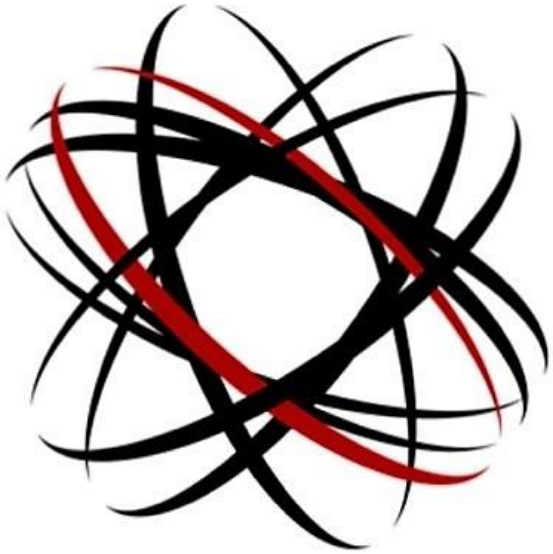

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# ADMINISTRATIVE LAW

## STUDENT WORKBOOK

## Preface

Administrative Law is one of the most practical areas of law you will encounter not just in law school but in life after law school. Far too often however, this course is tainted with a negative outlook by students before they even start the year and this blinds them to this reality. My interest in producing something of this nature is to bring the practical nature of the course to the fore and make it easier for you to work through the course. Your lecturers will walk and work through the work with you in class but that will not be enough for you to do well in the course. You will need to actually engage with the material they discuss in class and read the cases. The structure of this workbook is to complement that aspect of your studies and highlight important aspects that you may miss when you do your independent reading. A good student pre-reads for the lecture and also takes time to ask questions in class where something is unclear but that's not all. An even better student takes the time to post-read and self-study the work and even then, when something is not clear he or she makes sure to consult with the lecturer and or tutors.

Administrative law is all around you and I would encourage you to embrace it and change your mind-set towards the course –it really is an easy final layer to your legal studies. If you do this, attend class and tutorials plus self –study, there is no doubt in my mind that you will walk away with a very good mark for this course.

This work is not exhaustive but gives you an indication of the kinds of questions you will need to ask yourself after finishing a topic.

Wishing you all the very best!

**Paul Kaseke Snr**
*Johannesburg, January 2016*

## Contents

# Part A: Topical Guide and Exercises

*This section of the work breaks down important aspects of administrative law by posing key questions that should serve as a guiding questions when you are studying through individual topics. It is suggested that as you work through the section should you come across something you cannot answer, you should immediately raise it with your Lecturer/Tutor so you don't lag behind. This will also increase your chances of passing the course.*

## Sources of Administrative Power

The Constitutional Court in ***Fedsure*** held that as a foundational and fundamental principle of our constitutional democracy, no organ of state and no sphere of government may exercise power beyond that which has been conferred to it.

As Hoexter notes, administrative powers are conferred and accorded by law. In other words, some authority must exist to create administrative power. Differently put, if there is no law giving the administrator power to act in a certain way then the administrator lacks the required administrative power and consequently, his or her actions are unlawful.

With reference to the readings on this aspect of the work, answer the following questions

1. **Discuss ways in which the Constitution can confer administrative power. Cite relevant legal authority to support your answer**.

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2. **Legislation is said to be the most 'prolific and important source of administrative powers' (Hoexter, p31). Why is this so?**

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3. **Can quasi-legislation or standards produced by administrators be considered to be a source of administrative power?**

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4. **Is it possible for delegated legislation to be a source of administrative power without the original legislation conferring such powers?**

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5. **Would it be accurate to suggest that the prerogative powers are in themselves, a source of administrative power?**

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6. **'The State has all the rights that a private owner would have at the common law' – *Minister of Works v Kyalami Ridge* (par 48). Does this common law power referred to constitute a source of administrative power?**

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7. **There has been much debate on whether or not African customary law can be a source of administrative power. Critically discuss the merits of this debate with reference to relevant authority.**

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8. **Evaluate the following assertion: 'There simply cannot be any place for estoppel in administrative law because it affects fairness, good governance and the efficiency of the State.'**

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# Judicial Review

This section is loosely based on pages 108-169 of the Hoxter, *Administrative Law* (2ed) text.

A recurring theme in Administrative Law is the desire by courts to keep the concepts of appeal and review distinguishable from each other. It is thus important that you are also able to distinguish between the two as this will help you grasp a significant feature of this area of law and its existing tensions.

1. **Why are courts obsessed with this distinction? Is it really important?**

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2. **What did the SCA in *Rustenburg Platinum Mines v CCMA* have to say about reviews?**

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3. **When are appeals appropriate?**

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4. **When is a second decision maker allowed or entitled to declare the first decision (that being challenged) right or wrong?**

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5. **What is the 'watchdog theory'**?

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6. **Hoexter refers to the distinction between appeal and review as artificial. Give reasons for this assertion.**

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7. **Distinguish between judicial review in the administrative law sense and review in the constitutional sense**

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8. **Is an administrative law review similar to the special statutory review?**

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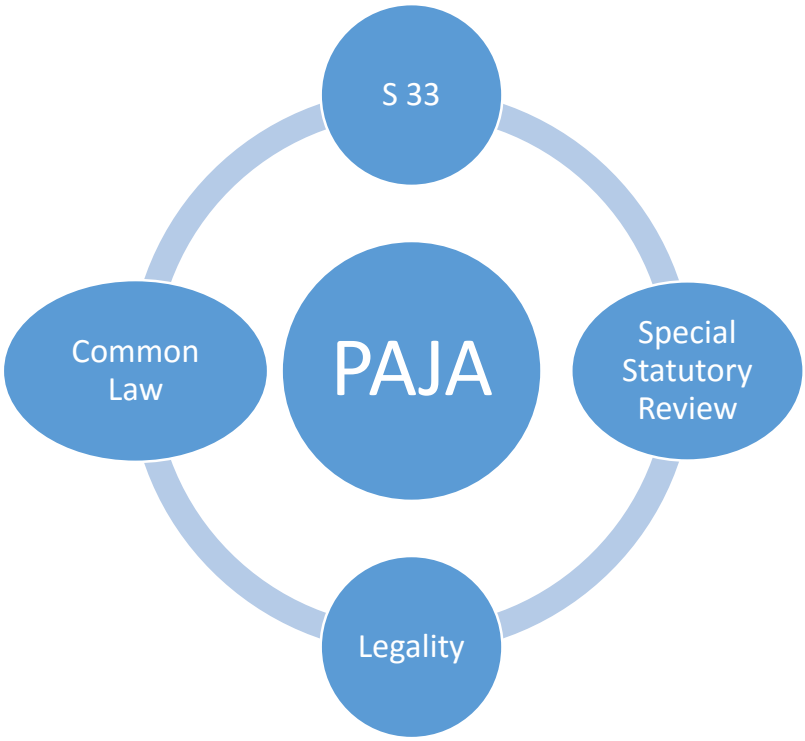
## Pathways of Review




The diagram above represents the five pathways of review in administrative law. Answer the following questions with reference to the diagram.

a. **What is meant by 'pathways of review' and what is the significance of these pathways in South African administrative law?**

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b. **Why is the PAJA at the centre of the diagram and how does *Bato Star* (particularly O'Regan's judgment) account for it?**

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**c. How do these pathways interact with each other?**

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**d. What is meant by the 'avoidance of the PAJA' and is it permissible to do so?**

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**e. In an administrative law enquiry, when does one start with the principle of legality as the pathway of review?**

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**f. While there are five traditional pathways of review, the 'Sidumo' formulation is sometimes seen as the sixth. Some commentators and scholars find it convenient to place it under special statutory review and not as an independent pathway. In your opinion, should the 'Sidumo' formulation be seen as an independent ground? Does the placement of the ground really matter? Substantiate your reasoning with appropriate legal authority.**

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## Administrative Action

Possibly the most confusing and unsettled area of Administrative Law in South Africa is the all important aspect of administrative action. In describing it, the Constitutional Court itself has admitted that what falls into the realm of administrative action is a difficult task and the classification should take place on a case by case basis (***President of the Republic South Africa v South African Rugby Football Union*****).**

With reference to pages 171-174 of the prescribed text, discuss the following:

1. **Has the concept of administrative action always been a part of South African administrative law? Discuss fully**

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2. **Administrative action can be viewed under the Constitution and also under the PAJA. What is the distinction if any and what necessitates that distinction?**

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3. ***SARFU*** **like many other cases, makes a distinction between the powers the President exercises as Head of State and when he acts as the Head of the Executive. What is the**

**importance of this distinction under the administrative action enquiry? Refer to relevant case law**

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**Determine whether or not there the following circumstances amount to administrative action under the PAJA and refer to appropriate authority in reaching your conclusion.**

4. **A resolution by the Thekwini Municipality to remove speed bumps from two major highways**

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5. **A resolution by the same municipality passing the local budget for the 2016 financial year**

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6. **The President's refusal to grant consent for the extradition of a well-known criminal to Venezuela**

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7. **The decision by the Premier of Gauteng to grant a servitude in favour of a fishing company**

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8. **The decision of the municipality to amend zoning regulations**

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9. **The allocation of money for education by the provincial government of Limpopo**

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10. **Notices published by the Department of Health that have an effective date of 10 July 2016 while the actual Act that gives the Department the power to make such regulations only comes into effect on the 10th December 2016.**

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11. **The decision by the President to appoint a commission of enquiry into the suitability of the Police Commissioner to hold office**

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12. **An investigation into the affairs of a company by the Companies Commission**

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**13. A police investigation into the murder of a top government official**

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**14. The awarding of a mining licence by the government**

