

# **A CRITICAL ANALYSIS OF ADMINISTRATIVE ACTION IN THE SOUTH AFRICAN TAX ENVIRONMENT**

**by**

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## DECLARATION

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I, Joandri Mulder, hereby declare that this dissertation is my own, unaided work. It is being submitted in partial fulfilment of the prerequisites for the degree of Master's in Tax Law at the University of Pretoria. It has not been submitted before for any degree or examination in any other University.

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Joandri Mulder

30 September, 2014

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## LIST OF ACRONYMS OR ABBREVIATIONS

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In this thesis, the following meanings are attached to the following terms and phrases:

<b>“Constitution”</b>	The Constitution of the Republic of South Africa Act 108 of 1996
<b>“Interim Constitution”</b>	Constitution of the Republic of South Africa Act 200 of 1993
<b>“IT Act”</b>	The Income Tax Act 58 of 1962
<b>“PAJA”</b>	The Promotion of Administrative Justice Act 3 of 2000
<b>“SARS”</b>	The South African Revenue Service
<b>“TA Act”</b>	The Tax Administration Act 28 of 2011
<b>“the Commissioner”</b>	The Commissioner for the South African Revenue Service
<b>“the Republic”</b>	The Republic of South Africa
<b>“VAT Act”</b>	The Value-Added Tax Act 89 of 1991

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## ABSTRACT

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Before the enactment of the Constitution, no specific right to judicial review existed. It formed part of the common law. This was changed by the Constitution. Section 33 of the Constitution now confers upon a person the right to administrative action that is lawful, reasonable and procedurally fair. PAJA was promulgated in order to give effect to this fundamental right as required by section 33.

This thesis considers administrative law in general, i.e. the scope of section 33 and PAJA and the working thereof in the tax environment. Insight is furthermore provided on the appropriate forum to be approached by a taxpayer regarding judicial review proceedings in respect of the Commissioner's discretionary decisions.

## CHAPTER 1: INTRODUCTION

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This thesis intends to provide the reader with a clear and concise framework of the application of administrative law in the South African tax environment. Clarity will be provided on when any action undertaken by the Commissioner constitutes administrative action and which forum is the correct forum for the taxpayer to approach when disputing the legality of such actions of the Commissioner and the effect thereof on the taxpayer.

Decisions are taken by the Commissioner on a daily basis with regard to taxpayers' tax affairs; some of which adversely affect the rights of taxpayers. Furthermore, tax and legal practitioners are approached on a regular basis by taxpayers whose rights have been adversely affected. The issues to be addressed in this thesis are current and relevant to the daily responsibilities of a tax professional and for all taxpayers. It is thus of paramount importance that it is clearly understood when certain conduct by the Commissioner constitutes administrative action, and if so, which forum to address when such conduct is disputed; i.e. the High Court or the tax court, in order to settle the matter timeously and cost-effectively.

Section 33 of the Constitution confers upon a person the right to administrative action that is lawful, reasonable and procedurally fair.<sup>1</sup> Anyone whose rights have been adversely affected by administrative action has the right to be given written reasons.<sup>2</sup> In order to promote this fundamental right and to give effect to section 33(3) of the Constitution, PAJA was introduced.

In order for PAJA to apply to decisions taken by the Commissioner, SARS has to qualify as an organ of state.<sup>3</sup> Section 2 of the South African Revenue Service Act<sup>4</sup> establishes SARS as an organ of state within the public administration but as an institution outside the public service. There is, thus, no doubt that SARS is an organ of

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<sup>1</sup> Sec 33(1) of the Constitution.

<sup>2</sup> Sec 33(2) of the Constitution.

<sup>3</sup> See the definition of "administrative action" in sec 1 of PAJA.

<sup>4</sup> Act 34 of 1997.

state and is exercising a public power or performing a public function in terms of legislation. Unfair, unlawful or unreasonable conduct by SARS is *contra* the Constitution and consequently PAJA, and is therefore invalid.

In terms of section 2 of the IT Act, section 3 of the TA Act and section 4 of the VAT Act, the Commissioner is responsible for carrying out the provisions and the administration of the respective Acts. The Commissioner has been entrusted with certain discretionary powers in terms of the abovementioned Acts. In instances where the Commissioner exercises any such discretion, or makes any decision, the Commissioner's actions may be administrative of nature if they comply with the remainder of the requirements of the definition of "administrative action" as set out in section 1 of PAJA.

If that is the case, the Commissioner's actions will constitute administrative action and must comply with the provisions of section 33 of the Constitution and the provisions of PAJA. In the event that the administrative action is in accordance with the listed scenarios in section 6 of PAJA, the effected taxpayer may take such administrative action on review by instituting proceedings in a court or a tribunal which may grant an order that is just and equitable as envisaged in section 8 of PAJA.

Prior to PAJA's enactment, reliance was placed by an aggrieved taxpayer on the case of *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Bpk*<sup>5</sup> in order for a taxpayer to take certain decisions of the Commissioner (which is not specifically made subject to objection and appeal) on appeal (in reality, review) in the tax court.

In the recent unreported VAT case number 789,<sup>6</sup> Bertelsmann J ruled that review proceedings may only be instituted in the High Court and not the tax court, which is in accordance with the provisions of PAJA. This decision, in essence, nullifies the principle of the court's decision in *Kommissaris van Binnelandse Inkomste v*

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<sup>5</sup> 1985 (2) SA 668 (T).

<sup>6</sup> 75 SATC 268.

*Transvaalse Suikerkorporasie Bpk.*<sup>7</sup> It is important for a taxpayer to approach the correct forum when disputing a decision or action of the Commissioner, i.e. the High Court or the tax court, in order to settle the matter timeously and cost-effectively. The question that will be considered is what the effect will be on a taxpayer having various disputes with regard to one tax matter, some of which must be addressed in the tax court on appeal and some of which must be addressed in the High Court on review; i.e. having to approach two different forums.

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<sup>7</sup> 1985 (2) SA 668 (T).

## CHAPTER 2: ADMINISTRATIVE LAW, THE CONSTITUTION AND PAJA

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### 2.1 OVERVIEW

In this chapter, the principles of administrative justice will be considered in general, taking into account section 33 of the Constitution, the provisions of PAJA, and case law.

### 2.2 INTRODUCTION

Before the enactment of the Constitution, no specific right to judicial review existed<sup>8</sup> and judicial review formed part of the common law. The constitutional right to administrative justice has incorporated common law principles in this regard but is, however, not a codification of the common law.<sup>9</sup> Section 33 of the Constitution now confers upon a person the right to administrative action that is lawful, reasonable, and procedurally fair.<sup>10</sup> This fundamental right may only be limited by section 36, the limitation clause of the Constitution.<sup>11</sup> The Constitution now forms the legal basis for judicial review.<sup>12</sup>

Furthermore, anyone whose rights have been adversely affected by administrative action has the right to be given written reasons.<sup>13</sup> Section 33(3) of the Constitution requires legislation to be enacted in order to give effect to the fundamental right set out

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<sup>8</sup> De Ville JR (2005) *Judicial Review of Administrative Action in South Africa*. Durban: LexisNexis Butterworths, p1.

<sup>9</sup> Burns, Y. (2012). *The Law of South Africa (Administrative Law)*. Vol 1, para 94. Available at: [http://0-www.mylexisnexis.co.za/innopac.up.ac.za/nxt/gateway.dll?f=templates\\$fn=index.htm\\$vid=mylnb:10.1048/enu](http://0-www.mylexisnexis.co.za/innopac.up.ac.za/nxt/gateway.dll?f=templates$fn=index.htm$vid=mylnb:10.1048/enu).

<sup>10</sup> Sec 33(1) of the Constitution.

<sup>11</sup> Hoexter, C. (2012). *Administrative Law in South Africa*. 2nd edition. Claremont: Juta & Co p17.

<sup>12</sup> Burns (note 9) at para 94. Available at: [http://0-www.mylexisnexis.co.za/innopac.up.ac.za/nxt/gateway.dll?f=templates\\$fn=index.htm\\$vid=mylnb:10.1048/enu](http://0-www.mylexisnexis.co.za/innopac.up.ac.za/nxt/gateway.dll?f=templates$fn=index.htm$vid=mylnb:10.1048/enu).

<sup>13</sup> Sec 33(2) of the Constitution.

in section 33 of the Constitution. PAJA was enacted in order to fulfil the aforementioned purpose and focuses mainly on judicial review.<sup>14</sup> Under PAJA, any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.<sup>15</sup> Section 6 of PAJA sets out the different grounds for review.<sup>16</sup>

According to Woolman, Roux and Bishop (2007),<sup>17</sup> the interpretation of the Constitution involves a process of determining the meaning of a constitutional right and involves in the first instance determining the meaning of the right; and secondly, whether the conduct is in conflict with that right. Section 39 of the Constitution requires firstly that, when the Bill of Rights is interpreted, the values which underlie an open and democratic society based on human dignity, freedom and equality must be promoted; and secondly, that the objects of the Bill of Rights must be promoted when interpreting or developing any other legislation.<sup>18</sup> As the right to just administrative action<sup>19</sup> forms part of the Bill of Rights, the aforementioned interpretation principles should be borne in mind when interpreting section 33 of the Constitution.

*“Administrative action”, which must be read in conjunction with the definition of “decision”, is defined in section 1 of PAJA as “any decision taken, or any failure to take a decision, by—*

*an organ of state, when—*

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

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<sup>14</sup> De Ville (note 8) at p2-3.

<sup>15</sup> Sec 6(1) of PAJA.

<sup>16</sup> Burns (note 9) at para 94. Available at: [http://0-www.mylexisnexis.co.za/innopac.up.ac.za/nxt/gateway.dll?f=templates\\$fn=index.htm\\$vid=mylnb:10.1048/enu](http://0-www.mylexisnexis.co.za/innopac.up.ac.za/nxt/gateway.dll?f=templates$fn=index.htm$vid=mylnb:10.1048/enu).

<sup>17</sup> Woolman, S., Roux, T. & Bishop, M. (2007) *Constitutional Law of South Africa*. 2nd edition. Cape Town: Juta & Co Ltd., p32-1.

<sup>18</sup> Woolman *et al.* (note 17) at p32-15.

<sup>19</sup> Sec 33 of the Constitution.

*a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,*

*which adversely affects the rights of any person and which has a direct, external legal effect”<sup>20</sup>.*

It is thus clear from the definition of “administrative action” that both an organ of state (public authority) and a private entity’s actions may result in administrative action. Therefore, it can be said that the administrative law regulates the actions of private bodies as well as the actions of organs of state exercising a public power or performing public functions.<sup>21</sup> In this regard it can be said that the term “organ of state” is defined widely to include various entities exercising administrative action.<sup>22</sup>

The action taken by an administrator must constitute “administrative action” in order for section 33 of the Constitution to apply to such action.<sup>23</sup> Furthermore, administrative action does not include the development of policy or the initiation of legislation, and in order to establish whether the actions of an administrator constitute administrative action, certain factors must be taken into account; for example, the nature, source and subject matter of the relevant authority.<sup>24</sup> In *Sebenza Forwarding & Shipping Consultancy (Pty) Ltd v Petroleum Oil & Gas Corporation of SA (Pty) Ltd t/a Petro SA and Another*,<sup>25</sup> a contract was awarded to the applicant which should have been reduced to a written agreement but this never happened. The applicant complained to the Minister of Minerals and Energy Affairs who should have conducted an investigation. The applicant and respondent agreed that the applicant would continue

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<sup>20</sup> Badenhorst, P.J., Mostert, H. & Dendy, M. (2012). *The Law of South Africa (Minerals and Petroleum)*. Vol 18, para 26. Available at: [http://www.mylexisnexis.co.za/nxt/gateway.dll?f=templates\\$fn=default.htm\\$vid=mylnb:10.1048/enu](http://www.mylexisnexis.co.za/nxt/gateway.dll?f=templates$fn=default.htm$vid=mylnb:10.1048/enu).

<sup>21</sup> Hoexter (note 11) at para 1.2(b) at p2.

<sup>22</sup> Burns (note 9) at para 70. Available at: [http://www.mylexisnexis.co.za/innopac.up.ac.za/nxt/gateway.dll?f=templates\\$fn=index.htm\\$vid=mylnb:10.1048/enu](http://www.mylexisnexis.co.za/innopac.up.ac.za/nxt/gateway.dll?f=templates$fn=index.htm$vid=mylnb:10.1048/enu).

<sup>23</sup> Badenhorst *et al.* (note 20) at para, 26. Available at: [http://www.mylexisnexis.co.za/innopac.up.ac.za/nxt/gateway.dll/dc/l6ba/p7ba/9fb6a/vaf6a/8af6a/abf6a?f=templates\\$fn=default.htm\\$vid=mylnb:10.1048/enu](http://www.mylexisnexis.co.za/innopac.up.ac.za/nxt/gateway.dll/dc/l6ba/p7ba/9fb6a/vaf6a/8af6a/abf6a?f=templates$fn=default.htm$vid=mylnb:10.1048/enu).

<sup>24</sup> *Ibid.*

<sup>25</sup> [2006] 3 All SA 478 (C).

to supply to the respondent pending the outcome of the investigation. The Minister subsequently informed the applicant that no inquiry would be lodged.

The court had to decide whether the Minister's actions constituted administrative action or not. The Minister contended that the decision was not administrative action but rather a "political decision". The court held that the Minister's consideration of Petro SA's irregularities was closer to implementation of legislation (i.e. administrative action) than formulation of policy. It was held that by not conducting the investigation, the Minister was exercising a public power, and further, that the applicant's rights were adversely affected by the Minister's decision not to reconsider the decision not to investigate. A case for procedural fairness was made following the lack of allowing the applicant to respond to the defence raised by the respondent during the Minister's preliminary inquiry. The court held that the Minister's decision constituted administrative action as defined in section 1 of PAJA.

In order for conduct by an organ of state to constitute administrative action, the conduct must comply with the aforementioned definition of administrative action. It is, thus, important to mention the various elements of the definition of administrative action in order to understand when certain conduct will constitute administrative action. The elements are the following:

- Decision;
- Organ of state;
- Adversely affecting the rights of any person; and
- Direct, external legal effect.

The following paragraph by Yvonne Burns<sup>26</sup> explains the relevance of section 33 of the Constitution in simple terms:

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<sup>26</sup> Burns (note 9) at para, 70. Available at: [http://0-www.mylexisnexis.co.za/innopac.up.ac.za/nxt/gateway.dll?f=templates\\$fn=index.htm\\$vid=mylnb:10.1048/enu](http://0-www.mylexisnexis.co.za/innopac.up.ac.za/nxt/gateway.dll?f=templates$fn=index.htm$vid=mylnb:10.1048/enu).

*“In short, the principles of the just administrative action clause encompass all those rules, principles and regulations which govern administrative action and with which administrative action must conform. Non-compliance with any of the legal rules and precepts laid down in section 33 lays the administrative action in question open to challenge on the basis of administrative unlawfulness or illegality.”*

The action undertaken must have been exercised by an organ of state in order to constitute administrative action.<sup>27</sup> The Constitution defines an organ of state as “any other functionary or institution exercising a public power or performing a public function in terms of any legislation.”<sup>28</sup> According to Burns,<sup>29</sup> an administrative body is normally created in terms of legislation, as are its powers and functions. Therefore, any administrative action exercised by an organ of state as it is empowered to do, must comply with all the principles relevant to just administrative action.<sup>30</sup>

The South African Revenue Service Act<sup>31</sup> establishes SARS as an organ of state within the public administration but as an institution outside the public service. It is therefore clear that SARS constitutes an organ of state and complies with the requirements of section 239 of the Constitution. As a result, the actions of the Commissioner are subject to the provisions of PAJA.<sup>32</sup>

The action exercised by an organ of state must affect the rights of a person adversely in order to constitute administrative action.<sup>33</sup> Furthermore, the action must have a

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<sup>27</sup> De Ville (note 8) at para 2.1.3 at p41.

<sup>28</sup> Sec 239(a)(ii) of the Constitution.

<sup>29</sup> Burns (note 9) at para 95. Available at: [http://0-www.mylexisnexis.co.za/innopac.up.ac.za/nxt/gateway.dll?f=templates\\$fn=index.htm\\$vid=mylnb:10.1048/enu](http://0-www.mylexisnexis.co.za/innopac.up.ac.za/nxt/gateway.dll?f=templates$fn=index.htm$vid=mylnb:10.1048/enu).

<sup>30</sup> Burns (note 9) at para 76. Available at: [http://0-www.mylexisnexis.co.za/innopac.up.ac.za/nxt/gateway.dll?f=templates\\$fn=index.htm\\$vid=mylnb:10.1048/enu](http://0-www.mylexisnexis.co.za/innopac.up.ac.za/nxt/gateway.dll?f=templates$fn=index.htm$vid=mylnb:10.1048/enu).

<sup>31</sup> Sec 2 of Act 34 of 1997.

<sup>32</sup> Croome, B. (2010) *Taxpayers' rights in South Africa*. Claremont: Juta, p209.

