The right to lawful administrative action

A Public Administration Perspective

D J Brynard
Department of Public Administration and Management
University of South Africa

ABSTRACT

Defining lawfulness in all its dimensions and knowing its true meaning in the context of public administration is no easy task. The research on which this article is based, explains the practical functioning of the requirements for lawful administrative action and decision-making. The aim of improving an understanding of the requirements for lawful administrative action and decision-making is to produce a set of guidelines to be used by public officials. The frequent judicial intervention into public administration by means of judicial review of administrative action has produced inputs, which gradually facilitates an incremental understanding of the requirements for lawfulness. The said inputs will probably have a positive guiding effect on the execution of administrative action and decision-making. The requirements for lawful administrative action have the potential not only to enhance accountability in public administration but also to enrich the administrative justice system.

INTRODUCTION

It is true that nobody has a more sacred obligation to obey the law than those who make the law, execute the law and adjudicate upon the law. What is lawful is not binding on some only and not on others. Lawfulness extends everywhere and therefore it is a constitutional imperative (section 33(1) of the *Constitution of the Republic of South Africa,* 1996) that administrative action must be lawful. However, the question is to what extent the understanding and adherence to lawfulness in administrative actions and decisions in the practice of public administration are.

In terms of the *Constitution of the Republic of South Africa,* 1996 (hereafter "the Constitution") (section 195(1)) a public official as a "public servant" is called upon to deliver a service to the public (the *customers*) and, in his/her service delivery, the public official must not only act in a way that is *lawful*, procedurally fair and reasonable (section 33(1)), but also in such a way that he/she is alert to the needs of South African people and addresses

these needs. The implication of this constitutional mandate is that administrative decision-makers are required to act *lawfully* and act within the bounds of their authority without misconstruing their mandate. However, to establish the constitutional content of lawfulness is no easy task because the concept is more often than not defined in the negative (i.e. by indicating what administrative action is unlawful) by curent legislation and the courts of law.

The foundational principles of a deliberative and accountable public administration have its source in the Constitution and the values enshrined in it. The argument of this article is that, in order to promote the constitutional vision, a proper and understandable application of the requirements of administrative justice, with particular emphasis on lawful administrative action, is needed to foster the principle of accountability.

The purpose of the research being reported here is to explain the practical functioning of the notion of lawful administrative action by means of an interpretation and analysis of relevant legislation and judicial decisions. The first objective of the research is therefore to establish the meaning and content of the word *lawful* in terms of the Constitution since that meaning must inform the reading of the *Promotion of Administrative Justice Act*, 3 of 2000 (hereafter "the PAJA") (the national legislation emanating from the constitutional mandate contained in section 33(3) of the Constitution). The second objective was an interpretation of *lawfulness* in terms of the provisions of the PAJA (which is logically underpinned by an understanding of the Constitution from which it emanates). To establish the meaning of the many requirements for lawful administrative action and understand how public officials should apply them in practice to ensure effective and efficient public administration is crucial for an understanding of lawfulness. The third objective is to shed light on the benefit of lawful administrative action as an instrument to enhance the culture of accountability in public administration.

CONSTITUTIONAL MEANING OF LAWFULNESS

Defining lawfulness in a positive sense (what it is) is no easy task. This explains why South African legislation and even the courts of the law often find it easier to define lawfulness in the negative by pointing out what is not lawful. The exact meaning and content of lawfulness are therefore not always clear. But surely, the constitutional meaning of and intent for lawfulness should be the starting point.

The Constitution makes an unqualified, direct and specific reference to lawfulness. It states that administrative action must be lawful (section 33(1)), which implies that all administrative actions and decisions must be duly authorised by law. This constitutional obligation to lawful administrative action should be interpreted widely to include compliance with the Constitution, with the provisions of the PAJA, with the provisions of the appropriate enabling or empowering statute and with the rules of common law (Burns & Beukes 2006:204).

LAWFULNESS IN TERMS OF THE PAJA

The PAJA attempts to give effect to the scope and meaning of the constitutional obligation upon public officials to act lawfully by setting unlawfulness as a ground for judicial review of

administrative action (section 6(2)). The grounds for judicial review in the PAJA translate into a number of requirements for lawfulness in public administration. In a sense, the obligation to act lawfully is a constitutional matter because the relevant subsections of the PAJA must be construed and applied consistently with the Constitution (*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004(4) SA 490 (CC):para 25). The implication is that administrative decision-makers are required to act lawfully or within the limits of lawfulness. However, both the PAJA and courts always define lawfulness in the negative by pointing out what kind of administrative action can be regarded as unlawful. This article adopts a different perspective and defines lawfulness in the positive sense. Adopting this perspective inevitably raises questions about the true meaning of lawfulness and of the practical implications of the concept of lawful administrative action with regard to public administration practice.

