g) The power to invest funds.
- (h) Subject to the provisions of this Act, the manner in which and the circumstances under which a medical scheme shall be terminated or dissolved.
 - (i) The appointment of a liquidator in the case of a voluntary dissolution.
 - (j) The settlement of any complaint or dispute.
 - (k) The amendment of the rules in accordance with the provisions of section 31.
 - (l) The giving of advance written notice to members of any change in contributions, membership fees or subscriptions and benefits or any other condition affecting their membership.
 - (m) The manner of calling the annual general meeting and special general meetings of members, the quorum necessary for the transaction of business at such meetings and the manner of voting thereat.
 - (n) The terms and conditions applicable to the admission of a person as a member and his or her dependants, which terms and conditions shall provide for the determination of contributions on the basis of income or the number of dependants or both the income and the number of dependants, and shall not provide for any other grounds, including age, sex, past or present state of health, of the applicant or one or more of the applicant's dependants, the frequency of rendering of relevant health services to an applicant or one or more of the applicant's dependants other than for the provisions as prescribed.
 - (o) The scope and level of minimum benefits that are to be available to beneficiaries as may be prescribed.



also subject to the approval of the Registrar of Medical Schemes and may not be amended without his sanction.

- (3) The choices of a member of a medical scheme are to leave or to continue as a member under the rules made in accordance with the Act and as approved and registered by the Registrar. There is no scope for the negotiation of benefits on an individual basis. Members can, in terms of the rules of some schemes apply for so-called *ex gratia* benefits but the decision as to whether or not such benefits are granted or not lies with the trustees of the scheme.
- (4) Generally speaking anyone who subscribes to a particular benefit option is entitled to exactly the same benefits as other subscribers. The Medical Schemes Act actively discourages the practice of risk rating individuals according to their health profiles and other individual risk related characteristics such as gender and age. The notion that these rules embody the terms of the contractual arrangement between the member and the scheme does not sit comfortably in the law of contract. One could almost see an argument here for the concept of an

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- (p) No limitation shall apply to the reimbursement of any relevant health service obtained by a member from a public hospital where this service complies with the general scope and level as contemplated in paragraph (o) and may not be different from the entitlement in terms of a service available to a public hospital patient.
- (q) The payment of any benefits according to-
- (i) a scale, tariff or recommended guide; or
 - (ii) specific directives prescribed in the rules of the medical scheme.
- (r) The dependants of a member are entitled to participate in the same benefit option as the member.
- (s) The continuation, subject to such conditions as may be prescribed, of the membership of a member, who retires from the service of his or her employer or whose employment is terminated by his or her employer on account of age, ill-health or other disability and his or her dependants.
- (t) For continued membership of a member's dependants, subject to such conditions as may be prescribed, after the death of that member, until such dependant becomes a member of, or is admitted as a dependant of a member of another medical scheme.
- (u) If the members of a medical scheme who are members of that medical scheme by virtue of their employment by a particular employer terminate their membership of the said medical scheme with the object of obtaining membership of another medical scheme or of establishing a new medical scheme, such other or new medical scheme shall admit to membership, without a waiting period or the imposition of new restrictions on account of the state of his or her health or the health of any of his or her dependants, any member or a dependant of such first mentioned medical scheme who-
- (i) is a person or persons contemplated in paragraph (s); or
 - (ii) is a person or persons contemplated in paragraph (t).
- (2) A medical scheme shall not cancel or suspend a member's membership or that of any of his or her dependants, except on the grounds of-
- (a) failure to pay, within the time allowed in the medical scheme's rules, the membership fees required in such rules;
 - (b) failure to repay any debt due to the medical scheme;
 - (c) submission of fraudulent claims;
 - (d) committing any fraudulent act; or
 - (e) the non-disclosure of material information.
- (3) A medical scheme shall not provide in its rules-
- (a) for the exclusion of any applicant or a dependant of an applicant, subject to the conditions as may be prescribed, from membership except for a restricted membership scheme as provided for in this Act;
 - (b) for the exclusion of any applicant or a dependant of an applicant who would otherwise be eligible for membership to a restricted membership scheme; and
 - (c) for the imposition of waiting periods other than as provided for in section 29 (A).

administrative contract since the only variable subject to negotiation is whether or not a person wishes to become a member or resigns from membership. Membership of a medical scheme is presently voluntary. However social health insurance legislation in the not too distant future may render it mandatory to belong either to a private medical scheme or a public fund that serves essentially the same purpose.