<sup>33</sup> De Ville (note 8) at para 2.1.5 at p51.

direct external legal effect; that is, the action must not only have an internal effect on the department but must affect the rights of people outwardly.<sup>34</sup>

## 2.3 LAWFULNESS – SECTION 6(2) OF PAJA

Section 6(2) of PAJA sets out several grounds for review of an administrator's actions, which will be discussed in more detail. In general, the requirement that administrative action be "lawful" means that the action must be duly authorised by law<sup>35</sup> and applicable to all administrative action.<sup>36</sup> In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*<sup>37</sup> the lawfulness of the increase in the general rate levied on property and rights in property was disputed. The parties to the matter agreed that the resolutions imposing the rate constituted administrative action under section 24 of the Interim Constitution.

The respondents, however, argued that the action was legislative in nature and not administrative. In this judgment it was expressed that the exercise of public power is only legitimate where it is lawful and that the legislature and executive in every sphere may exercise no power and perform no function which is not given to them by law. It was furthermore expressed that the common law principles of *ultra vires* still exist but are supplemented by the constitutional principle of legality, and that in relation to "administrative action", the principle of legality is enshrined in section 24(a) of the Interim Constitution (which is the predecessor of section 33 of the Constitution).

In order for a court or a tribunal to review administrative action, the action must in the first place have been taken in terms of an "empowering provision", which is defined in section 1 of PAJA as "*a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken.*"<sup>38</sup> Furthermore, if the person taking the decision was not authorised to take the decision or acted under a delegation of power which was not authorised in

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<sup>34</sup> De Ville (note 8) at para 2.1.6 at p54.

<sup>35</sup> Hoexter (note 11) at p253.

<sup>36</sup> De Ville (note 8) at p89.

<sup>37</sup> 1999 (1) SA 374 (CC).

<sup>38</sup> Sec 1 and Sec 6(2) of PAJA.

terms of the empowering provision, the action taken is reviewable by a court or a tribunal.<sup>39</sup> Thus, administrative action which is not authorised by law is unlawful and beyond the powers of the administrator,<sup>40</sup> i.e. administrative action must have an authoritative basis.<sup>41</sup> The action will also be reviewable if the action itself contravenes a law or is not authorised by the empowering provision.<sup>42</sup>

In *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another*,<sup>43</sup> the Constitutional Court had to consider the legality of rules that regulate micro-lenders. The applicant contested the validity of these rules. In this judgment it was expressed that the legality principle or doctrine of legality applies to all public power exercised in the Republic and must be “clearly sourced in law”. It was also expressed in *Law Society of South Africa v Minister of Transport*<sup>44</sup> where the court had to consider an application for leave to appeal regarding the constitutionality of certain sections and regulations of the Road Accident Fund Act No. 56 of 1996 that the rule of law requires that public power must be sourced in law and must be exercised within the confines of the formal boundaries of the law.

Thus, the action will be invalid if it is not authorised or supported in some way.<sup>45</sup> An administrator may only do what the administrator is empowered to do, may not act outside such authority, and may only perform a function or exercise power which the law authorises the administrator to do.<sup>46</sup> The public power or function exercised by the authority must be legally authorised.<sup>47</sup> Administrative authority may stem from a variety of sources including the Constitution, legislation, the common law, African customary law etc.<sup>48</sup> A public authority does not have more powers than what is granted to it in

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<sup>39</sup> Sec 6(2)(a) of PAJA.

<sup>40</sup> Hoexter (note 11) at p256.

<sup>41</sup> Burns (note 9) at para 100. Available at: [http://0-www.mylexisnexis.co.za/innopac.up.ac.za/nxt/gateway.dll?f=templates\\$fn=index.htm\\$vid=mylnb:10.1048/enu](http://0-www.mylexisnexis.co.za/innopac.up.ac.za/nxt/gateway.dll?f=templates$fn=index.htm$vid=mylnb:10.1048/enu).

<sup>42</sup> Sec 6(2)(f) of PAJA.

<sup>43</sup> 2007 (1) SA 343 (CC) or Case CCT 51/05.

<sup>44</sup> 2011 (1) SA 400 (CC).

<sup>45</sup> De Ville (note 8) at para 3.1.1 at p89.

<sup>46</sup> De Ville (note 8) at para 3.1.1 at p90.

<sup>47</sup> Hoexter (note 11) at para 1.4 at p29.

<sup>48</sup> De Ville (note 8) at para 3.1.1 at p90. See also Hoexter (note 11) at para 1.4 at p29.

terms of legislation and is usually also established through legislation,<sup>49</sup> for example SARS.

The scope of the administrator's powers must be established with reference to the empowering Act and other legislation, for example the Constitution.<sup>50</sup> The administrator must firstly be authorised to act; and secondly, must act within the boundaries of the powers conferred upon the administrator in terms of the empowering provisions.<sup>51</sup> The empowering provision may limit the administrator's actions in various ways, including geographical limitations, time limitations and specific subject matter.<sup>52</sup> In the event that the administrator acts beyond the powers afforded to the administrator in terms of the empowering provision, the actions of the administrator are *ultra vires*.<sup>53</sup>

If the administrator is not properly appointed or established, or if the administrator acts beyond the authority conferred upon him, her or it, i.e. where the administrator acts beyond the boundaries of the power conferred on him, her or it or where there is no authority to act at all, in exercising the specific action, the administrator will contravene the provisions of PAJA.<sup>54</sup> It follows that the body exercising the administrative action must be properly constituted and act within its powers.

In *Seven-Eleven Corporation SA (Pty) Ltd v Simelane NO and Others*,<sup>55</sup> the court dealt with an application to review and set aside a decision by the Competition Commission to refer a complaint of franchisees. In this case, it was expressed that the wording of the Competition Act No. 89 of 1998 made it clear that the intention of the Legislature was that the Commission must function within the limits of that Act and has no general discretion. Further, that the Commission must, in exercising its powers, have regard to applicable procedural requirements and must exercise its powers strictly in accordance with the Legislation. In terms of the Competition Act No. 89 of 1998, a decision to refer

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<sup>49</sup> De Ville (note 8) at para 3.1.1 at p90.

<sup>50</sup> De Ville (note 8) at para 3.1.2 at p99.

<sup>51</sup> *Ibid.*

<sup>52</sup> Burns (note 9) at para 100. Available at: [http://0-www.mylexisnexis.co.za/innopac.up.ac.za/nxt/gateway.dll?f=templates\\$fn=index.htm\\$vid=mylnb:10.1048/enu](http://0-www.mylexisnexis.co.za/innopac.up.ac.za/nxt/gateway.dll?f=templates$fn=index.htm$vid=mylnb:10.1048/enu).

<sup>53</sup> *Ibid.*

<sup>54</sup> Hoexter (note 11) at p256.

<sup>55</sup> 2002 (1) SA 118 (T).

a complaint must be taken by the Commission. The court held that the decision to refer was not taken by the Commission but rather by a different body and just “rubber-stamped” by the Commission. The body which took the decision was thus not constituted as contemplated in section 19(2) of that Act.

In *Acting Chairperson: Judicial Service Commission and Others v Premier of the Western Cape Province*,<sup>56</sup> the appellant’s appeal was dismissed. The respondent sought an order declaring certain proceedings of the Judicial Service Commission (JSC) invalid. According to section 178 of the Constitution, where a matter regarding a specific High Court is considered, the Premier of that province should form part of the JSC. The respondent was not present at the JSC proceedings. The question that the JSC had to consider in this instance was whether the Judge President of the Western Cape High Court was fit and proper to continue in office as a judge and as Judge President of that court. The matter therefore concerned a specific High Court. The court held that the JSC, properly constituted and by majority, did not fulfil its constitutional mandate.

In *Minister of Correctional Services and Others v Kwakwa and Another*,<sup>57</sup> the court dealt with an appeal regarding the rights of “unsentenced prisoners”. The second appellant determined a new privilege system in terms of section 22 of the Correctional Services Act No. 8 of 1959 which restricted or withdrew rights previously enjoyed by “unsentenced prisoners”. The court held that the exercise of statutory power must be in accordance with the principle of legality and that the appellants had to act within their statutory power and comply with the Constitution. Further, that the second appellant acted beyond the powers conferred on it and “*so fundamentally misconceived his powers the system designed by him cannot be allowed to stand.*”

In the event, however, that the administrator makes a decision in terms of a certain provision, albeit the wrong authorising provision, the administrator’s actions may not necessarily be invalid.<sup>58</sup> In *Latib v The Administrator, Transvaal*,<sup>59</sup> the respondent

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<sup>56</sup> 2011 (3) SA 538 (SCA).

<sup>57</sup> 2002 (4) SA 455 (SCA).

<sup>58</sup> Hoexter (note 11) at p260.

<sup>59</sup> 1969 (3) SA 186 (T).

declared, by Notice, a certain route to be a public main road and throughway. The route would have been called the Pretoria Eastern By-Pass and would have run through the farm Waterkloof, the property occupied by the applicant. The applicant contended that the Notice should have referred to a different section than what it did. The court held firstly, that if it is not a requirement as per legislation that the specific section in terms of which a proclamation is made should be mentioned, then there is no need to mention it; and, secondly, that the power to make the proclamation is granted by the enabling statute and that the notice should not be invalidated by the fact that the proclamation was made under the wrong section.

*Administrateur, Transvaal v Quid Pro Quo Eiendomsmaatskappy (EDMS) Bpk*<sup>60</sup> can be compared to the case of *Latib*. In this case the appellant declared in a Notice that a certain route would be broadened in terms of section 3 of the Road Ordinance 22 of 1957 over certain properties. The respondent's property formed part of these properties. The respondent contended that the Notice was *ultra vires* section 3 because what was in fact to be done was the building of new roads which did not exist previously and not the broadening of the existing road. The court held that section 3 did not allow the appellant to broaden a road in order to make space for the building of additional roads. Further, that the appellant's alternative argument which was that because section 5 provides the necessary authority to do what the appellant intended, the Notice should not be *ultra vires*, should not succeed as the appellant knowingly wanted to exercise the authority to broaden the road as contemplated in section 3, and was, according to the appellant, not necessary to make a declaration in terms of section 5(2)(b) to construct off- and onramps.

It is important that the actions of the administrator do not fall outside the limits of the powers entrusted upon the administrator as this would render the action subject to review.<sup>61</sup> In *Mohamed and Another v President of the Republic of South Africa and Others*,<sup>62</sup> the first applicant (Mohamed) was standing trial on criminal charges in a New York Federal Court. The applicant's contention was that Mohamed's arrest, detention and subsequent handing over to the United States Federal Bureau of Investigation was

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<sup>60</sup> 1977 (4) SA 829 (A).

<sup>61</sup> De Ville (note 8) at para 3.1.2 at p100.

<sup>62</sup> 2001 (3) SA 893 (CC).

in breach of the Aliens Control Act No. 96 of 1991. The court declared that the conduct was unlawful because at the time of Mohamed's removal from the Republic, no authority to deport Mohamed to the United States existed. It was expressed that the State's power to deport and the destination to which to deport could only be found within the confines of the Act and regulations thereunder. The power to deport with regard to destination is limited to what is listed in the regulations.

The extent of the administrator's powers also depends on whether there are discretionary or non-discretionary powers which are conferred upon the administrator.<sup>63</sup> An administrator may also be granted implied powers; in other words, the powers that are necessary in order to give effect to the powers granted to the administrator or are incidental thereto.<sup>64</sup>

Under PAJA, the administrator must be authorised to make the decision;<sup>65</sup> i.e., as a general rule, the specific administrator to whom the authority was granted must be the person who exercises the powers.<sup>66</sup> It is possible for the administrator to delegate such authority to another body or person in order to exercise the powers.<sup>67</sup> The administrator may, however, not do so unless authorised to do so.<sup>68</sup> Thus, in order for an administrator to delegate any powers, the administrator must, either expressly or by necessary implication, be authorised to do so in terms of the empowering provision.<sup>69</sup> The aforementioned is supported by section 6(2)(a)(ii) of PAJA which determines that the action of an administrator is reviewable if the delegation of power was not authorised by the empowering provision.<sup>70</sup> If the action of the administrator is

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<sup>63</sup> De Ville (note 8) at para 3.1.2 at p103.

<sup>64</sup> De Ville (note 8) at para 3.1.2 at p108.

<sup>65</sup> Sec 6(2)(a)(i) of PAJA.

<sup>66</sup> De Ville (note 8) at para 3.1.4 at p136.

<sup>67</sup> De Ville (note 8) at para 3.1.4 at p139.

<sup>68</sup> Burns (note 9) at para 101. Available at: [http://0-www.mylexisnexis.co.za.innopac.up.ac.za/nxt/gateway.dll?f=templates\\$fn=index.htm\\$d=mylnb:10.1048/enu](http://0-www.mylexisnexis.co.za.innopac.up.ac.za/nxt/gateway.dll?f=templates$fn=index.htm$d=mylnb:10.1048/enu).

<sup>69</sup> De Ville (note 8) at para 3.1.4 at p139.

<sup>70</sup> Sec 6(2)(a)(ii) of PAJA.

dependent on compliance with certain conditions or procedures which were not fulfilled, the action may also be reviewable.<sup>71</sup>

PAJA provides that action which may be reviewable includes the failure by an administrator to take a decision.<sup>72</sup> In the event that an empowering provision provides in some way that an administrator is obliged to make a decision in certain circumstances and the administrator fails to do so, the administrator's actions may be unlawful and subject to review. The administrator doesn't have a choice in such instances to act or not to act.<sup>73</sup> In *Mahambehlala v MEC for Welfare, Eastern Cape, and Another*,<sup>74</sup> the applicant applied for a social grant under the Social Assistance Act No. 59 of 1992. The applicant's application complied with all the necessary requirements but was unreasonably delayed. The court had to consider whether this unreasonable delay in approving the grant caused an infringement of the applicant's right to just administrative action. The court held that,

*"... the second respondent's failure to approve the applicant's application for a social grant ... resulted in an unlawful and unreasonable infringement of the applicant's fundamental right to just administrative action as set out in section 33(1) of the Constitution."*

In order for an administrator to be consistent in its decision making, the administrator may consider establishing certain policies, and issue guidelines and/or standards.<sup>75</sup> The aforementioned would aim to guide the administrator to exercise the administrator's discretion and to effect equal treatment.<sup>76</sup> In general, where a duty is imposed on a public authority to do something, estoppel would not be allowed to operate.<sup>77</sup> This would amount to the public authority obtaining more powers than what

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<sup>71</sup> Sec 6(2)(b) of PAJA.

<sup>72</sup> Sec 6(2)(g) of PAJA.

<sup>73</sup> Hoexter (note 11) at p313.

<sup>74</sup> 2002 (1) SA 342 (SE).

<sup>75</sup> De Ville (note 8) at para 3.1.3 at p112.

<sup>76</sup> *Ibid.*

<sup>77</sup> De Ville (note 8) at para 3.1.3 at p121.

is conferred upon it in terms of law.<sup>78</sup> However, recent case law shows that there are certain circumstances in which estoppel may be raised against a public authority.<sup>79</sup>

Furthermore, PAJA requires the purpose or motive for the administrator's actions to be lawful.<sup>80</sup> Thus, the empowering provision must provide, either expressly or impliedly, for the purpose of the administrator's actions.<sup>81</sup> If not, and ulterior purpose or ulterior motive is present,<sup>82</sup> the action will be unlawful and reviewable.<sup>83</sup> In *Sex Worker Education and Advocacy Task Force v Minister of Safety and Security and Others*,<sup>84</sup> the applicant applied for relief preventing the unlawful and wrongful arrest of sex workers by police officers. The applicant contended that, as the police knew that prosecution will, with a high probability, not follow arrest, the sex workers were arrested for an ulterior purpose, being to harass, punish or to intimidate. The court held that these arrests were unlawful.

If the administrator taking the action acted in bad faith, i.e. acted corruptly or with a dishonest intention, the administrator's actions will be reviewable.<sup>85</sup> According to Hoexter (2012),<sup>86</sup> this section of PAJA covers instances where an administrator acted dishonestly. It is important to note that this ground of review does not require internal remedies to be exhausted before a court is approached for review.<sup>87</sup> Generally conduct would qualify as acting in bad faith, or with *mala fides*, where the administrator acted fraudulently, dishonestly, with spite or for personal benefit etc.<sup>88</sup>

Ulterior purpose/motive should be distinguished from *mala fides* or acting in bad faith.<sup>89</sup> If the administrator acted not knowing that the purpose or motive for his, her or its

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<sup>78</sup> De Ville (note 8) at para 3.1.3 at p121.

<sup>79</sup> De Ville (note 8) at para 3.1.3 at p122.

<sup>80</sup> Sec 6(2)(e)(ii) of PAJA.

<sup>81</sup> De Ville (note 8) at para 3.3 at p172.

<sup>82</sup> Hoexter (note 11) at p308.

<sup>83</sup> De Ville (note 8) at para 3.3 at p172.

<sup>84</sup> 2009 (6) SA 513 (WCC).

<sup>85</sup> Sec 6(2)(e)(v) of PAJA.