Lawfulness is essentially an umbrella or over-arching concept which encompasses a number of requirements for valid administrative action (Burns & Beukes 2006:204). These requirements are laid down in section 6(2) of the PAJA as a comprehensive list of statutory grounds upon which administrative action may be reviewed for want of lawfulness. The advantages of defining the requirements for lawfulness in the positive are the following:

- the requirements serve to clarify what is (or what is not) expected of public officials to act lawful;
- the requirements thus have an educational effect;
- the requirements for lawfulness are accessible to those affected by administrative action; and
- the application of the requirements can help to spread a culture of administrative justice in public administration (Hoexter 2009:45).

Each of the requirements for lawful administrative action will now be explored individually in terms of its statutory identification in the PAJA, its positive meaning in public administration practice and its practical manifestation as perceived through examples from recent case law. The requirements are grouped under the following headings:

- the requirements which give effect to the fact that the authority to act must be authorised by law;
- the requirements related to the delegation of authority and the proper exercise of the discretion flowing from such delegation; and
- the requirement that all administrative action must be constitutionally sound or otherwise lawful.

EXERCISE OF AUTHORITY MUST BE AUTHORISED BY LAW

This group of requirements includes the requirement of authority to act, the duty to exercise authority, a proper interpretation of the enabling legislation and the compliance with mandatory and material procedures and conditions.

The requirement of authority to act (section 6(2)(a)(i) or section 6(2)(f)(i) of PAJA)

This requirement allows for judicial review of an administrative action if the public official "was not authorised to do so by the empowering provision" (section 6(2)(a)(i)) or the administrative action itself "contravenes a law or is not authorised by the empowering provision" (section 6(2)(f)(i)).

Public officials or bodies have no inherent authority. The exercise of authority must therefore be authorised by law. This implies that every incident of public authority must be inferred from a lawful enabling source, usually legislation. The requirement of authority to act has two dimensions:

- the public official must be properly appointed, or the public body must be properly constituted; and
- the public official is required to remain within the bounds of his/her authority (Plasket 2002:306; Hoexter 2012:256).

The first dimension refers to the fact that most enabling legislation confers authority on specific officials or bodies such as *the minister, the officer, the council, the commission* or *the board*. This implies that public officials or bodies must be properly appointed, properly constituted and properly qualified when they take administrative action. A prominent example of this was when a decision of the Judicial Service Commission (JSC) regarding a complaint of judicial misconduct on the part of the Judge President of the Western Cape was successfully challenged. The fact that the Premier of the province and other members of the JSC were absent from the particular meeting (not properly constituted) invalidated the proceedings at which the decision was taken (*Acting Chairperson: Judicial Service Commission v Premier of the Western Cape* 2011 (3) SA 538 (SCA):para 25). In another example, the decision of an interim Board of Governors of the Fort Cox College of Agriculture and Forestry in the Eastern Cape province was successfully challenged on the basis that the board was not properly constituted at the time as some of the members were not properly appointed in terms of the enabling statute (*Awumey and Another v Fort Cox Agricultural College and Others* 2003 (8) BCLR 861 (Ck):869G-870F). Another element of this dimension of authority is that when the authority is assigned to one particular official it must be exercised by that official and not by another (unauthorised) official or body (Hoexter 2012:261-262).

The second dimension calls for public officials to remain within the bounds of their authority and not to misconstrue their authority (*President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC):para 148). This implies that there must be a source of authority for taking the administrative action and that the taking of such action has to remain within the limits (bounds) as provided for in the particular source of authority. The source of authority may be found in the enabling statute or other relevant statutes (including the Constitution). A prominent example where the court could find no lawful authority for the particular administrative action was the summarily and unilateral suspension of social welfare benefits of thousands of pensioners by the Department of Health and Welfare in the then Northern province (*Rangani v Superintendent-General, Department of Health and Welfare, Northern Province* 1999 (4) SA 385 (T):395B-C). The

motivations for the suspensions were clear – to verify the particulars of beneficiaries and to root out *ghost pensioners*. However, this high-handed and unlawful administrative behaviour was condemned by Mr Justice Cameron as *extreme* and as having *savage* consequences for its often destitute victims (*Permanent Secretary, Department of Welfare, Eastern Cape and Another v Ngxuza* and Others 2001 (4) SA 1184 (SCA):para 7). This is a typical case where the official had prescribed authority, but then went beyond the authority expressly or impliedly conferred or even contravened the given authority by the method used to eliminate fraudulent claimants. It is clear from the mentioned examples that the use of administrative authority for an unauthorised purpose is very often the result of administrative ignorance or negligence and not necessarily of bad intent.

The requirement of the duty to exercise authority (section 6(2)(g)) of PAJA)

This requirement allows for judicial review of an administrative action if "the action concerned consists of a *failure to take a decision*" [own emphasis](section 6(2)(g)).

Where the authority is granted to a public official or body to take an administrative action or decision whether, for example a person qualifies for a social grant, the official is (once the person applies for such a grant in the prescribed manner) obliged to take a decision in this regard. This implies that the official has a duty to exercise the authority. Should the official fail to take the action or decision within the period prescribed or within a reasonable period, the actions or inactions may constitute unlawful administrative action (De Ville 2005:109).

