ADMINISTRATIVE LAW

LAWRENCE G BAXTER*

ADMINISTRATIVE INSTITUTIONS AND THE ADMINISTRATIVE PROCESS

Administrative Process: Retrospective Amendment

See Industrial Council for the Furniture Manufacturing Industry, Natal v Minister of Manpower 1984 (2) SA 238 (D), and Richard R Currie Properties Ltd v Johannesburg City Council 1984 (4) SA 195 (W).

Tribunals

Two new professional councils with important regulatory and disciplinary powers are the South African Council for Town and Regional Planners (Town and Regional Planners Act 19 of 1984) and the South African Council for Professional Land Surveyors and Technical Surveyors (see Act 40 of 1984, s 2).

Of potential significance for administrative lawyers is the proposal, made by a committee of the Council for the Co-ordination of Local Government Affairs, that with the enhanced powers of local government and with the planned creation of regional service councils, there should be created a series of independent municipal tribunals for the settlement of jurisdictional disputes between local authorities and disputes between local authorities and private individuals. (See the Report and Recommendations of the Committee of Enquiry into Control Over Local Authority Institutions Department of Constitutional Development and Planning (April 1984) para 4.3.) The tribunals would be distributed on a geographical basis but would not replace existing local tribunals possessing appellate jurisdiction in licensing, valuation and township matters. The tribunals would be chaired by lawyers and staffed by experts in municipal government and administration as well as co-optees chosen for their specialist knowledge in particular disputes. They would be empowered to deal with the merits of disputes. If these recommendations are accepted, they will represent a considerable advance towards a coherent system of administrative courts in South Africa, though whether these are to be tribunals of first instance or purely appellate tribunals is not clear from the report.

* BCom LLB (Natal) LLB Diploma in Legal Studies (Cantab) PhD (Natal), Attorney of the Supreme Court of South Africa, Professor of Law, University of Natal, Pietermaritzburg.

32
Costs

See Dreyer v Dreyer 1984 (2) SA 483 (O), where it was held that a maintenance officer has no power to make an award of costs at a maintenance enquiry.

Administrative Appeals

Various statutory provisions have created or amended internal appellate structures at the national level of government: see the Workmen's Compensation Amendment Act 29 of 1984, s 8; the Estate Agents Amendment Act 51 of 1984, s 5; the Sales Tax Amendment Act 99 of 1984, s 11; the Remuneration of Town Clerks Act 115 of 1984, s 11(3); the regulations under the Agricultural Pests Act 36 of 1983 published in GN R111 GG 9047 of 27 January 1984 (Reg Gaz 3666); and the regulations under the Machinery and Occupational Safety Act 6 of 1983 published in GN R2206 GG 9453 of 5 October 1984 (Reg Gaz 3753).

The extreme diversity that has evolved within the administrative process as a result of the accumulation of empowering statutes renders it difficult to make generalizations regarding the nature of administrative appeals. South Africa possesses no uniform system of administrative tribunals, nor is there any general code of administrative procedure. As a result, the precise scope of an administrative appeal, the procedures to be adopted, and the powers of the appellate tribunal will depend primarily upon the provisions of the constitutive legislation. These provisions are themselves usually unclear, and more specific answers must often be found by construing the statute in the light of the general administrative circumstances in which the appeal takes place. Illustrations of this interpretative process are to be found in Industrial Council for the Furniture Manufacturing Industry, Natal v Minister of Manpower & another 1984 (2) SA 238 (D), which dealt with the differences between an appeal to a minister and an appeal to an independent tribunal, and Hamman v Algemene Komitee, Johannesburgse Effektebeurs 1984 (2) SA 238 (W), which considered the procedures to be adopted on appeal.

The Furniture Manufacturing Industry case involved the question whether the transfer, by the Labour Relations Amendment Act 2 of 1983, of certain appellate functions of the Minister of Manpower under the Labour Relations Act 28 of 1956 to the industrial court was retrospective in operation. Prior to the enactment of the amending Act the second respondent had lodged an appeal to the minister against the refusal by the applicant to grant an exemption from the provisions of a provident fund and sick benefit agreement. The appeal was still pending when the amending Act (which was silent in relation to pending appeals) came into force. The applicant
sought an interdict restraining the first respondent from hearing the appeal, and an order directing him to deliver all the papers to the industrial court for its adjudication.

As the usual presumption against retrospective operation applies only where vested rights are affected (see the judgment at 242), Leon J was called upon to determine whether the transfer of jurisdiction to hear the appeal had indeed such effect. This in turn involved a consideration of the difference in the nature of the appeals which either the minister or the industrial court might hear. The applicant contended that the difference was immaterial, but Leon J found that [t]he right of appeal to the minister was something very different in kind from the right of appeal to the industrial court' (at 243F), and that 'to substitute a court for an administrative functionary is not simply a difference in procedure as the nature and ambit of the rehearing to which an appellant was entitled is altered' (at 244D). The learned judge took into account the fact that the industrial court performs the functions of a court of law (at 243D–F), conducts a full hearing and possesses full powers to receive and procure evidence (at 244A–C), whereas the minister would decide appeals upon the basis of written representations and statements and without conducting a formal hearing (at 243H).

One possible argument in favour of the applicant was not explicitly considered by the court, namely, that the presumption against retrospectivity does not operate where the retrospective effect of the legislation is a beneficial one (see e.g. Ex parte Christodolides 1959 (3) SA 838 (T) at 841A–B, H R Hahlo & Ellison Kahn The South African Legal System and its Background (1968) 208; L C Steyn Die Uitleg van Wette 5 ed by S I E van Tonder (1981) 95), though the effects of the legislation must work to the advantage of all the parties affected (Van Lear v Van Lear 1979 (3) SA 1162 (W) at 1167H). It might have been argued that the transfer of appellate functions to the industrial court improved the right of appeal enjoyed by the second respondent, though it seems that some influential organizations prefer an appeal to the minister: the Labour Relations Act was once again amended during 1984 so as to transfer the appellate jurisdiction in such cases back to the minister (Labour Relations Amendment Act 81 of 1984, s 5, amending s 51(6) of the principal Act). The highly controversial nature of the amendment (see House of Assembly Debates 7–8 June 1984 cols 8303–5, 8309–11, 8394–419) demonstrates not only that there is a substantial legal difference between appeals to ministers and appeals to independent tribunals, but that the difference is also one which is sometimes of considerable administrative and political significance.

In Hamman en 'n ander v Algemene Komitee, Johannesburgse Effektebeurs en 'n ander 1984 (2) SA 383 (W) (criticized under 'Reasons' below
59), the applicants' membership of the JSE had been terminated by the first respondent after an enquiry. Having noted an appeal to the JSE’s appellate board, the applicants sought orders designed to procure from the first respondent a full statement of its findings, the reasons for the termination of membership, and a transcript of the enquiry proceedings. (The second respondent had in fact promised to supply a copy of the transcript, which it had been preparing, but it failed to deliver (at 392C–D)). The orders were refused because, inter alia, Coetzee J concluded that, as the appellate tribunal was able to conduct a full rehearing de novo, albeit within the confines of the evidence that had been before the general committee (‘die enende inligting wat voor die komitee gewees het’), there was no need for the general committee to furnish its reasons (at 390C–E) or the transcript of its proceedings (at 391–2) to the applicants.

With respect, it is difficult to understand how an appeal confined to the evidence before the tribunal a quo can be regarded as an appeal in the wide sense Coetzee J appears to have had in mind. Instead, such an appeal is normally classified as an ‘appeal confined to the record’ or an ‘ordinary appeal’, not a full rehearing de novo (eg Tikly v Johannes NO 1963 (2) SA 588 (T) at 590–1). An appeal confined to the evidence before the tribunal a quo is, by definition, simply not a full rehearing. To the extent that it is confined it must be a limited appeal. In order to determine whether there is any prospect of success on appeal one must know what the appellate tribunal may consider, and in order to prosecute the appeal effectively one must have access to the information upon which the impugned decision was based. How can either of these objectives be achieved if the appellant is denied the record of the proceedings a quo? Apparently aware of this basic logical difficulty, Coetzee J conceded that the appellant’s task would in the absence of a transcript be a difficult one. Since, in his lordship’s opinion, it was not an impossible one, he rejected the argument that a duty to disclose the transcript was implied by the provision of a right of appeal.

Coetzee J’s view is based upon an unusually narrow (and sterile) approach to the interpretation of empowering statutes: nothing is to be read into the statute unless it is necessarily implied by the wording of the legislation (at 391 in fine). But, as the cases cited by the very author upon whom Coetzee J relied (Steyn op cit 51–2; the judge used an earlier edition) show, such a restrictive method of interpretation is normally used to protect an individual from the full scope of administrative power, not to limit his protection.
ADMINISTRATIVE LAW IN THE COURTS

Scope of Judicial Review

Constitutional Structures

Although the grounds for judicial review of administrative action tend to constitute a 'subordinate bill of rights', the extent of the protection offered by this charter depends upon the wording of empowering Acts of Parliament, which are not subject to review, and the degree of judicial activism displayed by the courts.