<sup>86</sup> Hoexter (note 11) at p310.

<sup>87</sup> De Ville (note 8) at para 3.4 at p176.

<sup>88</sup> De Ville (note 8) at para 3.4 at p175.

<sup>89</sup> De Ville (note 8) at para 3.3 at p173.

actions is not supported by law, the administrator's actions would not be *mala fide* but would the administrator rather have acted with an ulterior purpose or motive.<sup>90</sup>

In *Waks en Andere v Jacobs en 'n Ander*,<sup>91</sup> the applicants applied for relief declaring a decision taken by the Carletonville Municipality invalid. The decision entailed that certain parks in white residential areas would have only been for the exclusive use of whites. The court had to decide if that decision by the municipality was *mala fide* as it wasn't taken in the interest of, or for the benefit of, the residents of Carletonville but rather to promote a political philosophy, and held that the decision was invalid and void. The court held that the taking of the decision was influenced by inappropriate factors, was unreasonable, and the municipality did not act *bona fide*.

The decision of an administrator must be taken for a reason that is authorised by the empowering provision.<sup>92</sup> If the reason for the decision is not so authorised, the action will be reviewable.<sup>93</sup> However, if the same result would still have been achieved if the reason for the action is done away with, the action would not necessarily be invalid just because the reason for the action is not authorised by the empowering provision.<sup>94</sup>

Section 6(2)(e)(iii) of PAJA specifies that the administrator must, when taking the decision, take all the relevant factors into account and not any irrelevant factors.<sup>95</sup> This was true for the common law and is also applicable under the Constitution and PAJA. To determine whether the facts, circumstances or considerations are relevant or irrelevant is a question of interpretation of the relevant statutory provisions.<sup>96</sup>

In *Patel v Witbank Town Council*,<sup>97</sup> the applicant applied for a general dealer's certificate in respect of a certain property. There were some objections against the application which was subsequently rejected on the basis, *inter alia*, that the premises'

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<sup>90</sup> De Ville (note 8) at para 3.3 at p174.

<sup>91</sup> 1990 (1) SA 913 (T).

<sup>92</sup> Sec 6(2)(e)(i) of PAJA.

<sup>93</sup> De Ville (note 8) at para 3.5 at p176.

<sup>94</sup> De Ville (note 8) at para 3.5 at p177.

<sup>95</sup> Sec 6(2)(e)(iii) of PAJA.

<sup>96</sup> De Ville (note 8) at para 3.6 at p183.

<sup>97</sup> 1931 TPD 284.

locality was not such that it was desirable for such a business to be carried on there. The court held that the decision of the council to reject the application must be set aside as the council allowed “*a consideration which ought not to have weighed with it*” to influence its decision.

In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*<sup>98</sup> the applicant contended that the respondent did not apply its mind to the quantum of the quotas issued and did not take relevant considerations into account. The court held that this ground of appeal should fail as the respondent did not simply repeat the previous year’s allocation but had to consider each application individually. Some of the existing quota holders were even unsuccessful. The court held that no irrelevant factors had been taken into account and no relevant factors left out.

In the event that an administrator fails to take a decision within the prescribed time period or within a reasonable time period where no specific time period is prescribed and there is a duty on the administrator to take a decision, the administrator’s omission to act would be reviewable by a court.<sup>99</sup>

Under the common law, vagueness or uncertainty constitutes a ground for review of an administrator’s actions.<sup>100</sup> This was, however, not specifically included in the Constitution and/or PAJA.<sup>101</sup> Although not specifically provided for, it may be read in under the grounds for review “action which is otherwise unconstitutional or unlawful.”<sup>102</sup> Furthermore, failure by the administrator to apply his/her mind to the matter when taking the decision may also be read to be included under section 6(2)(i) as a ground for review.<sup>103</sup>

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<sup>98</sup> 2004 (4) SA 490 (CC). The facts of this case are set out in paragraph 2.4 of this chapter.

<sup>99</sup> Sec 6(2)(g) of PAJA and De Ville (note 8) at para 3.7 at p184.

<sup>100</sup> De Ville (note 8) at para 3.8 at p186.

<sup>101</sup> *Ibid.*

<sup>102</sup> Sec 6(2)(i) of PAJA and De Ville (note 8) at para 3.8 at p188.

<sup>103</sup> De Ville (note 8) at para 3.8 at p190.

If administrative action which is applied retrospectively is not authorised by law, it may be seen as unlawful or otherwise unconstitutional, as contemplated in section 6(2)(i) and reviewable.<sup>104</sup>

## 2.4 REASONABLENESS

The Constitution prescribes that administrative action must be reasonable.<sup>105</sup> The term “reasonable” is defined *inter alia* as sensible, logical and fair<sup>106</sup> and as having sound judgment.<sup>107</sup> Thus, having regard to the general dictionary meaning of “reasonable”, the administrator’s actions should be fair, logical and make sense. Furthermore, the administrator should exercise sound judgement when making the decision.

According to De Ville, the context will determine the standard of reasonableness, and in order to achieve this, factors, for example the circumstances of the matter, the nature of the power and the relevant statutory provision, will be taken into account.<sup>108</sup> In *Permanent Secretary, Department of Education and Welfare, Eastern Cape, and Another v Ed-U-College (PE) (Section 21) Inc.*<sup>109</sup> the appellant had reduced certain subsidies that were payable to the respondent. The respondent claimed that the reduction in the subsidies payable was unlawful and demanded payment of the subsidies at the rate that was applicable before the reduction. The court held that the exercise of the power to allocate subsidies constituted administrative action. It was stated by the court that the nature of the power exercised (amongst others) must be taken into account in order to determine procedural fairness and reasonableness.

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<sup>104</sup> De Ville (note 8) at para 3.8 at p192.

<sup>105</sup> Sec 33(1) of the Constitution.

<sup>106</sup> Hawkins, J.M. (1996) *The South African Oxford School Dictionary*. Cape Town: Oxford University Press p364.

<sup>107</sup> Oxford Dictionaries Online. Available at:  
<http://oxforddictionaries.com/definition/english/reasonable?q=reasonable>.

<sup>108</sup> De Ville (note 8) at para 4.6 at p212.

<sup>109</sup> 2001 (2) SA 1 (CC).

The test for reasonableness involves a rational connection between the legislation and the purpose of the legislation and is value-orientated.<sup>110</sup> Burns<sup>111</sup> states that:

*“the element of reasonableness is closely related to that of proportionality, which requires a reasonable relation between an administrative decision, its objectives and the facts and circumstances of the particular case.”*

The Administrator’s decision will be arbitrary if there is no justifiable reason for the decision taken and the decision has been made without considering the merits of the matter and constitutes a ground for review in terms of section 6(2)(e)(vi) of PAJA.<sup>112</sup> Furthermore, the action of an administrator would be reviewable if it is not rational in relation to the purpose for which it was taken, the purpose of the empowering provision, the information before the administrator, or the reasons given by the administrator for the decision.<sup>113</sup> According to De Ville,<sup>114</sup> an administrative decision which affects the fundamental rights of a person is reviewable under the ground of disproportionality which is incorporated under the ground of review “action otherwise unconstitutional or unlawful”. Lastly, under PAJA,<sup>115</sup> if the powers exercised by the administrator were done in such a way that no reasonable person could have exercised the powers in such a way, the action would be rendered reviewable.

In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*,<sup>116</sup> the court had to consider an application regarding fishing quotas. The applicant was dissatisfied with the allocation process of the fishing quotas for the 2002 – 2005 fishing season. For purposes of allocating quotas for hake, the industry is divided according to the various methods used to catch hake. The fishing industry also identified the need to restructure the industry due to the historical imbalances and to achieve equity within all branches of the fishing industry which is not a short-term objective.

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<sup>110</sup> De Ville (note 8) at para 4.6 at p213.

<sup>111</sup> Burns (note 9) at para 97. Available at: [http://0-www.mylexisnexis.co.za/innopac.up.ac.za/nxt/gateway.dll?f=templates\\$fn=index.htm\\$d=mylnb:10.1048/enu](http://0-www.mylexisnexis.co.za/innopac.up.ac.za/nxt/gateway.dll?f=templates$fn=index.htm$d=mylnb:10.1048/enu).

<sup>112</sup> De Ville (note 8) at para 4.2 at p198.

<sup>113</sup> Sec 6(2)(f)(ii) of PAJA and De Ville (note 8) at para 4.3 at p201.

<sup>114</sup> Sec 6(2)(i) of PAJA and De Ville (note 8) at para 4.4 at p209.

<sup>115</sup> Sec 6(2)(h) of PAJA.

<sup>116</sup> 2004 (4) SA 490 (CC).

The applicant contended that the decision of the Chief Director not to allocate the requested quota fell within section 6(2)(h) of PAJA. The court stated that:<sup>117</sup>

*“Section 6(2)(h) should then be understood to require a simple test, namely that an administrative decision will be reviewable if, in Lord Cooke’s words, it is one that a reasonable decision-maker could not reach. What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case.”*

The court held that the Chief Director took the need for restructuring and the identified considerations into account throughout the process. The question to ask is whether a reasonable equilibrium was reached, based on the facts, and taking into account the objectives of the relevant Act.

## 2.5 PROCEDURAL FAIRNESS

Action which amounts to “administrative action” as defined, must comply with the requirements of procedural fairness.<sup>118</sup> Procedural fairness entails ensuring that the person whose rights have been affected by the administrative action be afforded a proper hearing.<sup>119</sup> Furthermore, only in instances where a decision has been taken can a person make use of the right to procedural fairness.

PAJA<sup>120</sup> determines that administrative action should be procedurally fair where it affects the rights or legitimate expectations of a person negatively and that regard must

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<sup>117</sup> Note 116 at para [44-45].

<sup>118</sup> De Ville (note 8) at para 5.1 at p220.

<sup>119</sup> Burns (note 9) at para 96. Available at: [http://0-www.mylexisnexis.co.za/innopac.up.ac.za/nxt/gateway.dll?f=templates\\$fn=index.htm\\$vid=mylnb:10.1048/enu](http://0-www.mylexisnexis.co.za/innopac.up.ac.za/nxt/gateway.dll?f=templates$fn=index.htm$vid=mylnb:10.1048/enu).

<sup>120</sup> Sec 3(1) and (2) of PAJA.

be had to the circumstances of each case in order to determine whether the action was procedurally fair. Furthermore,<sup>121</sup> the person so affected should, *inter alia*, be–

- Given adequate notice of the nature and purpose of the administrative action to be taken;
- Informed of his/her right to request reasons for the administrative action taken;
- Afforded the opportunity to make representations; and
- Given a clear statement of the action taken.

### 2.5.1 Common law

The rules of natural justice applied under the common law. This entailed a two-legged test, i.e. the decision must comply with the following rules<sup>122</sup> –

- *Audi alteram partem (the audi-rule); and*
- *Nemo iudex in sua causa.*

At first, only in instances where a person's existing rights, freedom or property could be affected by a decision authorised by legislation, did the *audi-rule* apply.<sup>123</sup> This approach, however, changed to a more extensive one supporting that the *audi-rule* also applied where a person affected by a decision has a legitimate expectation.<sup>124</sup>

### 2.5.2 The Constitution

Procedural fairness replaced the requirements of natural justice.<sup>125</sup> Under the Constitutional era, any administrative action must comply with the requirements of

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<sup>121</sup> Sec 3(2) of PAJA.

<sup>122</sup> De Ville (note 8) at p218.

<sup>123</sup> De Ville (note 8) at para 5.1 at p219.

<sup>124</sup> De Ville (note 8) at para 5.1 at p220.

<sup>125</sup> *Ibid.*

procedural fairness, which is given a wider interpretation than what natural justice has been given under the common law.<sup>126</sup>

### 2.5.3 PAJA

It is said that an anomaly might exist between the definition of “administrative action” in section 1 of PAJA and the requirements for procedural fairness as per section 3 of PAJA.<sup>127</sup> The reason for this is that the definition of “administrative action” requires a person’s rights to be affected negatively, whereas section 3 requires a decision which impacts negatively on a person’s rights or legitimate expectations to be procedurally fair.<sup>128</sup> An amendment to either of the mentioned sections has been suggested by some writers.<sup>129</sup>

It is, furthermore, suggested that the phrase “materially and adversely affects” should be read to mean both deprivation and determination.<sup>130</sup> The requirements of procedural fairness also apply where the case is one of application, i.e. where a person’s rights still has to be determined.<sup>131</sup> According to De Ville,<sup>132</sup> “*there is no natural limit to what can be understood as falling within the concept of ‘rights’ in section 3(1) of PAJA*”. The rights envisaged in section 3(1) of PAJA to enjoy the protection of the requirements of procedural fairness include the fundamental rights protected by the Constitution.<sup>133</sup>

In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*<sup>134</sup> the applicant contended that the respondent’s action was not procedurally fair as the process to allocate the quotas has changed after publication of the guidelines and without notifying the applicant. There had been a shift in allocation of a small portion of

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<sup>126</sup> De Ville (note 8) at para 5.1 at p220.

<sup>127</sup> Sec 1 and Sec 3 of PAJA; De Ville (note 8) at para 5.1 at p222.

<sup>128</sup> *Ibid.*

<sup>129</sup> De Ville (note 8) at para 5.1 at p222.

<sup>130</sup> De Ville (note 8) at para 5.1 at p224.

<sup>131</sup> De Ville (note 8) at para 5.1 at p225.

<sup>132</sup> De Ville (note 8) at para 5.1 at p227.

<sup>133</sup> De Ville (note 8) at para 5.1 at p224.

<sup>134</sup> 2004 (4) SA 490 (CC). The facts of this case are set out in paragraph 2.4 of this chapter.

the quota due to the object of transformation which could not happen overnight. The court held that this change was not a change in policy that the applicant should have been notified of. Under the common law, it was decided that a “legitimate expectation” falls under the application of the *audi* rule and that a legitimate expectation should have a reasonable basis.<sup>135</sup>

In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*<sup>136</sup> (the SARFU case) it was further indicated that whether a legitimate expectation is subject to the requirements of procedural fairness, is a question of fact. In *Minister of Justice, Transkei v Gem*<sup>137</sup> it was said that for the doctrine of legitimate expectation to apply, a promise or an existing practise is not always required. The court held that the respondent had expected that his application would either be accepted or rejected and that the doctrine is applicable. The respondent should have been given an opportunity to be heard before the decision was taken.

In terms of PAJA, the administrator may follow a specific procedure in exercising its administrative power if such other procedure is prescribed in terms of another statutory provision.<sup>138</sup> Furthermore, PAJA determines that an administrator must act without any bias when taking any administrative decision.<sup>139</sup>

## 2.6 REASONS

Section 5 of PAJA determines that a person whose rights have been materially and adversely affected by any administrative action has the right to request written reasons from the relevant administrator.<sup>140</sup> The person so affected is required to request such reasons within 90 days from the date that that person became aware of the decision or

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<sup>135</sup> *Administrator, Transvaal and Others v Traub and Others* 1989 (4) SA 731; De Ville (note 8) at para 5.1 at p229.

<sup>136</sup> 2000 (1) SA 1 (CC).

<sup>137</sup> 1994 (3) SA 28 (TCA).

<sup>138</sup> Sec 3(5) of PAJA.

<sup>139</sup> Sec 6(2)(a)(iii) of PAJA.

<sup>140</sup> Sec 5(1) of PAJA.

should have reasonably become aware of the decision.<sup>141</sup> Furthermore, the request must be in writing and addressed to the applicable administrator.<sup>142</sup> The administrator also has 90 days from the date that the request for reasons has been received by the administrator to provide sufficient reasons to the applicant.<sup>143</sup> The circumstances of each case will determine whether the reasons submitted by the administrator are sufficient and/or adequate or not.<sup>144</sup>

In certain instances, reasons will be automatically provided by the administrator.<sup>145</sup> The right to be given reasons and what would constitute adequate reasons, are discussed in more detail in paragraph 2.3 of Chapter 3.

## 2.7 REMEDIES

A more detailed discussion of the remedies that a court or tribunal hearing an administrative matter may award is contained in paragraph 3.7 of Chapter 3.

In *Jayiya v MEC for Welfare, Eastern Cape Provincial Government and Another*,<sup>146</sup> the appellant applied for a permanent disability grant. No response was received from the welfare department and the appellant approached the court. An order was made in favour of the appellant which the Department did not comply with. One of the questions the court had to decide was whether the appellant was entitled to constitutional damages or not. The court found that the appellant should have relied on PAJA for a remedy in respect of the non-compliance by the Department.

In the SARFU case,<sup>147</sup> the court had to consider the basis on which presidential powers may be reviewed, flowing from two presidential notices published in the *Government Gazette* of 26 September 1997. These two notices dealt with the appointment of a

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<sup>141</sup> Sec 5(1) of PAJA.

<sup>142</sup> De Ville (note 8) at para 6.2 at p292.

<sup>143</sup> Sec 5(2) of PAJA.

<sup>144</sup> De Ville (note 8) at para 6.2 at p293.

<sup>145</sup> Sec (5)(6)(a) of PAJA.