The duty to exercise authority therefore has two dimensions:

- the duty to decide or to consider a matter; and
- the duty to act within a reasonable time.

The first dimension is the duty to decide or to consider a matter (section 6(2)(g)). The official who has the authority (or discretion) to grant or refuse a social grant is not allowed to simply ignore an application for such a grant. At the very least, the official must consider the application and decide whether to grant or refuse it.

The second dimension is the duty to act within a reasonable time (section 6(2)(g) read with section 6(3)). Thus where a particular period has been prescribed in an enabling provision for the taking of a decision the authorised official must comply within that period (section 6(3)(b)) and where no period has been prescribed the authorised official must comply within reasonable time (section 6(3)(a)). In both instances, there must have been an explicit duty to take a decision. This requirement for lawful administrative action in the PAJA will certainly be welcomed by anyone who has experienced the frustration of unreasonable delays when dealing with government departments. An example of this was when an applicant for a social grant (*old-age pension*) had to wait for more than two and a half years with no reply from the Eastern Cape Department of Welfare. He then asked the court to compel the Director-General of the particular department to consider and decide on his application. The court held that three months was a reasonable time within which the application could have been considered. The court remarked that the matter was not an isolated incident of administrative inefficiency but that it "appear[s] merely to be the tip

of the iceberg" (*Mbanga v MEC for Welfare, Eastern Cape and Another* 2002 (1) SA 359 (SE):369B-G).

The requirement of a proper interpretation of the enabling legislation (and to avoid the influence of an error of law) (section 6(2)(d) of PAJA)

This requirement allows for judicial review of an administrative action if "the action was materially influenced by an error of law" (section 6(2)(d)).

The failure of an official to interpret his/her authority and functions properly may result in an error of law. An error of law takes place when an official makes a wrong, incorrect or mistaken interpretation of a legislative provision. The particular interpretation must have a "material" influence (i.e. a significant influence and not a trivial influence) on the outcome of the administrative action (*Liberty Life Association of Africa Ltd v Kachelhoffer NO and Others* 2005 (3) SA 69 (C): para 48). In executing their authority, officials are, therefore, obliged to make proper interpretations of the enabling legislation (take decisions, which are correct in law). An error of law can manifest in the following two ways:

- it may prevent the official from appreciating the real nature of his/her authority; or
- it may prevent the proper exercise of discretion (Hoexter 2012:282).

An example of an error of law was found when the then Head of Education in the Western Cape province issued a directive to the principal of an Afrikaans-medium school (Mikro Primary School) instructing him to admit a group of forty learners and teach them in English based on his interpretation of section 22 of the *South African Schools Act*, 84 of 1996. In the court cases that ensued, it was found that the official made an error of law because he was certainly not entitled to unilaterally impose a new language of instruction on the school or to give the particular directive in defiance of the school's existing language policy (*Minister of Education, Western Cape v Governing Body, Mikro Primary Schoo*l 2006 (1) SA 1 (SCA):paras 44&59). This view was upheld by the Constitutional Court in a similar case in the Mpumalanga province. Mr Justice Moseneke held in this instance, that the Head of the Mpumalanga Department of Education made an erroneous interpretation of sections 22(1) and 25 of the *South African Schools Act*, 84 of 1996. Consequently he had no authority to constitute an interim school governing body (SGB) and the said SGB, in turn, did not have the authority to formulate a new language policy for the Hoërskool Ermelo (*Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC):paras 93&94).

The requirement of compliance with mandatory and material procedures and conditions (section 6(2)(b) of PAJA)

This requirement allows for judicial review of an administrative action if "a mandatory and material procedure or condition prescribed by an empowering provision was not complied with" (section 6(2)(b)).

Enabling legislation frequently imposes procedural requirements on public officials. When procedural requirements, formalities and preconditions are prescribed in an

enabling provision, it presupposes compliance. However, much depends on whether the procedural requirement is classified as *mandatory* or *directory*. In the case of a mandatory provision, it is customary to use peremptory language like *the official shall or must* perform some action. In the case of directory provisions, language like *the official may* is used which seems to indicate some discretion or choice on the part of the official (Burns & Beukes 2006:309).

A failure to comply with a mandatory procedure may hint at the possibility of the action being unlawful while failure to comply exactly with a directory provision may not have the same effect. This does not mean that provisions of a directory nature can simply be ignored. The reference in section 6(2)(b) to *material* procedure and condition may be interpreted that a strict mandatory compliance may even be replaced by *substantial* or *adequate* compliance (Hoexter 2012:292).

