

ADMINISTRATIVE LAW

DANIE BRAND*
MELANIE MURCOTT†

LEGISLATION

There was no legislation in the field of administrative law during the period under review.

CASE LAW

Administrative law-related cases in 2013 produced developments relating to two general issues: the relationship between the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') and legality; and the relationship between the PAJA and labour law. In addition, a number of more specific issues were addressed, most notably whether our law recognises a doctrine of substantive legitimate expectation, and issues relating to remedies on administrative law review.

THE PAJA AND LEGALITY

The fraught relationship between the PAJA and the constitutional principle of legality arose during 2013 in two related contexts: in relation to the choice made by courts regarding which of the two bodies of law should be relied upon for review of public conduct; and in relation to the substantive development of the content of the principle of legality, a development that allows the broader application of that principle, instead of the PAJA.

Choice of law

For several years before 2013, commentators discerned a general trend developing in our courts — best illustrated in *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 291 (CC), 2010 (5) BCLR 391 ('*Albutt*') and *Democratic Alliance v Acting National Director of Public Prosecutions* 2012 (3) SA 486 (SCA), ('*Democratic Alliance 1*') — to regard the PAJA and legality as parallel bases for review, both equally available to

* Associate Professor, Department of Public Law, University of Pretoria.

† Lecturer, Department of Public Law, University of Pretoria.

courts even in cases where public conduct could qualify as administrative action, and thus to treat the two bodies of law 'as free alternatives . . . that one may pick and choose between . . . at will' (C Hoexter *Administrative Law in South Africa* 2 ed (2012) 131).

This development has been almost universally criticised. The first criticism is that the 'free alternative trend' conflicts with clear and settled precedent giving expression to an established general principle of constitutional adjudication. The precedent (*Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC), 2006 (8) BCLR 872 Chaskalson CJ paras [95], [96] and Ngcobo J (as he then was) paras [426]–[428]) holds that the PAJA should apply where it is applicable and general norms such as legality may only be resorted to once it has been determined that the PAJA does not apply. The more general principle of constitutional adjudication which is reflected by this precedent — subsidiarity — determines that any legislation enacted pursuant to constitutional command to give effect to constitutional rights, may not be circumvented in favour of direct reliance on the Constitution (on subsidiarity see in general AJ van der Walt *Property and constitution* (2012)). In broad terms, this precedent and principle are intended to ensure that courts show due regard to the interpretation afforded a constitutional right by the legislature and to avoid the development of parallel systems of law dealing with the same subject matter (Hoexter above 134–7. See also M Murcott 'Procedural fairness as a component of legality: Is a reconciliation between *Albutt* and *Masetlha* possible?' (2013) 130 *SALJ* 160, 166–7).

The second criticism is that to give courts the choice to opt out of determining the application of the PAJA in cases where it might be applicable, stifles the development of the PAJA. This is true, first, in relation to the definition of administrative action that determines the PAJA's application. Simply put, in failing to ask whether the PAJA applies, courts also fail to develop standards according to which to answer that question. It is also true in relation to the PAJA's substantive provisions relating to grounds of review. Courts are prevented from developing the content of, for example, the procedural fairness provisions of the PAJA to fit the requirements of particular forms of public conduct if they can simply opt to apply legality (Murcott above 267). More broadly, the development of a principled, rather than a rigid conceptual approach to determining the application of the PAJA is stunted.

The free alternative trend was at its strongest, or at the very least was continued and confirmed, during the course of 2012. While one may at the time have started to talk of a unified approach emerging (see in general D Brand 'Administrative law' 2012 ASSAL 25), decisions raising the issue of the relationship between legality and the PAJA as bases for review of public conduct in 2013 muddy the waters. In short, 2013 can be seen to herald a slow departure from the free alternative trend and a possible return to the approach pre-*Albutt*.

The issue arose in at least six decisions in different courts during the course of the year: *Valuline CC v Minister of Labour* 2013 (4) SA 326 (KZP) ('*Valuline*'); *Scalabrini Centre, Cape Town v Minister of Home Affairs* 2013 (3) SA 531 (WCC) ('*Scalabrini HC*'); *Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa* 2013 (7) BCLR 762 (CC), [2013] ZACC 13 ('*ARMSA*'); *Freedom Under Law v National Director of Public Prosecutions* 2014 (1) SA 254 (GNP) ('*FUL HC*'); *Minister of Home Affairs v Scalabrini Centre, Cape Town* 2013 (6) SA 421 (SCA) ('*Scalabrini SCA*'); and *FirstRand Bank Ltd t/a Rand Merchant Bank v Master of the High Court, Cape Town* 2014 (2) SA 527 (WCC) ('*FirstRand*').

In *Valuline* the power to extend a collective agreement to non-signatories, rendering it generally applicable in the clothing industry, was at issue. The Minister of Labour ('the Minister') decided to extend the agreement pursuant to a request by the National Bargaining Council for the Clothing Industry ('the Bargaining Council') in terms of section 32 of the Labour Relations Act 66 of 1995 ('LRA'). In the KwaZulu-Natal High Court, Pietermaritzburg, Koen J held that the extension of the collective agreement was reviewable in accordance with the principle of legality for non-compliance with section 32(3)(c) of the LRA (para [13]). The jurisdictional facts for the exercise of the power to extend a collective agreement are that the Minister must (following the reasoning in *Walele v City of Cape Town* 2008 (6) SA 129 (CC) para [60]) be 'objectively' satisfied, first, that the majority of the employees who fall within the scope of the collective agreement are members of trade unions party to the relevant bargaining council, and, secondly, that the majority of employees who will fall within the scope of the agreement are employed by employers who are members of employers' organisations party to the relevant bargaining council (para [53]). In this instance, it was argued that, having failed objectively to satisfy herself of the

presence of these jurisdictional facts, the Minister had failed to apply her mind properly to the matter (para [56]).

Following the approach in *National Employers Association of SA v Minister of Labour* (case no JR 3062/2011 (LC), reported at (2013) 34 *ILJ* 1556 (LC) (20 December 2012)), the court held that there were no reasonable grounds for the Minister to be satisfied that the conditions of the LRA had been met. On this ground the extension decision fell to be reviewed and set aside (para [68]). Confusingly, when reviewing the Minister's conduct, the court made no reference to any of the review grounds in the PAJA. Instead it appeared to rely, in broad terms, upon the requirements of legality (para [13]). This was apparently done because an inquiry into whether or not a decision constitutes administrative action, 'is irrelevant to a review based on the principle of legality' (para [7]). However, when granting a remedy the court invoked the broad discretion to make an order that is just and equitable, supposedly conferred upon it by section 8 of the PAJA (para [70]). At the remedy stage of its judgment, the court regarded itself as exercising 'its discretion to withhold an order setting aside an invalid administrative act' (para [73]): this despite its failure to conduct an inquiry into whether or not the PAJA was applicable.

Scalabrini HC (above) concerned a decision by the Minister of Home Affairs to close a Refugee Reception Office in Cape Town. In deciding a review of the decision, Rogers J first considered the question of whether the decision was administrative action for purposes of the PAJA and then held that it was (paras [63]–[69]). He then proceeded to review, and hold invalid the decision on a number of grounds of review listed in the PAJA. These included lawfulness (the respondent had failed to consult with the Refugee Review Board as required by the empowering provision — para [79]); procedural fairness (the respondent had failed properly to consult with interested parties, including the applicant, an NGO working in the refugee field) (para [90]); and reasonableness/rationality (the decision was unreasonable in the sense that it had no rational link to the information before the administrator or the reasons provided for it, and its effect was also unreasonable — paras [99]–[116]). Despite having held that the decision at issue constituted administrative action, and having reviewed it on the basis of the PAJA grounds of review, Rogers J remarked in passing that had the decision not qualified as administrative action in terms of the PAJA, it would nevertheless have been reviewable on the same bases in terms of legality (paras [79], [97], [117], [118]).