<sup>146</sup> [2003] 2 All SA 223 (SCA).

<sup>147</sup> 2000 (1) SA 1 (CC).

commission of inquiry into the administration of rugby in the country and with the declaration of the provisions of the Commissions Act 8 of 1947 to be applicable to the commission and the promulgation of regulations for the commission's operation. An application was brought to the Transvaal High Court in order to set aside the aforementioned two notices by the South African Football Union (SARFU), two of its unions, and Dr Luyt (the president of SARFU and one of the unions). The High Court set the two notices aside, which decision was appealed against by the respondents. The Constitutional Court found that the judgment of the court *a quo* was wrong and that the orders should be set aside.

SARFU is the national body which is responsible for the management and administration of rugby in the Republic. Controversy relating to the administration and management of rugby in the Republic erupted. This related, *inter alia*, to allegations that SARFU was doing too little to develop rugby players from disadvantaged communities and did not enhance the development of the sporting facilities in the rural areas and townships. This led to the Minister appointing a task team to investigate the administration of rugby in the Republic.

Initially, SARFU was co-operating with the task team but decided to withdraw its co-operation during the course of the investigation by the task team. The Minister then indicated that he would approach the President in order to appoint a commission of inquiry which he indeed did. On 22 September 1997, the President formally appointed the commission. The appointment of the commission by the President was followed by a request from SARFU and the Gauteng Lions Rugby Union for both reasons from the President for his decision and all the information and/or documentation that led to the President's decision which were provided by the President as requested.

The founding affidavit annexed to the applicants' application set out the several causes of action which included *inter alia* the following:

“(4) *Audi alteram partem*

*In terms of s 33 of the Constitution, SARFU, and its constituent unions, were entitled to procedural fairness and accordingly to make representations to the President before he appointed the commission; alternatively the respondents had a legitimate expectation that they would be afforded such a hearing arising from the agreement of 21 February 1997.*

(5) *Failure to properly consider the matter*

*The President's decision to appoint the commission was so unreasonable as to be consistent only with a failure on his part properly to apply his mind to the matter. In support of this a number of circumstances were alleged, including bad faith on the part of the Minister, whose decision to appoint the commission the President had simply rubber-stamped ... without himself properly applying his mind ... In this context the affidavit refers back to an earlier mention of press reports of the press statement of 7 August 1997 to the effect that the President had at that stage indicated to the Minister that a commission was his for the asking.*

(6) *Administrative action not justified by reasons*

*The written reasons provided by the President do not justify the appointment and accordingly fail to comply with s 33(1)(d) of the Constitution.*<sup>148</sup>

The High Court found that the President exercised his powers to appoint a commission invalidly because<sup>149</sup> –

- Firstly, the President had abdicated his responsibility irrevocably in favour of the Minister.
- Secondly, the President had failed to afford the respondents an opportunity to be heard before the exercise of his powers.

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<sup>148</sup> Note 147 at para [13] p17.

<sup>149</sup> Note 147 at para [24] p17.

- Thirdly, that the President had failed to properly apply his mind to matter.

This whole judgment of the High Court was appealed against by the appellants to the Constitutional Court. The appellants argued that all three grounds on which the exercising of the President's powers were found to be invalid was flawed. The appellants argued that the order made by the High Court should be set aside and that under the circumstances the President exercised his powers properly. The respondents in turn argued three more grounds on which the President's exercise of his powers were invalid being; firstly, that the President should have consulted the Deputy President before making the decision which the President failed to do; secondly, that the issues in question weren't of a public concern and therefore the appointment of the commission was invalid; and lastly, that the terms of reference of the commission were vague so that the appointment of the commission was invalid.<sup>150</sup> The Constitutional Court upheld the appeal.

What is of relevance here is the question of whether the decisions by the President firstly to appoint a commission of inquiry and secondly to confer the powers as contemplated in the Commissions Act No. 8 of 1947 on the commission constitute administrative action as contemplated in section 33 of the Constitution. The court had to decide on the question as to whether the respondents were entitled to a hearing before the President exercised his decision. The court held that the function being performed must be considered in order to conclude whether certain action constitutes administrative action. The court found that the actions of the President to appoint the commission did not constitute administrative action and that the requirements of section 33 of the Constitution were not applicable to the appointment of the commission.

The court indicated that section 33 did not just codify the common law principles of administrative review but is now a constitutional overview of the exercise of power.<sup>151</sup> The court held that the question which must be determined is whether the task in itself

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<sup>150</sup> Note 147 at para [30] p19.

<sup>151</sup> Note 147 at para [135] p46.

is of an administrative nature or not, and that the focus must be on the power which is being exercised.<sup>152</sup>

The court found that the power to appoint a commission of inquiry is a discretionary power conferred upon the President in terms of section 84(2) of the Constitution and that by instituting the commission of inquiry into rugby, the President was not implementing legislation by exercising a constitutional power vested in him.<sup>153</sup> The court held that the exercise of the aforementioned power by the President did not constitute administrative action as contemplated in section 33 of the Constitution as both the exercise of the power and the subject matter of the power lacked administrative character.<sup>154</sup> The court further found that the proclamation making the Commissions Act applicable to the commission of inquiry affected the respondents' interests and that section 33(1) required the vesting of the powers under the Commissions Act in the commission of inquiry to be lawful.<sup>155</sup>

In the SARFU case, the respondents argued that they were entitled to a hearing before the President exercised his power as the exercise of his power affected the respondents' rights.<sup>156</sup> The court, however, held that although the respondents may be requested to present certain documents to the commission, which may limit their right to privacy, the limitation would not be an improper infringement of the respondents' rights as the commission was investigating a matter of public concern and their questioning would be in line with their investigation.<sup>157</sup>

The court found further that no legitimate expectation existed for the respondents that a hearing would be granted to them by the President before making his decision. A legitimate expectation could not arise from a regular practice by the President, nor did the agreement between the appellants and the respondents constitute an express

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<sup>152</sup> Note 147 at para [141] p48.  
<sup>153</sup> Note 147 at paras [146-147] p50.  
<sup>154</sup> Note 147 at para [147] p50.  
<sup>155</sup> Note 147 at para [168] p54.  
<sup>156</sup> Note 147 at para [184] p57.  
<sup>157</sup> Note 147 at para [186] p54.

promise to afford the respondents a hearing.<sup>158</sup> Lastly, it was held that the reasons provided by the President for his decision were sufficient to justify his decision.<sup>159</sup>

## 2.8 CONCLUSION

From the above, it is clear that an administrator's decisions must comply with the requirements of just administrative action. The administrator's actions must be lawful, reasonable and procedurally fair. Any person, whose rights have been affected materially by such a decision, has the right to request reasons and is entitled to an appropriate remedy.

In the next chapter, the principles of administrative justice will be considered in a more narrow sense; i.e. in the tax arena.

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<sup>158</sup> Note 147 at para [212 and 216] p66-67.

<sup>159</sup> Note 147 at para [222] p69.

## CHAPTER 3: THE APPLICATION OF ADMINISTRATIVE LAW IN THE TAX ENVIRONMENT

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### 3.1 BACKGROUND

Before the enactment of the Interim Constitution a taxpayer had no specific right to just administrative action.<sup>160</sup> Taxpayers' rights were impaired; e.g. the validity of tax legislation could not be challenged and the taxpayer had to rely on the restrictive common law principles of legality and natural justice and the Commissioner was seldom challenged on any of its decisions.<sup>161</sup>

Since the introduction of just administrative action as part of the Bill of Rights<sup>162</sup> in the Constitution,<sup>163</sup> a taxpayer also enjoys the protection of this fundamental right and an aggrieved taxpayer may challenge the constitutionality of tax legislation and the Commissioner's conduct.<sup>164</sup>

### 3.2 APPLICABILITY OF SECTION 33 AND PAJA TO THE COMMISSIONER

The question that arises here is whether decisions taken by the Commissioner may be challenged by taxpayers on the basis that the respective decision infringes the taxpayer's constitutional right to just administrative action.<sup>165</sup>

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<sup>160</sup> Croome, B. & Olivier, L (2010). *Tax Administration*. Claremont: Juta & Co Ltd., p21.  
<sup>161</sup> Croome, B. (note 32) at p203; Klue, S, Arendse, J.A. & Williams, R.C. (2012). *Silke on Tax Administration*. Preface. Available at:  
[http://www.mylexisnexis.co.za/nxt/gateway.dll?f=templates\\$fn=default.htm\\$vid=myInb:10.1048/enu](http://www.mylexisnexis.co.za/nxt/gateway.dll?f=templates$fn=default.htm$vid=myInb:10.1048/enu).  
<sup>162</sup> Chapter 2 of the Constitution.  
<sup>163</sup> Sec 33 of the Constitution.  
<sup>164</sup> Klue *et al.*, (note 161).  
<sup>165</sup> Croome, B. & Olivier, L. (note 160) at p23.

### 3.3 SARS AS AN ORGAN OF STATE

From the information contained in Chapter 2, it is clear that for section 33 of the Constitution and the provisions of PAJA to apply to the Commissioner, there are certain requirements that must be met. Administrative action is defined as any decision taken, or failure to take a decision, by an organ of state which affects a person's rights adversely and has a direct external legal effect.<sup>166</sup> Therefore, in order for PAJA to apply to the Commissioner, SARS must firstly be regarded as an organ of state.

Section 239 of the Constitution defines an organ of state as, *inter alia*, any department of state or administration in the national, provincial or local sphere of government. As discussed in the Introduction, section 2 of the South African Revenue Service Act<sup>167</sup> establishes SARS as an organ of state within the public administration but as an institution outside the public service.<sup>168</sup> There is, thus, no doubt that SARS is an organ of state and is exercising a public power or performing a public function in terms of legislation. No administrator has been excluded from the application of the provisions of PAJA as is made provision for in section 2 of PAJA and SARS is consequently not specifically excluded from being an administrator.<sup>169</sup> The Commissioner, therefore, constitutes an organ of state, as contemplated in section 1 of PAJA, and its decisions regulated by the provisions of PAJA.<sup>170</sup>

### 3.4 PROCEDURAL FAIRNESS

PAJA requires the Commissioner's decisions affecting a taxpayer's rights in a material and adverse manner to be fair.<sup>171</sup>

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<sup>166</sup> Sec 1 of PAJA.

<sup>167</sup> Act No. 34 of 1997.

<sup>168</sup> Croome, B. (note 32) at p209.

<sup>169</sup> Croome, B. & Olivier, L. (note 160) at p27.

<sup>170</sup> Croome, B. & Olivier, L. (note 160) at p28.

<sup>171</sup> South African Revenue Service. *Short Guide to the Tax Administration Act, 2011*. Version 2 dated 5 June 2013 at p10.

### 3.4.1 Decision

The meaning of “decision” plays an important role in the arena of administrative action. The reason for this is that it determines whether an administrative action was taken or not;<sup>172</sup> i.e. administrative action is defined as a *decision* taken or the failure to take a *decision* (own emphasis).<sup>173</sup> Therefore, to constitute administrative action, the Commissioner must have taken a decision.<sup>174</sup> A “decision” is defined widely enough to also include the failure to take a decision, which includes the refusal to make a decision.<sup>175</sup> Thus, where the Commissioner is obliged to make a decision but refuses to do so, the Commissioner’s decision may be taken on review by the taxpayer.

Generally the provision empowering the Commissioner to make a decision will prescribe the time period within which the decision must be taken, otherwise consideration would be given to what would constitute a reasonable period for making the decision in that particular instance.<sup>176</sup> The fact that a decision must have been taken by the Commissioner in order to constitute administrative action, means that a taxpayer cannot anticipate the provisions of PAJA or section 33 of the Constitution before such a decision has been taken by the Commissioner.<sup>177</sup>

### 3.4.2 Empowering provision

The Commissioner must exercise its discretion or make a decision in terms of an empowering provision.<sup>178</sup> The fiscal legislation, in terms of which the Commissioner generally exercises its discretion, falls within the ambit of empowering legislation.<sup>179</sup>

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<sup>172</sup> South African Revenue Service. *Short Guide to the Tax Administration Act, 2011*. Version 2 dated 5 June 2013 at p10.

<sup>173</sup> Sec 1 of PAJA.

<sup>174</sup> Definition of “administrative action” in Sec 1 of PAJA.

<sup>175</sup> Croome, B. (note 32) at p210.

<sup>176</sup> Croome, B. & Olivier, L. (note 160) at p29. See also Croome, B. (note 32) at p210.

<sup>177</sup> *Ibid.*

<sup>178</sup> Croome, B. & Olivier, L. (note 160) at p29. See also Croome, B. (note 32) at p210.

<sup>179</sup> Croome, B. & Olivier, L. (note 160) at p29.

Examples of decisions taken by the Commissioner which may fall within the ambit of PAJA include:<sup>180</sup>

- A request for an extension of time to submit a tax return (now in section 25(6) of the TA Act); and
- A request for the postponement of payment of tax pending an appeal or objection (dealt with under section 164 of the TA Act).

The definition of “administrative action” in PAJA requires that the decision taken by the administrator must affect the taxpayer’s rights adversely and also have a direct external legal effect.<sup>181</sup> The decision of the Commissioner must thus be a final decision regarding the taxpayer’s affairs and does not include the intermediate steps required in order to come to the decision.<sup>182</sup>

In *Plasmaview Technologies (Pty) Ltd v The Commissioner for the South African Revenue Service*<sup>183</sup> the respondent made certain determinations with regard to certain imported products. It was argued by the respondent that the second of these was not a determination, that the determination was in fact only contained in the subsequent letter of demand and that an application in terms of PAJA was therefore misplaced. The court, however, could not find any merit in this argument as the respondent itself referred to it as a “determination” and the words “tariff determination” appears as a heading on the document.

It seems that there is a view that regulations issued by the Commissioner under an empowering provision would constitute administrative action as defined and the provisions of PAJA are equally applicable to that action of the Commissioner.<sup>184</sup> This

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<sup>180</sup> Croome, B. & Olivier, L. (note 160) at p29.

<sup>181</sup> Sec 1 of PAJA.

<sup>182</sup> Croome, B. & Olivier, L. (note 160) at p29. See also Croome, B. (note 32) at p211.

<sup>183</sup> Case No. 44029/07 (TPD).

<sup>184</sup> Croome, B. & Olivier, L (note 160) at p30. See also Croome, B. (note 32) at p212.

view was expressed by Chaskalson CJ in *Minister of Health and McIntyre NO v New Clicks South Africa (Pty) Ltd and Others*:<sup>185</sup>

*“It is true that the making of regulations is not referred to in subparagraphs (a) to (f). But the reference in the main part of the definition to “any decision of an administrative nature” and in the general provision of subparagraph (g) to “doing or refusing to do any other act or thing of an administrative nature” brings the making of regulations within the scope of the definition.”*<sup>186</sup>

### 3.4.3 Procedural fairness

Section 33 of the Constitution requires administrative action of the Commissioner to be procedurally fair, and where it affects the rights of a taxpayer adversely, that taxpayer would be entitled to reasons. Section 3(1) of PAJA, however, requires the administrative action exercised by the Commissioner to materially and adversely affect the rights or legitimate expectations of a taxpayer. Section 3(1) of PAJA seems to, on the one hand, be more restrictive than the Constitutional requirements in that the taxpayer’s rights must be materially affected, but, on the other hand, to be slightly more broad in that where a taxpayer’s legitimate expectations are affected by the Commissioner’s conduct, it may also constitute administrative action.<sup>187</sup> It can be noted that, due to the insertion of “materially” in section 3(1) of PAJA, it may be possible for the provisions to be interpreted in a stricter light and that the taxpayer’s application for review against the Commissioner may be denied.<sup>188</sup>

Section 3 of PAJA requires that administrative action must be procedurally fair. To determine whether the action was fair, regard must be had to the circumstances of each case.<sup>189</sup> In order for administrative action to be fair, the Commissioner must, *inter alia*, give adequate notice and a clear statement of the proposed action, give the

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<sup>185</sup> 2006 (2) SA 311 (CC).  
<sup>186</sup> Note 185 above, at para [128].  
<sup>187</sup> Croome, B. & Olivier, L. (note 160) at p31.  
<sup>188</sup> *Ibid.*  
<sup>189</sup> Sec 3(2)(a) of PAJA.

taxpayer a reasonable opportunity to make representations, and give the taxpayer notice of the right to request reasons for the action.<sup>190</sup>

The TA Act allows the Commissioner to, in some instances, deviate from the requirement of procedural fairness; for example, where an inspection of a business premise is done without prior notice or a civil judgment is obtained for the recovery of outstanding tax without giving the taxpayer prior notice of such action to be undertaken.<sup>191</sup> In addition,<sup>192</sup> PAJA provides the Commissioner with the possibility to depart from the procedural fairness requirement in certain reasonable and justifiable circumstances which may be determined by considering –

- The objects of the empowering provision;
- The nature, purpose of and need to take the action;
- The likely effect of the action;
- The urgency of the matter or of taking the decision; and
- The need to promote an efficient administration and good governance.