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**15. The cancellation of a contract between a municipal council and a private firm**

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16. **A magistrate making a decision under s 87 of the National Credit Act**

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17. **The decision by the National Prosecuting Authority not to prosecute**

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18. **The decision by the President to change cabinet ministers without warning or notice**

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19. **The decision by the Judicial Services Commission to hold a preliminary hearing on the appointment of judges but excluding the public**

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**20. The decision to introduce prepaid meters in a specific municipality**

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**21. The decision by the President to dismiss the Police Commissioner**

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**22. The decision by the President not to dismiss the National Intelligence Services Head**

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**23. The decision to appoint a Regional Court President**

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**24. The pardoning power of the President**

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**25. The failure to renew a contract of a sessional academic at a tertiary institution**

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**26. The decision by a university to award a contract to contractor supplying cleaning services**

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**27. The decision by a university to exclude a student on grounds of misconduct**

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28. **The decision by a university to end outsourcing by immediately hiring all its outsourced staff at the end of their contracts**

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29. **The decision by a school to expel a student because she is pregnant**

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30. **The decision not to register applicants as providers of private security services**

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31. **The decision not to grant a drivers licence to a learner**

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# Lawfulness

The foundational premise of this course and indeed the PAJA, is that there is a constitutional right to lawful, reasonable and procedurally fair administrative action. The PAJA of course, is the legal instrument enacted by Parliament to give effect to this constitutional right. This entire section of the work deals with the first part of that constitutional right which is the lawfulness element. As stated earlier, the lawful element simply details the need for administrative conduct to be done within the bounds of the law for anything falling short of that is outside the power given to the administrator. It is an aspect of the rule of law to act within the powers allocated to an administrator. This is in essence the idea of legality. While the PAJA has canonised (or written down and codified) the common law grounds which gave birth to the content of this section, the common law still determines much of the interpretation of the content here. In other words, the common law is a useful if not pivotal tool in understanding what lawfulness would demand in various instances. You will find this especially true when the PAJA does not specifically cover a specific set of facts in its grounds of review –the common law will often present a ground which can be used to review something hence the importance of the common law cannot be ignored in this section.

Corder, Currie, Klaaren and Burnes are some of the most respected administrative law scholars and commentators in the country (apart from Prof. Hoexter of course) and they have different ways of grouping the grounds of review under lawfulness. That grouping is nothing more than preference and shouldn't put you off when you find it done differently in their texts. In this course and indeed in the prescribed text, the grounds of lawfulness are conveniently grouped under three sub-topics or themes. We will work through the same order: authority, jurisdiction and abuse of discretion.

Let's start with the concept of authority.

## AUTHORITY

This section is loosely based on pages 255 -276 of the prescribed text and you should refer to it as you work through the questions.

1. **According to *Fedsure*, what is the importance of authority in the context of administrators and administrative law in general?**

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2. **The PAJA codifies this common law ground. Where would one find it and what elements would be factored in for the ground of review to succeed**?

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3. **Legislation X requires the Minister to make a decision in consultation with the Director General and senior Directorate staff. Assume that when the decision is taken, the Minister is absent from the meeting but the Director General and Directorate staff are all present. Does this decision meet the tenets of authority as espoused in the PAJA?**

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4. **Do all members of a statutory body have to be present for a decision to be taken? Alternatively, does the absence of one or two members from a meeting where a decision is taken by a statutory body, affect the validity of the process?**

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5. **It is often held that a decision must be unanimous for it be seen as properly taken by a decision making body. Is this notion consistent with the PAJA and the common law in this regard?**

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6. **Distinguish between a situations where an administrator takes a decision but relies on the wrong provision even though they are entitled to take such a decision and where the administrator actually lacks authority. How would the two scenarios be resolved by our law?**

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7. **In the instance where an administrator relies on the wrong provision even though he genuinely possess the powers to act albeit in terms of another provision, how relevant is the fault of the administrator (negligence and intention)?**

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8. **Discuss and critique the so called *Quid Pro Quo* approach as applied by the courts**

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**9. What is the default position regarding the use of authority?**

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**10. Administrative law distinguishes between original authority and delegated authority. What are the implications of this distinction?**

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**11. With reference to the question above, classify the following bodies and the authority they exercise.**

**a. Parliament and its powers to make law**

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**b. The Minister and his/her powers to create a further set of regulations as allowed by the act of Parliament giving him such powers**

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**c. The Minister's designates who are tasked to come up with guidelines to support the Minister's rules /regulations in (b) above**

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**d. Any private body or grouping tasked to implement specific aspects of an act of Parliament and give effect to it.**

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**e. A third party contracted by an organ of state to maintain peace and security in a specific province**

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f. **VFS which is mandated by the Department of Home Affairs to screen applications of all immigrants to South Africa in an orderly and timeous manner as demanded by the Immigration Act.**

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12. **What is the presumed intention of Parliament when it delegates authority and how has this been interpreted in the cases?**

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13. **What is an original legislator? In answering this, give an exhaustive list of original legislators in the South African legislative framework.**

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14. **Our courts have defined what delegation of authority or power refers to in numerous cases. In your own words and citing one or two prominent cases, what does delegation entail?**

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15. **Why are there constitutional limits to the ability to delegate power?**

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16. **'Parliament can often delegate whatever powers it deems necessary in the interests of efficiency and practicality'. Evaluate this statement and while doing so discuss whether or not Parliament can delegate to the President, the legislative power to extend the term of office of the Chief Justice?**

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17. **Can Parliament delegate the power to amend an Act of Parliament to a member of the Executive?**

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18. **Discuss the validity of the guidelines in the scenario that follows. Parliament has just drafted an Act known as the 'Closed Border, South Africa Not For Sale Act'. It replaces the Immigration Act in its entirety and now prohibits foreigners from entering the Republic without a valid work permit or study permit. It grants immigration officers the right to deport 'suspicious looking and dodgy' foreigners. It does not however, describe what these 'suspicious foreigners' like. It also grants immigration officers the right to give 'on the spot permits' for seemingly deserving foreigners. It does not however, detail what criteria these permits will be awarded on.**

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19. **Would your answer in (18) above differ if only Senior Immigration Officers (with work experience of over twenty years) issued the permits?**

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20. **With the use of a practical example , define the delegatus and the delegate**

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21. **Discuss with the use of examples , the practical use of the presumption *delegatus delegare non potest* as a necessary feature of an effective administration and government**

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22. **What factors have been used by the courts to rebut the presumption in (21) above?**

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23. **How does our law deal with the instance where Administrator X should take and make a decision but instead gets instructions on the outcome from a political figure with vested interests in the matter?**

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24. **How does our law deal with an instance where Administrator X consults with Administrator Y who has unquestionable knowledge and expertise on the matter and bases the decision solely on the information provided by Administrator X?**

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25. **The distinction between the scenario in (23) and (24) above is not always clear for both administrators and students of administrative law. What is the difference between the two situations?**

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26. **What does the doctrine of functus officio mean at a practical level?**

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Now we turn to the second part of lawfulness, jurisdiction**.**

## JURISDICTION

An essential part of lawfulness is considering the boundaries of the actions of administrators because administrators may only act within the confines of the administrative territory they have been given which brings us to the discussion of jurisdiction. The administrative boundaries or territory of an administrator otherwise known as the jurisdiction, can be found in two realms – jurisdiction of fact and jurisdiction of law.

1. **What is the definition commonly attributed to an error of law**?

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2. **What is the definition commonly attributed to an error of fact?**

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3. **Both administrators and administrative law students struggle with the distinction between an error of law and an error of fact. With the use of two examples, distinguish between the two.**

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4. **Which sources of administrative power acknowledge the wrongfulness and reviewability of an error of law? Refer to specific authority in this regard.**

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5. **Deciding on an error of law has often been said to blur the lines between review and appeal because it questions the correctness of the administrator's actions as opposed to evaluating and scrutinizing the process followed. Why do our courts still engage in determining the substantive correctness of the legal interpretation by an administrator?**

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6. **The *Union Government v Union Steel* case infamously held that the courts could only review an error of law if the error itself prevented the administrator from appreciating the nature of his/her duties or prevented a proper exercise of his/her discretion. Critique the position taken by the court in light of the practical difficulty it presents. How have the courts approached this position?**

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**7. What was the common law position on non –jurisdictional errors?**

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**8. The *Chesterfield House* case stands in contradiction to the *Reynolds Brothers* case and the Goldfield's *Investment* case. Why is this so?**

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**9. The English case of *Anisminic Ltd v Foreign Compensation Commission* is considered a landmark case in this aspect of administrative law. Why is it significant?**

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10. ***Hira v Booysen*** **much like its English equivalent stated in (9) above, is also considered a landmark case in South African administrative law. Discuss its significance and relevance**

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11. ***Hira v Booysen*** **provides guidelines in determining the reviewability of error of law cases. List these guidelines.**

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12. **The *Tantoush* and *Mikro Primary* cases tackle error of law cases differently. How do these cases differ from the *Hira v Booysen* case**?

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13. **With the different legislative and judicial developments since the *Hira* case, what is the position of our law now in respect of errors of law? Are they reviewable and if they are, what types of errors would be reviewable?**

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**14. What is the distinction between a jurisdictional and a non –jurisdictional mistake of fact?**

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**15. What does the absence of jurisdictional facts mean for the administrator?**

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**16. There are some formulas that immediately seem like one is dealing with a jurisdictional mistake of fact. Give one such formula and any variations of it that you can think of**

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**17. Does the PAJA have any room for a jurisdictional mistake of fact and if so, where would one find the ground?**

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18. **What are the consequences of failing to comply with procedural requirements in an application? Use the following scenario to answer this. Mr Mayo is submitting a tender and he forgets to enclose a copy of his bank statement which is required before his tender can be accepted. He also neglects to put his name on the third page of the tender documents but he has put his name on every other page of the 43 page tender document.**

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19. **Discuss the purposive approach as applied to procedural jurisdictional facts.**

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20. **It would seem that the courts are reluctant to apply rigid rules to the area of tenders and procurement compliance. According to the SCA, when should condonation be used**?