The *ARMSA* case (above) involved an attempt by the applicant, a professional association representing the interests of regional magistrates, to set aside and have reconsidered a determination made by the first respondent (the President) of the annual salary increase to which members of ARMSA would be entitled.

On review in the High Court, ARMSA challenged the President's decision on a number of grounds. Most importantly, it argued that the decision was administrative action and subject to procedural fairness requirements. Because the President had failed to consider representations from it, his decision was procedurally unfair and invalid.

ARMSA succeeded in the High Court. The matter then went to the Constitutional Court for confirmation. Before the Constitutional Court the question arose whether or not the President's decision constituted administrative action subject to review in terms of the PAJA. It was argued that only if it qualified as administrative action, would it have been subject to procedural fairness requirements. On this issue, Nkabinde J held for a unanimous court that the determination and publication of the salary increase was not administrative action. Instead, in her view, it constituted executive action. Nkabinde J continued to hold that this meant that the decision was subject to review only for legality, which in her view did not require procedural fairness of the President (para [59]). (For our critique of Nkabinde J's holding in this respect, and the grounds upon which she held the decision not to be administrative action, see D Brand & M Murcott 'Administrative Law' in (2013) 2 *Juta's Quarterly Review of South African Law* 2.1.2).

FUL HC (above) was an application for the review and setting aside of two decisions by members of the Prosecuting Authority (a Provincial and a Special Director of Public Prosecutions) to discontinue prosecution on a variety of charges, including murder and fraud, against the suspended head of the Crime Intelligence Unit of the South African Police, Richard Mdluli. The applicant also applied for the setting aside of a decision of the (at the time acting) National Commissioner of Police to lift Mdluli's suspension from his employment and reinstate him in his position.

The case raised the question of the reviewability of decisions to discontinue prosecution by Provincial and Special Directors of Public Prosecutions. The various respondents argued that such decisions were entirely excluded from judicial review. In the

words of counsel for the Prosecuting Authority, the court did not have the 'right' to review decisions to prosecute or not to prosecute (para [12] of his heads of argument; para [187] of the judgment). Judicial review of decisions like these was excluded, so the argument went, by the power to review such decisions administratively conferred on the National Director of Public Prosecutions ('NDPP') by section 179(5)(d) of the Constitution of the Republic of South Africa, 1996 ('Constitution'). Murphy J rejected this argument out of hand. He noted with reference to the decision of the Constitutional Court in *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC), 2012 (12) BCLR 1297 ('*Democratic Alliance 2*'), that all prosecutorial decisions, including those to withdraw charges or discontinue prosecution, are subject, at least, to so-called 'rule-of-law review', that is review on the basis of the Constitution, the principle of legality and rationality. While it might be that the existence of an internal administrative remedy against a decision to discontinue prosecution — such as the NDPP's power to review decisions of Provincial and Special Directors — may under certain circumstances postpone recourse to courts, this postponement will only hold until the internal remedy has been exhausted. The court held it to be 'inconceivable' that this provision could entirely exclude the power of courts to review the decisions (para [189]).

What remained for debate, according to Murphy J, was whether decisions to discontinue prosecution were, in addition to rule-of-law review, subject to administrative law review in terms of the PAJA. On this point he also held against the Prosecuting Authority. He held that decisions to discontinue prosecutions or to withdraw charges, (ie decisions to stop prosecution that had already been instituted), are administrative action for purposes of the PAJA and as such are subject to review in terms of the PAJA (para [134]). However, Murphy J was at pains to point out that '*whether or not* the PAJA applies, [the] decisions . . . are subject to legality . . . review' (para [126]), and that legality applies 'irrespective of whether' a decision is administrative action in terms of the PAJA (paras [124], [165]).

Against this background, the judge proceeded to review and hold invalid the decisions on a variety of bases. However, he did so *both* in terms of the PAJA and of legality. For example, the decision to withdraw fraud and corruption charges against Mdluli was held to be invalid because it was regarded as unlawful and

irrational for want of consultation in terms of legality (paras [165], [167]). However, it was also declared invalid based on material errors of law and irrelevant considerations, and as unreasonable under the PAJA (paras [168]–[176]).

In *Scalabrini* SCA, the Minister of Home Affairs appealed the decision in *Scalabrini* HC (above). The Supreme Court of Appeal confirmed the setting aside of the decision but on a different basis. More specifically, the Supreme Court of Appeal considered, as had the High Court, whether or not the decision constituted administrative action for purposes of the PAJA. It held that it did not, but that it qualified as executive conduct (para [58]. See D Brand & M Murcott above 2.2.2 for critique). The court proceeded to review the decision on the basis of legality. The decision was declared invalid for want of rationality, the reasoning being that the Minister should have consulted relevant parties before making the decision (paras [70]–[72]).

Finally, in *FirstRand* the Master of the High Court, Cape Town had, in terms of the Companies Act 61 of 1973, authorised a commission of enquiry into the affairs of Lighthouse Square (Pty) Ltd, a company in liquidation. The Master had done so without affording procedural fairness: no notice was provided to FirstRand Bank Ltd, Lighthouse's principal creditor, and the bank was also not afforded the opportunity to be heard. What is interesting is that in addition to reviewing and setting aside the Master's conduct in terms of the PAJA (para [44]), the court found that her conduct was reviewable in terms of the principle of legality — particularly 'the fairness aspect' thereof (para [48]). The Western Cape High Court per Blignault J, relied on *Albutt* (above). He argued that the Master's treatment of FirstRand Bank Ltd was 'not only procedurally unfair', but also 'substantively unfair'. This was because it had been 'orchestrated by fraudulent conduct' by the person who requested the commission of inquiry and who had been consulted by the Master in reaching her decision (para [48]). In addition, the Master was found to have breached the principle of rationality (para [49]). On this score, Blignault J relied upon *Scalabrini* SCA (above) in finding that the exclusion of FirstRand's attorneys from the decision-making process 'inevitably impaired the quality [and, therefore, rationality] thereof' (para [49]).

The six decisions discussed above seem to illustrate the full panoply of possible approaches to the relationship between review under the PAJA and review in terms of legality. At the one

end of the spectrum, following the free alternative trend, is *Valuline*. Here the court clearly regarded it unnecessary to consider whether the PAJA or the principle of legality applied. It simply proceeded on the assumption that the decision may be reviewed in terms of legality, but applied provisions of the PAJA without acknowledgment. This seems a rather extreme example of the much criticised approach of seeing the two bases for review as entirely interchangeable.

More or less in the middle of the spectrum we would place *FUL* and *FirstRand*. In both these cases the question of whether or not the PAJA applied was properly considered and the PAJA found to apply. The impugned conduct was then reviewed and held invalid on the basis of the PAJA. However, in both cases a 'double-barrel' approach was followed in that the same conduct was simultaneously reviewed on the basis of legality. In part this approach can be explained by the fact that these were decisions of High Courts and were potentially subject to appeal. For this reason, the two courts intentionally addressed all the arguments presented. In fact, this much is clear in *FUL* (para [168]). However, in *FUL*, despite the clear holding that the impugned decisions constituted administrative action for purposes of the PAJA, the focus in the review was manifestly on legality. Murphy J expressly stated that legality applies *irrespective of whether* the decisions are administrative action (paras [124], [126], [165]). The double-barrel approach, therefore, seems to have been used intentionally.