Regard may be had to one of these instances where the Commissioner's conduct and decisions constitute administrative action and must comply with the procedures set out in PAJA and the Constitution but is allowed to deviate from those principles. For example, in terms of section 22 of the TA Act, a person who is required to register or who may register voluntarily, must do so in terms of the TA Act or the relevant tax Act. Once an application for registration is received by SARS, certain measures are taken by SARS to ensure the completeness of the person's registration application.<sup>193</sup> These measures include, for example, physical inspection of the person's business premises which is allowed in terms of the TA Act.<sup>194</sup> No prior notification of the inspection in this

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<sup>190</sup> Sec 3(2)(b) of PAJA.

<sup>191</sup> South African Revenue Service (note 171) at p10-11.

<sup>192</sup> South African Revenue Service (note 171) at p11; Sec 3(4) of PAJA.

<sup>193</sup> South African Revenue Service (note 171) at p17.

<sup>194</sup> South African Revenue Service (note 171) at p17 and Sec 45 of the TA Act.

instance is required to be given to the taxpayer which is a specific limitation of the taxpayer's right to fair administrative action.<sup>195</sup>

The administrative provisions regarding tax collection are now mostly consolidated in the TA Act.<sup>196</sup> In this regard, it can be submitted that the majority of the decisions taken by the Commissioner affecting the taxpayer's rights will in future be in terms of this Act.

### 3.5 REASONS

In terms of section 3(2)(b)(v) of PAJA, in order to give effect to the taxpayer's right to procedural fairness, the Commissioner must inform the taxpayer of his, her or its right to request reasons for the Commissioner's decision. It is said that the provision of reasons justifies the action taken by an administrator.<sup>197</sup> Therefore, where a decision is taken by the Commissioner, as administrator, the Commissioner should convey to the taxpayer how he came to the result.<sup>198</sup>

The right to request reasons is given effect in section 5 of PAJA which provides that a taxpayer who did not receive reasons for the administrative action taken, may request such reasons within 90 days from the date that the taxpayer became aware or should have reasonably become aware of the administrative action.<sup>199</sup> On receipt of such a request for reasons from an aggrieved taxpayer, the Commissioner must also respond within 90 days from the receipt of such request.<sup>200</sup> If the Commissioner fails to respond, section 3 of PAJA deems the action to have been taken without any good reason.<sup>201</sup> Section 5(4), however, makes provision for the Commissioner to, in some

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<sup>195</sup> South African Revenue Service (note 171) at p10.

<sup>196</sup> Klue *et al.* (2012). *Silke on Tax Administration*. Chapter 1 Introduction to tax administration in South Africa at para 1.3. Available at: [http://classic.mylexisnexis.co.za/nxt/gateway.dll?f=templates\\$fn=default.htm\\$vid=mylnb:10.1048/enu](http://classic.mylexisnexis.co.za/nxt/gateway.dll?f=templates$fn=default.htm$vid=mylnb:10.1048/enu).

<sup>197</sup> Croome, B. & Olivier, L. (note 160) at p43.

<sup>198</sup> Croome, B. & Olivier, L. (note 160) at p48.

<sup>199</sup> Sec 5(1) of PAJA.

<sup>200</sup> Sec 5(2) of PAJA.

<sup>201</sup> Sec 5(3) of PAJA.

instances,<sup>202</sup> deviate from the taxpayer's right to receive reasons. The reasons so provided by the Commissioner must be adequate and in writing.<sup>203</sup> It is worth noting that the Commissioner is not under an obligation to provide reasons if no such request is received from the taxpayer, although the Commissioner will provide reasons in most instances.<sup>204</sup> It is stated that by providing reasons for the Commissioner's conduct, the administrative action is justified.<sup>205</sup>

It is important to note that reasons may only be requested where the taxpayer's rights have been materially and adversely affected by the Commissioner's conduct, which is also the requirement for procedural fairness.<sup>206</sup> Croome and Olivier, however submit that any decision by the Commissioner would adversely affect the taxpayer's financial position, thereby affecting the taxpayer's rights, and is it essential for the Commissioner to always provide reasons.<sup>207</sup>

After a taxpayer has submitted his, her or its tax return and the return does not incorporate a determination of the amount of tax payable, SARS will make an assessment based on the return submitted by the taxpayer.<sup>208</sup> If the return incorporates a determination of the amount of tax, the submission of the return constitutes an original self-assessment.<sup>209</sup> Section 104(1) of the TA Act provides that a taxpayer, who is aggrieved by an assessment made, may object to the assessment.

A taxpayer objecting to the assessment must do so in accordance with the rules issued under section 103 of the TA Act.<sup>210</sup> Section 269 of that Act provides that the rules in force under another Tax Act which were repealed by the TA Act remain in force until such time that new rules are issued in terms of the TA Act. Therefore, the rules prescribing the procedures to be observed in lodging objections or noting appeals

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<sup>202</sup> This will apply where a deviation is reasonable and justifiable in the circumstances which will depend on certain factors and circumstances such as the objects of the empowering provision.

<sup>203</sup> Sec 5(2) of PAJA.

<sup>204</sup> Croome, B. & Olivier, L. (note 160) at p44.

<sup>205</sup> Croome, B. & Olivier, L. (note 160) at p43.

<sup>206</sup> Sec 5(1) of PAJA; Croome, B. & Olivier, L. (note 160) at p43.

<sup>207</sup> Croome, B. & Olivier, L. (note 160) at p43.

<sup>208</sup> Sec 91(1) of the TA Act.

<sup>209</sup> Sec 91(2) of the TA Act.

<sup>210</sup> Sec 104(3) of the TA Act.

against assessments, procedures for alternative dispute resolution, and the conduct and hearing of appeals before a tax court (the Rules), remain in force.<sup>211</sup>

Rule 3(1)(a) of the Rules provides that a taxpayer who is aggrieved by an assessment may request reasons for the assessment from the Commissioner within 30 days after the date of the assessment. This request must be in writing. It is said that the taxpayer may request reasons for an assessment from the Commissioner under either the Rules or PAJA.<sup>212</sup>

A further question that arises is what constitutes adequate reasons? “Adequate reasons” is not defined in either the Rules, any tax Act or in PAJA.<sup>213</sup> In *Income Tax Case No. 1811*<sup>214</sup> the court commented that in order to determine what “adequate reasons” are, each case will depend on its specific facts, and that no specific rule can be laid down to determine this, and further, that the Commissioner’s hand “*can rest heavily on the taxpayer.*”<sup>215</sup>

The Shorter Oxford English Dictionary<sup>216</sup> defines “adequate” as sufficient. This definition is not of much help in these circumstances. In *Moletsane v Premier of the Free State and Another*,<sup>217</sup> the court had to consider section 24 of the Interim Constitution. The applicant was informed, per letter, by the head of education and culture that the applicant had been suspended from duty pending a departmental investigation into alleged misconduct of the applicant. The court had to consider

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<sup>211</sup> Promulgated under section 107A of the Income Tax Act No. 58 of 1962 (the ITA), GN R467 in the *Government Gazette* No. 24639 of 1 April 2013. SARS has published a draft notice which contains the rules that will be issued under section 103 of the TA Act for a second round of public comment which comments were due 19 July 2013 (the Draft Rules) and is available at: <http://www.sars.gov.za/AllDocs/LegalDoclib/Drafts/LAPD-LPrep-Draft-2013-33%20-%20Draft%20Rules%20Section%20103%20of%20Tax%20Administration%20Act%20Second%20Round.pdf>. The term “adequate reasons” is also not defined in the draft Rules.

<sup>212</sup> Croome, B. (note 32) at p225.

<sup>213</sup> South African Revenue Service. *Guide on Tax Dispute Resolution*. Dated 30 November 2004 at para 5.2 at p6.

<sup>214</sup> 68 SATC 193 at p201.

<sup>215</sup> *Ibid.*

<sup>216</sup> *Shorter Oxford English Dictionary* (2007). 6th edition. New York: Oxford University Press Inc., Volume 1 at p27.

<sup>217</sup> 1996 (2) SA 95 (O).

whether the aforementioned constituted sufficient reasons as required per section 24(c) of the Interim Constitution. The court held<sup>218</sup> that the reasons given were sufficient and that the administrative action in question and the reasons provided were in relation to each other. Therefore, more drastic or serious administrative action would require more detailed, advanced, or drastic reasons.

According to the Practical Guidelines for Preparing Statements of Reasons, which is prepared by the Administrative Review Council (ARC)(Australia),<sup>219</sup> a Statement of Reasons must contain the decision, list the finding on material facts, refer to evidence for the findings, and give reasons for the decision. It is further stated that the decision-maker must give real reasons for its decisions; i.e. the decision must be explained logically and the facts must be linked to the decision.<sup>220</sup> In the Commentary on the Practical Guidelines for Preparing Statements of Reasons, it is considered why the Statement of Reasons is important and the following remarks are made:<sup>221</sup>

- By giving proper reasons, the decision can be explained and defended; and
- It assists the affected person to make a decision on whether to pursue appeal or review proceedings.

It is further stated that the provision of reasons improves quality decision-making, promotes public confidence in the administrative process, and assists tribunals and courts in performing administrative review.<sup>222</sup> According to Croome,<sup>223</sup> these guidelines might assist the Commissioner in giving proper reasons to a taxpayer for a decision taken affecting the taxpayer's affairs.

According to SARS' Guide on Tax Dispute Resolution<sup>224</sup> (the ADR Guide), the reasons provided to the taxpayer "*will enable the taxpayer to properly understand the basis of the assessment and assist in the formulation of the grounds to object thereto.*" The

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<sup>218</sup> Note 217 above at para [G-I] at p98.

<sup>219</sup> Available at: <http://www.arc.ag.gov.au/Documents/arcguidelinesnew.pdf>.

<sup>220</sup> Note 219 above, at p13.

<sup>221</sup> Available at: [http://www.arc.ag.gov.au/Documents/arc\\_commentary.pdf](http://www.arc.ag.gov.au/Documents/arc_commentary.pdf), at p2.

<sup>222</sup> *Ibid.*

<sup>223</sup> Croome, B. (note 32) at p229.

<sup>224</sup> South African Revenue Service (note 213) at p3.

ADR Guide follows the thinking that “*adequate reasons require the decision-maker to explain his decision in a way which will enable an aggrieved person to say, in effect: ‘Even though I do not agree with it, I now understand why the decision went against me’.*”<sup>225</sup> After having regard to the reasons, a taxpayer should be able to decide whether or not to challenge the decision taken by SARS.<sup>226</sup>

In *Income Tax Case No. 1811*,<sup>227</sup> the applicant brought an application against the Commissioner to remit the applicant’s request for reasons to the Commissioner for reconsideration to provide “adequate reasons”. On 6 October 2004, after an audit conducted, a notice of assessment was issued by the Commissioner to the applicant in terms of section 31 of the VAT Act, following a letter of findings issued to the applicant on 1 April 2004. On 3 November 2004, the applicant requested the Commissioner, in terms of rule 3(1)(a) of the Rules,<sup>228</sup> for reasons for the assessment. The applicant received the assessment on 8 June 2005. The court held<sup>229</sup> that the applicant’s request for reasons be remitted to the Commissioner for reconsideration. Further, that in structuring its reasons, the Commissioner must set out the relevant statutory provisions applicable, the findings of fact, and the reasoning process on which the conclusion depends. In coming to its decision, the court considered, *inter alia*, the following views of Iain Currie and Jonathan Klaaren, *Promotion of Administrative Justice Act Benchbook (2001)* and of De Ville, *Judicial Review of Administrative Action in South Africa*.<sup>230</sup>

- “... that a single line statement of reasons may quite adequately explain a straightforward decision with far reaching consequences, while a decision involving complex assessments of fact and the exercise of considerable interpretive discretion will take a great deal more explaining, no matter what its consequences are.”

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<sup>225</sup> South African Revenue Service (note 213) at p6.

<sup>226</sup> *Ibid.*

<sup>227</sup> 68 SATC 193.

<sup>228</sup> Note 211 above.

<sup>229</sup> Note 227 above at p207.

<sup>230</sup> Note 227 above at p201.

- “... that the adequacy of reasons should be determined with reference to the rationale for the duty to provide reasons. These are, firstly, that it encourages rational and structured decision making; secondly, it encourages open administration; thirdly, it satisfies the desire on the part of the individual to know why a decision was reached, and fourthly it makes it easier for that person to appeal against the decision and assists a court in reviewing administrative action.”

The court held that the letter of 8 June 2005 did not contain adequate reasons.<sup>231</sup> The letter rather stated that adequate reasons were provided during December 2004 and referred the applicant to correspondence of 20 letters back and forth between the Commissioner and the applicant.<sup>232</sup> The court held that even though it might contain reasons, the letters do not speak for themselves and that it constitutes a “*myriad of documents where the reasons cannot reasonably be determined.*”<sup>233</sup>

According to Olivier,<sup>234</sup> the above decision will have to be taken into account by SARS and SARS will have to align its processes to comply with the taxpayer’s right to fair administrative action. “Adequate reasons”, in the case of SARS, would not have been given when it merely refers taxpayers to legislation relied upon or to previous correspondence between the parties.<sup>235</sup>

From the above it is clear that SARS, when making any administrative decision regarding a taxpayer’s affairs, must comply with the taxpayer’s right to fair administrative action and provide adequate reasons for such decisions, whether requested under section 5(1) of PAJA or rule 3(1)(a) of the Rules. The observations from the quoted case law, SARS’ own ADR Guide, the Practical Guidelines for preparing Statements of Reasons, and various authors should assist SARS in compiling reasons which are sufficient for the taxpayer to say: “Even though I do not

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<sup>231</sup> Note 227 above at p203-204.

<sup>232</sup> *Ibid.*

<sup>233</sup> Note 227 above at p204.

<sup>234</sup> Olivier, L. (2009) SARS has to provide adequate reasons for its decisions. *Tydskrif vir die Hedendaagse Romeins Hollandse Reg.* Vol. 72 at p507.

<sup>235</sup> *Ibid.*

agree with the decision, I now understand why the decision went against me”, and to decide whether or not to pursue objection or appeal procedures.

### 3.6 JUDICIAL REVIEW

Sections 6 and 7 of PAJA deal with judicial review of administrative action as well as with the procedures to be followed in order to institute review proceedings. In terms of section 6(1) of PAJA, judicial review proceedings of an administrative action may be instituted by any person in either a court or a tribunal. Therefore, any taxpayer who is aggrieved by a decision of the Commissioner may take the Commissioner’s decision on review.

Such a decision may be taken on review if the decision falls within the ambit of one of the grounds of review<sup>236</sup> set out in section 6(2).<sup>237</sup> The grounds of review were discussed in Chapter 2, “*Lawfulness*”, in a general sense. Now, regard will be had to a few more specific instances where the Commissioner’s decisions may be subject to review.

What is, however, important to note, is that before a taxpayer can institute review proceedings, the taxpayer must exhaust all internal remedies available.<sup>238</sup> What does this mean? Must a taxpayer exhaust all and any possibility offered in law? This requirement of PAJA seems to be interpreted in a stricter sense in that the phrases “internal remedy” and “any other law” do not mean that the taxpayer must go to the extent to, for example, approach parliament or the public protector for relief before approaching a court.<sup>239</sup> It rather means that the remedies provided for under the specific legislation applicable to the case are exhausted first.<sup>240</sup> Therefore, a taxpayer disputing the merits of a decision of the Commissioner regarding an assessment, must

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<sup>236</sup> The grounds of review set out in section 6 of PAJA are very similar to or based on those of the common law. See Klue, S. *et al.* (2013) *Silke on Tax Administration*. Available at: [http://www.mylexisnexis.co.za/nxt/gateway.dll?f=templates\\$fn=default.htm\\$vid=mylnb:10.1048/enu](http://www.mylexisnexis.co.za/nxt/gateway.dll?f=templates$fn=default.htm$vid=mylnb:10.1048/enu) at para 3.28 and Croome B and Olivier L (note 160) at p50.

<sup>237</sup> Sec 6(2) of PAJA; Croome, B. & Olivier, L. (note 160) at p51.

<sup>238</sup> Sec 7(2) of PAJA.

<sup>239</sup> Hoexter (note 11) at p540-541.

<sup>240</sup> *Ibid.*

first exercise his, her or its right of objection and appeal provided for under the TA Act (previously, *inter alia* the IT Act) before the taxpayer can approach a court or tribunal for review of the decision.<sup>241</sup>

Section 7(2)(c)<sup>242</sup> provides for a court or tribunal to allow, in exceptional circumstances and where it is in the interests of justice, the taxpayer to not make use of the internal remedies available and approach a court or tribunal directly on review application. An example of “exceptional circumstances” would be where there is a sign of bias against the aggrieved person (in this instance the taxpayer) and it is unlikely that a fair hearing will be conducted, and has it previously been found that there would be, in this instance, no purpose in first using the internal remedies.<sup>243</sup> But, where the time period within which to institute an internal remedy has lapsed, the duty to first exhaust internal remedies has not been fulfilled and the court would not see it as an “exceptional circumstance”.<sup>244</sup> There seems to also be a view that in forcing the taxpayer to first make use of internal remedies, the taxpayer’s constitutional right to access to a court is being infringed.<sup>245</sup>

Plasket argues that section 7(2) of PAJA infringes a person’s right to access to court.<sup>246</sup> This is because where there has been administrative action which is unlawful, unreasonable, or procedurally unfair, it prevents the taxpayer from approaching a court.<sup>247</sup> According to Plasket, the section would probably not withstand a constitutional attack as it would not be a reasonable and justifiable limitation of the person’s constitutional rights as contemplated in section 36(1) of the Constitution.<sup>248</sup> Plasket further concludes.<sup>249</sup>

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<sup>241</sup> Klue, S. *et al.* (note 236).