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**21. Substantive jurisdictional facts can be either objective or subjective. What is the difference?**

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**22. The so called ' Shidiack principle' , taken from the *Shidiack v Union Government* case sets down instances where the courts would be entitled to intervene. What are these instances?**

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**23. Discuss the position and principles from the 'security cases'**

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**24. *Hurley* is said to be a turning point in our law. What is the significance, if any, of this case?**

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**25. *Walele* seems to champion an important justification of reviewability of subjective jurisdictional facts under the Constitution. Why is this so and what is the effect of the judgment?**

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**26. What was the common law position of mistakes or errors of fact that were within the jurisdiction of the administrator (non-jurisdictional facts)?**

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***27.* Discuss the cases of *De Freitas v Somerset West Municipality* and *Ferreira v Premier, Free State***

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**28. *Pepcor* closes the discussion on reviewability of non-jurisdictional facts. Discuss why this is so**

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The last section of lawfulness is the abuse of discretion. This section is important because it recognises that administrators have a specific discretion to exercise when making a decision but when they fall short of this standard or abuse their discretion then one can approach the courts to have the decision reviewed. The easiest way to understand the work herein is to imagine yourself as the applicant and consider the various instances where the administrators you have come across so far violated one of these grounds. I have often thought of the times I had to apply for a visa renewal and had to endure long winded excuses of why the application was delayed or why a decision had not been made etc. Some of you may have endured the same with passport applications, licence renewals and applications of other types with government departments. It really does help to take the law out of the book as it were and practically see how the PAJA tries to promote an effective and efficient administration in the Republic. The grounds are indeed very practical and easy to get so you should really get this with relative ease (and enjoyment!)

## ABUSE OF DISCRETION

1. **Discuss the difference between ulterior motive and ulterior purpose**

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2. **Discuss how the PAJA deals with the grounds listed in (1) above.**

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3. **In a situation where the administrator uses one provision to achieve a different purpose from that which the legislature intended, what is the position of the courts in that regard?**

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4. **Why has the ground of bad faith been problematic or controversial?**

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5. **Would it be appropriate and accurate to state that bad faith and dishonest in this constitutional order are not relevant or alternatively are not grounds in law to ground a review in terms of the PAJA?**

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6. **How did the court in Johannesburg Stock Exchange define the failure to apply one's mind**

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7. **Where would one find the ground of review in (6) above?**

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8. **Mr. Murambadaro Redu applied for a permit to hunt lions. The relevant department acknowledged receipt of his application on 1 January 2016 and when he calls them two months later, the Director General responds 'Askies, we have not been able to come to a decision on your matter. The competition is stiff and hopefully one of the others withdraw their application so we have less headaches. I don't even know when that will be or when we will make a decision but there is no rush in Africa. Be patient'. You are approached to advise on this matter with reference to both the PAJA and the common law.**

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9. **Tenny Farrow applied for a national identity card on 1 December 2015 and according to the Department of Home Affairs, these should be produced after 48 days. By 1 March**

**2016(way over the 48 days), she has not yet heard anything from the Department. What grounds of review can she rely on in terms of the PAJA?**

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10. **Fully dissect the case of Anchor Publishing in relation to relevant and irrelevant considerations**.

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11. **Fettering has been said to be similar to unlawful dictation. Discuss the similarities and differences of the two concepts.**

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**12. What is the *Britten* principle?**

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**13. What useful guidelines emerge from the *Bato Star* case in relation to fettering**

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**14. What is meant by the terms 'arbitrary and capricious decision-making'**

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**15. What does the s 6(2) (i) ground of the PAJA cover?**

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# Reasonableness

You will recall that the right to administrative action in s 33 demands that administrative action is 'lawful, reasonable and procedurally fair'. We have already examined the first aspect of lawfulness and now we turn to arguably the most controversial aspect of s 33: reasonableness.

1. **Why is the ground of reasonableness so controversial?**

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2. **How did the judiciary in the pre-democratic dispensation deal with the inherent controversies brought about by the element of reasonableness?**

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3. **What were the criticisms around the classifications approach?**

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4. **Discuss Baxter's approach to a unified ground of reasonableness**

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5. **The Interim Constitution made reference to the concept of a 'right to administrative action which is justifiable in relation to the reasons for it where any of his or her rights is affected or threatened'. It is clear that the drafters completely scrapped the reasonableness wording from the text. This presented a nightmare for commentators and courts alike. Discuss why this is so and what the effect of the changed wording had on the continued use of the 'reasonableness' as a ground of review in South African administrative law .**

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6. **What is the definition of reasonableness in the administrative law sense?**

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7. **What are the ingredients or elements of reasonableness?**

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8. **How does the *Trinity Broadcasting* case describe rationality ( *hint* – they adopted the approach taken in the Labour Appeal Court case of *Carephone*)**

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9. **How does the PAJA give scope to the element of rationality?**

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10. **Is the ground of rationality in the PAJA not covered by the more general ground of reasonableness in s 6(2) (h) of the PAJA?**

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11. **Proportionally has not found universal acceptance as a ground of review in South African administrative law. Why is this so?**

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12. **What is the *Wednesbury* formulation and has it found any support in South African administrative law?**

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13. **There are many ways to interpret s 6 (2) (h) of the PAJA. Discuss two of these approaches with reference to case law and academic authority.**

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14. **Bato Star provides factors to consider when determining the unreasonableness or reasonableness of a decision. What are these**

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15. **Why do most commentators (chief amongst them, Hoexter and Jowell) applaud the *Bato Star* factors by O'Regan J?**

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16. **Does the distinction between review and appeal continue to exist in light of reasonableness as a ground under the PAJA?**

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17. **Where does deference emerge from in an administrative law sense and what does it entail?**

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**18. How does *Bato Star* clarify the scope and application of deference or judicial restraint?**

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**19. What is the interaction between reasonableness and the principle of legality?**

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**20. Would you conclude that there is more scope for reasonableness under the PAJA or under the principle of legality? Give reasons for your answers**

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## Procedural Fairness

This section covers the last ingredient of the s 33 right to administrative action- procedural fairness.

1. **Why is procedural fairness significant?**

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2. **What does fairness guarantee under our Constitution?**

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3. **Is there a fixed content of what fairness entails?**

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4. **What does *audi alteram partem* mean?**

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5. **Why is it important for one to be given a chance to participate in a decision affecting them or be heard?**

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6. **Discuss the relevance of the *Traub* case**

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7. **Where does the PAJA deal with procedural fairness?**

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8. **What did the court in *Brenco Inc.* mean when it held that the requirements of the *audi alteram* principle are 'contextual and relative'?**

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9. **Give one pre-democratic example of the contextual approach to fairness**

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10. **Discuss the minimum requirements of fairness in s 3(2) of the PAJA**

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11. **Discuss the so called discretionary ingredients of fairness in s 3(3) of the PAJA**

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12. **How can one possibly escape the minimum requirements of s 3(2) of the PAJA?**

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13. **Discuss the concept of 'fair but different' under the PAJA in terms of s 3(5).**

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14. **How have the courts dealt with non-compliance of s 3(2)?**

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15. **Meek Mill approaches you with a legal question. He wants to know if he can remedy a procedurally unfair process initiated by his record company's HR department by creating an appeal process. Advise him fully with reference to both the PAJA and the common law.**

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16. **Bonang Thusi is an employee of Pearl The Queen Ltd. - a radio station in Braamfontein. She has been charged with failing to defend herself from vicious attacks by one of her arch rivals and this has compromised the station in the process. Assume and accept that there is something in the disciplinary code of the company that speaks to this. Bonang is now told that she waived her rights to procedural fairness in one of her tweets which read in part: 'I don't recognise that child so I have nothing to say'. You are approached by her legal advisor, AKA Bruh a renowned entertainment lawyer. He asks you to advise him on the position of the waiver of procedural fairness rights in South African administrative law**

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17. **How did the classification of functions gain prominence in South African administrative law?**

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18. **What led to the rejection of the classification of functions discussed in the question above?**

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19. **Discuss the relevance of the legitimate expectation doctrine to the realm of procedural fairness**

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20. **How have the courts dealt with the requirement of materiality that appears in s 3(1) of the PAJA?**

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21. **How did the courts develop the legitimate expectation doctrine in the pre-democratic era?**

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22. **Compare the development of the legitimate expectation doctrine in the constitutional era to the development in the pre-democratic era.**

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23. ***Joseph*** **has been said by many to be the 'sledge hammer that paved way for a new understanding of procedural fairness'. Critically discuss this case**

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24. ***Walele*** **and** ***Joseph*** **are often thought to represent two opposing approaches and views to fairness. What are these approaches and which of the two cases do you think is the appropriate approach to fairness. Give reasons for your answers**

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25. **How does the principle of legality deal with fairness and is there scope for further development of the concept?**

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**26. Would it be accurate to suggest that the PAJA deals with procedural fairness in more detail (and content) than the principle of legality?**

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**27. What are the traditional requirements for a legitimate expectation? Remember to also give authority for these**

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**28. What is the 'loose approach' to legitimate expectations?**

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**29. What is the present position of our law in relation to the approach to legitimate expectations? In other words do our courts prefer the traditional or the loose approach?**

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30. **What is a substantive legitimate expectation and how have the South African courts dealt with these?**