At the other end of the spectrum, we find *Scalabrini* HC, *ARMSA* and *Scalabrini* SCA. In all three cases, what has been referred to as the 'safety net approach' to the relationship between the PAJA and legality, was employed. In *Scalabrini* HC the court, after explicitly considering whether the Minister's decision constituted administrative action and holding that it did, reviewed the decision and set it aside on the basis of the PAJA. The court remarked in passing that, were the decision not administrative action it would be reviewable and liable to be set aside on the basis of the safety net of legality. In both *ARMSA* and *Scalabrini* SCA, the courts considered whether the impugned conduct was administrative action and decided that it was not. Having done so, they then invoked the 'safety-net' of legality to evaluate the decisions (Hoexter above 418). In *Scalabrini* this resulted in the confirmation of the setting aside of the decision. In *ARMSA* the court held that the President's decision passed

muster as against legality, whereas it would not have done so had it been evaluated against the PAJA.

Valuline clearly represents the post-*Albutt* approach to the relationship between the PAJA and legality. The decision is subject to the full range of criticism that this approach has drawn. *FUL* and *FirstRand* seem to combine elements of the pre- and post-*Albutt* approaches. Both courts address the question of whether the decisions at issue constitute administrative action subject to the PAJA head-on. Then, having found the PAJA applicable, it is applied. However, they do so in conjunction with legality, applying legality and the PAJA interchangeably. This means that they avoid the criticism that the PAJA's development has been stunted due to its non-application where it should have applied. However, they may still be criticised for acting contrary to the doctrine of subsidiarity and developing two parallel bodies of law on the same subject matter. *ARMSA* and *Scalabrini SCA*, most clearly aligned to the pre-*Albutt* approach, avoid all the criticism set out above.

Extending the potential scope of legality: A duty to consult

A development that has gone hand-in-hand with our courts' approach to the relationship between the PAJA and legality, is the slow extension of the content of legality to include, under some circumstances, a duty to consult. This move, most clearly started by the Constitutional Court in *Albutt* (above), has enabled courts to apply legality in preference to the PAJA for the review of public conduct, even if the complaint against that conduct is a failure to consult. This is a ground of review previously thought only to be available as a freestanding ground under the PAJA, and not legality (see *Murcott* above).

This development can be seen as both positive and negative. The recognition that legality sometimes requires consultation has enabled courts to exact accountability through the application of legality in circumstances where it would previously not have been possible.

Unfortunately, the extension of legality to include consultation often enables courts to avoid determining whether the PAJA applies or applying it when they should, with all of the conceptual and practical difficulties this entails. The result is a truncation of the development of a principled understanding of which standards to use when reviewing different kinds of public conduct.

The question of whether and, if so, under what circumstances, legality requires consultation arose in a number of cases during

2013. The decision of the Director General of the Department of Home Affairs ('DG') to close the Cape Town Refugee Reception Office in *Scalabrini* HC (above) was challenged on the basis that it ought not to have been made without public consultation under section 4 of the PAJA, or as required by the principle of legality. Rogers J felt that the decision amounted to 'administrative action affecting the public'. Consequently, the DG had to follow one or more of the procedures listed in section 4(1) of the PAJA.

Rogers J also held — relying on *Democratic Alliance 2* (above, paras [33], [34], [36]) and *Albutt* (above) as authority for the proposition that the process by which a decision is made must be rational — that procedural fairness in the form of consultation with organisations representing the interests of asylum seekers was required by legality (paras [92]–[94]). He held that the DG could not achieve the statutory purpose of the applicable legislation to ensure that there are as many refugee reception offices in South Africa as required and would also not be able to make a rational decision as to whether or not a refugee reception office in Cape Town was needed, without consulting with the relevant organisations (para [95]). The perspective of the asylum seekers was found to be 'of obvious importance in reaching a rational conclusion as to whether or not a [refugee reception office] in Cape Town was needed' (para [95]). Moreover, the DG recognised the need to consult with 'stakeholders', including organisations representing the interests of asylum seekers. Therefore, his failure to consult with them was found to have been 'inexplicable' (para [96]). In this way Rogers J invoked legality as a 'safety net' in relation to the need to follow a fair process before deciding to close the centre (Hoexter above 418), in case the PAJA was found not to apply.

This aspect of Rogers J's decision was confirmed on appeal by the Supreme Court of Appeal. Nugent JA's decision that the DG's closure of the centre was not administrative action put paid to the Scalabrini Centre's reliance on procedural fairness in terms of the PAJA. However, having held that the DG's decision (to close down the refugee reception centre) was not administrative action subject to review on the basis of the PAJA, Nugent JA proceeded to evaluate the decision as executive conduct against the constitutional principle of legality, and in particular the requirement of rationality in decision making as imposed by that principle. In this respect, relying on Yacoob J's judgment in *Democratic Alliance 2* (above para [12]), he started off by pointing out that rationality

has both a procedural and a substantive aspect. In order to be rational, the decision itself and the process used to take it, must be rational (para [69]). He first considered, and rejected the argument that the DG's decision was, in itself, 'substantively' irrational (paras [65], [66]). Nugent JA then proceeded to consider the procedural rationality of the decision. In this respect, relying on *Albutt*, he pointed out that under some circumstances, the procedural aspect of rationality requires that interested parties be heard, or that consultation or participation be allowed in the decision-making process (para [68]). In *Albutt*, the facts of the case indicated that rationality demanded that the interested parties be heard. The decision at issue was one to grant amnesty for political offenders in order to promote national reconciliation. Therefore, a hearing for victims of the crimes, or their families, was clearly required to establish a rational link between the decision and its stated purpose. However, Nugent JA pointed out that rationality, although imposing no general or free-standing requirement for a hearing to interested parties, would also require consultation or a hearing where there are persons or parties with special knowledge or experience of the subject matter of a pending decision, and the decision maker is aware of them and of the fact of their special knowledge or experience. In this case, he continued, the DG had consulted with the Scalabrini Centre and other parties knowledgeable about refugees in Cape Town and their problems. At that consultation, while the possible closure of the centre was not yet in issue, the DG had undertaken to consult with them again should the closure of the centre be considered. According to Nugent JA, this undertaking served as proof that the DG recognised that the parties who stood to be consulted were specifically knowledgeable about, and experienced in, the subject matter of his decision. On this basis, in order to have acted rationally, the DG should have consulted with the Scalabrini Centre and other interested parties and his failure to do so rendered the decision irrational (paras [70]–[72]).

In *ARMSA*, the main ground for review of the President's decision was his total failure to consult with ARMSA before making his decision. Nkabinde J, having decided that the President's decision did not constitute administrative action, concluded that it was subject to review only in respect of the constitutional principle of legality. Relying on the court's decision in *Masetlha v President of the Republic of South Africa & another* [2007] ZACC 20: 2008 (1) SA 566 (CC); 2008 (1) BCLR (CC), the

court proceeded to state that a review based on legality weighs the decision only against a limited set of requirements, including lawfulness and rationality. She concluded that

[p]rocedural fairness is not a requirement for the exercise of executive powers and . . . executive action cannot be challenged on the ground that the affected party was not given a hearing unless a hearing is specifically required by the enabling statute (para [59]).