In countries with constitutionally-entrenched bills of rights the courts are obviously expected to apply the principles enshrined by such bills when evaluating administrative action, and the scope of judicial review is likely to be broadened as a result. (Cf eg Bernard Schwartz & H W R Wade Legal Control of Government: Administrative Law in Britain and the United States (1972) 6–8.) The tradition of testing administrative action against the provisions of a bill of rights is alien to South African lawyers, yet the adoption of such bills in neighbouring territories is already influencing the shape of Southern African administrative law in general. In this regard, the Bophuthatswana decision of Smith v Attornney-General, Bophuthatswana 1984 (1) SA 196 (BSC), discussed in the section on Constitutional Law above, should be consulted by administrative lawyers for its analysis, within a constitutional context, of the principles of natural justice, due process and proportionality (Verhältnismäßigkeit) (at 199–202). Cf also Minister of Home Affairs v Dabengwa 1984 (2) SA 345 (ZSC), Minister of Home Affairs v Bickle 1984 (2) SA 439 (ZSC), and Granger v Minister of State (2) 1984 (4) SA 908 (ZSC).

Activism and Restraint

The scope of review can be significantly narrowed or enlarged by an attitude of restraint or activism on the part of the reviewing court. Although such attitudes are seldom plainly expressed, some 1984 cases provide illustrations. See, for example, Minister of Home Affairs v Dabengwa 1984 (2) SA 345 (ZSC), where the court counselled judicial restraint in order to avoid the possibility of executive intransigence (at 358–9), Hamman v Algemene Komitee, Johannesburgse Effektebeurs 1984 (2) SA 383 (W); where an extreme, literalist approach was adopted in the construction of a statutory provision conferring a right to reasons (at 391G–H), Kauluma v Minister of Defence 1984 (4) SA 59 (SWA), where the presumption in favour of individual liberty was said to be weakened in the face of security concerns (at 67C–F) and where the 'natural construction of the statute' was used, not to restrict the permissible interference with individual liberty, but to admit wide-ranging powers of detention (at
78B–F), and Mota v Moloantoa 1984 (4) SA 761 (O), where M T Steyn J took the view that courts should adopt a ‘robust approach’ to complaints concerning irregularities committed during the conduct of elections (at 804–5).

Cf also Airoexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban 1984 (3) SA 65 (N) at 76–7, and Airoexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban 1984 (4) SA 593 (N) at 600–3, where opposing attitudes to the protection of commercial trading interests are evident.

Classification of Functions

The classification of administrative acts into the categories of ‘legislative’, ‘judicial’, ‘quasi-judicial’ and ‘purely administrative’, as a prelude to either applying or dismissing the principles of legality, is a method of concealing judicial activism or restraint. This seems to be the only credible explanation for the continued survival of a process of analysis that is both hopelessly crude and frustratingly tautologous. It has at least become settled in South African law that the classification is only of relevance in a few limited areas, most important of which are the promulgation of subordinate legislation, the reasonableness of delegated legislation, and the application of principles of natural justice. The principles relating to the abuse of power otherwise apply to all administrative acts, and the scope of review does not vary according to the ‘type’ of action under review.

There seems, however, to be no end to the ingenuity with which the classification process is employed both by counsel and by judges. In Reinecke v Nel 1984 (1) SA 820 (A) counsel for the appellant suggested that the scope of review was diminished where a nomination officer had to act in a ‘quasi-judicial’ manner. (This view is not entirely unprecedented, though what precisely is meant by ‘quasi-judicial’ is never made clear: cf Prinsloo v Newman 1975 (1) SA 481 (A) at 505C–D, Theron v Ring van Wellington van die NG Sendingkerk in Suid-Afrika 1976 (2) SA 1 (A) at 11C–D.) The argument was rejected, correctly it is submitted, by Grosskopf AJA, delivering the judgment in which the other members of the court concurred (at 834–5).

The more usual use of the ‘judicial’ or ‘quasi-judicial’ classification—to indicate that, if anything, the scope of review is wider than ever—was adopted in Gray v The Master 1984 (2) SA 271 (T) at 273G–H, applying Coetzee v De Kock NO 1976 (1) SA 351 (O), in which it was held that the functions of a master of the Supreme Court under s 42(2) of the Administration of Estates Act 66 of 1965 are of a judicial or quasi-judicial nature and therefore subject to stringent review.
The traditional reluctance to recognize powers of delegation is evident in Leon J’s judgment in *Durban (Ningizimu) Community Council v Minister of Co-operation and Development* 1984 (2) SA 222 (D). The learned judge held that the authority of the minister to vest in community councils his powers in respect of ‘the allocation and administration of the letting of accommodation’ does not include his ‘legislative’ powers of fixing rentals and charges. While the decision is probably supported by sound policy considerations, Leon J’s attempts (at 226) to deduce the answer to the dispute from dictionary definitions of the words ‘administer’ and ‘administration’ again illustrate the sterile nature of the classification process. After all, a vast spectrum of subordinate legislation is the product of ‘administrative’ action. It all depends upon how one defines the term. What really matters is whether the principles of law that dictate a result one way or another are functionally appropriate to the action in question, and this will in turn depend upon the relevant policy factors in issue, not conceptual labels.

Leon J also employed the classification process in a manner that must surely be incorrect: in *White Rocks Farm (Pty) Ltd v Minister of Community Development* 1984 (3) SA 785 (N) the learned judge took the view that when an official makes a ‘purely administrative’ decision he need not take into account all the considerations that are relevant to the decision; mere honesty on the part of the decision-maker is sufficient (at 792–3). In dispute was a decision to expropriate, and Leon J followed the ruling by Botha JA in *Pretoria City Council v Modimola* 1966 (3) SA 250 (A) at 263G–H, that expropriation is a ‘purely administrative act’. Given the manifest illogicality of Botha JA’s classification—it is difficult to imagine any form of administrative action which more clearly falls within the usually accepted criteria for ‘quasi-judicial’ action than expropriation—it is a pity that Leon J adopted Botha JA’s views; the latter had devised the classification for the purposes of excluding the operation of the principles of natural justice and, as natural justice was not in issue in *White Rocks*, Leon J was not bound to follow it.

Having decided that the decision in question was ‘purely administrative’, Leon J then applied the decision of Milne J in *Durban City Council v Jailani Café* 1978 (1) SA 151 (D), in which it was held that ‘purely administrative’ acts are not even susceptible to the ordinary principles of review relating to abuse of discretion. The *Durban City Council* decision flies in the face of decades of authority and is almost certainly incorrect; if anything, the tide is running the other way—toward extending the scope of review of ‘purely administrative’ acts so as to include the principles of natural justice as well.
Leon J went even further to hold that, while review on the ground of improper purposes might be admitted, the ‘purely administrative’ nature of the decision to expropriate implied that the complainant’s onus of establishing improper purposes was heavier than usual. Here Leon J relied on a dictum of Van den Heever J in *Sorrell v Milnerton Municipality* 1980 (4) SA 660 (C) at 665B, but the authority on which Van den Heever J herself relied does not support her, and the application of the classification process to the question of onus is a novel one which, in this author’s respectful opinion, is incorrect.

On a more refreshing note, Bethune J declared in *Kaputuwaza v Executive Committee of the Administration for the Hereros* 1984 (4) SA 295 (SWA) that natural justice is applicable ‘[e]ven if the decision . . . is regarded as a purely administrative one’ (at 314G–H). This, it is submitted, is a far more sensible approach than that which insists upon the discovery of a ‘quasi-judicial’ feature before natural justice can be said to apply. Whether, in the light of the judgment as a whole, Bethune J really meant what he said is perhaps a matter for debate (cf eg his judgment at 315C–D).

*Jurisdictional Facts*

The questions of law, fact and opinion that a court may itself reassess are frequently labelled ‘jurisdictional facts’. The demarcation between jurisdictional, reviewable facts and those which ought to remain within the exclusive determination of the administrative authority itself, irrespective of error, constitutes one of the classic areas of dispute in administrative law. Ideally, only that which is properly justiciable should be subject to correction on review, but what is ‘justiciable’ will strongly depend upon the relative mood of activism or restraint of the reviewing court.

A clear illustration is to be found in the field of security legislation where administrative action is made to depend upon the opinion of the empowered officials. For many years the dead weight of the majority decision in *Liversidge v Anderson* [1942] AC 206 (HL) haunted South African law. The approach in that case of blindly accepting the opinion of the official concerned, irrespective of how distorted that opinion might be, has in Britain now been abandoned in favour of a more ‘objective’ approach, in terms of which all questions of fact, opinion and law, with the exception of pure policy considerations, are open to review (see most recently eg *R v Secretary of State for the Home Department: Ex parte Khawaja* [1984] AC 74 (HL) at 110F–G).

In recent years some (though not all) South African judges have also begun to reject the abstentionist approach (see eg *Sigaba v Minister of Defence and Police* 1980 (3) SA 535 (TkSC), *Honey v Minister*
of Police 1980 (3) SA 800 (TkSC)). It is pleasing to observe that this trend continued in 1984, and that in two cases—United Democratic Front (Western Cape Region) v Theron NO 1984 (1) SA 315 (C) at 323B–E (per Rose Innes J), and Ndabeni v Minister of Law and Order 1984 (3) SA 500 (D) at 511–12 (per Didcott J)—the reasoning of the majority in Liversidge v Anderson (supra) was unequivocally rejected.