- (5) The Act requires at least 50% of the trustees to be elected from amongst scheme members. This means that the remaining 50% can be appointed by someone else. Power over the scheme is thus not necessarily exclusively in the hands of its members.
- (6) Membership of closed or restricted membership schemes is often a condition of employment. With the current high levels of unemployment one could argue that membership of such schemes for employees of the relevant employer is thus mandatory. This is a further erosion of the contractual nature of the relationship between scheme and member.
- (7) The duties of the trustees are set out in section 57 of the Act and the Council for Medical Schemes may, in terms of section 46, by notice in writing, remove from office a member of the board of trustees of a medical scheme if it has sufficient reason to believe that the person concerned is not a fit and proper person to hold the office concerned. Directors of companies are generally removed by way of a resolution of the relevant company in terms of section 22 of the Companies Act.²⁸²
- (8) Provisions very similar to the principles of administrative law are imposed on trustees of medical schemes. In terms of section 57(6) of the Act the board of trustees shall-
 - (a) take all reasonable steps to ensure that the interests of beneficiaries in terms of the rules of the medical scheme and the provisions of this Act are protected at all times;

²⁸² Companies Act No 61 of 1973

- (b) act with due care, diligence, skill and good faith;
- (c) take all reasonable steps to avoid conflicts of interest; and
- (c) act with impartiality in respect of all beneficiaries.

It is submitted that in view of the foregoing it may be difficult to argue that a decision of a board of trustees is not subject to administrative review, especially where the complaint relates to a failure to act in good faith or with impartiality in respect of a beneficiary. When one considers the definition of ‘administrative action’ in the Promotion of Administrative Justice Act, it is submitted that in certain circumstances there may well be scope for argument that the business of a medical scheme as defined in the Medical Schemes Act is a public function. Medical schemes in South Africa are not for profit entities that exist solely for the benefit of their members. Procedural fairness, equality and reasonableness are extremely important factors in an environment in which the continued existence of a medical scheme is heavily dependent upon its credibility with its members. Access to health care services is a constitutional right that is very much dependent on the availability of funding. If a medical scheme unreasonably withholds funding for a health care intervention that is within the scope of the benefits provided by the scheme, it is unlikely, however that administrative review will be the weapon of choice for the member since the Act itself provides for a system for dealing with complaints and disputes which allows for appeals to the Council for Medical Schemes and an Appeal Board established under the Act.

The meaning of the expression “public function” will largely determine whether or not the activities of a private entity fall within the definition of “administrative action” in terms of the PAJA. It is submitted, however, that

- (1) where the individual affected by the activity concerned is one out of a group of persons,
- (2) the group has been selected or created by some agency external to itself, the individual in question did not actively or directly choose to be a part of that particular group and may not even be aware of the extent or nature of the group in question (in other words membership of the group was a result of external circumstances, default or the dictates of law),

- (3) the activity concerned was not directed specifically at that particular individual but rather more generally at the group of which he forms a part, and
- (4) the circumstances and parameters of the activity in question are defined, mandated or dictated by legislation

such factors would present a strong argument that the activity in question is a public function and where the rights are directly affected thereby (i.e. the definition of 'administrative action' in the PAJA is satisfied) this activity would also constitute administrative action.

3.21 Summary and Conclusions

Administrative law clearly has an important role to play in the delivery of health services by the public sector in particular. The delivery of health services is in fact more likely to take place in terms of a relationship between provider and patient that is governed by administrative law than one governed by the law of contract. This is due to a number of reasons not least of which is that the *essentials* of what would ordinarily have been a contractual relationship are usually specified in legislation or regulations. The transaction within the public sector has little or no commercial value given that many patients are not required to pay for health care services as they are indigent. Those that do earn an income are charged for services on the basis of their income as opposed to the true cost of rendering those services and there is no profit motive involved. This position is changing to some degree within the public health sector with some of the larger hospitals trying to attract medical scheme patients to differentiated amenities in order to obtain a greater income for the establishment concerned. However, revenue retention by public health establishments is still a problematic area and the motive behind revenue retention is in any event not a profit one.

The principles of administrative law are in many ways better suited to regulate a relationship between patients and providers of health care services because of the emphasis on procedural fairness and the growing view that health services are a public good. If access to health care services should be based on criteria other than relative wealth or income and that the right to health should be enjoyed by everyone

irrespective of their socio-economic status then the provision of health care services starts to look much less of a commercial transaction as contemplated by the law of contract and much more of a resource allocation and distribution process the procedural aspects of which are governed by administrative law. The problem with the law of contract, as will be explained in a subsequent chapter, is that it is not only still very commercially oriented, an orientation which does not sit comfortably with the concept of health care services as a public good, but it is also in South Africa at least, rooted in the Victorian era where multinational corporations and similar legal entities did not exist and power rested very much in the hands of governments. The law of contract in South Africa has not yet absorbed the realities of the imbalances of power created by current global markets and organisations whose wealth exceeds the Gross Domestic Product of many countries.

Administrative law and its preoccupation with fairness is uniquely positioned to be of great assistance and benefit to both patients and providers of health care services in terms of regulating their relationships. It is therefore unfortunate that it is unlikely that South African courts will in the near future be prepared to construe the delivery of health care services as a transaction that should be governed by administrative law rather than the law of contract. There is too strong a predilection to take into account the needs of private sector health service providers from a commercial perspective as will be demonstrated in the discussion of the relevant cases in the chapter of this thesis that deals with the law of contract. Perhaps as South Africa moves towards a social health insurance system, more and more of health service delivery transactions, even in the private sector, will come to be governed by legislation to the point where administrative law will be able to play a meaningful role in the delivery of health services in both public and private sectors.