FUL HC also raised the question of whether the rationality requirement, imposed on public conduct in terms of the doctrine of legality, includes a requirement to consult or to allow participation in decision making. The decisions at issue in the case (here relevant the decisions of a Provincial and Special Director of Public Prosecutions to discontinue prosecution on murder and related and fraud charges respectively), were taken without prior consultation with the prosecutors and investigators involved in pursuing the charges. In addition, no hearings were given to the victims of the crimes concerned or to their families. Murphy J first pointed out that rationality comprises a substantive as well as a procedural component and that the latter may require, for example in circumstances where one set of interested parties in a process were consulted before a decision was taken, that other such interested or relevant parties must likewise be consulted — in short, the means employed to take a decision must be rationally related to its purpose and this may under some circumstances require that relevant and interested stakeholders be included in the process, or that some may not be included at the expense of others (paras [127], [165], with reference to *Albutt* above paras [65]–[68]). He then proceeded to hold specifically with respect to withdrawal of the fraud charges by a Special Director of Public Prosecutions that the decisions to discontinue prosecutions, taken after representations from Mdluli were considered, but without any consultation with either the prosecutors or investigators involved or with the NDPD (with respect to whom Prosecution Policy explicitly requires consultation in sensitive, contentious or high-profile cases) was irrational. This was so both because the failure to involve the prosecutors and investigators in the decision meant that the decision was not rationally related to its purpose of ensuring justice in the prosecutorial process and because all relevant stakeholders were not treated even-handedly (para [166]). Similarly, with respect to the decision of a Provincial Director of Public Prosecutions to withdraw the murder and murder-related charges, he held that this decision was irrational for failure to consult with victims and witnesses, with the

prosecutors and investigators involved and with the NDPP (para [180]).

These 2013 decisions in the first place represent a broadening of the role of consultation as a requirement for public conduct in terms of legality from the somewhat limited scope as initially envisaged in *Albutt* (above). In *Albutt* the Constitutional Court firmly limited the scope of the consultation requirement to the facts of that case. Ncgobo CJ did so by reading the consultation requirement into legality through rationality. However, Ncgobo CJ had in mind a limited 'means-end' notion of rationality. The decision, to his mind, only needed to be rationally related to its purpose. This limited conception of rationality enabled him to hold that, as the purpose of the President's decisions in that case was the achievement of national reconciliation, his failure to consult with victims of politically motivated crimes, or their families before making a decision to grant amnesty to perpetrators, severed the link between this purpose and the decision and rendered the decision irrational (para [74]). Consultation on this approach is required only if the purpose of a particular decision requires it.

The 2013 decisions dealing with legality and consultation also 'read' the requirement of consultation 'into' legality through the channel of rationality. However, they work with a broader conception of rationality, that also requires a rational link between a decision and the information at the disposal of the decision maker. This is most obviously true of *Scalabrini* SCA. Nugent JA was clear that a decision maker must consider all information at his or her disposal which is relevant to a decision. If there are parties with information, experience and views relevant to a decision and the decision maker is aware of them, those parties must be consulted (paras [70]–[72]). Significantly, Nugent JA distinguishes in this manner his 'reading in' of a requirement of consultation through rationality from that employed in *Albutt* (ibid). He also departs from the approach followed by Rogers J in *Scalabrini* HC where the consultation requirement was more expressly linked to the statutorily prescribed purpose of the decision.

Nugent JA's approach is also evident in *FUL* HC. In discussing the consultation component of legality, Murphy J linked the requirement to the aspect of rationality that requires a decision maker to take account of all considerations relevant to a decision. He eventually held that the views of the prosecutors involved in

framing the charges were eminently relevant to the decisions to withdraw prosecution. As a result, the failure to consult with them was regarded to be irrational (paras [127], [165]).

Murphy J goes further in adding an additional string to the bow of the requirement of consultation under legality. He held that as the accused had been given ample opportunity to make representations to the prosecuting authority, other stakeholders, especially the victims or their families, should be provided with an equal opportunity to do so (para [166]). This seems to introduce a requirement of consultation into legality which is not sourced from rationality, but from an entirely new basis arising from a broad concept of fairness.

Apart from broadening the scope for consultation as part of legality, the 2013 decisions are important for another reason. As pointed out above, our reaction to the extension of a requirement of consultation to review under legality is somewhat ambivalent. On the one hand it is to be welcomed; it extends the scope of real accountability and participation to decisions that would otherwise not have been subject to it. On the other hand, this extension blurs the distinction between legality and the PAJA. The unprincipled approach of using the two bodies of law interchangeably as bases for review is an unintended, negative result.

We support the development of a principled approach to determining the application of the PAJA as against legality rather than a conceptual one — that the question should be whether it is prudent to apply the PAJA, with its particular set of review grounds to a given decision, rather than whether the decision is a certain kind of decision by its nature, to which the PAJA applies or does not.

The ground of review that most obviously raises the question of the application of the PAJA in principled terms is procedural fairness. Clearly there are a variety of substantive reasons why it might not be prudent to apply procedural fairness to a decision, although lawfulness and some level of reasonableness (rationality) may still apply — reasons that don't apply equally to the PAJA's other review grounds (that it in any event shares with legality). It might be unnecessary to apply procedural fairness if the decision is already subject to some other form of public participation. Most legislative decisions serve as a good example here. It might in certain circumstances be undesirable to do so, as the requirements of procedural fairness would unduly hinder the exercise of power in the public interest (many executive

decisions would fall in this category). Applying procedural fairness principles might also be undesirable if the decision at issue is one that should not be subjected to the kind of interest-bargaining that is inevitably involved in procedural fairness. Here again, many 'high' executive decisions, as well as decisions of a judicial nature would serve as illustration.

In this light, procedural fairness seems to us the fulcrum on which the development of a principled rather than a conceptual approach to the application of the PAJA turns. If the PAJA has procedural fairness while legality does not, courts would be forced to consider, on a principled basis, whether or not it is substantively prudent to apply the PAJA. To extend procedural fairness to legality enables the opposite. Courts could disregard the principled reasons for applying the PAJA and fall back on an easy and empty conceptualism.

Fortunately, the 2013 decisions dealing with consultation as a component of legality seem to point to a way out of our dilemma. The point of departure here is what triggers the application of procedural fairness in terms of the PAJA and the requirement of consultation under legality, respectively. The procedural fairness aspect as provided for in the PAJA is triggered only if someone's interests are adversely affected by a decision. In short, only parties with an interest in a matter, or 'stakeholders' in the decision, are entitled to a hearing. The primary goal of 'procedural fairness' (obviously secondary reasons for procedural fairness related to quality of decision making and general transparency exist) is fairness to those affected by a decision and the provision of an opportunity to protect their interests.

From 2013 decisions such as *Scalabrini SCA*, it appears that under legality a duty to consult is triggered, not by the fact that someone's interests are affected adversely by a decision, but when parties are particularly knowledgeable about, or hold information about a decision and the decision maker is aware of this. Such parties must then be consulted, not because they have an interest in the decision which fairness requires them to have an opportunity to protect, but because they have a contribution to make to the decision, which is ultimately in the public interest. Apart from *FUL HC*, where Murphy J — moved by a concern for fairness — required that both the victims of crime and the perpetrators be given an equal opportunity to state their cases, the duty to consult under legality seems to have little if anything to do with fairness to those affected by a decision.