The area of procurement is known for its procedural requirements and formalities that have to be complied with by officials and applicants. However, these formalities should not be used to disqualify an otherwise unimpeachable tender on the basis of an inadvertent failure (or innocent omission) by an applicant to sign a *declaration of interest* form (*Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 (2) SA 481(SCA):paras 17-21). Mr Justice Murphy warned in a similar case that conditions such as these (like the signing of the tender) should not be applied mechanically by the official to unreasonably disqualify a tender for an innocent omission because that could undermine the objective of considering all tenders on a competitive basis (*Total Computer Services (Pty) Ltd v Municipal Manager, Potchefstroom Local Municipality* 2008 (4) SA 346 (T):paras 57–58).

DELEGATION OF AUTHORITY MUST BE AUTHORISED AND THE DISCRETION PROPERLY EXERCISED

This group of requirements include the requirement of proper delegation of authority and the proper exercise of discretionary authority. The latter requirement has been divided into five sub-requirements.

The requirement of proper delegation of authority (section 6(2)(a)(ii) of PAJA)

This requirement allows for judicial review of an administrative action if the public official "acted under a delegation of power which was not authorised by the empowering provision" (section 6(2)(a)(ii)).

The general rule is that a delegated authority must be exercised by the official on whom it is confirmed. However, it is often impossible for the designated official to exercise the authority or perform the function personally. For this reason it has always been the practice of original legislators (like Parliament, a provincial legislature or a municipal council) to delegate authority by stipulating in their legislation that their delegatees may further delegate (i.e. subdelegate) their authority to other officials (by means of a process of proper delegation of authority). The Constitution also makes express provision for this

inevitability of subdelegation by stipulating that an executive authority of state in any sphere of government may –

> *delegate any power or function that is to be exercised or performed in terms of legislation to any other executive organ of state, provided the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed [own emphasis] (section 238(a)).*

A typical example of an express authority to subdelegate in terms of a particular piece of legislation (i.e. a subdelegation consistent with the relevant enabling legislation) is found in the *Marine Living Resources Act,* 18 of 1998 (hereafter the MLRA) which allows the Minister to subdelegate to the Director-General or an official of the Department nominated by the Director-General "any or all the powers conferred upon him/her in terms of this Act, save a power to make regulations" (Section 79(1)(a)). The Director-General is also authorised in terms of section 79(2) to subdelegate any authority conferred on him/her in terms of the Act to another official in the Department on the conditions that he/she deems fit. The bottom line is that subdelegation of authority is only permissible where the enabling legislation expressly or impliedly authorises it.

In a relevant case, the Deputy Director-General of the then Department of Environmental Affairs and Tourism was delegated authority in terms of the enabling legislation (the *Marine Living Resources Act,* 18 of 1998) to allocate fishing rights in the hake longline sector. On nomination by the Director-General the authority was properly delegated by the Minister to the Deputy Director-General in terms of section 79(1)(a) of the MLRA. The Deputy Director-General employed the services of an advisory committee to assist with the allocation decisions and this was questioned as a possible abdication of authority. However, the facts of the case indicated clearly that the advice received amounted to a very limited delegation and that the Deputy Director-General retained full control over the final allocation decisions and thus did not abdicate his discretionary authority in favour of the advisory committee (*Minister of Environmental Affairs and Tourism v Scenematic Fourteen (Pty) Limited* 2005 (2) All SA 239 (SCA):para 19-24).

The requirement of proper exercise of discretionary authority (section 6(2)(e) of PAJA)

This requirement is based on six sub-grounds of judicial review (sections 6(2)(e)(i-vi) of PAJA) which concerns itself with the manner in which administrative action is exercised. The requirement seeks to establish what is required for the proper exercise of discretionary authority and will now be explored as five separate requirements for lawful administrative action.

The requirement of a lawful purpose or motive for administrative action (section 6(2)(e)(i) and section 6(2)(e)(ii) of PAJA)

This requirement allows for judicial review of an administrative action if the action was taken "for a reason not authorised by the empowering provision" (section 6(2)(e)(i)) or "for an ulterior purpose or motive" (section 6(2)(e)(ii)).

Both the requirements mentioned above stem from the principle that officials may only exercise their authority for the purpose for which the authority was given to them. Section 6(2)(e)(i) addresses itself to the particular set of purposes behind the enabling provision by asking the question which purposes are authorised by the enabling provision. The administrative action that ensues must be in line with the purposes which were authorised for that particular action and must be based on the reasons which were assigned for that action. However, section 6(2)(e)(ii) makes it clear that the authority that was given to the official by the enabling provision for a particular or specific purpose cannot be used for an ulterior purpose which was not contemplated by the enabling provision. This means that the public official must use his/her authority for an authorised purpose and, failing to do so, may be considered as an abuse of authority. The use of the term *ulterior motive* in this section has a different meaning to *ulterior purpose* and refers to the subjective frame of mind of the official and could even imply a dishonest frame of mind or a sinister motive. An example of ulterior motive is where the chief traffic officer of a municipality instructs his/her traffic officials to issue a certain number of traffic fines per day irrespective of the circumstances. This will amount to ulterior motive since the chief traffic officer is fully aware that the purpose of the instruction was not to regulate traffic but to acquire revenue for the particular municipal area (Burns & Beukes 2006:368). Another example was when the police services arrested prostitutes for the ulterior purpose of harassment rather than the lawful purpose of having them prosecuted. The police services made these arrests while knowing with a high degree of probability that no prosecution would follow such arrests. The purpose of the arrests were therefore an ulterior purpose, namely to harass, punish or intimidate the sex workers (*Sex Worker Education and Advocacy Task Force v Minister of Safety and Security* 2009 (6) SA 513 (WCC):paras 3&60).