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31. **How does the PAJA capture and deal with the common law principle associated with the maxim *nemo iudex in sua causa*?**

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32. **What are the tests for bias?**

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33. **What test for bias has the Constitutional Court expressed support for (here you can also include the wording)?**

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34. **What are the sources of bias?**

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35. **Discuss the application of financial interests as a source of bias**

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36. **Five judges (more appropriately, justices) of the Constitutional Court are friends and business associates with appellants in a case presently being heard before the Court. Will an application for their recusal citing bias a ground, be successful?**

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37. **An administrator who decides on the granting of permits to foreign national students with on behalf of the Minister of Home Affairs is on record as having said 'there are too many foreign national students in our Rainbow nation and if it were up to me only five in a hundred thousand applicants would receive study permits or maybe even none at all LOL'. He is currently the Chief Adjudicator of Study Permits with the implication that no study permit is granted without his approval. A concerned applicant who intends on studying for**

**her Masters in Law at Wits is worried that she will be prejudiced by what she perceives to be an inherent xenophobic bias towards foreign nationals. Advise her fully on the steps she can take to ensure her application is processed and adjudicated fairly and on the merits.**

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38. **A selection panel for the position of lecturer is on record as saying they are only interested in seeing 'bright applicants who can obviously only emerge from a specific race' and that they will not entertain mickey-mouse candidates (a reference they make to all other race groups). Is there a case to be made of bias in this case?**

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39. **The Dean of the Law Faculty at Money Matters Most University has been accused of being a dictator and bullying his staff. He sets up a commission of inquiry with the aim of encouraging staff and students to report such fears and concerns. He assures them that he will look into it and if he receives more than 10 complaints he will step down. He chairs the commission of inquiry and refuses for anyone else to do so. Some staff members refuse to participate and instead cite a lack of procedural fairness. What specific grounds could they be referring to and what are their chances of succeeding?**

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## REASONS

1. **What is meant by 'reasons' in administrative law and what is the history behind the giving of these reasons in South African administrative law?**

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2. **Discuss whether the following qualify as reasons in terms of our law :**
   a. **' The process was competitive'**

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   b. **'There were better candidates'**

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**c. ‘We had a high number of applicants’**

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**d. ‘You were not what we wanted’**

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**e. ‘You are not black enough’**

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**f. ‘You are black and we sought white candidates only’**

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**g. ' You are not entitled to reasons'**

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**h. 'The reason for your unsuccessful application is seen in the ticked box below'**

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**3. Discuss the duty to give reasons at the common law**

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4. **Why is it important to give reasons?**

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5. **What is the distinction between reasons and information, a term which appears in many legislative provisions?**

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6. **How did the Interim Constitution deal with the giving of reasons?**

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**7. What is the 'Goodman Bros approach to reasons'?**

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**8. Why did the SCA never return to its own formulation in the case above?**

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**9. How does the Final Constitution deal with reasons?**

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**10. Does the principle of legality demand that reasons be given by administrators?**

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**11. When is one entitled to request reasons under the PAJA?**

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**12. Does the addition of the word 'materially' make any difference in the giving of reasons under the PAJA?**

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**13. Assume that Mujobokori Ninja Rasta Mouse has a right to reasons but he asks for these reasons on the 1st January 2016 but he was informed of the outcome of the application process he is querying on the 1st of September 2016. Can he still request these reasons under the PAJA?**

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**14. Can a person who has been given oral reasons request written reasons?**

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**15. Assume that Rasta Mouse in Question 13 above was given reasons along with the general public, can he still request individual reasons?**

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**16. Can one ask for reasons before the time frame in s 5(2) has lapsed?**

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**17. With reference to the leading cases in this area, what is meant by 'adequate reasons'?**

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**18. Can standard-form letters be seen as 'adequate reasons'?**

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**19. Discuss the 'escape routes' as Hoexter refers to them, by which administrators can be exempt from giving reasons.**

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**20. Discuss the other provisions dealing with reasons in the PAJA apart from s 5**

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**21. Is there a right to request reasons in the absence of a request to give such reasons?**

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## PRACTICE QUESTIONS

In this section you are presented with typical and past exam questions that you will go through in tutorials or work through on your own. You will note that we have not grouped them under specific topics because in the exam and certainly in practice, you do not get direction of that nature. You are being prepared to tackle the exam by rightly identifying the correct issue and where possible, the most appropriate ground of review. As you have already been told, it is possible that a single set of facts gives rise to multiple grounds of review. You may find that there are three grounds of review that can be raised in one question but two of them may be stronger than the other. Generally you will not be expected to detail all three. The idea, depending on the question of course, is to go for your strongest ground of review for indeed in practice you need only prove one ground for a review to succeed. Your tutors and lecturers will explain how to bring in alternative grounds in an essay.

### Exercise 1

NeneGate Paradise (Pty) Ltd ('NeneGate Paradise') intends applying for commercial fishing rights in both the hake longline and pelagic sectors in terms of the Marine Living Resources Act 18 of 1998. In terms of s 18(1) of the Act, no person may, inter alia, undertake commercial fishing or subsistence fishing unless a right to do so has been granted to such a person by the Minister. The Act also provides that any application for any right, permit or licence in terms of this Act 'shall be accompanied by an application fee determined by the Minister'. The application fee for the fishing rights in the hake longline sector is R1 000 and the application fee for the pelagic sector is R800.

On 26 March 2015, NeneGate Paradise submits its application for commercial fishing rights in the hake longline sector to the Department of Water and Environmental Affairs. Intending to cover the costs of

their application fees for both this application, as well as their subsequent application for fishing rights in the pelagic sector, NeneGate Paradise decides to pay the amount of R1 800 to the Department, which payment accompanies the aforementioned application. Two weeks later, NeneGate Paradise submits its further application for commercial fishing rights for the pelagic sector but does not pay any further fees.

The application for fishing rights in the hake longline sector is granted. However, the application for fishing rights in the pelagic sector is rejected. It appears that the Deputy Director-General of the Department of Water and Environmental Affairs, acting upon the recommendation of an advisory committee, decided to reject the application. The application was rejected on the basis that the prescribed application fee for fishing rights in the pelagic sector did not accompany the application as was required by the legislation. It is common cause, that the Minister acting in terms of s 79(1) of the Act delegated his powers to the Director-General. In terms of this section, the Minister is empowered to delegate all of any of the powers conferred upon him to the Director-General or to an officer of the Department nominated by the Director-General; except the power to make regulations. In terms of s 79(2) the Director-General is also empowered to delegate any power conferred upon him or her in terms of the Act to an officer in the Department. It is also common cause that the Director-General delegated his powers to the Deputy Director-General, and that the Deputy Director-General appointed a committee to assist with the evaluation of the applications in accordance with a strict set of guidelines and instructions.

NeneGate Paradise wants to challenge the decision not to grant them the licence in respect of the pelagic sector. They argue that the Minister had to decide upon the application himself and that the decision could not be made by the Director-General, Deputy Director-General, or the committee. Furthermore, they also want to challenge the decision not to grant the application on the basis that they had in fact paid the application fee for fishing rights in the pelagic sector when the first application was submitted.

**Advise them fully.**

## Exercise 2

Shumaya Ayeye is a student at the University of the Witwatersrand. On 1 October 2015, Shumaya was involved in an altercation with one of the lecturers at the Law School, PAJA Bear. During this altercation, it is alleged that Shumaya assaulted PAJA Bear with his fists. On 15 November 2015, Shumaya receives a letter from the VC of the University to the effect that he is required to appear before a disciplinary committee on 1 December 2015. The letter informs him of the nature and

severity of the offence with which he has been charged and clearly sets out the details of the date, time and venue of the hearing. Attached to the letter is an affidavit from a witness, a certain Marvin Naidoo. In his affidavit, Marvin states that he witnessed the altercation and saw Shumaya hitting PAJA Bear with his fists.

Shumaya arrives at the hearing with an attorney, a certain Mr #Hashtag. However, the chairman of the disciplinary committee, Mr Khumalo, refuses to allow Mr #Hashtag to represent Shumaya on the basis that external legal representation is not allowed. In terms of the relevant University rules 'an accused student may personally conduct his/her defence or alternatively the student may be represented by another student or member of staff of the University'. After Mr #Hashtag leaves the premises, Shumaya decides to represent himself. In his defence, Shumaya admits that he had an argument with PAJA Bear about the mark he had received for his Administrative Law test. However, he alleges that PAJA Bear became angry when he questioned him and he slapped Shumaya two times. Shumaya alleges that he did hit PAJA Bear, but was only acting in self-defence. At the hearing, however, the VC produces a further affidavit from Marvin Naidoo in which he states that PAJA Bear did not hit Shumaya at all and that it was Shumaya who was the aggressor.

Shumaya is stunned by these allegations and he is not given an opportunity to counter the allegations contained therein. At the hearing, Shumaya is found guilty of assaulting PAJA Bear and he is suspended from the University for two semesters.

Shumaya is concerned about the fairness of the decision.

**Advise him fully on what grounds of review he can raise in a review application**

## Exercise 3

The Association for Disabled Persons Society (ADPS) is an organisation in Gauteng which has been in existence for 12 years and it looks after people with various disabilities. Although the organisation receives donations from companies and other private individuals, it is mainly dependant on the subsidy which it receives from the Provincial Department of Social Welfare. The organisation has been receiving the subsidy from the Department since its inception and this has enabled it to expand its premises and accommodate approximately 50 people. On 10 January 2016, the Department summarily decides to cancel the subsidy. This has placed the ADPS in an unfortunate situation where it may be forced to close down, thereby leaving many people stranded. You are approached by the Chairman of the ADPS. He requires advice on whether the ADPS can approach the court for an order requiring the Department to continue paying the subsidy to them.