<sup>242</sup> Sec 7(2)(c) of PAJA.

<sup>243</sup> Croome, B. & Olivier, L. (note 160) at p55; Klue, S. *et al.* (note 236).

<sup>244</sup> Klue, S. *et al.* (note 236).

<sup>245</sup> Croome, B. & Olivier, L. (note 160) at p55; Plasket, C. (2002) The exhaustion of internal remedies and section 7(2) of the Promotion of Administrative Justice Act 3 of 2000. *South African Law Journal*. Vol 119, p50.

<sup>246</sup> Plasket (note 245) at p60.

<sup>247</sup> *Ibid.*

<sup>248</sup> Plasket (note 245) at p61.

<sup>249</sup> Plasket (note 245) at p62.

*“Even if section 7(2) is not unconstitutional, it certainly is impractical, particularly in a country such as South Africa which has an administration, in the national, provincial and local spheres of government that can hardly be described as a model of efficiency. It is ill-conceived and it can hardly be argued that it is capable of promoting an efficient administration.”*

Where the Commissioner acts beyond the scope of the empowering provision, the action is reviewable.<sup>250</sup> For example, higher penalties are imposed than what is allowed in terms of an empowering provision in a tax act.<sup>251</sup> The Commissioner’s action is also reviewable if the Commissioner is biased against the taxpayer.<sup>252</sup> The test for bias, as contemplated in PAJA, is a reasonable suspicion of bias, not actual bias; i.e. not a real likelihood that the decision maker will act with bias.<sup>253</sup>

Where the Commissioner did not apply his mind or failed to take material facts into account in coming to a decision, that decision may be reviewable based on the grounds that irrelevant considerations were taken into account or relevant considerations were not considered.<sup>254</sup> In *Pepcor Retirement Fund and Another v Financial Services Board and Another*,<sup>255</sup> the court considered an appeal regarding the question whether a material mistake of fact should be a ground of review of a decision. The court found that administrative action based on material mistake of fact would not fall into the provision of the Constitution dealing with administrative action; i.e. section 33(1).<sup>256</sup> This case was instituted after PAJA was promulgated but the court mentioned, *obiter dictum*, that even though PAJA does not include a material mistake of fact as a ground of review, section 6(2)(e)(iii) can be interpreted as to include or restate the common law ground of review.<sup>257</sup> Therefore, if the Commissioner takes a decision based on a material mistake of fact, that decision is indeed reviewable under the provisions of PAJA.

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<sup>250</sup> Sec 6(2)(a)(i) and (ii) of PAJA.

<sup>251</sup> Croome, B. & Olivier, L. (note 160) at p51.

<sup>252</sup> Sec 6(2)(a)(iii) of PAJA.

<sup>253</sup> Croome, B. & Olivier, L. (note 160) at p51.

<sup>254</sup> Sec 6(2)(e)(iii) of PAJA. See also Klue, S. *et al.* (note 236) and Croome, B. & Olivier, L. (note 160) at p53.

<sup>255</sup> [2003] 3 All SA 21 (SCA).

<sup>256</sup> Note 255 above at para [45-46].

<sup>257</sup> *Ibid.*

Another important ground of review to note is the failure to take a decision.<sup>258</sup> Therefore, where the Commissioner has failed to take a decision where he is obliged to do so, it constitutes a reviewable administrative action.<sup>259</sup> In terms of section 6(3), if the Commissioner has a duty to take a decision but no time period is specifically prescribed within which the decision must be taken and the Commissioner fails to take such a decision, the action is reviewable, based thereon that there has been unreasonable delay. Also, where a time period is prescribed within which the specific decision must be taken, the action is reviewable as the Commissioner, notwithstanding the expiration of the time period, still has to take a decision.<sup>260</sup>

For example, in terms of section 72 of the VAT Act, the Commissioner may make an arrangement or decision where the Commissioner is satisfied that due to the manner in which the taxpayer conducts his, her or its business, difficulties, anomalies or incongruities have arisen in the application of any provisions of the VAT Act. Where a taxpayer then approaches the Commissioner to make such an arrangement or decision and the Commissioner is in possession of all the necessary information and/or documentation to enable him to make such decision or arrangement, and the Commissioner fails to do so within a reasonable time (as no specific time period is attached to the section), it is my opinion that the Commissioner's action is, based on the above ground of review, reviewable due to unreasonable delay.

Other grounds of review which may render a decision of the Commissioner reviewable include, *inter alia*, where a mandatory or material procedure prescribed by the empowering provision is not followed,<sup>261</sup> where the reason for which the action was taken is not authorised by the empowering provision,<sup>262</sup> the decision was taken for an ulterior motive or purpose<sup>263</sup> (e.g. high collection targets),<sup>264</sup> or the action is otherwise

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258 Sec 6(2)(g) of PAJA.

259 *Ibid.*

260 Sec 6(3) of PAJA.

261 Sec 6(2)(b) of PAJA.

262 Sec 6(2)(e)(i) of PAJA.

263 Sec 6(2)(e)(ii) of PAJA.

264 Croome, B. & Olivier, L. (note 160) at p51-52.

unconstitutional or unlawful<sup>265</sup> (it is argued that the last mentioned ground of review was included in PAJA to extend the taxpayer's right to review).<sup>266</sup>

If an aggrieved taxpayer decides to take the Commissioner's decision on review, the procedures as contemplated in section 7 of PAJA must be followed. In terms of section 7(1),<sup>267</sup> the taxpayer must institute the review proceedings without any unreasonable delay and within 180 days from either the date that internal remedy procedures are completed or, in the absence of any internal remedy, the date –

- On which the taxpayer was informed of the administrative action;
- On which the taxpayer became aware of the administrative action and reasons for it; or
- On which the taxpayer is reasonably expected to have become aware of the action and the reasons for it.

The review proceedings should be instituted in a High Court or other court having jurisdiction.<sup>268</sup>

### 3.7 REMEDIES

Hoexter comments that “*Section 8 of PAJA, entitled ‘Remedies in proceedings for judicial review’, is now the first stop for any complainant in search of a judicial administrative-law remedy.*”<sup>269</sup> Once a court has found that a ground of review is present, an appropriate remedy should be granted.<sup>270</sup> These remedies are provided for in section 8 of PAJA. One of the remedies that may be granted by a court is to set the administrative action aside.<sup>271</sup> The administrative action has effect until a court

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<sup>265</sup> Sec 6(2)(j) of PAJA.  
<sup>266</sup> Croome, B. & Olivier, L. (note 160) at p54.  
<sup>267</sup> Sec 7(1) of PAJA.  
<sup>268</sup> Sec 7(4) of PAJA.  
<sup>269</sup> Hoexter (note 11) at p519.  
<sup>270</sup> De Ville (note 8) at para 7.3 at p325.  
<sup>271</sup> Sec 8(1)(c) of PAJA.

declares it invalid, at which point that action may be treated as if it never existed.<sup>272</sup> The setting aside of the administrative action means that the decision is void and is what would logically follow when an action is declared to be invalid.<sup>273</sup>

Once the administrative decision is set aside, the court will generally refer the matter back to the administrator for reconsideration.<sup>274</sup> Therefore, a court will not easily substitute the administrative action with its own decision.<sup>275</sup> This common law position is reflected in its equivalent included in PAJA.<sup>276</sup> The court will thus generally refer the decision back to the Commissioner to reconsider.

Under the common law, correcting or substituting an administrator's decision should rather occur as the exception.<sup>277</sup> PAJA also makes provision for the court to correct a default arising because of the administrative action or to substitute the action.<sup>278</sup> However, this remedy may only be granted in exceptional circumstances.<sup>279</sup> Although PAJA does not spell out what would be regarded as "exceptional circumstances", it is stated that the common law principles should still guide the courts in this regard.<sup>280</sup> Therefore, where the end result is a forgone conclusion, and it would be a waste of time to refer the decision to the Commissioner, or where further delay would cause unjustifiable prejudice to the applicant, and where the Commissioner (as original administrator) has shown bias or incompetence to such a degree that it would be unfair to ask the applicant to submit to its jurisdiction again, the court may substitute the Commissioner's decision.<sup>281</sup>

The court can furthermore, in terms of section 8(1)(d) of PAJA, declare the rights of the parties in respect of any matter to which the administrative action relates; i.e. make a

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<sup>272</sup> Hoexter (note 11) at p545-546.

<sup>273</sup> Hoexter (note 11) at p546.

<sup>274</sup> Sec 8(1)(c)(i) of PAJA.

<sup>275</sup> Hoexter (note 11) at p552.

<sup>276</sup> *Ibid.*

<sup>277</sup> Hoexter (note 11) at p552.

<sup>278</sup> Sec 8(1)(c)(i)(aa) of PAJA.

<sup>279</sup> *Ibid.*

<sup>280</sup> Hoexter (note 11) at p553.

<sup>281</sup> Hoexter (note 11) at p553; Croome, B. & Olivier, L. (note 160) at p58.

declaratory order.<sup>282</sup> It is stated that this does not only apply to the party instituting the proceedings and the administrator, but also to a third party.<sup>283</sup> This remedy is beneficial to the parties in that even before a dispute arises and therefore any harm is inflicted, a determination of the parties' rights can be obtained.<sup>284</sup>

A court may be approached to grant a temporary interdict or relief<sup>285</sup> and may direct the administrator to act in a manner that the court or tribunal requires<sup>286</sup> or can make an order which prohibits the administrator from acting in a particular manner.<sup>287</sup> Hoexter submits that these remedies provided for in section 8 are general or wide enough to include final interdicts, or if not, that they would certainly be just and equitable orders as the general remedy provided for in section 8 requires.<sup>288</sup> In light of this, a taxpayer may seek relief in the form of an interdict against the Commissioner.

Compensation may, in exceptional cases, be awarded to a taxpayer under section 8(1)(c)(ii)(bb) of PAJA.<sup>289</sup> However, where a financial loss has been suffered by a taxpayer due to an administrative act of the Commissioner, it seems that the better option to recover such a loss would be to pursue a contractual or delictual claim, rather than administrative review, as the application procedure (as contemplated in Rule 53 of the Uniform Rules of Court<sup>290</sup>) to be followed in seeking judicial review does not make provision for disputes arising to be resolved, which are likely to arise in such a case.<sup>291</sup>

In terms of section 8(1)(f) of PAJA, a court can make an order as to costs. This provision is in alignment with the common law; i.e. costs are generally awarded against

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<sup>282</sup> Sec 8(1)(d) and sec 2(b) of PAJA.

<sup>283</sup> De Ville (note 8) at para 7.3.4.2 at p352-353.

<sup>284</sup> Hoexter (note 11) at p558.

<sup>285</sup> Sec 8(1)(e) of PAJA.

<sup>286</sup> Sec 8(1)(a)(ii) of PAJA.

<sup>287</sup> Sec 8(1)(b) of PAJA.

<sup>288</sup> Hoexter (note 11) at p560.

<sup>289</sup> Croome, B. & Olivier, L. (note 160) at p58.

<sup>290</sup> Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa. Juta and Company Limited. Available at: [http://www.justice.gov.za/legislation/rules/HIGHCourt%20Uniform%20Rules%20\[as%20at%2030May2008\].pdf](http://www.justice.gov.za/legislation/rules/HIGHCourt%20Uniform%20Rules%20[as%20at%2030May2008].pdf).

<sup>291</sup> Hoexter (note 11) at p570.

the unsuccessful party.<sup>292</sup> The court can, *inter alia*, make a cost order *de bonis propriis* or a punitive cost order.<sup>293</sup> In the former case, the official would have acted *mala fide* and must pay the costs personally, and in the latter case, an order on an attorney-and-own-client scale would be made, for example, where the official abused his or her position or acted outside the provisions of a fiscal statute.<sup>294</sup>

From the above, it is clear that once the Commissioner's decision has been found to be unlawful by a competent court or tribunal, relief in the form of various remedies are available to the aggrieved taxpayer and the court or tribunal hearing the matter will make an appropriate decision.

### 3.8 LEGITIMATE EXPECTATION

The doctrine of legitimate expectation (the doctrine) originates from the English law<sup>295</sup> and has been accepted in our law.<sup>296</sup> This doctrine is concerned with whether "*the affected person has a legitimate expectation of a certain outcome that will entitle him or her to a fair hearing in the circumstances.*"<sup>297</sup> This can, for instance, occur where an express promise was made to the taxpayer by the Commissioner, and the taxpayer has an expectation of a benefit or privilege of which he, she or it cannot be deprived of without affording the taxpayer a fair hearing,<sup>298</sup> or where the Commissioner has a regular practice which the taxpayer can expect to continue,<sup>299</sup> or the previous conduct of the Commissioner gave rise to an expectation that a certain procedure will be followed before a decision is taken.<sup>300</sup>

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<sup>292</sup> Hoexter (note 11) at p574.

<sup>293</sup> Croome, B. (note 32) at p240; Hoexter (note 11) at p575.

<sup>294</sup> Croome, B. (note 32) at p240.

<sup>295</sup> Klue, S. *et al.* (2012). *Silke on Tax Administration*. Chapter 3: Constitutional aspects of tax administration: The doctrine of legitimate expectation in the context of tax, at para 3.30. Available at: <http://www.mylexisnexis.co.za/nxt/gateway.dll?f=template&fn=default.htm&vid=mylnb:10.1048/eenu>.

<sup>296</sup> Hoexter (note 11) at p394.

<sup>297</sup> Hoexter (note 11) at p394-395.

<sup>298</sup> Klue, S. *et al.* (note 295).

<sup>299</sup> Hoexter (note 11) at p395.

<sup>300</sup> Klue, S. *et al.* (note 295).

The doctrine affords a taxpayer both procedural (i.e. a fair hearing) and substantive relief and it must be determined objectively whether the expectation was legitimate or not.<sup>301</sup> This common law doctrine now also features legislatively in PAJA.<sup>302</sup> Section 3(1) of PAJA requires administrative action which materially and adversely affects the legitimate expectations of any person to be procedurally fair. From the above, it is clear that the Commissioner cannot make a decision without affording the taxpayer a hearing first.<sup>303</sup>

Klue *et al.* argue that SARS' Interpretation Notes, Guides and Press Releases express a settled practice and the doctrine may form a legal basis for the taxpayer to compel the Commissioner to adhere to it.<sup>304</sup> Louw seems to be agreeing with Klue *et al.* on this issue.<sup>305</sup> Louw is of the opinion that:<sup>306</sup>

*“Dit blyk uit die Engelse regspraak dat die beginsel van ‘legitimate expectation’ en veral in die geval waar die SAID ‘n aanwysing gee, erken word ... is ek van mening dat die posisie in Suid-Afrika soortgelyk behoort te wees, veral in die lig van die feit dat ons ‘n geskrewe grondwet het wat spesifiek vir billike administratiewe optrede voorsiening maak ... en die SAID sal slegs gebonde gehou kan word aan ‘n aanwysing, indien die belastingbetaler inderdaad die skema of transaksie geïmplementeer het op die wyse soos aan die SAID voorgelê is.”*

Furthermore, it is argued that where a taxpayer approaches the Commissioner on facts comparable to an earlier ruling issued by the Commissioner to the taxpayer, the taxpayer has a legitimate expectation that the second ruling will be similar to the first.<sup>307</sup> However, when applying for a ruling to the Commissioner, the taxpayer must disclose

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301 Klue, S. *et al.* (note 295).

302 Hoexter (note 11) at p396.

303 Croome, B. & Olivier, L. (note 160) at p63.

304 Klue, S. *et al.* (note 295).

305 Louw, C. (2003) Kan die Suid-Afrikaanse Inkomstediens (SAID) gebonde gehou word aan sy aanwysings? *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg.* Vol 66, p292.

306 Louw, C. (note 305) at p296.

307 Croome, B. & Olivier, L (note 160) at p63.

all the relevant facts to the Commissioner.<sup>308</sup> Davis is also of the view that taxpayers may expect that the Commissioner will honour and be bound by its practice notes.<sup>309</sup> In *Commissioner of Taxes v Astra Holdings (Private) Ltd t/a Puzey & Payne*<sup>310</sup> however, the court held that a legitimate expectation could not arise for the taxpayer where the person responsible for administering the taxes made an error of law and because thereof a tax due to the revenue collector cannot be collected. In *COT v Astra Holdings (Private) Ltd t/a Puzey & Payne*<sup>311</sup> the court held that an error of law cannot give rise to a legitimate expectation. Therefore, an error by the Commissioner in applying the law which has the effect that tax due to the state is not collected cannot give rise to a legitimate expectation.<sup>312</sup>

To conclude, the previous conduct or practices of, or promises made by, the Commissioner may create a legitimate expectation for a taxpayer that a certain procedure or outcome would apply. This doctrine is well accepted in our law and the Commissioner's action should be reviewable based thereon. However, where the Commissioner's decision is based on an error of law, there is some indication that no legitimate expectation could have arisen.