In the United Democratic Front case (supra) the respondent, acting under s 46 of the Internal Security Act 74 of 1982, had prohibited a meeting which the applicant had been due to hold the same evening. His power to do so was conditional upon his having ‘reason to apprehend that the public peace would be seriously endangered’ by the meeting. The applicant brought an urgent application to have the prohibition set aside. In the light of uncontroverted evidence that the proposed meeting was not likely to constitute a serious danger to the public peace, the order was granted. In his reserved reasons for judgment, Rose Innes J held that the Act required that only those meetings which constituted a grave or serious breach were hit by s 46 (at 320–2), and that ‘the words “has reason to apprehend” must be interpreted objectively’ (at 323F). As there appeared to be no circumstances which might have suggested that the threat to the public peace was serious, the learned judge concluded that the jurisdictional fact necessary for the magistrate’s action was absent. From the magistrate’s failure to give reasons for the prohibition and his failure to attend the application Rose Innes J also drew an inference that there were no grounds for the prohibition. (In a subsequent application, however, it was established that the magistrate had been unable to attend the original application. As a result Rose Innes J’s judgment was rescinded in terms of rule 42 (1)(a), though the substance of his judgment, dealing with the requirement of objective grounds for action, remains unaffected.)

In the Ndabeni case (supra) the organization of which the applicant was a member, the Azanian People’s Organization (AZAPO), had published and was distributing copies of a magazine called ‘Frank Talk’. A security policeman, acting on the belief that this constituted a breach of s 13(1)(a)(v) of the Internal Security Act 74 of 1982, had seized nearly all copies of the magazine. His power to seize material was governed by s 20 of the Criminal Procedure Act 51 of 1977, which requires that the officer concerned should have ‘reasonable grounds’ for believing that an offence was being committed. The applicant successfully sought an urgent order for the return of the magazines. In his reserved reasons Didcott J found, after an examination of the magazine and on a construction of the
Internal Security Act, that the magazine did not in fact fall within the scope of s 13(1)(a)(v) and that the policeman had therefore been wrong in his assumption. Taking the view that the policeman’s belief should be based upon some objective evidence, and not simply the latter’s subjective opinion, Didcott J ordered the return of the magazines.

A consideration that may influence the courts in adopting the objective approach is the wording of the empowering legislation. It has been suggested that words such as ‘has reason to believe’ carry a more objective connotation than phrases such as ‘in his opinion’ (e.g. Anthony S Mathews Law, Order and Liberty in South Africa (1971) 147–9). It is not clear why this should be so, since one assumes that legislatures always intend officials to have ‘reason’ for their opinions before they may act; nevertheless, some support for this distinction may be derived from another 1984 case, Kauluma v Minister of Defence 1984 (4) SA 59 (SWA), where the subjective approach was preferred. Here the court was confronted by the phrase ‘if he [i.e. the State President] is of the opinion’ (s 103ter(4) of the Defence Act 44 of 1957). Berker JP took the view (at 70F–G, Strydom J concurring) that if all the procedural prerequisites prescribed by the section have been complied with then the opinion of the State President cannot be gainsaid (except on the traditional grounds relating to abuse of discretion, e.g. mala fides). In other words, the mere existence of an opinion on the part of the State President constitutes the jurisdictional fact in question.

An illustration of the objective approach to jurisdictional facts in the field of labour law is Pinetown Town Council v President of the Industrial Court & others 1984 (3) SA 173 (N). The second respondent (a union) had applied to the third respondent (the minister) to establish in terms of s 35 of the Labour Relations Act 28 of 1956 a conciliation board to resolve its salary dispute with the applicant. The board was appointed, but it failed to resolve the dispute. The matter was then referred to the industrial court in terms of s 45, and the court made an order favourable to the union. The applicant applied to the Supreme Court to have the order set aside on the basis that no ‘dispute’ within the meaning of s 35 existed, and that neither the conciliation board nor the industrial court had had jurisdiction. Leon J (Broome J concurring) held that the existence of such a ‘dispute’ is a jurisdictional fact which is subject to the objective assessment of the reviewing court. In a judgment which contains a useful discussion of the doctrine of jurisdictional review (at 178–9), the learned judge determined for himself that a ‘dispute concerning the relationship between employer and employee’ did exist between the applicant and the second respondent, and that the dispute was
not one 'of law' (the existence of which would have denied the conciliation board jurisdiction). Industrial disputes are often regarded as relatively non-justiciable, hence the decision in this case is notable for its activist approach. It should, for example, be compared with the more restrained, subjective approach of the court in *Raad van Myvahbonde v Minister van Mannekrag* 1983 (4) SA 29 (T), where the existence of an 'unfair labour practice' was held to be not objectively justiciable. Both decisions may be correct, but their contrasting results illustrate how fine is the dividing line between what is and what is not justiciable in labour matters.

For an objective approach to the review of questions of law related to the exercise of discretionary power, see *Reinecke v Nel* 1984 (1) SA 820 (A) at 834–5.

*Public Law and Private Law*

Private individuals may do anything which is not prohibited by law; public officials may only do that which the law permits. Private persons may exercise their rights and liberties as they please, as long as they do not infringe the rights of others; public bodies must act according to certain minimum standards prescribed by the law. But when do persons cease to be 'private' and assume the mantle of 'public' authority? And when does 'private' action become 'public'?

An illustration of the difficulty of these questions is the case of *Rajab v University of Durban-Westville* 1984 (1) PH F13 (D). From the (incomplete) report it appears that the applicant had applied for an academic post at the University and that the application had been rejected by the selection committee. The applicant then sought judicial review of the proceedings of the committee and the university council. The respondent objected, in limine, that the principles of judicial review did not apply at all: the matter was a purely private, contractual one involving a dispute between an employer and a possible employee. (It is not clear whether it was the applicant's locus standi or entitlement to natural justice that was challenged.)

The applicant's counsel argued that the law relating to such forms of employment had shifted significantly from the classical model of private law and that the ordinary principles of judicial review were now becoming applicable. He also argued that as the respondent was a statutory body exercising statutory powers it could not be equated with a private employer.

Magid AJ rejected both contentions. He distinguished cases such as *Director of Education, Transvaal v McCagie* 1918 AD 616 and *Malloch v Aberdeen Corporation* [1971] 2 All ER 1278, upon which counsel had relied, on the ground that in those cases the complainants had
already held appointments with the employers concerned. Instead, the learned judge applied Cooper v Findlay (1) 1954 (4) SA 697 (N), in which it was held that an advocate has no locus standi to challenge the admission of a colleague because his complaint relates only to the 'chance' or opportunity to derive some benefit, not to a right to retain a benefit. With respect, on Magid AJ's own reasoning Cooper's case was indistinguishable in principle from McCagie's and Malloch's cases, for the applicant in Cooper was already an admitted advocate.

Magid AJ relied again upon the right/privilege distinction in dismissing the second point. Finding that the practice of hearings before a selection committee was not itself of statutory origin, he could see 'no reason why an applicant for employment should be in any better position as against a prospective employer than, for example, an applicant for membership of the Jockey Club ... or any other club ... or an applicant for a permit ...' (citing a number of well-known authorities).

Perhaps on the facts of the case Magid AJ was correct, but the law is indeed changing (cf eg Nagel v Fielden [1966] 2 QB 633, and Central Council for Education and Training in Social Work v Edwards reported in The Times 5 May 1978), and South Africa is now one of the last refuges of the notorious right/privilege distinction. One wonders if the court would really have rejected the principles of review if it had been proved, say, that the selection committee had been bribed?

Administrative Acts

Notice

See Van Rensburg v Stadsraad van Alberton 1984 (1) SA 147 (W) (effect of the substitution of the common-law requirement of personal notice by a statutory requirement of notice by registered post).

Enforcement

An industrial council may enforce the observance of an industrial agreement by way of a civil action, despite the fact that the relevant legislation already provides alternative methods for enforcement and renders non-observance a criminal offence: National Industrial Council of the Leather Industry of SA v Parshotam & Sons (Pty) Ltd 1984 (1) SA 277 (D).

Duration, Variation and Revocation

The power to withdraw or vary an order does not necessarily preclude the operation of the functus officio principle: cf Black Allied
and Tunnel Workers Union (SA) Inc Bawu (SA) v Kilbarchan Colliery Ltd, unreported judgment of the industrial court 16 February 1984 (see 1984 SACLAW E 837).

On the automatic lapsing, without application to court, of the registration of a newspaper see Ritch v Jane Raphaely & Associates (Pty) Ltd 1984 (4) SA 334 (T) at 337A–D.

Administrative Power and its Use

Source of Power

A trustee is not an ‘officer of the court’, nor does he derive his powers from the inherent jurisdiction of the courts; he is instead a creature of statute, and his powers derive from the Insolvency Act 24 of 1936 and related legislation: Gilbert v Bekker 1984 (3) SA 774 (W).

Preservation of Power: Repeal of Legislation

See Keagile v Attorney-General, Transvaal 1984 (2) SA 816 (T).

Assumption of Powers by the State President

The State President is now permitted to administer departments of state for general affairs directly, and he is authorized to take over powers previously vested in any minister of state for general affairs (Constitution Amendment Act 105 of 1984, ss 3 and 4, amending and replacing ss 24 and 26, respectively, of the Republic of South Africa Constitution Act 110 of 1983).