**Advise him fully, making reference to applicable cases.**

## Exercise 4

The Cape Town Municipality places a notice in a local newspaper calling for tenders. In the notice the Municipality states that its sole criterion is to choose the most cost-effective tender. Break it and Make It (Pty) Ltd is one of the applicants who submit a tender to the Municipality. The tender application is given to a certain Mr Botha, who is the official in the Municipality responsible for deciding tender applications (i.e. the authorised decision maker). While Mr Botha is busy sorting through all the tender applications, he is approached by another official in the department, a certain Mr Nene who tells him not to award the tender to Break it and Make It (Pty) Ltd as this is a 'white-owned company'.

According to Mr Nene, tender applications should, as far as possible, be awarded to companies in which blacks are the major shareholders. Despite the fact that Break it and Make It (Pty) Ltd submitted the most cost-effective tender, Mr Botha decides to listen to Mr Nene and does not award the tender to Break it and Make It (Pty) Ltd. Mr Botha checks his records and sees that several tenders have already been awarded to Break it and Make It (Pty) Ltd and reasons that not awarding them this particular tender will not make much of a difference. Break it and Make It (Pty) Ltd want to challenge the decision not to award them the tender.

**Discuss which grounds of review they can rely on to set aside the decision**

## Exercise 5

Under what circumstances is it competent for a court, in reviewing an administrative action, to substitute its decision for the decision of the administrator?

**Explain fully**

## Exercise 6

In terms of the Marine Living Resources Act 18 of 1998, any person who wishes to gain access to marine living resources (e.g. catch fish, gather crustaceans etc.) requires some sort of authorisation (permit, licence). In terms of section 28(4) of the Act:

'the Minister may, whenever he or she is of the opinion that it is in the interests of the promotion, protection or utilisation on a sustainable basis of a particular marine living resource, at any time by written notice to the holder of a right, licence or permit, revoke, suspend, cancel or reduce that right, licence or permit.'

Azuka is the holder of rights in the pelagic (pilchards and anchovies) sector. In May 2016 he receives a letter from the Department of Environmental Affairs and Tourism: Marine and Coastal Management Directorate, which reads: 29 April 2016

Dear Azuka Mchana

You are hereby informed that your rights to catch 1000 kg of pilchards per annum, granted in terms of the Marine Living Resources Act 18 of 1998 in January 2016, has been revoked in terms of s 28(4) of the said Act. The reason for this is that the Minister has reached the conclusion that it is in the interests of the promotion, protection or utilisation on a sustainable basis of pilchards that your rights be revoked.

Yours faithfully

DG

Azuka writes a letter to the Minister requesting reasons for the decision to revoke his fishing rights. He receives a letter from the Department two weeks after he sent his request indicating that he has been provided reasons in the initial letter from the Minister, dated 29 April 2016.

Is the Department correct?

**Explain fully, providing full authority.**

## Exercise 7

Miss North Point is a resident of Randburg in Johannesburg She is 85 years old, illiterate and very poor. She applied for a pension (for which she qualifies in terms of the relevant legislation) to the Department of Welfare in January 2016. In May 2016, she approaches you, an attorney, asking whether there are any steps she can take to obtain a decision, because she has heard nothing from the department.

**Advise her fully, including whether she will be entitled to payment of all the benefits to which she would have been entitled had the decision been made timeously, together with interest**.

## Exercise 8

Does an administrator have standing (locus standi) to apply to court for the review of its own decision? Explain fully with reference to decided cases.

Mrs What Do You Mean is 65 years old. She lives in a rural area in the South of Johannesburg. She is illiterate and very poor, supported sporadically by a son who works in Pretoria. She travels to Braamfontein about once every two years. She applied to the Department of Welfare for a pension in February 2013. She received a letter in April 2014 indicating that the application was unsuccessful. She approaches you, an attorney at the Wits Law Clinic, in February 2015 asking if she is able to review the decision.

**Explain fully with reference to decided cases.**

## Exercise 9

How does the Administrative Justice Act, (the PAJA) deal with fairness and public participation?

## Exercise 10

Discuss how the courts have dealt with contractual cases in South African administrative law

## Exercise 11

Would the following constitute administrative action under the PAJA?

1. A recommendation by the disciplinary committee to the executive committee of the Rotary Club for one of its members to be expelled.
2. A decision by the Director General of the Department of Labour to hold a banquet using state funding at a fancy 5-star hotel in Victoria Falls, Zimbabwe.
3. Regulations by the Department of International Relations governing accreditation of foreign press teams into the country.

## Exercise 12

Would it matter if the actions listed in Exercise 11 do not qualify as administrative action under the PAJA?

## Exercise 13

Deference has become a controversial and widely debated aspect of administrative law in South Africa. Discuss how courts should tackle the topic with reference to scholarly work and any case law that has dealt with it.

## Exercise 14

A new statute, the Racism Act 15 of 2016, gives the Minister of National Reconciliation ( a new ministry created by the Act) the power to ban for a period of up to a year any club, society, or other organization that is associated with racism or has racist sympathies.

Section 4(1) empowers a Racism Tribunal (RT) to undertake an investigation into the activities of any organization and to make a report to the Minister. The report may recommend that the Minister issue a banning order. In terms of s 4(2) the Minister may accept or reject the report and its recommendations. If the report recommends a banning order and the Minister accepts the report, he may then ban the organization in terms of s 4(3).

The Act makes no mention of a hearing at any stage of this process, and nor does it provide for reasons to be given to affected organizations. It does, however, make provision for an appeal to a Racism Appeal Board against any decision of the Minister.

Your client, Miss Velaphi Sparrow-, has notoriously stated that specific races must be wiped off the face of the earth as they are inferior to the other races. This starts a series of protests on social media and her actions are condemned by all political parties in the country. A week ago she received a banning order in terms of s 4(3). She was investigated by the RT, which discovered evidence linking her with certain known racists and plotting to unleash a racial slur on social calling for the removal of minority races. The RT submitted a report to the Minister recommending that she be banned from the Republic or otherwise deported, for a year. The Minister accepted the report and immediately decided to issue the banning order.

Miss Sparrow believes that she may be able to have the banning order reviewed and set aside for lack of procedural fairness. She asks you for an opinion on the following specific questions. (You may assume that the order amounts to 'administrative action' for the purposes of the Promotion of Administrative Justice Act 3 of 2000).

(a) Did Miss Sparrow have a right to be heard before the banning order was issued — and if so, who should have heard it?

(b) Is she entitled to written reasons for the decision to ban it?

(c) Are there any procedural obstacles to having the banning order reviewed?

## Exercise 15

(a) Indicate whether the following items would qualify as 'administrative action' in terms of the Promotion of Administrative Justice Act. Give reasons for your answers.

**1.** An application for a disability grant from the Gauteng Department of Welfare.

**2.** A decision by Wits University to suspend the SRC president pending the outcome of a disciplinary enquiry.

**3.** A decision of the Sandton Cake Decorators' League to expel one of its members.

## Exercise 16

Critically discuss the sources of bias in South African administrative law.

## Exercise 17

Ma'Zondi applies for a permit to run a taxi service, Shizzy Taxi Service, in and around a rural village of about 500 people in Limpopo province. The nearest town, which has a clinic as well as a bank and a post office, is 30 km away, and many of the villagers find it difficult to get to the town in order to use those services. Ma' Zondi is sure that her taxi service will do very well.

The legislation in question says that the administrator may refuse to grant such a permit if it 'is satisfied' that 'adequate' transport facilities already exist in the area. A few of the villagers have bicycles, and one or two have donkey carts that they hire out to others. There is also a 20-seater bus that comes once a week to transport people to town. The administrator decides that the existing transport facilities are indeed adequate, and it refuses Ma' Zondi's application on that basis.

Focusing on the two terms used in the legislation, 'is satisfied' and 'adequate', comment on the applicant's chances of challenging the administrator's decision.

## Exercise 18

In what circumstances will a court correct an administrative action instead of referring it back to a decision-maker? Discuss fully.

**Exercise 19**

Discuss what is meant by administrative action in terms of s 1 of the Promotion of Administrative Justice Act (the PAJA)

**Exercise 20**

The popularity of the legitimate expectations doctrine is unlikely to wane in future particularly because of s 3(1) of the PAJA requires that fairness be observed in relation to' administrative action that materially and adversely affects the rights or legitimate expectations of any person'

Cora Hoexter *Administrative Law in South Africa* (2007)

In light of the above, fully discuss the development of the doctrine of legitimate expectations In South African administrative law.

**Exercise 21**

How have courts determined the administrator's ability to sub-delegate in the absence of an express authority for the administrator to do so?

**Exercise 22**

Max Kaguda pays R 12 000 to Johannesburg City Council for the provision of utility services to his block of flats. He has a set up debit system by means of which the municipality should automatically debit his account on the 1st day of every month. Due to some glitch, the municipality did not debit his account for the first six months of 2015 (January – June). The municipality debited the account only from 1 July 2015. On 1 February 2016 the City's Financial Officer realizes this and decides to remedy this by backdating the payment with effect from 1 March 2016.

Advise Max on the applicability of the estoppel doctrine in administrative law which may prevent the administrator from backdating payments of this nature.

**Exercise 23**

Does procedural fairness apply to preliminary stages of a multi-staged decision making?

## Exercise 24

Discuss the relevance of 'practical necessity' when dealing with implied authority to sub-delegate

## Exercise 25

Section 5 of the PAJA refers to 'adequate reasons'. Discuss fully what this implies.