### 3.9 CONCLUSION

From the above, it is clear that –

- A taxpayer has rights;
- Section 33 of the constitution confers upon the taxpayer the right to administrative action that is lawful, reasonable and procedurally fair, which right is given effect to in PAJA;
- The commissioner is an organ of state as contemplated in PAJA and must therefore comply with the provisions of PAJA and section 33 of the constitution;

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<sup>308</sup> Croome, B. & Olivier, L. (note 160) at p64.

<sup>309</sup> Davis, D.M. Legitimate Expectations. *The Taxpayer*. Vol 51, p6.

<sup>310</sup> 66 SATC 79 at p92.

<sup>311</sup> 66 SATC 79; Stretch, R. & Silke, J. (2004). Doctrine of legitimate expectations curtailed. *Taxgram*, April issue.

<sup>312</sup> *Ibid.*

- Where the taxpayer is aggrieved by a decision taken by the commissioner, it is possible for that taxpayer to pursue judicial review; and
- When it is found that the Commissioner's decision is wrong (i.e. unlawful), sufficient relief is available for the affected taxpayer.

Having said that a decision of the Commissioner is reviewable in certain circumstances, the next step for the taxpayer is to institute judicial review proceedings against the Commissioner. In this regard, the question that the taxpayer is faced with is: "Which court should I approach? Which court is the correct and competent court to grant me relief?" The next chapter will focus on this question and endeavours to give guidance as to which forum the aggrieved taxpayer must approach.

## CHAPTER 4: FORUM TO BE ADDRESSED BY AN AGGRIEVED TAXPAYER

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### 4.1 BACKGROUND

Once it is determined that a decision or action of the Commissioner constitutes administrative action and the taxpayer is aggrieved by that decision or action, the remaining hurdle for the taxpayer to overcome is to take that decision or action of the Commissioner on review. The important question then to ask is which court or forum must be approached by the taxpayer if it is decided to pursue judicial review proceedings. This chapter will focus on what the taxpayer's possibilities are with regard to the correct forum when disputing the legality of administrative actions of the Commissioner and what the effect thereof will be on the taxpayer.

Prior to PAJA's enactment, reliance was placed on the case of *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Bpk*<sup>313</sup> in order for a taxpayer to take certain decisions of the Commissioner (which are not specifically made subject to objection and appeal) on appeal (in reality, review) in the tax court. However, in the recent unreported *VAT case number 789*, Bertelsmann J ruled that review proceedings may only be instituted in the High Court and not in the tax court, which is in accordance with PAJA. This decision, in essence, nullifies the principle of the court's decision in *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Bpk*.<sup>314</sup>

It is important for a taxpayer to approach the correct forum when disputing a decision or action of the Commissioner; i.e. the High Court or the tax court, in order to settle the matter timeously and cost-effectively. The question that remains to be answered is what the effect will be on a taxpayer having various disputes with regard to one matter; some of which must be addressed in the tax court on appeal and some of which must be addressed in the High Court on review; i.e. having to approach separate forums.

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<sup>313</sup> 1985 (2) SA 668 (T).

<sup>314</sup> *Ibid.*

## 4.2 APPLICATION OF THE LAW

### 4.2.1 Judicial review in the courts

Section 6(1) of PAJA provides for judicial review proceedings to be instituted by any person in either a court or a tribunal. Section 7(2) of PAJA requires the Rules Board for Courts of Law to make rules for the procedure of judicial review (the Rules) by the 28th of February 2009, which rules have not yet come into force.<sup>315</sup> Section 7(4) of PAJA provides that review proceedings shall be instituted in a High Court or another court having jurisdiction which provision is applicable until such time that the rules for the procedure of judicial review have come into operation. Since no rules have been implemented as yet, section 7(4) is applicable and review proceedings shall be instituted in either a High Court or another court having jurisdiction.

As the review proceedings must be instituted in either a High Court or another court having jurisdiction, it is important to have a look at a High Court's constitution and jurisdiction. Generally, a High Court would consist of a judge president, one or more deputy judge presidents, and several other judges.<sup>316</sup> When sitting as a court of first instance, a matter is normally heard by one judge, unless otherwise determined. An appeal against a judgment of a single judge must be heard by three judges and an appeal against a decision of an inferior court by at least two judges.

A High Court has the power to review both criminal and civil matters on the various grounds as contemplated in section 24 of the Supreme Court Act.<sup>317</sup> These grounds include, *inter alia*, bias, gross irregularity in the proceedings, and the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.<sup>318</sup> In addition to this, in common law, a High Court has an inherent jurisdiction to review the decision of statutory bodies, voluntary associations, and other

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<sup>315</sup> Hoexter (note 11) at p528.

<sup>316</sup> Van Dijkhorst, K. (2004). *The Law of South Africa (Courts)*. Vol. 5 Part 2, at para 115 at p106. Durban: LexisNexis Butterworths.

<sup>317</sup> Act 59 of 1959.

<sup>318</sup> Van Dijkhorst (note 316) at para 118 at p109.

tribunals.<sup>319</sup> However, since the enactment of PAJA, judicial review proceedings are ordinarily pursued in terms of PAJA and not the common law.<sup>320</sup>

Currently Rule 53 of the Uniform Rules of Court<sup>321</sup> (the Uniform Rules) (Rule 53)<sup>322</sup> is used to institute judicial review proceedings and is in the form of an application.<sup>323</sup> Rule 53(1) provides that proceedings for the review of a decision or proceedings of, *inter alia*, a tribunal, board or officer performing administrative functions must be brought by notice of motion which must set out the decision or proceedings to be reviewed and which is delivered by the party seeking the review of the decision or proceedings to the person who took the decision.<sup>324</sup> Such notice of motion must call upon that person to firstly show cause why the decision should not be reviewed or be set aside; and secondly, to, within 15 days from the receipt of the notice of motion, provide the record of the proceedings of the decision to be reviewed to the registrar.<sup>325</sup>

The notice of motion is supported by an affidavit. The notice of motion must contain the decision or proceeding to be reviewed.<sup>326</sup> The supporting affidavit must set out the relevant facts and/or circumstances on which the applicant relies in order for the decision to be set aside or corrected.<sup>327</sup> The record of the proceedings shall be provided by the registrar to the applicant and the applicant must make copies of the relevant parts of the record which should be provided to the registrar as well as to the parties.<sup>328</sup> After perusal of the record, the applicant is entitled to supplement (i.e. amend) the supporting affidavit within 10 days after having received the record if necessary.<sup>329</sup> If another party (the administrator) wishes to oppose the application, notice of such intention must be delivered to the applicant within 15 days from receipt

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<sup>319</sup> Van Dijkhorst (note 316) at para 118 at p110 and Hoexter (note 11) at p515.

<sup>320</sup> Hoexter (note 11) at p516 and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at para 25.

<sup>321</sup> Available at:

[http://www.justice.gov.za/legislation/rules/HIGHCourt%20Uniform%20Rules%20\[as%20at%2030May2008\].pdf](http://www.justice.gov.za/legislation/rules/HIGHCourt%20Uniform%20Rules%20[as%20at%2030May2008].pdf).

<sup>322</sup> Rule 53 of the Uniform Rules.

<sup>323</sup> Hoexter (note 11) at p525.

<sup>324</sup> Rule 53(1)(a) of the Uniform Rules.

<sup>325</sup> Rule 53(1)(b) of the Uniform Rules.

<sup>326</sup> Rule 53(2) of the Uniform Rules.

<sup>327</sup> *Ibid.*

<sup>328</sup> Rule 53(3) of the Uniform Rules.

<sup>329</sup> Rule 53(4) of the Uniform Rules.

of the notice of motion which must be followed by opposing affidavits.<sup>330</sup> The applicant may also submit a replying affidavit.<sup>331</sup> It is important to comply with the requirements of Rule 53.

As PAJA requires The Rules Board for Courts of Law to make The Rules by 2009, it is said that Rule 53 would not be used much longer.<sup>332</sup> This is supported by Rule 1 of the Rules. Rule 1(1) of the Rules provides that “*These Rules apply to proceedings for judicial review in the High Court, the Labour Court or the Magistrate’s Court.*” Rule 1(4)(b) provides further that “*Rule 53 of the Uniform Rules of the High Court and Rule 7A of the Rules for the Conduct of Proceedings in the Labour Court no longer apply in proceedings for judicial review.*” Although the Rules have been published, they have not yet been made effective. Since section 7(4) of PAJA provides that any judicial review proceedings must be instituted in the High Court or another court having jurisdiction, Rule 53 would still apply. The Rules are still not in operation and Rule 53 would therefore continue to apply until such time that the Rules have been made operational.

A tax court consists of a judge of the High Court, an accountant of not less than 10 years’ experience, and a representative of the commercial community.<sup>333</sup> In cases of mining tax appeals and the valuation of immovable property, the second person may be either a mining engineer or a sworn appraiser if the Commissioner or the appellant prefers it.<sup>334</sup> Further, an appeal against a decision of the tax court lies with the High Court or the Supreme Court of Appeal in certain circumstances.<sup>335</sup>

If a section in a Tax Act is not specifically made subject to objection and appeal, or has been specifically excluded from objection and appeal, a decision in terms of the section must be taken on review. Section 104(2) of the TA Act provides that a taxpayer may object to and appeal against a decision of the Commissioner in certain instances, including any decision which may be objected to and appealed against in terms of any

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<sup>330</sup> Rule 53(5) of the Uniform Rules.

<sup>331</sup> Rule 53(6) of the Uniform Rules.

<sup>332</sup> Hoexter (note 11) at p528.

<sup>333</sup> Van Dijkhorst (note 316) at para 122 at p112-113.

<sup>334</sup> *Ibid.*

<sup>335</sup> Van Dijkhorst (note 316) at para 122 at p113.

Tax Act. In this regard, section 3(4) of the ITA sets out what sections of the ITA are subject to objection and appeal. In addition, it is also possible for a section itself to provide that that section is subject to objection and appeal. If the taxpayer then wishes to object to and appeal against a decision of the Commissioner, as contemplated in section 3(4) of the ITA, the taxpayer must make use of the provisions of Chapter 9 of the TA Act.<sup>336</sup> Any other decision by the Commissioner which aggrieves the taxpayer must be taken on review. In this regard, it is important to take note of the cases of *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Bpk*<sup>337</sup> and unreported *VAT Case Number 789*.

Before 2012, i.e. before the decision in *VAT Case Number 789*, it was possible for a taxpayer to, in effect, object to and appeal against a decision of the Commissioner which was not specifically made subject to objection and appeal.<sup>338</sup> This is because of the decision in *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Bpk*.<sup>339</sup> The facts and decision of that case are shortly summarised (please note that references to sections of the ITA are to the sections as they were in operation at the time of the decision in this matter; i.e. before the enactment of the TA Act).

The Commissioner issued an additional assessment to the taxpayer during 1983 for an amount of R3 500 000 which was not assessed during the tax periods ending March 1973 and March 1974 in the amount of R3 500 000. The letter by the Commissioner addressed to the taxpayer stated that the reason for the additional assessment was the withholding by the taxpayer of material facts. What the facts referred to in the letter were, was not addressed.

The taxpayer objected to the additional assessment, which objection was disallowed by the Commissioner and the taxpayer appealed to the Special Court for the hearing of Income Tax Appeals. The taxpayer's (hereinafter the respondent's) appeal was upheld

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<sup>336</sup> Sec 3(4) of the ITA.

<sup>337</sup> 1985 (2) SA 668 (T).

<sup>338</sup> *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Bpk* 1985 (2) SA 668 (T).

<sup>339</sup> 1985 (2) SA 668 (T).

from where the appeal by the Commissioner (hereinafter the appellant) to the High Court. Sections 79, 81 and 83 of the ITA were relevant in this matter. The appellant's contention was that the respondent could not have approached the Special Income Tax court because of the fact that the administrative decision of the appellant which the respondent was aggrieved by, was not subject to appeal but review, and that such a review application could only be addressed to the High Court in terms of Rule 53. Furthermore, that the Special Income Tax court was a creature of statute and could therefore only exercise the powers conferred upon it in terms of sections 82 to 84 of the ITA. The power to review did not form part of these powers.

The court divided the sections of the ITA which deal with decisions by the appellant into three categories. The first category comprises those sections in terms of which the decision of the appellant is specifically made subject to objection and appeal. The second category comprises the sections which specifically exclude the appellant's decisions from objection and appeal, and the last category is the one which was relevant in this case; i.e. where the decision of the appellant is neither made subject to, nor has been excluded from objection and appeal.

Section 79, dealing with additional assessments, provided for the Commissioner to raise an assessment(s) in respect of certain amounts even though the relevant taxpayer has already been assessed for the specific tax period in respect of which the additional assessment was raised. Such an additional assessment can be raised by the Commissioner where he is satisfied that an amount which was subject to tax and should have been assessed, was not assessed. Generally, such an additional assessment may not be raised after a period of three years from the date of the original assessment in which the amount should have been taxed except where the amount was not assessed due to fraud, misrepresentation, or non-disclosure of material facts.

Thus, if the taxpayer is guilty of fraud, misrepresentation or the non-disclosure of material facts, the Commissioner may assess the taxpayer after three years in respect of a certain amount. The court held that this is therefore an assessment in respect of taxable income made in exceptional circumstances and that the general provisions applicable to assessments then also impact on this assessment. The respondent was

also informed by the appellant in its assessment that if the respondent wished to object to the assessment, the objection must be received by the appellant within 21 days.

The respondent objected to the additional assessment. The respondent's objection was two-legged; i.e. on the basis that the amount taxed was a receipt of a capital nature and that the additional assessment was raised more or less eight years after the relevant year of assessment and that the amounts in question were properly disclosed. The respondent's objection on both grounds was denied and the respondent appealed against the decision. The court held that where there is no right to object to and appeal against a decision of the appellant in terms of section 79(1)(i), but there is such a right in respect of the assessment, and it would be anomalous to only be entitled to take the decision on review to the High Court in terms of Rule 53. According to the court, the Special Court is an administrative court in respect of decisions of the appellant regarding the ITA and that that court is competent to hear reviews in respect of decisions of the Commissioner in other instances.

The court held that any discretionary decision by the appellant in terms of the ITA which is not specifically excluded or made subject to objection and appeal should be subject to investigation by the Special Court. Thus, the taxpayer can object to the decision in terms of the principles of section 81 and then appeal against the decision in terms of section 83(1) to the Special Court. The court held further that in these circumstances such an appeal is technically a review of the Commissioner's decision on the basis of the normal grounds of review.

The court therefore held that in circumstances like these, i.e. where the Commissioner has to decide whether relevant facts were omitted by the respondent, it is not plausible that only the High Court and not the Special Court could set the appellant's decision aside. The court held that both the decision to raise an assessment after three years and the basis for the assessment can be investigated by the Special Court.<sup>340</sup>

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<sup>340</sup>

24 SATC 361.

Another decision of importance in this regard is *MTN International (Mauritius) Limited v The Commissioner of Inland Revenue, South African Revenue Services*.<sup>341</sup> In this case, the court held that before it could be decided whether the Commissioner acted *mala fide*, it must first be decided whether it was proper for the Commissioner to issue an additional assessment and that that was an issue to be decided by the tax court. The court expressed the view that the doctrine of legitimate expectation may be endorsed if the court dealing with the merits of the matter (the tax court) found it justifiable for the applicant to rely on a legitimate expectation. The court therefore held that the appropriate forum to hear the review was the tax court.

According to Chris Schembri,<sup>342</sup> in these instances, the normal procedure for objection and appeal, as contemplated in sections 81 and 83 of the ITA (now sections 104 and 107 of the TA Act), would have to be followed by the taxpayer. However, Schembri is of the opinion that a taxpayer following this procedure must make certain that it is clear from his, her or its appeal that it is an appeal based on the manner in which the Commissioner has come to its decision; i.e. carried out his discretionary powers, and not a “normal” appeal.

The court, in *VAT Case No. 789*,<sup>343</sup> however, found differently. This decision is in direct contrast with the decision of the court in *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Bpk*.<sup>344</sup> The facts of *VAT case No. 789* are briefly that the appellant (i.e. the taxpayer) acquired certain goods and deducted input tax on the acquisition thereof. The input tax was, however, not supported by tax invoices and vague VAT returns were submitted by the appellant. A tax audit was done by the respondent and an assessment was raised. The appellant objected based on the fact that due to fraud by the supplier, the tax invoices could not be obtained and he relied on the provisions of section 20(7) of the VAT Act.

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<sup>341</sup> Case Number 23203/11, North Gauteng High Court, 31 January 2013.