Scope of Power: Summary Powers

The Community Development Amendment Act 20 of 1984, s 20 (amending s 18C of the Community Development Act 3 of 1966) purports to render the summary and forcible powers of entry and ejectment possessed by officials of the Department of Community Development immune from the operation of any other statutory or common-law provision, and it extends these powers to designates of the Director-General of that department.

Scope of Power: Extension by Separate Statutes


Scope of Power: Conflicting Provisions

See S v Ngubane 1984 (4) SA 223 (N), dealing with the power of the State President to amend the Code of Zulu Law under ss 24 and 25 of the Black Administration Act 38 of 1927.
Scope of Power: Implied Powers

BP Southern Africa (Pty) Ltd v Secretary for Customs and Excise 1984 (3) SA 367 (C) concerned the question whether a fiscal exemption could be granted ex post facto. This decision has now been reversed by the Appellate Division (1985 (1) SA 725 (A)) and will be discussed in the next issue of the Survey.

See also Durban (Ningizimu) Community Council v Minister of Co-operation and Development 1984 (2) SA 222 (D) (whether the power to vest in a council the ‘allocation’ and ‘administration’ of dwellings includes the power to vest in the council the power to fix rentals and charges for other services), and S v Ntshingila 1984 (2) SA 289 (T) at 294A (implied power to suspend conditionally an order made in terms of s 29 of the Blacks (Urban Areas) Consolidation Act 25 of 1945—but cf Malherbe v South African Medical and Dental Council 1962 (1) SA 825 (N)).

Estoppel

In Ndongeni v Administration Board, Western Cape 1984 (1) SA 768 (C) Berman AJ held that the respondent was estopped from evicting the applicant, despite the fact that it had given him notice of his default in rent payments, because it had extended indulgence to the applicant before, thereby lulling him into believing that it would not act upon its threat of eviction. While equity seems to support the learned judge, his decision may be incorrect: the cases relied upon concerned the operation of estoppel as between private parties, and no account was taken of the public law principle that a public authority cannot as a result of its prior conduct be deprived of its powers by the application of estoppel. On the other hand, the powers of eviction under which the respondent purported to act were couched in discretionary and non-peremptory terms (‘may’); it could be argued in support of Berman AJ’s decision that estoppel can operate in such circumstances (cf Durban City Council v Glenore Supermarket & Café 1981 (1) SA 470 (D) at 478A).

Fettering of Discretion by Misconstruction of Powers

See Vokwana v National Transport Commission 1984 (2) SA 245 (TkSc) esp at 251–4 (refusal by commission to admit supplementary information at hearing).

Fettering of Discretion by Rigid Policies and Quotas

A statutory body upon which a discretionary power has been conferred may not fetter the exercise of that power by the adoption of a rigid policy or an arbitrary quota. Two good illustrations are Mafuya v Mutare City Council 1984 (2) SA 124 (Z), and South North
Haulage (Pty) Ltd v Administrator of the Orange Free State 1984 (1) PH F28 (O).

In Mafiya the respondent had imposed a quota upon the total annual number of hawkers' licences that it would grant, had failed to take into account the prior business commitments of existing licence-holders, and had adopted a first-come-first-served approach without considering each individual application. Dumbutshena JP set aside the refusal by the respondent to grant licences to the applicants.

In the South North Haulage case the respondent had adopted an inflexible policy of refusing to allow the operation of vehicles with a height in excess of 4,1 metres. Applying, among others, the leading case of Britten v Pope 1916 AD 150, the court set aside the respondent's refusal to grant the applicant a permit.

Failure to Take Into Account Relevant Considerations

See Langa v Township Manager, Umlazi Township 1984 (1) PH M2 (D) (failure to consider preferential nature of claim).

Formalities and Procedures: the 'Mandatory' ('Peremptory')/'Directory' Problem

See Rossiter v Rand Natal Trust Co Ltd 1984 (1) SA 385 (N) (inadequate information in advertisement of sale in execution), BP Southern Africa (Pty) Ltd v Secretary for Customs and Excise 1984 (3) SA 367 (C) at 374H-I (use of 'shall' and prescription of criminal sanctions indicating that strict compliance envisaged), Sheray Investments (Pty) Ltd v Town Council of Springs 1984 (4) SA 80 (W) (incorrect notice for objections), and Stadsraad van Vanderbijlpark v Dorperaad van Transvaal 1984 (2) PH D1 (T) (inadequate information in notice of application for special consent).

Proper Exercise of Discretionary Powers

For an interesting discussion of the manner in which discretionary powers should be exercised by the industrial court, see National Union of Mineworkers v Driefontein Consolidated Ltd (1984) 5 ILJ 101 (I) at 113–18, and cf Noddele v Mount Nelson Hotel (1984) 5 ILJ 216 (I) at 224–6.

Abuse of Power/Unreasonableness

Bad Faith and Improper Motive/Purpose

See Mafiya v Mutare City Council 1984 (2) SA 124 (Z) at 132B–F (improper political purposes motivating decision to favour some licence applicants over others), S v Khoete 1984 (2) SA 480 (O)
(invocation of statutory offence for improper purpose), *White Rocks Farm (Pty) Ltd v Minister of Community Development* 1984 (3) SA 785 (N) esp at 793–5 (motive not to be confused with purpose), and *Kapuluaza v Executive Committee of the Administration for the Hereros* 1984 (4) SA 295 (SWA) at 314–15 (allegation of bad faith).

**Gross Unreasonableness**

See *Omega Freight Services (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie* 1984 (3) SA 402 (C) at 414–18.

**No Reasonable Evidence**

Although he ruled in favour of the applicant on other grounds (see under ‘Natural Justice’ below 49), Gordon J in *Barnard v Jockey Club of South Africa* 1984 (2) SA 35 (W) refused to set aside a disciplinary decision on the grounds that it was based upon unsatisfactory evidence and was one at which no reasonable tribunal could have arrived (at 39–40). The court relied on the dictum of Holmes JA in *Johannesburg Local Road Transportation Board v David Morton Transport (Pty) Ltd* 1976 (1) SA 887 (A) at 895, in which it was stated that unreasonableness is not per se a ground for review.

It is submitted, with respect, that Gordon J was mistaken. Holmes JA’s dictum has since been considerably qualified, at least as far as adjudicative proceedings are concerned, by the judgments of Jansen JA in *Theron v Ring van Wellington van die NG Sendingkerk in Suid-Afrika* 1976 (2) SA 1 (A) and of Kotze JA in *W C Greyling & Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board* 1982 (4) SA 427 (A). These, and a number of earlier judgments, indicate that the courts will in fact apply the ‘no reasonable evidence’ standard in review proceedings, especially where the tribunal under review has to weigh evidence in the same manner as do the courts. It is true, as Gordon J observed (at 40D–E), that the courts continue to pay lip service to Holmes JA’s restrictive dictum, but by their deeds it is quite apparent that they have abandoned its spirit.

**Unreasonableness: Delegated Legislation**

See *Boardman v Minister van Finansies* 1984 (1) SA 259 (T) at 262–5.

**Vagueness**

See *Chairman of the Board Appointed by the SA Council for Architects v Bolnik* 1984 (1) SA 639 (A) at 655C–F.
Natural Justice

Proper Notice

See 'S' v Kommissaris van Kindersorg, Brakpan 1984 (3) SA 818 (T) (failure to give notice to mother in adoption proceedings).

Fair Hearing

In Kaputuaza v Executive Committee of the Administration for the Hereros 1984 (4) SA 295 (SWA) the court found that the principles of natural justice had been violated because one of the parties to a dispute had been heard by the decision-maker in the absence of the applicants (at 313–14). This is good law, for which there is considerable judicial support (see eg Lawrence Baxter Administrative Law (1984) 546–50, 553–4, and the cases there cited). In Barnard v Jockey Club of South Africa 1984 (2) SA 35 (W), however, Gordon J refused to set aside a decision on this ground even though the learned judge accepted that the subsequent receipt of evidence in the absence of the applicant 'left much to be desired' (at 41–3). It is submitted that Gordon J was wrong in this regard. (The decision was set aside on other grounds: see under 'Sources of Bias: Pecuniary Interest' below 49.)

See also Mafuya v Mutare City Council 1984 (2) SA 124 (Z), where the failure to grant a hearing to a large number of persons, including many existing licence holders, before refusing their applications for hawkers' licences, was held to constitute a violation of natural justice and the duty to act fairly.