This appears, most clearly perhaps, from Nkabinde J's decision in *ARMSA*; the only decision in which legality was not used by the court to impose a duty to consult. In the face of the argument that *ARMSA* and its members should have been given the opportunity to make representations to the President about their salaries, Nkabinde J held that legality includes no requirement of *procedural fairness*. The magistrates, therefore, could not claim *procedural fairness* (para [59]). As authority for this statement, she refers to *Masetlha* (above), where the majority of the Constitutional Court held that the National Director of Intelligence had no right to be heard by the President before the latter decided not to renew his contract of appointment. In *ARMSA* Nkabinde J reasoned that it would not be prudent to subject the President's decision — a decision involving judicial independence — to the private interest bargaining about salaries that would follow were the magistrates afforded a hearing (para [43]). This reasoning can, of course, equally be applied to *Masetlha*: it was not prudent to subject the President's decision, one of great public import, to the private-interest bargaining that a hearing for *Masetlha* would probably have entailed. Nkabinde J's judgment in *ARMSA* is, therefore, no authority for a general proposition that legality embraces no duty to consult or to allow participation in decision making. It only serves as authority that legality does not require procedural *fairness* of the President. The President's decision is one that it is not prudent to subject to procedural fairness and the participation of stakeholders to protect their private interests, although it might be sensible, for the purpose of gathering relevant information, to subject it to a more general duty to consult with knowledgeable people who hold information of the subject matter of the decision.

Seen in this light, the insertion of a duty to consult into legality that gathered such momentum in 2013, need not bedevil the development of a principled approach to the application of the PAJA as against legality. Instead, it provides an example of the development of one aspect of this approach: decisions that it is not prudent to subject to private-interest bargaining are not suited to the application of the PAJA.

ADMINISTRATIVE LAW AND LABOUR LAW

In 2010 *Gcaba v Minister of Safety and Security* 2010 (1) SA 238 (CC), 2010 (1) BCLR 35, supposedly 'settled the status of

employment-related action as non-administrative action' in the context of public-sector employment disputes (Hoexter above 234). However, it would appear that a great deal of uncertainty persists in this regard. In 2013 administrative law arguments were invoked in at least five employment-related decisions, with varying degrees of success. In these decisions the courts were seized with the issues of the appropriate relationship between administrative law and labour law, and whether the High Courts are the appropriate forum in which to challenge employment-related action.

In *Provincial Commissioner, Gauteng South African Police Services v Mnguni* (2013) 34 ILJ 1107 (SCA), [2013] 2 All SA 262 (SCA), the respondent (Mnguni), sought to exploit what seemed like a gap left after the Constitutional Court decisions in *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC), 2008 (3) BCLR 251 and *Gcaba* (above). He applied for an order to review and set aside a decision to dismiss a public sector employee in terms of administrative law in the High Court, rather than in terms of the labour law in the Labour Court. The respondent, a police officer, was dismissed for misconduct. He appealed against his dismissal to the first appellant, who dismissed his appeal. He then approached the High Court successfully for the review and setting aside of the decision to dismiss him. This decision was taken on appeal to the Supreme Court of Appeal. The grounds for appeal were essentially that the respondent had approached the High Court and that it had decided the case on the wrong body of law. The respondent had not, as the decisions in *Chirwa* (above) and *Gcaba* (above) seem to require of him, based his application on the Labour Relations Act 66 of 1995 (the LRA) and referred it to the Labour Court. Further, he had not characterised the decision to dismiss him as administrative action and relied on the PAJA. Instead, arguing that the decision of the appeals authority to dismiss him was a 'quasi-judicial' decision and as such subject to common law review, he based his application on a 'separate, or residual, right to challenge the decision . . . in the High Court, on common law grounds of review' (para [16]). The question on appeal, therefore, was whether the respondent had a common-law right of review. Mpati P (with Lewis, Malan and Pete JJA and Mbha AJA concurring) held that he did not. Relying on the decisions in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 and *Pharmaceutical Manufacturers Association of SA: In re Ex Parte*

President of the Republic of South Africa 2000 (2) SA 674 (CC), 2000 (3) BCLR 241, Mpati P first pointed out that there were not two separate bodies of law for review of public decisions: the common law and the constitutionally sourced administrative law embodied in the PAJA. There is only one system of law which is shaped by the Constitution as supreme law of the country (paras [17], [18]). Also, relying on *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A) ('Traub'), *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A) and *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC), 2007 (3) BCLR 300, Mpati P indicated that the classification of functions as 'quasi-judicial', or otherwise as the basis of the application of the review powers of courts had long been rejected by our courts (para [19]). Then, turning to *Chirwa* (above), Mpati P pointed out that it was held in that case that review of public sector dismissals on the basis of common-law principles of natural justice was no longer competent (paras [22]–[24]). Against this background, the conclusion was inescapable that the respondent's putative reliance on common-law grounds of review, separate from the PAJA, had to fail. In the absence of such a right, Mpati P continued, there were potentially three bodies of law on the basis of which the respondent could have founded the challenge to his dismissal: the LRA, the PAJA or the common law of contract. *Chirwa* (above) indicated for Mpati P that the respondent should have relied on the LRA and approached the Labour Court from the outset. The court pointed out that the regulations in terms of which the decision confirming his dismissal had been taken were enacted pursuant to statutory provisions dealing with employment matters. They flowed from a collective agreement between the first appellant and labour unions representing employees in the Police Service, and were intended to ensure fairness in employment-related disciplinary decisions. The court concluded that the dismissal decision was 'quintessentially a labour issue'. As such, it was subject to the exclusive jurisdiction of the Labour Court (paras [20], [25]). However, the respondent had explicitly disavowed reliance on both the LRA and the PAJA. He also never sought to invoke the common law of contract to challenge his dismissal (para [21]). Given the fact that he had no other bases upon which to challenge the decision, his challenge in the High Court should have failed. Consequently, the appeal was upheld (para [29]).

Letele v The MEC, Free State Provincial Government, Department of Education ([2013] ZAFSHC 144 (29 August 2013) unre-

ported available at <http://www.saflii.org.za/za/cases/ZAFSHC/2013/144.html>) concerned a decision of the respondent (the MEC) to dismiss the applicant (Ms Letele) from her position in the public service. The applicant had been charged with misconduct. The misconduct presiding officer appointed to adjudicate the charges against the applicant exonerated her, whereupon the respondent, a member of the Executive Council for Education ('MEC') noted an appeal. This appeal, of which the applicant received no notice, was never heard. Nevertheless, the respondent proceeded to dismiss the applicant, furnishing her with a letter of dismissal. The applicant approached the Government Public Service Sectoral Bargaining Council, where her dismissal was declared *ultra vires*.

The applicant approached the High Court for a declaratory order that her dismissal was *ultra vires* and void, and for orders that she be reinstated in her position and paid all remuneration owing to her from the date of her purported dismissal to the date of her reinstatement. The applicant's case was simply that the respondent's empowering provision, the so-called 'SMS Handbook', issued in terms of the Public Service Regulations of 2001, made no provision for an appeal by the respondent against a decision of a misconduct presiding officer. Consequently, it was alleged that both the noting of the appeal and her subsequent dismissal were *ultra vires*. In her papers, the applicant expressly stated that she alleged no unfairness in her dismissal, and disavowed any reliance on the provisions of the LRA relating to unfair dismissal or unfair labour practices, or on any other labour legislation. She also explicitly stated that she did not rely on the PAJA, but instead based her application on the constitutional principle of legality. The respondent raised no substantive defence against the application, asserting only that the High Court lacked jurisdiction to entertain the matter. Arguing that the matter was in essence a labour-related matter which, in terms of the decision of the Constitutional Court in *Gcaba* (above), fell within the exclusive jurisdiction of the Labour Court, the respondent asserted that the matter should not have been referred to the High Court.