The requirement of considering relevant considerations when taking lawful administrative action (section 6(2)(e)(iii) of PAJA)

This requirement allows for judicial review of an administrative action if the action was taken "because irrelevant considerations were taken into account or relevant considerations were not considered" (section 6(2)(e)(iii)).

It is the practice that every piece of enabling legislation which confers discretionary authority on public officials must provide some guidelines. However, when the enabling legislation has not clearly spelled out which factors should be taken into account it will be the responsibility of the administrative authority to determine through interpretation of the relevant enabling provisions what is and what is not relevant. The wider the discretionary authority, the wider the range of options available to the official. This requirement for lawful action clearly indicates that the exercise of authority must be based on the consideration of relevant considerations and not on irrelevant considerations. An example of this was when a tender for the collection and disposal of scrap metal was awarded on the basis of an irrelevant consideration (the financial ability of a third party) and without having regard to the financial ability of the tenderer itself. The financial ability of the tenderer to perform the contract for which it tenders, is a crucial consideration in awarding of the tender. The award of a tender by Eskom based on the financial ability of a third party was therefore considered by Mr Justice Cloete to be *illogical* and clearly an irrelevant consideration (*Eskom Holdings Ltd v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA):para 6).

The requirement of unimpeachable administrative action (administrative action with integrity) (section 6(2)(e)(iv) of PAJA)

This requirement allows for judicial review of an administrative action if the action was taken "because of the unauthorised or unwarranted dictates of another person or body" (section 6(2)(e)(iv)).

The exercise of a discretionary authority rests with the authorised official or body and no one else. The holder of discretionary authority must personally exercise the authority (apply its own mind to a matter) and cannot delegate it to another official in the absence of statutory authorisation. The official may also not avoid taking the decision by referring it (abdication of authority) to someone else who is not authorised. In the event of this happening the unauthorised dictates may assume various forms such as unlawful dictation and unlawful referral (passing the buck). In practice, this occurs when a decision which appears to have been made by an authorised official has in fact been made at the dictation of an unauthorised official. An example of this was when it was found that a university council has simply rubber-stamped a selection committee's decision to appoint a campus director instead of making the decision itself, as it was required to do by the relevant statute. Section 15(2) of the *Vista University Act*, 106 of 1981 stipulated that such an appointment would be made by council itself unless the authority of appointment was delegated to a committee of the council in terms of section 10(7) of the Act. However, no such delegation of authority took place. The result was that the council failed to apply its mind to the issue of the appointment and allowed an unauthorised body to take the decision (*Mathipa v Vista University* and Others 2000 (1) SA 396 (T):401D-G & 402D-E).

The requirement of taking administrative action in good faith (bona fides) (section 6(2)(e)(v) of PAJA)

This requirement allows for judicial review of an administrative action if the action was taken *in bad faith (mala fides)* (section 6(2)(e)(v)).

For administrative action to be proper and lawful, it must be taken in good faith and with good intentions (*bona fides*). This implies administrative action taken with a sincere and honest intention on the part of public officials. The opposite happens when an official deliberately acts in bad faith and with a dishonest or bad intention (*mala fides*). Such action is indicative of fraud and dishonesty because it is being conscious or knowingly use authority for ends that are prohibited by law. The *mala fide* exercise of a discretion has been referred to as a decision that has an improper purpose or ulterior motive, takes account of irrelevant considerations, or is arbitrary in nature (*Winckler and Others v Minister of Correctional Services and Others* 2001 (2) SA 747 (C):758G-H). This view confirm the belief that *mala fides* is difficult to distinguish from action taken with an ulterior motive or purpose or even from other related grounds for judicial review. Action taken in bad faith exist when it can be proven that an official acted out of personal animosity, spite, vengeance or for the personal benefit of his/her relations or friends (De Ville 2005:175). When an official acts in bad faith it is presumed that he/she knew that the action was wrongful but nevertheless persisted with the action. Such intentional action cannot be argued to have complied with the requirements of lawfulness.