## Exercise 26

Explain the meaning and the scope of mandatory requirements in s 3 (2) (b) of the PAJA.

## Exercise 27

While the principle of legality can be seen by many as a safety net in South African administrative law, it also poses a significant threat to the PAJA.

Discuss with reference to case law

## Exercise 28

Explain the nature and the scope of the duty to exhaust internal remedies in South African administrative law

## Exercise 29

The definition of 'administrative action' in the PAJA has been said to be too narrow and complicated. Furthermore, it has been said that there is a disparity between it and the meaning attributed to administrative action in terms of s 33 of the Constitution.

**Critically comment on this**

## Exercise 30

Hoexter suggests that 'any legal system that tries to uphold the distinction between appeals and reviews is bound to experience some controversy when dealing with a review of an error of law.'

**Discuss fully**

## Exercise 31

The following are relevant provisions from the Refugees Act which you must use to answer the questions that follow.

***REFUGEES ACT***

S 3: A person qualifies for refugee status for the purposes of this Act if that person:

(a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion,

nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it'

(b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or

(c) is a dependant of a person contemplated in paragraph (a) or (b).

S 21: An application for asylum must be made in person in accordance with the prescribed procedures to a Refugee Reception Officer at any Refugee Reception Office.

S 24 (1): Upon receipt of an application for asylum the Refugee Status Determination Officer:

(a) in order to make a decision, may request any information or clarification he or she deems necessary from an applicant or Refugee Reception Officer;

(b) where necessary, may consult with and invite a UNHCR representative to furnish information on specified matters; and

(c) may, with the permission of the asylum seeker, provide the UNHCR representative with such information as may be requested.

S 24 (3): The Refugee Status Determination Officer must at the conclusion of the hearing:

(a) grant asylum; or

(b) reject the application as manifestly unfounded, abusive or fraudulent; or

(c) reject the application as unfounded; or

(d) refer any question of law to the Standing Committee.

S 11: The Standing Committee:

(e) must review decisions by Refugee Status Determination Officers in respect of manifestly unfounded applications.

S 25 (1): The Standing Committee must review any decision taken by a Refugee Status Determination Officer in terms of section 24 (3) (b)

S 25 (3): The Standing Committee:

(a) may confirm or set aside a decision made in terms of section 24 (3) (b); and

(b) must decide on a question of law referred to it in terms of section 24 (3) (d).

S 26 (1): Any asylum seeker may lodge an appeal with the Appeal Board in the manner and within the period provided for in the rules if the Refugee Status Determination Officer has rejected the application in terms of section 24 (3) (c).

Baba Johnso is a citizen of Zimbabwe who flees the country and seeks refuge in South Africa where he hopes to become a refugee. He applies for asylum in terms of the Refugees Act 130 of 1998. In his application, He relies on s 3 of the Act. This section provides, inter alia:

'A person qualifies for refugee status for the purposes of this Act if that person:

(a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it'

In his application, Baba Johnso states that he is not a supporter of the Gamatox party. He left Zimbabwe for fear that he would be forced to join militant supporters of the party in Zimbabwe who were intimidating supporters of other political parties.

The Refugee Status Determination Officer, Shumaya Nomvula, decides to grant asylum to Baba Johnso and he drafts and signs a letter to this effect. However, before the letter can be sent to Baba Johnso, Shumaya is involved in a serious accident and is hospitalized for several weeks.

In his absence, an acting Refugee Status Determination Officer, Mam' Thandi Bruh, is appointed. She decides to reject Baba Johnso's application for asylum. She decides that rejecting the application would be a good way of preserving jobs for local South Africans by preventing foreigners (such as Baba Johnso) from obtaining employment at the expense of qualified locals. She also adopts the view that in order for an applicant to succeed in showing that he has a well-founded fear of persecution, he must establish that there is a real risk of him being persecuted in Zimbabwe and not merely a possibility of being persecuted. On this basis, she concludes that Baba Johnso's application for asylum must be rejected as it is unfounded (but not found to be manifestly unfounded).

Explain the legal position in each of the following separate instances:

1.1 Explain whether Mam' Thandi Bruh was entitled to change the decision that was originally made by Shumaya. You can assume that an acting Refugee Status Determination Officer has the necessary authority to perform the functions and exercise powers that ordinarily vest in a Refugee Status Determination Officer appointed in terms of the Refugees Act.

1.2 Baba Johnso wants to challenge Mam' Thandi's decision to refuse his application for asylum.

**Discuss TWO grounds of review upon which this decision can be challenged**

1.3 Assume that the decision made by Mam' Thandi is subsequently reviewed by the Standing Committee which is established in terms of the Refugees Act and that the Committee decides to confirm her decision. Baba Johnso wants to challenge the authority of the Standing Committee to make this decision.

**Advise him on his prospects of success in this regard. In answering this question please refer to the relevant provisions of the Refugees Act set out above.**

1.4 Assume that Shumaya subsequently returns to work, overturns the decision made by Mam' Thandi and communicates this decision to Baba Johnso. Would Shumaya be entitled to revoke the decision made by Mam' Thandi under these circumstances?

**Discuss fully**

## Exercise 32

One year ago, the Mantashe Municipality awarded a tender to Getting It Done Baby (Pty) Ltd to fix certain potholes in the Scottsville area which falls under the Municipality's jurisdiction. Getting it Done Baby (Pty) Ltd. fixes the potholes efficiently and quickly and the municipal manager is so impressed that he tells the director of Getting it Done Baby (Pty) Ltd., Darren Kwesta, that the Municipality is also looking to repair potholes in Hayfields and they would definitely award this tender to Getting it Done Baby (Pty) Ltd. as he is pleased with its standard of work. On 26 March 2015, the Municipality calls for tenders to repair potholes in Hayfields.

Getting it Done Baby (Pty) Ltd. is one of several companies that apply for the tender. The cash-strapped Municipality, however, is under pressure to choose an applicant that submits the most cost-effective tender. On this basis, the Municipality decides to award the tender to ABC (Pty) Ltd. It appears that cost of the work that ABC (Pty) Ltd submitted for its tender was R 700 000 whereas the cost of the work for the tender submitted by Getting it Done Baby (Pty) Ltd. was R 900 000. When Darren asks the Municipal Manager for reasons for his decision, he is told that the tender that they submitted was for R 90 000 and 'did not meet the criterion upon which the municipality based its decision'.

a. Darren approaches you for legal advice. He believes that the Municipality is bound to award his company the tender based on the prior discussions that he had with the municipal manager. Advise him on the legal position in this instance. During the course of your consultation, Darren also informs you that cost for the work of the tender that Getting it Done Baby (Pty) Ltd. submitted was actually R 80 000 and not R 90 000. He requires advice on whether there is any basis upon which he can challenge the decision not to award the tender in light of the mistake that the municipality made with regard to the tender amounts.

   **Advise him fully**.

b. Darren believes that the Municipality was required to give him a hearing before it made the decision to award the tender to someone else.

   **Advise him on the legal position**.

c. Darren is not satisfied with the reasons that have been given to him by the municipal manager and wants to challenge them on the basis that they are 'inadequate'.

   **Advise him on the legal position in this instance.**

**Exercise 33**

Julius Zillius-Deville receives a tax assessment from the South African Revenue Service (SARS) indicating that he owes SARS an amount of R 1 500 000. He has a current account with Nedbank and the amount standing to the credit of his account is R 1 200 000. Julius does not pay the money that is owing to SARS. Acting in terms of s 99 of the Income Tax Act, SARS appoints Nedbank as an agent and instructs the bank to collect the amount that is due to SARS. Julius wants to challenge the notice that was issued in terms s 99 on the basis that he was not given a hearing before the notice was issued.

**Advise him fully**

S 99 of the Income Tax Act reads as follows:

'The Commissioner may, if he thinks necessary, declare any person to be the agent of any other person, and the person so declared an agent shall be the agent for the purposes of this Act and may be required to make payment of any tax, interest or penalty due from any moneys, including pensions, salary, wages or any other remuneration, which may be held by him or due by him to the person whose agent he has been declared to be.'

## Exercise 34**

Mrs. Hawiza owns several properties within the City of Hawk Municipality and has been in dispute with the Municipality about outstanding rates and electricity accounts. She has made an application in the manner prescribed by the Promotion of Access to Information Act 2 of 2000 (PAIA) for a copy of the original documents upon which her rates assessment and electricity accounts were based. She has been informed that there are circumstances under which such a request can be refused in terms of Chapter 4 of PAIA.

She is concerned that the Municipality has recently had many technical computer problems and may as a consequence, not have the documents which could have been destroyed. Discuss the grounds in terms of which the City of Hawk Municipality may refuse the request in terms of the PAJA.

***** This exercise is not a typical exam question and is designed to trick students.***

## Exercise 35

Nonhlanhla Gumede is a resident of a rural area near Creighton in KwaZulu-Natal. She is 65 years old, illiterate and very poor. She applied for a pension (for which she qualifies in terms of the relevant legislation) to the KwaZulu-Natal Department of Welfare in June 2011. In May 2012, she approaches

you, an attorney, asking whether there are any steps she can take to obtain a decision, because she has heard nothing from the department.

**Advise her fully,** including whether she will be entitled to payment of all the benefits to which she would have been entitled had the decision been made timeously, together with interest.