Test for Bias

In Omega Freight Services (Edms) Bpk v Voorsitter Nasionale Vervoer-kommissie 1984 (3) SA 402 (C) Fagan J (Friedman J concurring) applied the test for bias as expressed by Lord Denning MR in Metropolitan Properties (FGC) Ltd v Lannan [1969] 1 QB 577 at 599, which focuses on the apprehension of bias created in the mind of a reasonable man who has taken reasonable steps to inform himself of the material facts (see 1984 (3) SA at 419–20, also approving the explanation given in De Smith's Judicial Review of Administrative Action 4 ed by J M Evans (1980) 263–4). It seems that this formulation has now become generally accepted in South African law. Although Fagan J, after an analysis of the facts (at 420–7), rejected the applicant's contention that the respondent commission had been biased, the learned judge also recognized that a challenge to the impartiality of a decision-maker can be raised even if the information giving rise to the apprehension of bias only became known to the complainant after the hearing itself (at 420B–F).
Sources of Bias: Pecuniary Interest

_**Barnard v Jockey Club of South Africa**_ 1984 (2) SA 35 (W) is a good illustration of pecuniary bias as a disqualifying factor. The applicant had been convicted and sentenced under the Jockey Club’s rules by a board of stipendiary stewards. She appealed without success to the local executive stewards, and then appealed with limited success to the head executive stewards. She challenged the procedure adopted by both the board and the local executive stewards. Her challenge to the board was rejected by the court (at 37–43). Her attack on the proceedings before the local executive stewards was, however, upheld because one of the members of the executive tribunal was also a partner in the firm of attorneys that had acted for the board of stewards in the appeal to the executive. Even though the court doubted that the member had really been biased (at 48B–C), it held that the mere presence of a pecuniary advantage to the firm was sufficient to create in the minds of reasonable men the suspicion of bias (at 47D–H). The proceedings were set aside in their entirety.

Sources of Bias: Undue Influence

In _S v Vermaak_ 1984 (2) SA 88 (C) the trial of a prisoner on a disciplinary offence was set aside because the case had been heard by a prison officer of the same rank as the complainant. The court observed that, in order to minimize the risk of peer influence and enhance the qualifications of the tribunal, the trial should have been presided over by an officer of considerably higher rank (at 91C–I).

Sources of Bias: Nepotism

See _Mafuya v Mutare City Council_ 1984 (2) SA 124 (Z) at 132C–F.

Applicability: Exclusion by Statute

Section 2(a) of the Import and Export Control Amendment Act 8 of 1984 (replacing s 2(4) of the Import and Export Control Act 45 of 1963) is yet another Draconian inroad into the principles of natural justice. The amendment permits the Minister of Industries, Commerce and Tourism, or anyone authorized by him, to cancel, amend or suspend any import or export permit ‘in his discretion at any time and without giving any person notice or an opportunity to make representations’. In addition, the qualifications that were previously stipulated in the principal Act in relation to the exercise of this punitive power are removed by the amending Act, thereby greatly extending its potential scope.

While it may be argued that there is a case for summary action, given the sometimes sensitive nature of international trade and
especially in the face of the threat of sanctions (cf the speech of the Minister of Industries, Commerce and Tourism in *House of Assembly Debates* 13 February 1984 cols 902–3), it is difficult to understand how the absolute denial of a right to notice and a hearing can ever be justified, particularly when one bears in mind the extensive damage which the deprivation of a permit might inflict on the interests of affected businesses.

During the second reading of the bill the members of all parties in Parliament either failed completely to grasp (see the speech of the spokesman for the Official Opposition *House of Assembly Debates* 13 February 1984 col 903), or misunderstood (see the speech of the spokesman for the National Party *House of Assembly Debates* 13 February 1984 col 905), the significance of the amendment, and the second reading debate seems generally to have been afflicted by an atmosphere of xenophobia. The bill was not committed, nor was there any discussion during the third reading. The provision appears to be yet another example of bureaucratic arrogance, and it is to be hoped that the courts will place as restrictive an interpretation upon it as possible. This might be done by construing the provision so as not to exclude the right to a hearing after the action has been taken (which could at least induce the minister to rescind his decision).

On express or implied exclusion of natural justice, see *Dhlamini v Minister of Education and Training* 1984 (3) SA 255 (N) at 258–60.

**Applicability: Special Circumstances**

Very rarely, particularly during wartime, the courts have refused to apply the principles of natural justice to decisions involving security matters because of the existence of ‘very special circumstances’. A possible example in South African law is *Minister of the Interior v Bechler* 1948 (3) SA 409 (A) at 452 (though the decision was also based upon other factors).

In *Dhlamini v Minister of Education and Training & others* 1984 (3) SA 255 (N) counsel for the respondents attempted to persuade the court that practical difficulties and great administrative inconvenience should also be recognized as giving rise to ‘special circumstances’. The effect of this argument, if successful, would have been to excuse the respondents from having to grant matriculation candidates an opportunity to be heard before their examination results were cancelled in response to the discovery of a number of irregularities in the conduct of the examinations. Leon J rejected this contention and stressed the importance of the need for a serious emergency (at 260–1). The learned judge was wise to adopt a strict approach to the
'special circumstances' exception; the admission of an exception on the basis of administrative inconvenience would provide public authorities with a tailor-made justification for virtually every violation of natural justice. (It should be noted that Leon J's judgment was followed by Thirion J a few weeks later in Cindi v Minister of Education and Training (NPD, unreported, case no M1186 of 1984), in which the facts were similar.)

**Applicability: Preliminary Decisions**

When a decision-making process becomes composite, it is always difficult to determine the stage at which natural justice should be observed. On the one hand, decision-makers cannot be expected to grant a hearing to an affected party at every stage in their investigations; on the other hand, the mere decision to proceed further could be damaging in itself.

Judges have sometimes tried to simplify the problem by drawing a distinction between 'final' and 'provisional' decisions. But this really only begs the question, because provisional decisions may have permanent effects even if they are subsequently reversed or modified. Hence the decision of Conradie AJ in Grundling v Van Rensburg NO 1984 (4) SA 680 (W) is to be welcomed. The applicant, a preacher, had been suspended by his presbytery after a prior investigation by the presbytery commission into a rumour concerning his conduct. He was not informed of the nature of the rumour until the commission had completed its investigations, and he was allowed an opportunity to rebut it only when the presbytery itself considered the case. The respondent argued that there had been no duty to allow the applicant to rebut the rumour at an earlier stage because the investigation into the rumour was only provisional and further action would commence only on the presentation of a formal charge. It also argued that, even if there had been a defect of natural justice as far as the commission's investigation was concerned, this had been corrected in the proceedings before the presbytery itself (where a proper hearing had been given).

Conradie AJ rejected both contentions. (As to the second, see the following section.) On the nature of the investigation, the learned judge held that the appropriate test was not whether the commission's proceedings were provisional but whether there was potential prejudice to the applicant (at 689B–C). In so holding, Conradie AJ applied the well-known dicta of Lord Wilberforce in Wiseman v Borneman [1971] AC 297 (HL) at 317, and of Lord Denning MR in Re Pergamon Press Ltd [1971] Ch 388 at 399, and, it is submitted, he has helped to clarify a sometimes confusing subject.
Curing Defects of Natural Justice by Appeal

It is seldom possible to cure, at a subsequent administrative appeal, a significant violation of natural justice committed at the first decision-making stage. Not only is the 'taint' of the first hearing likely to be carried forward to the second (*Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) at 658D), but as Megarry J once observed, '[i]f the rules and the law combine to give the [complainant] the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal?' (*Leary v National Union of Vehicle Builders* [1971] Ch 34 at 49).

Applying the reasoning adopted in these and other cases, Conradie AJ held, in *Grundling v Van Rensburg NO* 1984 (4) SA 680 (W), that the failure to allow the applicant an opportunity to rebut a detrimental rumour which a presbytery commission had been investigating had not been cured by providing him with a full hearing when the presbytery finally considered the matter itself (at 687–8).

The principle was also applied in *Barnard v Jockey Club of South Africa* 1984 (2) SA 35 (W), where the entire proceedings before a board and two appellate tribunals were set aside even though the court only found irregular the proceedings before the intermediate appeal tribunal, because '[t]o deny [the applicant] a hearing of one appeal would be to deny her a full hearing' (at 48D–E, per Gordon J).

Duty to Act Fairly

See *Barnard v Jockey Club of South Africa* 1984 (2) SA 35 (W) at 42–3 ('fundamental fairness'), and *Mafuya v Mutare City Council* 1984 (2) SA 124 (Z) at 130F–G, in which the duty to act fairly is equated with audi alteram partem.

Liability for Administrative Action

Delictual Liability of Public Authorities

See *Kenly Farms (Pty) Ltd v Minister of Agriculture* 1984 (1) SA 406 (C) (whether administrative officials could have been authorized to act negligently), and *Rabie v Minister of Police* 1984 (1) SA 786 (W) (whether a police mechanic, off duty and in private clothing, could be said to be acting as a servant of the state when committing an assault while purporting to arrest the plaintiff). Both cases are discussed in the section on the Law of Delict below.
Statutory Immunity

Section 27 of the Animal Diseases Act 35 of 1984 creates immunity from liability in respect of action taken in good faith under the Act.

Statutory Compensation

Provision is made by the Animal Diseases Act 35 of 1984 for the payment of statutory compensation in respect of losses suffered as a result of action taken under the Act (s 19).

On the distinction between statutory 'compensation' and common-law 'damages', see Kenly Farms (Pty) Ltd v Minister of Agriculture 1984 (1) SA 406 (C) at 409–10.

Standing to Sue

See National Industrial Council of the Leather Industry of SA v Parshotam & Sons (Pty) Ltd 1984 (1) SA 277 (D) (locus standi of industrial council to enforce observance of industrial agreement), Estate Agents Board v Louis Locke Estates (Pty) Ltd 1984 (1) SA 709 (W) (locus standi of board to prevent, by way of interdict, improper conduct on the part of an agent), and Rajab v University of Durban-Westville 1984 (1) PH F13 (D) (discussed under 'Public Law and Private Law' above 42).