An example of action taken in bad faith (*mala fides*) was when the Free State Department of Education, in an effort to redeploy educators where schools had too many educators,

designed a procedure to orchestrate the dismissal of the surplus educators. The particular procedure adopted by the Department was described by the court as "a scandalous display of imagined power" and the action of the Department that followed as "utterly shocking and it testified of scandalous and condescending conduct". The court found that the actions of the Department were *mala fides* and labelled it as "an utterly unsuitable manner of behaving towards employees" (*Suid-Afrikaanse Onderwysunie v Departementshoof, Departement van Onderwys, Vrystaat en 'n Ander* 2001 (3) SA 100 (O):107H-108A). In another example of administrative action taken in bad faith, the Mpumalanga Department of Education suspended a teacher at the Vezilwazi High School from duty with salary pending a departmental charge of misconduct. However, no charges were brought against the teacher and a few months later the payment of her salary was ceased. The Department then had a change of heart and informed the teacher that she had been absent from her duties for a period exceeding 14 days without consent and that she is consequently automatically dismissed. Based on this evidence, Mr Justice Shongwe held as follows: "It gives a very wrong impression for the department to suspend an employee lawfully and then, before completion of that process, to summarily dismiss the employee" (*Damane v Premier, Mpumalanga and Another* 2002 (2) SA 762 (T):766H-I). In this particular case, the action taken by the Department was clearly taken in bad faith but was struck down by the court as unlawful on the basis of an inconsistent application of procedure.

The requirement of taking systematic and predictable administrative action (section 6(2)(e)(vi) of PAJA)

This requirement allows for judicial review of an administrative action if the action was taken "arbitrarily or capriciously" (section 6(2)(e)(vi)).

No authority is really unfettered and the exercise of all authority, including discretionary authority, is subject to the legal prescripts of the enabling legislation. Even though the discretion entails a choice, it is always a limited one which needs to be taken in a systematic and predictable fashion. To be able to exercise discretionary authority in a systematic and predictable fashion the official needs to apply his/her mind. The opposite is true when administrative action is taken in an arbitrary and capricious fashion. To act arbitrarily means to make a random decision (that is not systematic) and often not based on reason. Capricious action refers to action that is inconsistent with legal prescripts and unpredictable because of the impulsive and erratic nature of the decision (Burns & Beukes 2006:380). At common law, administrative action was said to be arbitrary or capricious when it was irrational or senseless and without foundation or apparent purpose (Hoexter 2012:325).

An example of arbitrary or capricious action was a decision of the Zonderwater Correctional Supervision and Parole Board (hereafter "the parole board") to unduly delay the release on parole of a particular prisoner. Section 73(4) of the *Correctional Services Act*, 111 of 1998, permits the release of a prisoner on parole before the expiration of the term of imprisonment. In terms of section 73(5)(a)(i) of the mentioned Act, "a prisoner must be placed under correctional supervision or on day parole or on parole *on a date determined* by the Correctional Supervision and Parole Board" [own emphasis]. Following on a number of delays in making a decision, the parole board eventually decided to place the particular prisoner on parole but to postpone his release for one year to complete a so-called v*ictim mediation programme*. Mr Justice Matojane then held that section 73(5)(a)(i) of

the mentioned Act makes no reference to a victim mediation programme as a prerequisite for release on parole and therefore the delay to release the prisoner on parole was "irrational, capricious and arbitrary" in terms of section 6(2)(e)(vi) of the PAJA (*Mbonani v Minister of Correctional Services and Others* [2011] ZAGPPHC 196 (5 October 2011):para 11). In another example, some crucial directives in the tendering policy were not made available to prospective tenderers. The particular department failed to notify prospective tenderers of the fact that the tendering policy indicated that preference would be given to tenderers who had not been awarded a contract previously. In a systematic and predictable approach to administrative action, those tenders (not complying with this requirement) could then already have been excluded by the Provincial Tender Board for the Eastern Cape (hereafter "the tender board") at the outset and without there being any need to evaluate them further. Based on the fact that this crucial directive only became apparent during the evaluation process of tenders by the tender board, Mr Justice Ebrahim found that the manner in which the policy was implemented in this case was arbitrary (*RHI Joint Venture v Minister of Roads and Public Works, Eastern Cape* 2003 (5) BCLR 544 (Ck):paras 37–39).

REQUIREMENT OF TAKING CONSTITUTIONALLY SOUND ADMINISTRATIVE ACTION (SECTION 6(2)(I) OF PAJA)

This requirement allows for judicial review of an administrative action if "the action is *otherwise unconstitutional or unlawful*" [own emphasis] (section 6(2)(i)).

This requirement has two dimensions. The first dimension refers to "otherwise constitutional" administrative action and the second dimension refers to the "otherwise lawful" administrative action.

Administrative action must be in line with the provisions and values of the Constitution. This means a direct application of the Constitution (in terms of the principle of legality) to determine the lawfulness of administrative action rather than an application only through section 33(1) of the Constitution or through a specific constitutionally mandated statute such as the PAJA (Plasket 2002:330). Thus, the requirements of lawfulness of administrative action (as demanded by section 33(1) of the Constitution and the PAJA) seem to coincide completely with the content of the constitutional principle of legality. This requirement represents an application of the broader principle of legality (as an aspect of the rule of law) to administrative action. The principle of legality is implicit in the Constitution (section 1(c)) and applies to all exercises of public authority (also non-administrative action). It therefore seems that in the area of lawfulness, there is nothing to choose between the requirements in the PAJA (which only applies to administrative action) and those implied by the principle of legality. In fact, the principle of legality provides an essential safeguard when action does not qualify as "administrative action" for the purposes of the PAJA or the Constitution (*Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC):paras 97 & 144).