Here, in contrast to *Mnguni* (above), the use of administrative law arguments met with some success in relation to a public-sector dismissal. Thamage AJ rejected the objection to the High Court's jurisdiction in part. With respect to the application for a declaratory order, he held that given that the applicant had

explicitly disavowed reliance on the LRA and based her action on the constitutional principle of legality and not the labour law, the High Court had jurisdiction to determine the question of the validity of her dismissal in terms of what he called its common-law jurisdiction to review public conduct for want of authority (para [13]). Thamage AJ proceeded on this basis to hold that the dismissal was indeed *ultra vires* and *ab initio* void (para [18]). However, as regards the applicant's application for ancillary relief (reinstatement and payment of remuneration from date of dismissal to reinstatement) he upheld the challenge to jurisdiction. He held that the High Court's jurisdiction sourced in legality, extends only to determining the validity of the conduct of public organs. It does not include the authority to order either reinstatement or payment of remuneration withheld subsequent to dismissal (para [22]). The High Court, so he continued, could have asserted jurisdiction to grant such additional relief, were the application based in contract. It may also have been able to do so even if the application had been explicitly based on the PAJA. As this was not the case, he concluded, ordering reinstatement and payment of remuneration were not matters falling in the exclusive jurisdiction of the High Court (para [20]).

In *Khulong v Minister of Health* (Case no 59211/2009 (GNP) unreported (11 April 2013)) the applicant (Ms Khulong) sought an order setting aside her discharge from the public service and reinstating her in her position. The respondents entered an exception against the application, arguing that the High Court lacked jurisdiction to entertain a labour matter which should have been referred to the Labour Court in terms of the LRA. Mabena AJ held that the High Court indeed had jurisdiction. He found that the applicant had been correct in relying upon administrative law rather than employment law arguments, since the applicant's discharge did not constitute a dismissal as contemplated in the LRA. The court held in this respect (paras [12]–[14]) that:

- The applicant was discharged from service in terms of ss 17(3)(a) and 17(5)(i) of the Public Service Act 103 of 1994 ('Public Service Act').
- These sections read together constitute a so-called deeming provision. In short, they provide that a public service employee who absconds from work for a certain period of time, is deemed to have been dismissed.
- Discharge in terms of such deeming provisions is not a discretionary decision of the employer. The employee is,

instead, simply discharged by operation of law (see *MEC, Public Works, Northern Province v CCMA* (2003) 24 ILJ 2155 (LC)).

- Discharge in terms of the deeming provision, therefore, does not constitute dismissal for purposes of the LRA, so drawing the jurisdiction of the Labour Courts.
- Discharge occurs simply through operation of the provisions of the Public Service Act. The High Court has jurisdiction to determine whether or not this piece of legislation has been complied with.

On this basis, the court proceeded to hold that the applicant's discharge had been unlawful in terms of the relevant provisions of the Public Service Act as, on the facts, she had not willingly and intentionally been absent from work as is required by its provisions. Accordingly, the application was granted (paras [16], [17]).

In *Sewsunker v Durban University of Technology* ([2013] ZAKZDHC 47 unreported (16 September 2013) available at <http://www.saflii.org.za/za/cases/ZAKZDHC/2013/47.html>) the applicant (Mr Sewsunker) was dismissed by the Durban University of Technology. The applicant instituted CCMA proceedings in respect of his dismissal, but later entered into a settlement agreement with the University. In terms of the settlement agreement, he withdrew his CCMA case and became entitled to early retirement in respect of the pension rules of the University. The University interpreted the settlement agreement, read with the University's rules, as having the effect of allowing the applicant to receive a pension, but not post-retirement medical aid benefits. The applicant sought to review and set aside the University's decision to deny him his post-retirement medical aid benefits. In the High Court Van Zyl J agreed with the University's interpretation of the settlement agreement read with the university's rules, and found that the applicant was not entitled to post-retirement medical aid benefits. In other words the University's decision was upheld, rather than set aside (paras [32]–[40]). Having adopted this view, the court considered whether the University's decision amounted to administrative action for purposes of the PAJA (para [48]). Relying on *Chirwa* (above para [142]), the court held

The source of the power to refuse the applicant post termination medical aid benefits derived from the terms of the original employment contract between the parties and which included the respondent's policy regarding post-retirement benefits and the limitations

associated therewith. This was recognised by the subsequent settlement agreement before the CCMA. The nature of the power is therefore contractual and does not constitute reviewable administrative action in terms of PAJA. . . (para [50]).

The court proceeded to hold that even if the University's conduct did amount to administrative action, it fell to be reviewed as an unfair labour practice under the LRA and not in terms of the PAJA (paras [51], [52]). However, given this approach, it is unclear on what basis the court then continued to exercise its discretion to judicially review the University's decision and to find that it should not be set aside in the first place.

The last case in which an employment-related matter was considered, was *FUL HC* (above). This matter involved an application for the review and setting aside of two decisions taken by members of the Prosecuting Authority (a Provincial and a Special Director of Public Prosecutions). The decisions entailed discontinuing prosecution on a variety of charges, including murder and fraud, against the suspended head of the Crime Intelligence Unit of the South African Police, Richard Mdluli, and a decision of the (at the time acting) National Commissioner of Police to lift Mdluli's suspension from his employment and reinstate him in his position. The National Commissioner of the South African Police Service, the second respondent, argued that the challenge to the decision to lift Mdluli's suspension and to reinstate him on the basis of legality and administrative law before the High Court was not competent. The National Commissioner reasoned that as the matter was employment-related, it fell within the exclusive jurisdiction of the Labour Court. Murphy J rejected this argument on three related grounds. First, he pointed out that the interests that Freedom Under Law sought to enforce with their review application were public interests rather than private employment ones. The administrative law and constitutional law were, therefore, patently the appropriate causes of action (para [223]). Secondly, he pointed out that the provisions of the LRA on which the Commissioner sought to rely, did not restrict jurisdiction to the Labour Court. In fact, they confirmed the High Court's jurisdiction to decide challenges to employment-related decisions *where constitutional rights were implicated*, and extended concurrent jurisdiction with respect to such matters to the Labour Court (paras [226], [227]). Thirdly, he indicated that the authority for limiting the jurisdiction of the High Court in relation to challenges to public sector employment decisions was

restricted to cases where a public sector employee was complaining of a decision of its employer on the basis that it was an unfair labour practice, or in some other way in conflict with the labour law. In this case, he concluded, there was no complaint about the unfairness of Mdluli's suspension, but a challenge to the withdrawal of a decision to suspend Mdluli. The challenge was also not brought by the employee to enforce his employment-related rights, but by Freedom Under Law in the public interest (para [230]). For all these reasons it was held that the High Court had jurisdiction to entertain the matter.