Judicial Remedies and Procedure
Reference Back or Correction

As to when a court will substitute its own decision for that of the tribunal whose decision it has set aside, instead of referring it back to the latter for reconsideration, see Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban 1984 (3) SA 65 (N) at 74–6, Frasers (OFS) Bpk v Voorsitter van die Nasionale Vervoerkommissie 1984 (2) PH M29 (T), and cf Vokwana v National Transport Commission 1984 (2) SA 245 (TkSC) at 254C–G.

Severance

See S v Savage 1984 (1) SA 327 (SWA).

Interdicts

Nestor v Minister of Police 1984 (4) SA 230 (SWA) is an important case concerning the use of interdicts in the enforcement and protection of prisoners' rights and liberties. The judgment of Berker JP contains a valuable analysis of the substantive and evidential requirements for the grant of temporary interdicts in such circumstances (at 243–51).
On the requirements for the grant of an interim interdict pending the outcome of an administrative appeal, see *Marinpine Transport (Pty) Ltd v Local Road Transportation Board, Pietermaritzburg* 1984 (1) SA 230 (N) at 233–4, and *Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban* 1984 (3) SA 65 (N) (which also deals with the question of urgency).

*Interdict de Libero Homine Exhibendo*

Two important decisions were reported in 1984: *Minister of Home Affairs v Dabengwa* 1984 (2) SA 345 (ZSC), and *Kauluma v Minister of Defence* 1984 (4) SA 59 (SWA). *Kauluma* is discussed in the section on Constitutional Law above. See also under ‘Activism and Restraint’ above 36.

*Mandamus*

The unqualified application of private law principles when considering the granting of remedies against public authorities can lead to anomalous results. *Lipschitz v Watrus NO* 1980 (1) SA 662 (T) provides a useful illustration. It was clear from the facts that the respondent had acted unlawfully by refusing to consider the applicant for appointment as a trustee or liquidator in the future (see L G Baxter (1980) 43 *THRHR* 324 at 327). Yet the court ruled (at 673C–E) that it could not issue a mandatory order directing the respondent to exercise his discretion in future because the applicant had failed to establish that he possessed a ‘clear right’. While such a requirement may be normal and even appropriate in private law disputes, it becomes absurd in the public law context where many of the powers conferred by statute relate not to rights (in the classical sense) but to ‘privileges’ or benefits which may be awarded in the decision-maker’s discretion.

The decision in *Lipschitz* was followed in *Kapituza v Executive Committee of the Administration for the Hereros* 1984 (4) SA 295 (SWA) at 317E–1, though no harm was done because Bethune J found on the facts that the applicants had proved the violation of a clear right (at 317–19). A far better approach, it is submitted, is to adapt the requirements of a mandatory order to suit the principles of substantive law involved; thus where it is established, for example, that a decision-maker has fettered his discretion and will continue to do so in the future, a mandatory order directing him to exercise his discretion in a lawful manner should be granted irrespective of whether the complainant has suffered or will suffer an invasion of a clear right. As long as he has standing and has or will suffer prejudice, he will have made out a case for a remedy, and the most appropriate one should be granted. Zietsman J appears to have
adopted this approach in an unreported decision in the South Eastern Cape Local Division (see South African Transport Services v Chairman, Port Elizabeth Road Transportation Board 1984 (1) SA 236 (SE) at 239–40). There is no doubt that the granting of a mandamus or mandatory order in such circumstances correctly expresses well-established principles of administrative law.

On the use of mandamus to enforce compliance with a statutory duty, see Minister of Home Affairs v Dabengwa 1984 (2) SA 345 (ZSC).

Declaratory Orders

A court may grant an order declaring an election nomination to be invalid even though the nomination court has itself not yet considered the nomination: Reinecke v Nel 1984 (1) SA 820 (A) at 835B–D.

Delay

See Setsokotsane Busdien (Edms) Beperk v Die Voorsitter van die Nasionale Vervoerkommissie 1984 (1) PH F2 (O) (delay of nine months unreasonable).

Statutory Appeals

Provision for appeals to the Supreme Court against the decisions of statutory tribunals are contained in the Town and Regional Planners Act 19 of 1984, s 31; the Workmen’s Compensation Amendment Act 29 of 1984, s 8, replacing s 25 of the principal Act (against decisions of the newly-created revision board) (and see also s 9, replacing s 26 of the principal Act, providing for the stating of a case); the Professional Land Surveyors’ and Technical Surveyors’ Act 40 of 1984, s 32; and the Estate Agents Amendment Act 51 of 1984, s 11 (extending the present rights of appeal provided for in s 31 of the principal Act).

The chameleon-like character of many tribunals is most graphically illustrated by the industrial court. In United African Motor & Allied Workers’ Union v Fodens (South Africa) (Pty) Ltd 1984 (3) SA 343 (T) (Digest of Cases on Appeal), Esselen J and Bliss AJ held that the industrial court, conducting a compulsory arbitration in terms of ss 17(11)(f) and 46 of the Labour Relations Act 28 of 1956, does not exercise ‘judicial functions’ and does not sit as a court of law; hence such a determination is not appealable to the Supreme Court. Because of the extreme diversity of the functions performed by tribunals such as the industrial court, it is obvious that not all of their decisions should be the subject of appeals to the Supreme Court. The uncertainty manifested by the litigation in cases such as Fodens would be eliminated if the legislature expressly specified, in
relation to each empowering subsection, when a decision is appealable and when it is not. This could be dealt with by way of a schedule to the relevant Act.

On the scope of a right of appeal on a question of law, the appealability of a 'recommendation' by a board to a minister (against whose decision no appeal lies), and the jurisdiction of the appeal court, see the judgment of Nienaber J in *Jerpis Trading (Pty) Ltd v Westsun Hotel (Pty) Ltd* 1984 (2) SA 431 (D).

For a valuable discussion concerning the procedures to be adopted in appeals from administrative bodies and the Commissioner of Customs and Excise in particular, see the judgment of Esselen J in *Metmak (Pty) Ltd v Commissioner of Customs and Excise* 1984 (3) SA 892 (T).

*Exclusion of Judicial Remedies by Provision of Alternative Remedies*

In three decisions the prior existence of special statutory or ‘domestic’ remedies was held not to preclude the court’s jurisdiction to review invalid administrative action: see *Reinecke v Nel* 1984 (1) SA 820 (A) at 836A–E, *Grundling v Van Rensburg NO* 1984 (3) SA 207 (W), and ‘S’ v *Kommissaris van Kindersorg, Brakpan* 1984 (3) SA 818 (T) at 823–4. Cf also *Kaputaaza v Executive Committee of the Administration for the Hereros* 1984 (4) SA 295 (SWA) at 316A–F.

*Direct Ouster Clauses*

See *Kauluma v Minister of Defence* 1984 (4) SA 59 (SWA) at 69–72, 79–80.

*Limitation Clauses and Notice Requirements*

See the section on the Law of Delict below.

*Onus*

See *United Democratic Front (Western Cape Région) v Theron NO* 1984 (1) SA 315 (C) at 326D–F (onus in cases where action is based upon information peculiarly within the knowledge of the public authority), *White Rocks Farm (Pty) Ltd v Minister of Community Development* 1984 (3) SA 785 (N) at 793D (discussed under ‘Classification of Functions’ above 000), and *Kauluma v Minister of Defence* 1984 (4) SA 59 (SWA) at 64E–G (onus in application for interdict de libero homine exibendo).

*Reasons*

Where discretionary powers are concerned, it is often very difficult to determine whether a public authority has acted lawfully. Bona fide decision-making is not enough: the legal and factual
prerequisites prescribed by the empowering legislation must exist; the decision to act must also have a rational basis and the decision-maker must take into account all relevant considerations, ignore those which are irrelevant, and act for the purposes contemplated by the empowering legislation. One of the most effective methods of determining that these principles are observed is to require the decision-maker to disclose the basis and reasons for his decision. As yet, however, South African common law does not require findings and reasons to be disclosed and, unlike many other countries, we do not yet have any general statutory requirement to this effect.

Two factors serve partially to mitigate this defect in our law:

(a) legislatures have sometimes been persuaded to insert express findings-and-reasons requirements in statutes, thereby remedying the defect in the common law (at least for the specific administrative action concerned); and,

(b) from a refusal to disclose reasons a court may draw an inference that the decision-maker has not acted lawfully.

**Reasons Required by Statute**

There seems to remain some judicial reluctance to enforce statutory duties to disclose findings and/or reasons. This is partly due to a degree of confusion regarding the concepts of findings and reasons, and it is partly the result of extreme judicial restraint in the areas of administration concerned.

Let us first be clear on terminology. The empowering provisions which stipulate how and when a public body may act constitute the *preconditions* for any action at all. The *findings* constitute the basic evidence before the decision-maker as well as the inferences to be drawn from this evidence. (Americans draw a distinction between ‘basic’ and ‘ultimate’ findings.) The *reasons* constitute the explanation as to why, *in the light of the findings and of the overall legislative parameters within which the public body may act*, the decision-maker has decided in the way that he did.