This requirement of lawfulness (or *otherwise lawful* administrative action) in the PAJA has also been called a *residual* or *catch-all* clause (Currie & Klaaren 2001:173; Hoexter 2012:319). It provides space to deal with administrative action which was found to be unlawful, but which was not part of the list of requirements explicitly spelled out in the PAJA.

The *catch-all* clause may also be used to take account of requirements for lawfulness that are provided for in the enabling legislation of a particular area of public administration. In a recent case, it was held by Mr Justice Willis (relying on section 6(2)(i) of the PAJA) that the decision of the Judicial Service Commission (JSC) to hold its hearings behind closed doors was, in the particular circumstances, unconstitutional and otherwise unlawful (*eTV (Pty) Ltd v Judicial Service Commission and Others* 2010 (1) SA 537 (GSJ):543I-J).

The requirements for lawful administrative action have now been explained. Let us now explore the possible benefits of the right to lawful administrative action to enhance accountability in public administration.

CREATING A CULTURE OF ACCOUNTABILITY

The content of the right to lawful administrative action as an important element of administrative justice is now clear, but what is its constitutional foundation? The foundation of administrative justice is embedded in the values and principles of the Constitution. The founding values of the Constitution are expressed in section 1 and include, among others, issues like human dignity, non-racialism, non-sexism, constitutional supremacy, rule of law and a system of democratic government. The constitutional values extracted from these, which are the most suitable to be promoted through the application of the principles of administrative justice, are linked to a system of democratic government which must ensure accountability, responsiveness and openness (section 1(d)). Apart from the mentioned commitment to accountability, responsiveness and openness, the Constitution in its *principles governing public administration* repeats the commitment to accountability, responsiveness and transparency (section 195(1)(e)-(g)) and also requires the fair, impartial and equitable provision of public services (section 195(1)(d)).

Accountability, in the constitutional sense, means that public officials must explain in public the manner in which they have exercised their authority. To be effective, this explanation needs to happen in the public domain simply because publicity is the very soul of justice. The right to lawful administrative action is enforced in public primarily through the mechanism of judicial review because non-compliance with any of the grounds of review laid down in section 6(2) of the PAJA can be challenged in a court of law. Section 34 of the Constitution confers on everyone the fundamental right of access to the court for *a fair public hearing* before a court or appropriate tribunal or forum. This implies that any person who is unhappy with an administrative decision may challenge the decision in the public domain in a court. This means an open and transparent procedure, which ensures accountability. Judicial review essentially focuses on the diagnosis of what public officials have done wrong with a view to facilitate the correction of maladministration. Thus, the mechanism of judicial review may, for example, enable a court to decide whether public officials have exceeded their authority or misconstrued their authority by straying beyond their entitlement to act. The right to lawful administrative action (an element of administrative justice) as mentioned in section 33(1) of the Constitution have, in a sense, constitutionalised judicial review of unlawful administrative action. Consequently, any administrative action that infringes on the right to lawful administrative action may also be challenged as a violation of the Constitution.

Judicial review of administrative action is not, however, an exclusive mechanism to ensure accountability. The administrative or departmental procedures of internal review and appeal are non-judicial mechanisms, which may also give effect to the right to lawful administrative action, albeit in a less public fashion. The so-called "Chapter 9" tribunals, like the Public Protector, may also be approached with a complaint on the unlawful actions of public officials. In fact, judicial review may only be used as a last resort. In terms of the PAJA, any internal remedy provided for in a piece of enabling legislation must be used before an affected person can approach a court for a judicial review (section 7(2)). For example, in terms of the *Refugees Act,* 130 of 1998, an applicant for asylum whose application was rejected by a Refugee Status Determination Officer may appeal to the Refugees Appeal Board (section 26(1)). The latter is a three-member board appointed by the Minister that can confirm, set aside or substitute any decision taken by a Refugee Status Determination Officer. This means that an aggrieved applicant for asylum must first use the internal appeal mechanism to the Refugees Appeal Board before a court may be approached for judicial review.

CONCLUSION

The article suggested a logical flow and build-up of an understanding of lawfulness. It explained the concept of lawfulness by starting off with those requirements which give effect to the fact that the authority to act must be authorised by law, as a minimum threshold. The article then discussed the requirements related to the delegation of authority and the proper exercise of discretion flowing from such delegation. The article ended with the *catch-all* statement that all administrative action must be constitutionally sound or otherwise lawful to allow for the inclusion of those requirements which may have been inadvertently omitted from the list of requirements in section 6(2) of the PAJA.