These five decisions reveal that there is a great deal of uncertainty as to the circumstances in which the administrative law may be successfully invoked in the context of public-sector employment disputes. Whilst in *Mnguni* (above) it was held that review of public sector dismissals on the basis of common-law principles of natural justice is no longer competent, in *Letele* (above) the court was prepared to declare a public sector dismissal unlawful in terms of the principle of legality, on the basis that the dismissal was void *ab initio* for lack of authority. Further, in *Khulong* (above) the discharge of a public sector employee was set aside on administrative-law grounds on the basis that it was not a dismissal, but that the termination of services occurred through operation of law. The picture only becomes murkier in relation to unfair labour practices. In *Sewsunker* (above) the court held that the LRA ought to have been invoked, and that the High Court lacked jurisdiction. Nevertheless, the court was prepared to scrutinise (review) the conduct before it. In our view, public-sector employees are best advised to invoke the LRA in the Labour Court rather than administrative law review grounds in the High Court to challenge both dismissals and unfair labour practices. However, based on *FUL HC* (above) public-sector employers will not be able to prevent administrative law challenges to their employment-related decisions in the High Court when those challenges are brought in the public interest so as to ensure accountability, rather than to enforce employment-related rights.

SUBSTANTIVE LEGITIMATE EXPECTATION

The possibility of developing the doctrine of substantive legitimate expectation arose in *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal* 2013 (4) SA 262 (CC),

2013 (6) BCLR 615. The doctrine of legitimate expectation entails that a reasonable expectation based on a well-established practice or an express promise by an administrator acting lawfully, gives rise to legal protection when the practice or promise is clear, unambiguous and unqualified (Geo Quinot 'The developing doctrine of substantive protection of legitimate expectations in South African administrative law' (2004) 19 *SAPL* 543, 546, 547. See also *National Director of Public Prosecutions v Phillips* 2002 (4) SA 60 (W) para [28]). Although the doctrine of legitimate expectation has often been invoked since *Traub* (above), when our courts first embraced it, our courts are yet authoritatively to use the doctrine to afford *substantive protection* to those whose legitimate expectations have been adversely affected (Quinot above 547). Instead, the doctrine has 'largely remained a vehicle for the extension of procedural protection' (Quinot above 547, 548). Even where the Constitutional Court has been expressly asked to determine whether a legitimate expectation could confer a right to substantive relief, it has avoided doing so. The question of substantive protection of legitimate expectations has thus been left undecided, and open for determination in the future (see, for example, the cases discussed by Hoexter above 421–36). Unfortunately, *KwaZulu-Natal Joint Liaison Committee* (above) represents another missed opportunity to develop the doctrine.

In this case an association of independent schools (the applicant), sought to enforce a promise of the Department of Education in KwaZulu-Natal ('Department') to pay subsidies granted to them in accordance with section 48 of the South African Schools Act 84 of 1996 ('Schools Act'). Therefore, the applicant sought substantive protection of an express promise. At least in theory, the case presented an opportunity to develop the doctrine of substantive legitimate expectation.

In September 2008, the Department notified the schools of 'approximate' funding levels for 2009, but in May 2009 it gave notice of its intention to 'cut' subsidies by as much as 30 per cent in 2009/10, and then proceeded to do so (paras [3], [4]). The applicant sought to enforce the Department's original promise to pay subsidies in terms of its notice in September 2008. In the High Court, Koen J found that the notice of September 2008 did not create enforceable obligations on the part of the Department. It only gave notice of 'approximate' funding levels (para [11]).

A majority of the Constitutional Court, in the judgment written by Cameron J, held that the September 2008 notice gave rise to an

enforceable undertaking by the Department at *public law* to pay the schools the approximate amounts set out in it. This undertaking was not enforceable on the basis of an agreement between the parties, but on the basis of a constitutional duty to give effect to the right to basic education and the provisions of the Schools Act (paras [30]–[47]). As such, the Department's notice constituted 'a publicly promulgated promise to pay' which 'created a legal obligation unilaterally enforceable at the instance of those who were intended to benefit from its promise' (para [48]). According to Cameron J, the idea of a 'publicly promulgated promise to pay' was not new to our law but had apparently been relied upon pre-PAJA. The government was then found to be capable of undertaking 'obligations towards its subjects unilaterally' (para [48]). The court creatively adopted this pre-PAJA precedent that was not relied upon by any of the parties before it, to establish a public/administrative law remedy capable of standing alongside the PAJA. This was undoubtedly due to the fact that the applicant refused to couch its claim in terms of the PAJA or invoke the doctrine of substantive legitimate expectation, instead preferring to pursue contractual arguments (paras [57], [58]).

Arguably, the facts before the court presented an ideal opportunity to develop the notion of substantive legitimate expectations, drawing on *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC). There the court enforced a legitimate expectation that a state subsidy scheme payable to schools would continue, on the ground that the state had unfairly terminated the scheme. Therefore, the effect of the finding in *Premier Mpumalanga* (above) was to afford the beneficiaries of the scheme not only procedural, but also substantive relief. The court arguably left the way open for the development of a doctrine of substantive legitimate expectation (Hoexter above 434), by finding, albeit *obiter*, that 'it may be that in many cases a retroactive termination of benefits will not be fair no matter what process is followed unless there is an overriding public interest' (*Premier Mpumalanga* (above para [41])).

Cameron J remarked that this *obiter* finding in *Premier Mpumalanga* (above)

... reflects a sound principle of our constitutional law. It is that a public official who lawfully promises to pay specified amounts to named recipients cannot unilaterally diminish the amounts to be paid after the due date for their payment has passed. *This is not because of a*

legitimate expectation of payment . . . Rather, this principle concerns an obligation that became due because the date on which it was promised had already passed when it was retracted (para [52], our emphasis).

Therefore, in the face of the applicant's stance (para [31]), instead of developing the doctrine of substantive legitimate expectation, Cameron J created an alternative legal basis upon which to challenge the exercise of public power: a unilateral and publicly promulgated promise to pay. This obligation arises, not because such a promise gives rise to a right or a substantive legitimate expectation capable of enforcement in terms of the PAJA (even though the public power in issue arguably met all the requirements of the definition of 'administrative action' in terms of the PAJA), but because such a promise creates a binding obligation, enforceable against the holder of such power *at public law*. Cameron J then explained that the promise to pay ought to be enforced for reasons of 'reliance, accountability and rationality'. The schools had relied on the original notice. Consequently, accountability demanded that any budget cuts ought not to have been enforced after payment of subsidies had fallen due under such budgets. The revocation of a promise after its time for fulfilment had expired did 'not constitute rational treatment of those affected by it' (paras [63]–[65]).

The court's approach is strikingly similar to that adopted under English law in relation to the enforcement of substantive legitimate expectations, particularly in *R (Abdi and Nadarajah) v Secretary for the Home Department* [2005] EWCA Civ 1363. See also Hoexter above 427–36). Cameron J made it clear that he was not developing a doctrine of substantive legitimate expectations (despite arguments advanced by the *amicus curiae*), on the basis that it was unnecessary to do so (paras [25]–[28], [50], [52], [69]). So, in *KwaZulu-Natal Joint Liaison Committee* (above) we are left with precedent that allows the public to institute proceedings against the government to hold it to its publicly promulgated unilateral promises. Payment is so claimable after the due date for payment has expired, on the ground that the revocation of those promises would amount to irrational conduct, contrary to the values of accountability and reliability. Further, it would seem that these proceedings — which effectively amount to a species of review for rationality — need not be brought under the PAJA, despite the fact that the conduct involved may amount to administrative action.