## Exercise 36

The Ayeye Municipality calls for tenders for the erection of street lights in the Pretoria area. Hotline Bling (Pty) Ltd ('Hotline Bling); Formation (Pty) Ltd ('Formation) and Zupta (Pty) Ltd ('Zupta') all submit tenders. Hotline Bling submits a tender quoting their price for the work required at R 90 000 and undertake to complete the work within six weeks. Formation submits a tender quoting their price for the work required at R 80 000 and undertake to complete the work within twelve weeks. Zupta undertake to complete the work within eight weeks and according to documents before the Municipality, Zupta's quote for the work is R 130 000. Having considered the prices and the completion times for the respective tenders, the cash strapped Municipality awards the bid to Formation as they submitted the most cost-effective tender. When Formation is informed of the decision, they immediately start ordering all of the necessary materials and equipment that they need to complete the work. In light of the above facts, explain the legal position in each of the following separate instances:

a. Hotline Bling wants to challenge the decision to award the tender to Formation on the basis that the Municipality, in making its decision, placed too much of emphasis on the amount of the bid submitted by the prospective applicants and did not give sufficient consideration to the duration of time needed to complete the work.

   **Advise Hotline Bling on whether they can have the decision set aside.**

b. Hotline Bring argue that their tender offered the best of both worlds in that it was both cost effective and time saving. On the contrary, they argue that while Formation bid was cost-effective, it would take twice as long to carry out the tender.

   **Advise Hotline Bling on whether they can challenge the decision to award the tender to Formation on the basis that the Municipality made a decision that was not reasonable**

c. Assume that it is subsequently discovered that the tender submitted by Zupta was R 70 000 and not R 130 000. Due to oversight of an official of the Municipality the wrong documents were placed before the Municipality which contained the incorrect figure.

**Can Zupta challenge the decision of the Municipality to award the tender to Formation under these circumstances?**

d. Assume that a court subsequently sets aside the tender awarded to Formation as a result of the error made by the Municipality in awarding the tender to them. Can Formation claim delictual damages from the Municipality for the out-of-pocket expenses that it incurred?

**Explain fully**

## Exercise 37

Nae Nae Reloaded is in prison for raping and murdering a woman, Mrs. Bete reMukaka, fourteen years ago. Nae Nae Reloaded has been diagnosed with cancer and is terminally ill. In November 2015, Nae Nae Reloaded applies to the Correctional Supervision and Parole Board ('Parole Board') for medical parole but the Board refuses his application. In terms of s 39 (1) of the Correctional Services Act 111 of 2013, any sentenced offender may be considered for placement on medical parole by the Parole Board if:

'(a) such offender is suffering from a terminal disease or condition or if such an offender is rendered physically incapacitated as a result of injury, disease or illness so as to severely limit daily activity or inmate self-care;

(b) the risk of re-offending is low; and

(c) there are appropriate arrangements for the inmate's supervision, care and treatment within the community to which the inmate is to be released.

In December 2015, the Parole Board decides to refuse Nae Nae Reloaded's application on the basis that even though he is terminally ill, he has not yet been rendered physically incapacitated by his illness (you can accept for the purposes of this question that this information is factually true). The board also adopts the view that refusing him parole will send a strong message to society that heinous crimes especially against vulnerable members of society such as women will not be tolerated.

The Board also informs Nae Nae Reloaded that he must still undergo a further rehabilitation programme (he had already completed one rehabilitation programme before in May 2015) before he can be eligible for parole. This is the first time that Nae Nae Reloaded has been informed of the need to undergo a further rehabilitation programme. When Nae Nae Reloaded first applied for medical parole in March 2015, the chairman of the Parole Board promised him that he would be granted parole the next time he applied provided he completed a rehabilitation programme.

a. **Discuss any four grounds of review upon which Nae Nae Reloaded can challenge the Board's decision, made in December 2014, to refuse him medical parole.**

b. Nae Nae Reloaded wants to know whether he can bring his application for judicial review in July 2016 as he needs to undergo some medical treatment in the interim.

   **Advise him fully**

c. Nae Nae Reloaded wants the court to make an order granting him medical parole instead of referring the matter back to the Parole Board.
   **Explain whether the court may grant such an order under these circumstances.**

d. Nae Nae Reloaded argues that he is entitled to parole as the chairman of the Parole Board is obliged to honour the promise that he made to him in March 2015.
   **Advise him fully**

## Exercise 38

Clueless Developers (Pty) Ltd ('Clueless Developers') commence a particular development along the South Coast of Kwazulu-Natal. Unbeknown to them at that time, the activity in question actually required prior environmental authorization in terms of the National Environmental Management Act 107 of 1998 ('NEMA'). When Clueless Developers (Pty) Ltd realize their mistake, they immediately apply to the Minister for authorization to continue with the activity in terms of s 24 G of NEMA. In terms of this section, a person who has commenced an activity without the requisite authorization may apply to the Minister for authorization ex post facto. Prior to granting the authorization, however, the Minister must consider a report compiled by the applicant setting out, inter alia, a description of the need and desirability of the activity; an assessment of the nature, extent, duration and significance of the consequences for or impacts on the environment of the activity; a description of mitigation

measures undertaken or to be undertaken; and a description of the public participation process followed. In addition, the applicant is obliged to pay an administrative fine not exceeding R 5 million before the authorization can be issued.

Clueless Developers prepares an initial detailed report and after receiving comments from the public, they make a few minor amendments to the report and submit it to the Minister. The Minister refers this report to an advisory committee which he had appointed to assist him in considering such applications. The Minister instructs the committee to advise him specifically on whether the activity in question may have any adverse impact on the environment and whether Clueless Developers have taken sufficient measures in order to minimize the impact of the activity on the environment. The committee decides that everything is in order and recommends that authorization can be granted. The Minister subsequently orders Clueless Developers to pay a fine of R 50 000.

Clueless Developers (Pty) Ltd issues a post-dated cheque for R 50 000. Upon receiving the cheque, the Minister immediately grants them authorization having regard, inter alia, to the report submitted and the recommendation by the committee. The cheque is honored by the bank when it is presented for payment two weeks later (NB: as the cheque was post-dated the proceeds of the cheque was only obtainable when the postdate arrived).

The KZN Natural Resources Protection Organization (KNRPO), a concerned environmental group, wants to challenge the Minister's decision to grant authorization to Clueless Developers. You can assume for the purposes of this question that KNRPO has the necessary legal standing to challenge the decision.

a. KNPRO argues that a fair procedure was not followed as they were not given an opportunity to comment on the final report compiled by Clueless Developers. KNRPO did, however, view and make comments on the initial report that was compiled.

   **Advise them on their prospects of success in this regard.**

b. KNRPO allege that the Minister's decision to grant the authorization is a nullity as the fine was not paid before the authorization was granted as required by s 24 G.

   **Advise them on the position in this regard.**

c. KNRPO allege that the Minister unlawfully abdicated his power to the advisory committee and want the decision to be set aside on this basis.

   **Advise them fully.**

d. Assume, for the purposes of this question, that the post-dated cheque issued by Clueless Developers was dishonored. Would the Minister have been entitled to revoke the authorization that he granted? Explain.

## Tackling Case Law

***Paul Kaseke Snr***

In my opinion, what makes students do badly in this course is an underestimation of the importance of the case law that applies to a question. The first clue to the importance of the cases is your textbook. Every page of it is an engagement with case law in some way or the other. That is because much of the content of this course and indeed the PAJA itself is unpacked in and through the cases. Without the cases we would never know what an unreasonable delay is or what can be delegated and what cannot be delegated. We would also not know what constitutes administrative action and what does not. As a rule of thumb, if you find yourself writing more than two paragraphs without a discussion of case law then you are probably heading the wrong way. It's not just citing cases that is important –it is an actual appropriate discussion of the cases that is key. At this level of study you are expected to not just cite the cases but discuss the cases at a level appropriate for a final year law student who is

about to be unleashed to the general public. The standard of your case law engagement must therefore be much higher than anything you have come across in your previous years of study.

What is relevant here is not a whole page discussion of facts but rather that you engage with the law that the case presents as an addition to our administrative law jurisprudence. Many students think that the best way to answer a question that requires case engagement is to present a detailed body of facts from the case but this cannot be further from the truth. Of course there are different questions that require different usage of the case law but certainly at this stage, your examiners are not setting papers that require a regurgitation of the facts of cases they have taught over and over. Use your discretion and see how much of the facts the question requires you to give. It may well be that some questions require a lengthier set of facts to be discussed in comparing two cases but even then remember that your examiner is interested in what the case adds to the body of administrative law as we know it. The law we refer to here is not the set of facts but the principles as applied to the set of facts. At this stage, the ability to pull out relevant case law, discussed at an appropriate level within an appropriate length is what will get you credit.

The easiest way to get around all the many cases in law school really is to get a good summary of them and a good summary of a case can be called a case brief . In the next section I will discuss how to prepare a case brief.

**Preparing a Case Brief for Study Purposes**

If you read throughout the semester and make (not get- note the difference, with the former you actually actively do it yourself and with the latter you passively receive from a friend or academic), you will not struggle with the cases in the exam. The trick is to make a good case brief. Briefs in the legal sphere are used to inform advocates of how a matter has developed and sum up all salient points of a case. This brief needs to be good enough to make the Advocate feel like he has been involved with the case from day one. In the context of studying, your case brief should be your best friend until you graduate. Your case brief should be the only case references you check towards an exam if you do it really well during the term.

Every good case brief should have the following points:

- Facts ( the name of the case , parties to the case , what happened factually and procedurally)
- Issues in dispute (what did the court have to decide- important to isolate the issues relevant to the course and section you are dealing with. For instance, the *Grey's Marine* touches on virtually every element of administrative law from the administrative action enquiry to

procedural fairness. Be sure to state what aspect of the case you are referring to for a specific part of the work

- The holding ( what did the court decide)
- Rationale ( the reason for the holding)
- Any dissenting or minority views ( what did the minority hold and what was the rationale behind their views )
- Be sure to also form an opinion of your own on every case – do you agree with the minority or the majority? Why or why not?