The analysis of the meaning and practical functioning of the requirements for lawful administrative action in our public administration provided evidence of frequent judicial intervention. However, such judicial intervention should not be viewed in a negative light since it is a clear sign that the constitutional democracy (and the culture of justification it promises) is functioning properly and that the judicial system is providing the much-needed inputs to refine the understanding of the requirements for lawfulness. The mentioned inputs materialise on a slow case-by-case basis as the courts interpret and apply the provisions of the PAJA and the Constitution. These inputs gradually facilitate an incremental understanding of the requirements for lawfulness as well as the often broad frameworks laid down by the enabling legislation and are therefore crucial ingredients for the development of a lawful system of public administration.

An effective system of judicial review of unlawful administrative action is an essential mechanism of public scrutiny to ensure accountability in public administration. The interventions made into public administration as a result of the practice of judicial review of administrative action in South Africa may sometimes be experienced as a succession of justiciable controversies in public administration. However, this practice has proven that the South African administrative justice system is now empowered by the relevant provisions of

the PAJA and the Constitution and ready to make a meaningful contribution to accountable public administration.

REFERENCES

Acting Chairperson: Judicial Service Commission v Premier of the Western Cape 2011 (3) SA 538 (SCA).

Awumey and Another v Fort Cox Agricultural College and Others 2003 (8) BCLR 861 (Ck).

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others 2004 (4) SA 490 (CC).

Burns, Y. and Beukes, M. 2006. *Administrative law under the 1996 Constitution.* 3rd edition, Durban: LexisNexis.

Currie, I. and Klaaren, J. 2001. *The promotion of administrative justice act benchbook.* Claremont: Siber Ink.

Damane v Premier, Mpumalanga and Another 2002 (2) SA 762 (T).

De Ville, JR. 2005. *Judicial review of administrative action in South Africa*. Revised edition, Durban: LexisNexis Butterworths.

Eskom Holdings Ltd v New Reclamation Group (Pty) Ltd 2009 (4) SA 628 (SCA).

eTV (Pty) Ltd v Judicial Service Commission 2010 (1) SA 537 (GSJ).

Head of Department, Mpumulanga Department of Education v Hoërskool Ermelo 2010 (2) SA 415 (CC).

Hoexter, C. 2009. The transformation of South African administrative law since 1994 with particular reference to the Promotion of Administrative Justice Act 3 of 2000. Unpublished DPhil Thesis, University of the Witwatersrand, June.

Hoexter, C. 2012. *Administrative law in South Africa.* 2nd edition, Claremont: Juta.

Liberty Life Association of Africa Ltd v Kachelhoffer NO and Others 2005 (3) SA 69 (C).

Mathipa v Vista University and Others 2000 (1) SA 396 (T).

Mbanga v MEC for Welfare, Eastern Cape and Another 2002 (1) SA 359 (SE).

Mbonani v Minister of Correctional Services and Others [2011] ZAGPPHC 196 (5 October 2011).

Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province 2008 (2) SA 481(SCA).

*Minister of Education, Western Cape v Governing Body, Mikro Primary Schoo*l 2006 (1) SA 1 (SCA).

Minister of Environmental Affairs and Tourism v Scenematic Fourteen (Pty) Limited 2005 (2) All SA 239 (SCA).

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

Permanent Secretary, Department of Welfare, Eastern Cape and Another v Ngxuza and Others 2001 (4) SA 1184 (SCA).

Plasket,C. 2002. The fundamental right to just administrative action: judicial review of administrative action in the democratic South Africa. Unpublished DPhil Thesis, Rhodes University, June.

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

Rangani v Superintendent-General, Department of Health and Welfare, Northern Province 1999 (4) SA 385 (T).

RHI Joint Venture v Minister of Roads and Public Works, Eastern Cape and Others 2003 (5) BCLR 544 (Ck).

Sex Worker Education and Advocacy Task Force v Minister of Safety and Security 2009 (6) SA 513 (WCC).

South Africa (Republic). *Constitution of the Republic of South Africa*, 1996.

South Africa (Republic). *Correctional Services Act*, 111 of 1998.

South Africa (Republic). *Marine Living Resources Act*, 18 of 1998.

South Africa (Republic). *Promotion of Administrative Justice Act,* 3 of 2000.

South Africa (Republic). *Refugees Act,* 130 of 1998.

South Africa (Republic). *South African Schools Act,* 84 of 1996.

South Africa (Republic). *Vista University Act,* 106 of 1981.

Suid-Afrikaanse Onderwysunie v Departementshoof, Departement van Onderwys, Vrystaat en 'n Ander 2001 (3) SA 100 (O).

Total Computer Services (Pty) Ltd v Municipal Manager, Potchefstroom Local Municipality 2008 (4) SA 346 (T).

Winckler and Others v Minister of Correctional Services and Others 2001 (2) SA 747 (C).