These terms are all ambiguous in lay parlance; sometimes an even more ambiguous term, namely ‘grounds’, is also brought in. But the three concepts expressed above are fairly distinct ones, and they simply reflect the general principles of administrative legality. Only by understanding the distinction between them can we avoid confusion.

In furnishing reasons it is not enough simply to regurgitate the empowering section of the legislation: not only does this constitute no more than a statement of the preconditions for any action under the section—which begs the question—but the acceptance of such
as 'reasons' would be an exercise in absurdity because if the preconditions are already expressed in the legislation there is no purpose in stipulating a reasons requirement. Were such an interpretation to be adopted, one would have to accept the ridiculous conclusion that the 'reasons' for any future administrative action under the legislation have already been expressed once the legislation is signed by the State President.

It should also be noted that the reasons for the decision are bi-directional: they explain the relationship, or rational link, between the evidence and the action taken and they explain the relationship, or necessary link, between all the lawful options available to the decision-maker (express and implied) and the action taken. This second aspect is almost invariably overlooked when the adequacy of reasons is considered. Yet it is extremely important, since it indicates why substantial reasons may be expected from a decision-maker even when he is not required to disclose any evidence ('information', 'findings'). In any discretionary power there is usually a number of options available, all of which may be based upon the same set of facts. But certain unlawful options may be chosen if no account is taken of relevant considerations, or if irrelevant considerations are taken into account, or if purposes that are not permitted by the legislation are pursued. Sometimes reference to the evidence is necessary if this is to emerge, but this is not always the case. Thus if the Minister of Law and Order decides to detain certain individuals upon the basis of highly sensitive information but chooses to detain them for six months instead of, say, three weeks because he wishes to punish them for their political views, he will be acting unlawfully. If he is required to state his reasons for the detention, as he is (§ 28 of the Internal Security Act 74 of 1982), his action would immediately be exposed as unlawful (though possibly quite bona fide) because he would have had to state in his reasons the purposes for which he acted. At the same time, the adequacy of his reasons in this respect does not turn on the disclosure of any evidence at all.

It is therefore not good enough to say that reasons cannot be disclosed if the evidence to which they (partly) relate cannot itself be disclosed. Furthermore, once the distinction between basic and ultimate findings is grasped, it need not be accepted that if the evidence itself ought not to be disclosed then no findings or information can be given. The ultimate findings—conclusions, evaluations, etc.—may well be capable of disclosure without jeopardizing sensitive evidence. For example, the minister, without in any way disclosing the identity of informers, may say 'in the light of reports received concerning your public and private
utterances during the period July to September 1984 in Durban and the Western Cape, I have concluded that you have been inciting and wish to incite members of the public to acts of violence thereby propagating a state of unrest'. This is an extreme example, and I do not suggest that the courts should simply accept that the minister always has to be so cagey—sometimes the basis for his action is a matter of notoriety, as when he discloses it on a public platform—but even here the example illustrates that more can be furnished than is commonly given by the minister or accepted by the courts.

These arguments should come as no surprise: judges engage in this sophistication of reasoning all the time and, if the power of severely affecting the rights and interests of individuals is to be placed in the hands of administrative officials instead of judges, we can at least expect sophisticated reasoning from them too. After all, they do have reasons for their actions, don’t they?

Against this analysis we may now consider two cases which dealt with statutory duties to give reasons. The first is Hamman en ‘n ander v Algemene Komitee, Johannes burgse Effektebeurs en ‘n ander 1984 (2) SA 383 (W) (the facts of which have already been outlined under ‘Administrative Appeals’ above 33).

The Stock Exchanges Control Act 7 of 1947 provides that when the general committee of the stock exchange terminates an individual’s membership of the exchange he is entitled to be apprised of the ‘reason’ for the termination (s 10(1)). In addition, the statutory regulations then in force provided that if he wished to lodge an appeal to the exchange’s appeal board this had to be prosecuted within ten business days of receipt of the committee’s ‘reasons’. The written notice of the appeal was to be accompanied by a copy of the committee’s notice of appeal as well as the committee’s ‘reasons’ for the termination.

The committee had in fact furnished the applicants with a brief though not uninformative statement of ‘reasons’ consisting mainly of conclusions of fact (at 385–6). The applicants argued, however, that the statement failed to comply with the duty to give reasons in that it failed to disclose the findings of fact, the evidence that had been accepted and rejected by the committee, and the reasons for the findings of fact and the acceptance or rejection of evidence. (The applicants also argued that they should be supplied with a copy of the transcript of proceedings before the general committee; this aspect of the case has already been discussed above 34–5.) Coetzee J rejected their application for an order declaring the respondents bound to provide proper reasons. He advanced a number of reasons for his decision.
Least convincing was his opinion that, as the Act referred only to 'reason' and not 'reasons', it was intended only that the committee should identify which of the ten 'grounds' for termination (stipulated by the Act) it had relied upon (at 387–8). This reasoning seems strained, to say the least. Not only does it demonstrate a confusion, compounded by use of the word 'grounds', between the preconditions and the reasons for termination, but it ignores s 6 of the Interpretation Act 33 of 1957, which stipulates that singular terms must be taken to include the plural and unless a contrary intention is evident from the legislation. Far from revealing a contrary intention, the legislation (all of it, as superior and subordinate legislation should be read together if the latter is valid) clearly revealed an intention to include the plural, the regulations referred exclusively to 'reasons'.

The second reason for rejecting the application was that, in Coetzee J's opinion, the law did not require that reasons should be full, even when they were required to be given by statute. Two decisions pointing very clearly to the contrary and binding on the learned judge, Hanley v Estate Agents Board 1978 (3) SA 281 (T), and Steyn v Estate Agents Board 1980 (2) SA 334 (T), were distinguished on the ground that they dealt with another statute (at 390B), though no effort was made to demonstrate that the principle with which they were concerned differed in any way. (Coetzee J also doubted their correctness (at 389–90). Criticism may be levelled at the reasoning here, too, though considerations of space preclude further discussion. Lest it be thought, however, that the learned judge has abandoned faith in the venerable principles of precedent and stare decisis by this cavalier disregard for such strong authority, the reader is directed to Coetzee J's own reassertion of their value in Trade Fairs & Promotions (Pty) Ltd v Thomson 1984 (4) SA 177 (W) esp at 186–7.)

The third reason for deciding against the applicant was that it would be 'unrealistic' to expect a committee consisting of ten members to formulate the reasons for its decision: each of the members would have his own reasons for voting one way or another (at 390F–H). Coetzee J purported to distinguish Steyn v Estate Agents Board 1980 (2) SA 334 (T), in which the duty to furnish reasons was fully enforced, on this ground; what was apparently not considered by the learned judge, however, was that the Estate Agents Board itself consisted of between nine and eleven members (Estate Agents Act 112 of 1976, s 3(1)). In any event, apart from the fact that the inconvenience of compliance does not in itself justify a departure from the prescriptions of statute, one may ask why the mere weight of numbers should make any difference. When adjudicating upon
the validity of an Act of Parliament the quorum of the Appellate Division is eleven judges, yet there has never been a suggestion that this absolves those judges from the duty to deliver, or identify themselves with, a reasoned judgment. The analogy wears thin, admittedly, when a statutory body consisting of many members (for example, a city council) decides a matter of policy by enacting a by-law. In situations such as the present, however, where an individual’s membership is being terminated for breach of a code of behaviour, the deciding body is surely under a duty to make up its mind on what aspects of the code have been breached. Good chairmen experience no difficulty in drawing the majority consensus after hearings and deliberation: they do so by formulating a reasoned motion (cf Annamalai v Newcastle Town Council 1960 (1) SA 550 (N) at 555–6). Where action can have the effect of depriving someone of his existing entitlements, one should expect nothing less.

The next ground for Coetzee J’s decision is perhaps the strongest: the reasons that had in fact been supplied were, in his lordship’s opinion, clear and precise (at 391A). It is a pity that the judgment, in so far as it relates to the duty to give reasons, was not confined to this factual basis. After all, administrative bodies cannot always be expected to supply lengthy and detailed reasons, and it is sufficient if the affected individual is left in no doubt as to the basis of the decision and the reasoning process of the decision-maker. While it is arguable that the reasons that were supplied did not meet this criterion, this is essentially a matter for the assessment of the reviewing judge.

Coetzee J’s final reason for deciding against the applicants was that the declaratory order that they were seeking was one which it is in the discretion of the court to award. Taking the view that the exchange’s appeal board was a more appropriate body to deal with the complaint concerning the inadequacy of the reasons, Coetzee J decided to exercise his discretion against granting the order (at 391C–F). But this seems to miss the point about the reasons altogether: the reasons have to be supplied so as to enable the affected persons properly to prosecute the appeal (against those very reasons). What is the good of telling an appellant that he may appeal against the decision of the committee even though he does not know how that decision was reached?

The second decision dealing with a statutory duty to give reasons was Gumede & others v Minister of Law and Order & another 1984 (4) SA 915 (N). The impact of this decision was partly offset by the decision in a related case, Gumede & others v Minister of Law and Order (NPD, unreported, case no 2495 of 1984), which at the time of writing was on appeal and will be discussed in the next issue of the Survey.
Nevertheless, Law J’s decision in the first, reported Gumede case marks a welcome departure from the traditional judicial reluctance to question the legality of detention orders. Seven detention orders were set aside and the court ordered the release of the detainees.