<sup>342</sup> Schembri, C. (2003). *Income Tax (Tax Planning Corporate and Personal)*. *Grounds of Review*, Vol. 17. Available at: [www.mylexisnexis.co.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=mylnb:10.1048/enu](http://www.mylexisnexis.co.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=mylnb:10.1048/enu).

<sup>343</sup> 75 SATC 268.

<sup>344</sup> 1985 (2) SA 668 (T).

The parties in this matter agreed that review was the only way in which the respondent's decision could be interfered with. The respondent submitted that the tax court did not have the power to review the decision in question where the appellant contended that review fell within the tax court's powers. The court held that section 32 of the VAT Act sets out which decisions of the Commissioner, in terms of the VAT Act, are subject to objection and appeal. Section 20(7) does not form part of the decisions listed in section 32. The respondent's submission that the tax court could not hear the appeal was therefore correct.

The court referred to the definition of "court" in PAJA<sup>345</sup> which defines a court to be the Constitutional Court or a High Court or a court of similar status, and stated that the problem that the appellant was faced with is that the tax court is a creature of statute and therefore only has powers ("adjudicate jurisdiction") which are conferred upon it by statute or the legislature, and does not have inherent jurisdiction similar to a High Court. Therefore, a review application instituted in terms of PAJA does not fall within the powers of the tax court and must be brought before a High Court.

According to the doctrine of *stare decisis*, a court should follow the decision of a higher or a fuller court on the court's own level.<sup>346</sup> Thus, a lower or inferior court should follow the decision of a higher court until such decision has been overruled or overturned.<sup>347</sup> The doctrine only applies to the reason for the decision; i.e. laying down legal principles, and not to opinions expressed by the court.<sup>348</sup>

Based on the above, the latest decision in *VAT Case No. 789*, if it was also a High Court decision, would generally be followed by respective role players in the legal environment and, although the principle of *stare decisis* is not applicable to decisions of the tax court being a special court,<sup>349</sup> also in this instance as it is the latest decision dealing with the issue discussed in this chapter.

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<sup>345</sup> Sec 1 of PAJA.

<sup>346</sup> Van Dijkhorst (note 316) at para 163 at p137.

<sup>347</sup> *Ibid.*

<sup>348</sup> Van Dijkhorst (note 316) at para 164-165 at p137-138.

<sup>349</sup> Van Dijkhorst (note 316) at para 172 at p141.

The question is, what is the effect of this decision on a taxpayer?

Let us assume the following facts. The taxpayer has an export business and is selected by SARS on a risk assessment<sup>350</sup> basis to be audited. In terms of Part A of Chapter 5 of the TA Act, the Commissioner is required to keep the taxpayer informed with regard to the audit. Once the audit is completed by SARS, the Commissioner is required, if the outcome of the audit resulted in potential adjustments of a material nature, to provide the taxpayer, within 21 business days, or any extended period required, with a document which sets out the outcome of the audit as well as the grounds for the proposed assessment or decision.<sup>351</sup>

The taxpayer must then respond to this document issued by the Commissioner in writing and within 21 business days after receipt of the document.<sup>352</sup> The taxpayer can, however, request an extension of this period which the Commissioner may allow based on the complexities of the audit.<sup>353</sup> The taxpayer may, based on the fact that the matter is complex, request a reasonable extension from the Commissioner, but which request is denied and the Commissioner issues an assessment. The taxpayer, in terms of section 104(1) of the TA Act, then objects to the assessment raised by the Commissioner. The decision of the Commissioner not to allow the taxpayer an additional period in order to respond to the document issued by the Commissioner, in terms section 42(3), is a decision which is not made specifically subject to objection and appeal in terms of the TA Act and the taxpayer must therefore take that decision of the Commissioner on review.

From the aforementioned example, it is clear that section 104(1) of the TA Act allows a taxpayer to object to, and appeal against, an assessment issued by the Commissioner. However, the exercise of the Commissioner's discretion not to allow the taxpayer an

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350 Sec 40 of the TA Act.  
351 Sec 42(2)(b) of the TA Act.  
352 Sec 42(3) of the TA Act.  
353 *Ibid.*

extension of the time period as contemplated in section 42(3) of the TA Act is a decision which is not specifically made subject to objection and appeal.<sup>354</sup>

Based on the decision in *VAT Case No. 789*, the taxpayer would, in these circumstances, be required to object to and appeal against the decision of the Commissioner to issue an assessment. This objection and appeal would lie with the tax court. However, the decision of the Commissioner not to allow the taxpayer an extension of the time period, as contemplated in section 42(3) of the TA Act, as it is not specifically made subject to objection and appeal, has to be taken on review by the taxpayer in the High Court.

It has, however, been confirmed by the courts that where a question of law is involved, i.e. a declaratory order is sought, the Commissioner and Special Court are not the only competent authorities to decide on the matter.<sup>355</sup> In *Shell's Annandale Farm (Pty) Ltd v Commissioner for South African Revenue Service*,<sup>356</sup> the applicant received certain amounts in respect of an expropriation. The respondent claimed payment of VAT in respect of the amounts so received. The applicant questioned its VAT liability and approached the court for an order declaring that the applicant was not liable for the payment of VAT in terms of section 7(1)(a) of the VAT Act as there was no supply of goods or services. The court held that it had a discretion to consider the application for a declaratory order and that the Special Court, *inter alia*, is not the only forum that may be approached in this instance.

It follows that a taxpayer that has a single tax dispute regarding different aspects of tax collection has to approach two different forums in order to settle the dispute; i.e. the taxpayer will be a party in two separate court cases in two different courts. This anomalous result has a negative impact on the taxpayer, especially when the taxpayer is a smaller business or an individual. This result has the implication of double the legal expenses which the taxpayer would not have incurred had the dispute been able to be settled *in toto* in the same court, i.e. in one single court case, and it may be time

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<sup>354</sup> See sec 104(2) of the TA Act.

<sup>355</sup> *Shell's Annandale Farm (Pty) Ltd v Commissioner for South African Revenue Service*  
62 SATC 97 at p103.

<sup>356</sup> 62 SATC 97.

consuming and cause major frustration for the taxpayer being involved in two separate matters which technically relate to one issue or dispute.

Furthermore, PAJA, in terms of section 7(1), allows a taxpayer 180 days from either the date that internal remedy proceedings are concluded or the date that the taxpayer became aware or should have become aware of the administrative action, to institute proceedings for judicial review. In contrast to this, the Draft Rules, in rule 7(1), allow a taxpayer 30 days from either the date of the assessment or the date of a request for reasons to object to an assessment. PAJA allows for a much more lenient and reasonable period to institute the relevant proceedings than the Draft Rules. Following the above approach, i.e. that different forums must be approached, would result in different periods being applicable to institute the relevant proceedings.

As the example clearly purports, it is highly likely that the different aspects of a taxpayer's dispute with SARS will be closely related with one another, but according to the above, may have to be settled in different courts. From the taxpayer's perspective, the outcome as sketched out above has an absurd result and some kind of solution should be sought to provide the taxpayer in such a situation with relief.

The question now becomes, what can be done to solve the aforementioned absurdity? Is a legislative amendment required?

The court held in *VAT Case No. 789*<sup>357</sup> that the tax court is a creature of statute<sup>358</sup> and therefore only has the jurisdiction which is conferred on it by the legislature and not inherent jurisdiction similar to that of the High Court. The jurisdiction of the tax court is set out in section 117 of the TA Act. In terms of section 117(1),<sup>359</sup> the tax court has the jurisdiction to preside over tax appeals lodged under section 107 of the TA Act. Generally, a taxpayer may, in terms of section 104,<sup>360</sup> object to an assessment made or certain defined decisions. The Commissioner may then, in terms of section 106(2) of the TA Act, either allow or disallow such an objection. The taxpayer may then, in terms

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<sup>357</sup>

At p272.

<sup>358</sup>

The tax court is established in terms of section 116 of the TA Act.

<sup>359</sup>

Of the TA Act.

<sup>360</sup>

Of the TA Act.

of section 107(1),<sup>361</sup> appeal against that decision either to the tax board or to the tax court. Therefore, based on the flow described in this paragraph, the tax court can hear any matter which starts off as an objection to an assessment<sup>362</sup> or as an objection to certain specified decisions.<sup>363</sup>

It must be noted that the TA Act, in certain specific instances, directs the taxpayer to specifically approach the High Court on review in respect of a decision taken by the Commissioner. These instances include firstly, an application for the return of seized material or costs of damages, and secondly, jeopardy assessments. In terms of section 66(1) of the TA Act, a person may request SARS to return seized material and to pay the costs of physical damage caused by the search and seizure. If this request is refused by the Commissioner (which constitutes a decision by the Commissioner), section 66(2) of the TA Act provides that that person may apply to the High Court for the return of the seized goods or payment of compensation. The court may make an appropriate order. The second instance in which a person should specifically approach a High Court on review is where SARS has issued a jeopardy assessment in terms of section 94 of the TA Act and the taxpayer contends that the amount of the jeopardy assessment is excessive or that the circumstances justifying the jeopardy assessment do not exist.

In order to make it possible for the taxpayer in the example to only approach one forum to solve both his tax disputes which are so closely related, the first suggested possible solution is that section 104(2) of the TA Act be amended to make all discretionary decisions of the Commissioner subject to objection and subsequently appeal.

A “court” is defined in section 1 of PAJA as, *inter alia*, a High Court or another court of similar status. As mentioned above, and is evident from *VAT Case No. 789*, the tax court does not have inherent jurisdiction similar to that of the High Court.<sup>364</sup> Therefore, it cannot be regarded as a court with similar status.<sup>365</sup> In order to enable the taxpayer

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<sup>361</sup> Of the TA Act.  
<sup>362</sup> Sec 104(1) of the TA Act.  
<sup>363</sup> Sec 104(2) of the TA Act.  
<sup>364</sup> VAT Case No. 789 at p272.  
<sup>365</sup> *Ibid.*

in the example to solve both his tax disputes by approaching one forum, it is secondly suggested that the definition of “court” in section 1 of PAJA be amended to specifically include a tax court. If such an amendment is effected, as section 6(1) of PAJA provides that any person may institute proceedings for judicial review in a court or a tribunal, it would be possible for the taxpayer to approach the tax court in judicial review proceedings.

### 4.3 CONCLUSION

It is important for a taxpayer to approach the correct forum when disputing a decision or action of the Commissioner, i.e. the High Court or the tax court, in order to settle the matter timeously and cost-effectively. In the past, reliance was placed by taxpayers on the decision of *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Bpk.*<sup>366</sup> The effect of this matter was that a taxpayer could object to and appeal against a decision of the Commissioner, but that such an appeal is technically a review of the Commissioner’s decision on the basis of the normal grounds of review. This decision was, however, nullified by the decision in *VAT Case No. 789* where the court held that the tax court does not have inherent jurisdiction and cannot entertain a judicial review application and that such an application must be brought in the High Court.<sup>367</sup>

The decision in *VAT Case No. 789* causes an anomalous result therein that a taxpayer may have to approach different forums in order to solve a tax dispute which consists of more than one aspect which may often be closely related. If the approach of *VAT Case No. 789* is followed, which is the current status, in the absence of a legislative amendment, the taxpayer would in the instance described in the example and in the aforementioned paragraph, have to approach both the High Court and the tax court. It is therefore suggested that either the definition of “court” in section 1 of PAJA be amended to specifically include a tax court or that section 104(2) of the TA Act is amended to make all discretionary decisions of the Commissioner subject to objection and subsequently appeal. This would enable an aggrieved taxpayer to approach the

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<sup>366</sup> 1985 (2) SA 668 (T).

<sup>367</sup> VAT Case No. 789 at p272.

tax court in judicial review proceedings instituted under PAJA and would result in a cost- and time effective manner to solve closely related tax disputes.

## CHAPTER 5: CONCLUSION

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This thesis studies the administrative law in general with the application thereof in the tax environment. Furthermore, it involves a discussion on the appropriate forum which a taxpayer must approach in order to solve tax disputes.

### 5.1 PAJA, THE CONSTITUTION AND THE COMMISSIONER

From all of the above, it is clear that section 33 of the Constitution confers upon a person the right to administrative action that is lawful, reasonable and procedurally fair and that anyone whose rights have been adversely affected by administrative action has the right to be given written reasons. Section 33 requires legislation giving effect to this fundamental right to be enacted. PAJA is the consequence of this constitutional instruction. The fundamental right envisaged in section 33 must therefore be read with the provisions of PAJA.

The action taken by an administrator must constitute “administrative action” in order for section 33 of the Constitution to apply to such action. This means that the various elements of the definition of “administrative action” must be present; being, a decision by an organ of state which adversely affects the rights of any person and has a direct, external legal effect. It was established in Chapter 3 that SARS is an organ of state and must comply with the requirements of administrative justice as contemplated in the Constitution and PAJA.

Administrative action must firstly be lawful. This requirement means that the action must be duly authorised by law. Under PAJA, any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action. The different grounds for review are set out in section 6 of PAJA.

The action must have been taken in terms of an “empowering provision” (for example fiscal legislation) as defined in section 1 of PAJA, which includes that whoever takes the decision must be authorised to do so; e.g. under a delegation of power. The

empowering provision may limit the administrator's actions in various ways. In summary, the body exercising the administrative action must be properly constituted and must act within its powers afforded to it in terms of legislation. Where an obligation is put on the administrator in terms of the empowering provision to make a decision, PAJA provides for review in instances where the administrator fails to do so. Thus, the Commissioner must be careful not to delay any decision making unnecessarily, as the failure to take a decision is also vulnerable for review. It is furthermore important that persons be treated equally in respect of similar administrative decisions. Policies or guidelines may assist the administrator in being consistent with its decision making.

In making decisions of an administrative nature, the administrator must be careful not to infringe a person's rights by acting with bias, ulterior motive, or for a reason which is not authorised by the empowering provision. To achieve this, the purpose for the administrator's decision must be lawful. The administrator must take care not to have regard to the circumstances which are irrelevant, and *vice versa*, in order not to render his, her or its decision vulnerable for review.

Secondly, the Constitution requires administrative action to be reasonable. Therefore, where an administrator considers a decision in respect of a discretionary power that has been conferred on it, it must ensure that the outcome of its decision is one which a reasonable decision-maker could reach. In ensuring that a reasonable decision is reached, the administrator must take the circumstances of each case into account; in other words, each case's circumstances will determine whether the administrator acted reasonably or not in that specific instance. The importance thereof is that an administrator must afford a person a chance to make representations once a decision has been reached which adversely affects the person's rights, and it must be stressed that that decision might be reviewable if this requirement of procedural fairness is not complied with.

In order to assist the person so affected to consider whether or not the decision of the administrator must be taken on review, reasons for the decision may be requested. Decisions taken by the Commissioner affect taxpayers financially and it is preferable that reasons be provided for such decisions. These reasons must be clear and in

proportion to the complexity of the facts and the decision. The reasons afforded by the Commissioner must assist the taxpayer in understanding why the specific outcome was reached and to decide whether or not judicial review should be pursued. When providing reasons for the administrative action, it is important for the Commissioner to make sure that the reasons are clear and that the taxpayer should not have to search for reasons in, for example a myriad of documents provided to the taxpayer. The guidelines set out in this thesis should assist the Commissioner in compiling a set of proper reasons for any administrative decision taken.

Before it is decided to take any administrative decision on review, all internal remedies must first be exhausted. This requirement assists the taxpayer (or other affected person) in being cost and time effective as many issues may be settled through the internal alternative dispute procedure. Once an administrative decision of the Commissioner which affected a taxpayer negatively has been found to be “wrong”, relief in the form of various remedies are available to the taxpayer and the court or tribunal hearing the matter will make an appropriate decision as to which remedy should be afforded.

From the information in this thesis, it is important for the Commissioner to keep the principles of “legitimate expectation” in mind when making decisions regarding the application of principles set out in certain Guides, Interpretation Notes or other directions issued by him, as what is stated by the Commissioner in those documents may give rise to a legitimate expectation for the taxpayer that he, she or it will be treated as expressed in such documents.

## **5.2 FORUM TO BE ADDRESSED BY THE TAXPAYER**

Once the taxpayer has decided to pursue judicial review subsequent to a decision by the Commissioner, that taxpayer must decide which forum is the correct forum to approach. This question is addressed in this thesis, especially in instances where the taxpayer has various disputes relating to a single tax issue. The importance of approaching the correct forum is motivated by the need to settle tax matters timeously and cost-effectively.

In order to achieve this, the proposed suggestion includes a legislative amendment of either the definition of a “court” in section 1 of PAJA to specifically include a tax court, or of section 104(2) of the TA Act to make all discretionary decisions of the Commissioner subject to objection and subsequently appeal.

### **5.3 SUMMARY**

Taking the information set out in this thesis into account, it is clear that a taxpayer has certain rights which, after the introduction of the Constitution, include the right to just administrative action. In making decisions affecting a taxpayer and to honour this fundamental right, the Commissioner must take section 33 of the Constitution, as well as the principles of PAJA, into account.

**Number of Words:** 23,111

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