REMEDIES

In 2013 there were two interesting decisions concerning the granting of remedies in administrative law. First, in *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 (1) SA 604 (CC), 2014 (6) BCLR 641, the Constitutional Court took the unusual step of finding an administrative decision to be invalid, but delaying the granting of a remedy in respect of that decision on the basis that the practical consequences of unravelling the decision would be complex and difficult. The court also felt that it did not have sufficient information before it to take a decision regarding what remedy would be just and equitable. Secondly, in *De Jong v The Trustees of the Simcha Trust* ([2013] ZAWCHC 178 unreported (22 November 2013) available at <http://www.saflii.org/za/cases/ZAWCHC/2013/178.html>), the court considered the circumstances under which compensation could be awarded in terms of section 208(1)(c)(ii)(bb) of the PAJA.

Allpay (above) concerned a challenge to the validity of a tender award by the South African Social Security Agency ('SASSA') to Cash Paymaster Services (Pty) Ltd ('Cash Paymaster') for the countrywide payment of social grants to beneficiaries. The challenge was brought by an unsuccessful tenderer, AllPay Consolidated Investment Holdings (Pty) Ltd ('AllPay'). Allpay had been excluded from the pricing stage of the tender, as its tender did not meet certain technical and functional requirements. AllPay sought to review the tender award on a number of bases, including the unfairness of the process. The SASSA asserted that neither AllPay's rights, nor its legitimate expectations had been adversely affected by the irregularities it complained of. As a result, it alleged that the PAJA's procedural fairness provisions were not implicated (para [59]). The Constitutional Court, in Froneman J's judgment, disagreed for four reasons. First, the court found that 'tenderers have a right to a fair tender process, irrespective of whether they are ultimately awarded the tender' (para [60]). Secondly, the court found that the review related to the outcome of the tender, not each decision along the way. Clearly the outcome had an effect on AllPay's rights (ibid). Thirdly, the exclusion of AllPay from the pricing stage affected the outcome of the tender award, and consequently AllPay's rights and legitimate expectations. Finally, where irregularities in the process *may* have affected the fairness of the outcome of a decision, it was held that they *do* have 'the *capacity* to affect legal

rights' (ibid). Having found that the SASSA's tender award to Cash Paymaster was reviewable in terms of the PAJA, the Constitutional Court delayed determining what remedy it ought to hand down. This was done on the following bases.

The national system for the payment of social grants has been in operation for some 20 months now. SASSA and Cash Paymaster assert that it is running smoothly and efficiently and that setting the tender aside would cause great disruption. The Centre for Child Law made submissions in relation to the appropriate remedy in order to protect the rights of child grant beneficiaries. Part of the submissions dealt with the constitutional obligation that Cash Paymaster may have to continue with the current system even if the tender award is set aside, until a new system is in place. These considerations raise difficult factual and legal issues. The information currently before us is outdated and inadequate. It would be inappropriate to make a decision on a just and equitable remedy in the absence of further information and argument on these issues. Our order will thus contain directions requiring further submissions and a hearing on the issue of a just and equitable remedy before a final decision is made (para [96]).

The court's stance on a just and equitable remedy was invariably influenced by the constitutional imperative in section 172(1)(a) that conduct inconsistent with the Constitution 'must' be declared invalid to the extent of its inconsistency. This is clear from the court's remarks

Once a ground of review under PAJA has been established there is no room for shying away from it. Section 172(1)(a) of the Constitution requires the decision to be declared unlawful. The consequences of the declaration of unlawfulness must then be dealt with in a just and equitable order under section 172(1)(b) [of the Constitution]. Section 8 of PAJA gives detailed legislative content to the Constitution's 'just and equitable' remedy (para [25]).

In order to overcome the practical difficulties of unravelling the tender award should it declare the SASSA's decision invalid, the court sought guidance from the parties and *amicus curiae* on this issue. The court did so by directing the parties and *amicus curiae* to furnish further submissions and information on issues relating to the remedy, including 'the time and steps necessary, and the costs likely to be incurred, in the initiation and completion of a new tender process for a national social grant payment system', 'just and equitable arrangements that should be made for the continued operation of the payment of social grants until a new system is implemented', 'the public interest' and other transitional arrangements (para [98]). The court's approach arguably repre-

sents an extreme case of finality giving way to legality (Hoexter above 550, 551), and potentially narrows the circumstances in which courts will decline to set aside unlawful, unfair or unreasonable administrative decisions on the basis of considerations such as practicality, certainty and finality, as they have done in the past (ibid). (See also, for instance, *Chairperson, Standing Tender Committee v JFE Sapela Electronics* 2008 (2) SA 638 (SCA) and *Millennium Waste Management v Chairman, Tender Board: Limpopo Province* 2008 (2) SA 481 (SCA).)

In *De Jong* (above) owners of units in the Four Seasons sectional title scheme situated at Buitenkant Street in Cape Town had, in December 2012, obtained an interim interdict preventing the Simcha Trust from carrying on certain construction work that would diminish the value of their properties. Subsequently, these owners sought an order reviewing and setting aside the City of Cape Town's decision to approve the Simcha Trust's building plans. Before the review was decided, the Simcha Trust recognised that its building plans had been approved in a manner which is inconsistent with that required by the Constitutional Court's finding in *Walele v City of Cape Town* 2008 (6) SA 129 (CC), 2008 (11) BCLR 1067, during a period when the City was in the process of rationalising its building plan approval process to align it with that decision. An order reviewing and setting aside the City's approval of the Simcha Trust's building plans was then granted by consent. The legal effect of this order was that the approval of the Simcha Trust's building plans was remitted for reconsideration by the City (para [29]). The Simcha Trust, having elected not to oppose the review, instead sought an order against the City to the effect that the City should pay compensation in the amount of its costs in the interdict application, and a refund of the 'scrutiny fee' of R82 327,60 paid to the City in order to have its building plans assessed (para [10]).

Rogers J rejected the Simcha Trust's claim for compensation in terms of section 8(1)(c)(ii)(bb) of the PAJA. The court emphasised (para [25]), that its approach was consistent with the cautious approach towards imposing liability on public bodies for the negligent exercise of their powers, upheld in *Steenkamp* (above), in that it was done after 'a proper balancing of the policy considerations relevant to a determination as to whether a public body has acted wrongfully (in the delictual sense) when performing an administrative function'. The court, relying on an argument based in interpretation, found that on a proper construction of

section 8(1)(c), 'compensation is not available as a remedy if the usual remedy of remittal has been granted or if exceptionally the court has substituted its own decision for that of the administrator' (para [22]). In other words, the exceptional remedy of compensation will not be available where an 'ordinary' remedy (remittal), or an alternative exceptional remedy (substitution), has been granted. The court went on to comment in passing that its finding did not prevent 'a respondent' from claiming compensation' (para [23]). The court emphasised

[T]here may be persons other than the applicant for review who have suffered harm in consequence of unlawful administrative action and who would thus be aggrieved. Once the court has determined that the administrative action was irregular and should be set aside, all the persons interested in the matter and cited as parties are arguably entitled to be heard as to the appropriate relief to be granted . . . and if it should emerge that neither a remittal nor a substituted decision is feasible, why should such a respondent not be entitled to the further alternative remedy of compensation? (para [23]).

Despite its interpretation of the PAJA, the court went on to assess whether the City should be required to pay any of the compensation sought by the Simcha Trust. It found that on the facts, the City was not liable either to refund the scrutiny fee, or to pay the Simcha Trust's costs in the interim interdict application. In other words, for the court 'the matter did not present any exceptional circumstances justifying a departure from the usual remedy of remittal (even if that remedy was not expressly sought)' (para [30]).