On the next page is a model case brief that you may find useful. Feel free to add more content to it to suit your needs

## Personal Case Brief

**Name of case:**

**Court (if on appeal also state this):**

**Parties:**

**Factual history:**

**Procedural history:**

**Issues in dispute:**

**Holding and Finding of Court:**

**Rationale behind finding:**

**Dissenting / Minority finding (including reasons):**

**Interesting observations about case (rely on lecturer for this):**

## Answering Problem-Type Questions in Law Using the IPAC Formulation

**IPAC**, as you have come to know, is in fact derived from the American "IRAC" concept. The only difference is that whereas the P in IPAC stands for Principle, the R in IRAC stands for Rule. It is one of the ways of putting across a legal analysis or argument (but not the only one). IPAC stands for Issue, Principle, Application, and Conclusion.

Think of IPAC as a strategy to a successful game. It is a game plan to avoid habitual disappointers (think of recurring bottom-league placed teams for instance!) from losing. If you want, IPAC is a wooing plan much like a guy's plan to ask a lady out. There is some form of structure around it. No one would accept a declaration of love from a guy who has not introduced himself, stated his mission, laid down some enticements, etc. IPAC does exactly this in its proposal of the law to a lecturer.

## THE ISSUE

This is perhaps the most important part of your analysis even though it is short in nature. If you get your issue wrong, the rest of your analysis is guaranteed to give you a dignified failure mark.

- The issue is the **legal question you have been asked to analyze**. Remember, the facts you are given always suggest an issue but the facts themselves are NOT the issue.
- Alternatively, ask yourself what brought the parties to you as a lawyer. It is always going to be a legal question that is the issue (people come to lawyers for legal questions not social questions).
- When reading a judgment, you will see statements like "we come then to the basic issue in the case…" or "the case turns upon the question whether or not…." Those statements are trails to the issue; they direct you to the issue.
- The issue is best formulated as a question but be careful to answer this as your lecturer asked you to. Ask what is in dispute in the facts and why is it so important because it points to a legal issue. A good example is "the issue in the given facts is whether …." Don't worry about the language you use to articulate the issue but be sure that however you do it, you identify the legal problem. Some lecturers may not like the idea of "the issue is whether or not Cyril committed murder" so you may use the following as alternatives: "Did Cyril commit murder", "Can Cyril be found guilty of murder", "Should Cyril be found guilty of murder". With time, you will find a formula that works for you.

## THE PRINCIPLE(S)

Your legal issue is covered by an **area of law** and some **specific principles** so your job now is to state what this area is and principles are.

- State the principle or point in law governing the issue
- It is advisable not to simply state the law i.e. "the law is ..." That models a D student. An A student will imply the law. An example of this is " The crime of murder is defined as the unlawful, intentional killing of another and as such the elements that need to be met are …"
- The law/principle and facts are well linked so find this from reading thoroughly.
- You cannot have an analysis of facts unless you have identified the applicable legal principle that will be relevant to addressing the legal issue you identified.
- You must consider:
    1. Elements (elements for a delict or contract for example);

2. Definitions ;
3. Exceptions to the general rule;
4. Limitations to the legal rule; and
5. Possible defenses where applicable.

- You MUST state where your **authority** comes from. Where did you get that principle from? It may be from an Act but usually you will find it is taken from a case. If you were to state a principle but not state where it comes from, consider it irrelevant and unworthy of attracting a mark from a lecturer.
- When possible, always start from the general rule and end up with the specific law principles applying to the facts.
- You must identify the consequences of applying the rule –what could possibly happen?
- Lastly, ask yourself what the consequences of applying the rule to the particular situation are – this leads you to the next stage of your answer.

## THE APPLICATION

This is the part where you **analyze the law and the facts**. This is also where the lawyer in you comes to play. Many great lawyers have called this the 'lawyering stage'. The first two stages don't really show your thinking capacity, but this stage does.

- Compare the facts to the legal principles you stated
- For each fact, ask yourself whether it proves or disproves the legal principle
- Match each element of the principle you stated with a fact in an orderly manner (in the way you dealt with the principles).
- The easiest way to do this is to use **"because**", "**since**", "**as**". An example would be "The element of voluntary conduct is satisfied **because/in light** of the fact that Tom was in control of his thoughts and actions at the time of the commission of the crime".

- When a legal principle requires that certain factors be present for the principle to apply, then the absence of one or more of those factors will help you reach the conclusion that the principle does not apply. A simple example is that all contracts of the sale of land must be reduced to writing. Accordingly, if your given facts do not have a written contract yet one party claims that there is a contract for the sale of land you apply that thinking to the facts i.e. "*Due to the fact that there is no written contract , Tim's allegation of a contract for the sale of land in Winchester cannot stand* ***because*** *one of the requirements set out by the Land Act as set out in the preceding paragraph of this essay, namely that such contracts must be reduced to writing before they can be deemed to be valid, has not been met*"
- Ask yourself why some facts are relevant
- How do the facts satisfy the principle?
- What is a counter argument for another solution?

## THE CONCLUSION

Using the analysis and application you have just done, you will now be able to come to a **conclusion** as to whether the principles apply to the facts and if they do, what result this will have.

- Usually, this should be the shortest part of your essay as all you are doing is stating how the legal issue you identified in the first part can be solved with reference to the principles you outlined.
- Always bear in mind that this last part requires you to **take a stance**. Think of it this way: a client comes to you with an issue and wants to know if they have prospects of success in court with the present position of the law. They don't pay you for half-conceived, middle-ground answers where you state "*in the case of A v Van the court said yes but in the case of Rex they said no*". What they do pay you for is taking a stance based on the analysis you did.
- You may not, I repeat **NOT,** have a conclusion that is detached from your application. If your analysis points to the fact that there is no way Jazuma can be found guilty of fraud, you **MAY NOT** then say "*In my opinion, Jazuma is guilty of fraud*" for the reason that it is contradicting your application. Such a conclusion is not sound in law and is not fit and proper (along with the person who reaches such absurd conclusions).
- Your conclusion must **SUPPORT** your argument and analysis.
- Your conclusion must not be exaggerated or overbroad for instance, the fact that Peter is not guilty of murder does not mean that he cannot face civil action. You therefore cannot make

statements like "*In my opinion, Peter is innocent of all wrongdoing and cannot be found liable in any court for the death of Tumi.*"

- You must remember that the application of the law is going to always be subjective (different judges will come to a different conclusion with the same facts). Your conclusion must then be stated as a likely probability or the most likely outcome. You may therefore not say "*any normal minded lawyer will see that Rama is innocent*".
- When the arguments you have raised are a grey area of law, make sure to accommodate alternate views and identify them as such in your answer. A good example of this would be "*Although the above cases seem to suggest that Thapelo is defrauding the state and I have argued this position through out, it is remotely possible that the loophole identified in the Mensa case could provide a defense for him*."
- You must conclude each issue you raised before giving an overall conclusion. As such, you may have several little IPACs in one essay when you have multiple issues to address. Courses like Criminal Law and Contract Law often require this sort of answering technique.

## DISTINCTION BETWEEN FACTS AND ISSUES

Facts are not issues – they point to issues. Facts are factual (duh!), but remember that the issue is the legal problem you are being asked within those facts. Remember it this way: facts can be restated and understood by anyone (Oprah, sociologists, Tom, Dick and Thabo) but the legal issue can be identified, articulated and solved only by a legally conditioned mind (in other words only a lawyer can pick out a legal issue from a set of facts).

**Example**: A dying old man, Musoro Wegomo, is very ill and nearing his death yet makes an oral contract with his nephew. The terms of this contract are that the uncle will immediately give all his life savings to his nephew, Muzukuru-wamusoro in return for him providing food and shelter until the old man dies. The nephew is promised R 200 000 and spends R25 000 a year looking after the dying man. The old man lives for another 20 years and in year 21 the nephew cuts off all support. Musoro approaches you and asks for you to represent him against his nephew.

Unbeknown to many of you is the fact that there are at least two issues issue in the facts. Train your mind to pick up issues using the keys under issue (what could either of the two parties want from you)

**The Facts** are : An ill, dying elderly man ( Musorowegomo) makes an oral to contract to give his nephew(Muzukuru) R 200 000 in return for food and shelter up until his demise (death). It costs Muzukuru R25 000 annually to look after him and after 20 years of doing this, he finally stops supporting him.

**The Issues**: Is an oral contract valid if concluded with a terminally ill man. Alternatively, is an oral contract valid and enforceable after 20 years?

**The Law** : Any contract concluded with terminal patients or people lacking capacity due to ill health is null and void unless the party is assisted and the contract is ratified by the courts - *R v Gabby*; *Teller v Murray*.

**Analysis/Application**: The case of ***R v Gabby*** asserts that any (and consequently, all) contracts concluded with people lacking capacity due to ill health are null and void. It also states that any contracts entered into by terminal patients will not be valid. In the given facts, Musoro is referred to as both very ill and dying which I will assume to indicate that he is a terminally ill individual or alternatively lacks capacity due to ill health. That he is gravely ill and nearing death is not in dispute; however, it can be argued whether or not he meets the requirement of a terminally ill patient since the nature of his ailment is not known. This is a matter of fact however, for the purposes of my discussion, it will be assumed that indeed he meets this requirement and consequently lacks capacity to conclude any contracts. Furthermore, the case of ***Teller v Murray***, which was decided after the ***Gabby*** case, suggests that in the interests of justice, it will always be assumed that patients who are sick for more than 6 months on end are terminal patients unless the contrary can be proven.

**Conclusion**: In light of the above case authority, it is my submission that Musoro never concluded a valid contract and thus cannot claim for breach of contract against Muzukuru.