The notices authorizing the detentions had been issued in terms of s 28(1) of the Internal Security Act 74 of 1982, which required that they be accompanied by a ‘statement by the minister setting forth the reasons for the detention . . . and so much of the information which induced the minister to issue the notice . . . as can, in the opinion of the minister, be disclosed without detriment to the public interest’ (s 28(3)(b)). It should be noted that the Act clearly distinguishes between ‘reasons’, which the minister must give, and ‘information’, which he may withhold under certain circumstances.

In purported compliance with this section the minister issued the following statement in each notice:

‘(a) Reason for the detention of . . . : I am satisfied that the said . . . engages in activities which endanger the maintenance of law and order.

(b) Information which induced me to issue the said notice: By acts and utterances the said . . . did himself and in collaboration with other persons attempt to create a revolutionary climate in the Republic of South Africa, thereby causing a situation endangering the maintenance of law and order.’

Taking the view that where statutes confer autocratic or Draconian powers affecting the liberty of individuals the courts have a duty to ensure that the four corners of the empowering statute are strictly observed (at 919–20), Law J found the notices to be invalid for two reasons (at 920D–1). First, the minister had confused the distinction between reasons and information and had, in purporting to disclose ‘reasons’, merely stated a conclusion (one might add that he had merely regurgitated the provisions of the Act), while, in purporting to disclose ‘information’, he had in fact stated reasons (which, one might add, were at best only partial). In the light of the discussion above, it is submitted that Law J was perfectly correct.

The second reason for setting aside the notices was that the minister had in effect refused, without giving reasons, to disclose any information at all: ‘Where the minister supplies no information at all he is, in my view, obliged to state his reasons for not doing so’ (at 921F). This aspect of Law J’s judgment may, however, be open to question. The minister was vested with a discretion to refuse to disclose information under certain circumstances, and there is no statutory duty placed upon him to furnish reasons as to why he has refused (see (b) below). The failure to supply reasons, in the absence
of a statutory duty to do so, can only constitute a basis for drawing the inference that the minister has acted unlawfully. Indeed, as Law J’s subsequent remarks (at 921F–G) imply, this was probably all that he meant to say. Nevertheless, it is submitted that the courts should in any event be stricter in drawing inferences from a failure to give reasons and, read in this light, Law J’s approach is to be welcomed.

Inference Drawn from Refusal to Give Reasons

By refusing to give reasons a decision-maker runs the risk of the inference being drawn that he has acted unlawfully. Sometimes the inference may in the light of all the facts of the case be inappropriate (see eg Omega Freight Services (Edms) Bpk v Voorsitter, Nationale Vervoerommissie 1984 (3) SA 402 (C) at 424C–G), and the failure may in fact have been justified (see eg Theron NO v United Democratic Front (Western Cape Region) 1984 (2) SA 532 (C), discussed below 64–5).

It has been said that some other evidence of unlawfulness must also exist before an adverse inference may be drawn from the failure to give reasons (see National Transport Commission v Chetty’s Motor Transport (Pty) Ltd 1972 (3) SA 726 (A) at 736). Yet this is extremely restrictive where a litigant who seeks to challenge the validity of administrative action is entirely dependent upon the public authority concerned for evidence of the unlawfulness of its action. Hence it is pleasing to observe that a number of judges now appear to be adopting a more activist approach. In Gumede v Minister of Law and Order 1984 (4) SA 915 (N) Law J regarded the failure by the minister to give reasons as to why he would not disclose information as unlawful, even though there was no statutory requirement that reasons should be given (see above), while in Mafuya v Mutare City Council 1984 (2) SA 124 (Z) Dumbutshena JP declared that ‘[t]he refusal to give reasons is in itself evidence of bad faith’ (at 133F). In Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban & others 1984 (3) SA 65 (N) the first respondent had refused to meet allegations that it had unlawfully refused to grant two temporary permits, and it had refused to supply its reasons for the refusal. Broome J was not satisfied:

‘It seems reasonable to suppose that the decision of the first respondent was motivated by reasons, that these reasons were foremost to the mind of the board at the time they deliberated on the matter and decided to refuse the application. In other words, that these reasons existed before the decision was made and [that] they are not to be prepared like arguments and worked out after
the event. Now that being so, presuming as I do that reasons must have been in existence at the time, I can see no justification for the failure on the part of the first respondent to decline to furnish reasons for its refusal' (at 74B–D).

A troublesome case is Theron NO v United Democratic Front (Western Cape Region) & others 1984 (2) SA 532 (C), in which the judgment of Rose Innes J in United Democratic Front (Western Cape Region) v Theron NO 1984 (1) SA 315 (C) was rescinded in terms of rule 42(1) of the Supreme Court Rules. In the first decision (on urgent application) Rose Innes J had set aside a prohibition which the respondent had earlier in the day placed upon a meeting due to take place that evening. In his subsequent reasons for judgment the learned judge had adopted an objective approach to the question of jurisdictional facts, ruling that when a magistrate issues such a prohibition his reason to apprehend that the public peace would be seriously endangered must be based upon facts that are objectively verifiable (see under ‘Jurisdictional Facts’ above 40). In his prohibition the magistrate had given no reasons for his belief that the public peace would be endangered; instead he had merely stated that he ‘had reason to apprehend’ that such would be the case. On the other hand, the applicants had furnished evidence to the court concerning their activities, the nature of the proposed meeting, and the peaceful and orderly conduct of similar, previous meetings, all of which tended to show that there was no reason to apprehend a threat to the public peace (see 1984 (1) SA at 318–20, 324B–H). This evidence was found by Rose Innes J to be ‘credible and acceptable’ (at 326G).

The respondent failed to oppose the application and, from the magistrate’s failure to present reasons for anticipating a serious disruption to the public peace, Rose Innes J drew the inference that there were none (at 325–6). Furthermore, he took the view that the respondent had failed to discharge the onus of establishing the lawfulness of his action (at 326D–F). The learned judge seemed, however, to base his decision on neither the inference drawn from the failure to give reasons nor the failure to discharge the onus of establishing lawfulness; instead he appeared to rely upon the evidence tendered by the applicant:

‘The case, however, does not turn upon the onus of proof. The evidence given at the hearing of the application was credible and acceptable evidence. In all the circumstances applicant has proved that respondent did not have reason to apprehend that the public peace would be endangered by the meeting’ (at 326G).

The magistrate’s prohibition was accordingly set aside and the meeting went ahead, apparently peacefully. Yet the respondent then
launched an application to have the judgment rescinded on the basis that it had been erroneously given in his absence (see rule 42(1)(a)). Vivier J (Schock J concurring) found, on the (disputed) facts, that it had not been reasonably possible for the magistrate to attend the application or to instruct the Deputy State Attorney, and that he had not deliberately declined to appear at the hearing; hence Rose Innes J had been mistaken in this conclusion (see 1984 (2) SA 532 (C) at 536C). Assuming that it was clear that Rose Innes J had acted on this mistaken assumption and had based his judgment upon the inference drawn from the failure to appear and the failure to discharge the onus of proving lawfulness (at 533–4), the court granted an order rescinding Rose Innes J’s earlier order.

While it should be noted that the second decision did not in any way challenge the adoption by Rose Innes J of an objective approach to the jurisdictional facts, it is submitted that the rescission was incorrect. Although one must accept the court’s factual findings regarding the magistrate’s inability to oppose the application, and hence the finding that Rose Innes J had acted erroneously in that regard, this is not the end of the matter. The assumption that Rose Innes J had relied on this factor is a flat contradiction of the learned judge’s assertion, quoted above, that he had not. What was entirely ignored by Vivier J was the fact that ‘credible and acceptable evidence’ (in some abundance), which tended to demonstrate that the magistrate’s apprehension was ill founded, had been placed before Rose Innes J. This in itself was sufficient to turn a prima facie case into one in which the preponderance of probability was in the original applicant’s favour. The court has a discretion when granting rescission under rule 42(1)(a), and the applicant for rescission must at least show that the application would probably not have succeeded had the mistaken assumption not been made (cf De Wet v Western Bank Ltd 1977 (4) SA 770 (T) at 777F–G, confirmed on appeal in 1979 (2) SA 1031 (A)). All that the magistrate established was that Rose Innes J had been partly in error; he did not establish that the judgment had been ‘erroneously granted’.

Rule 53

The applicability of the procedural requirements of rule 53 of the Supreme Court Rules was considered in two cases. In Reinecke v Nel 1984 (1) SA 820 (A) it was held that rule 53 proceedings are not mandatory in an urgent application where the court is in a position to grant a declaratory order in anticipation of an administrative decision (see Grosskopf AJA at 834–5, rejecting the argument of counsel at 823). In Government of the Republic of South Africa v Midkon
(Pty) Ltd 1984 (3) SA 552 (T) it was held that rule 53 is not always appropriate in the review of arbitration proceedings, and the failure to adopt such procedure will be condoned by the court where, for example, the requirements of the rule relating to the production of the record of the arbitration proceedings are impractical (at 558–9).

Territorial Jurisdiction

See Minister of Law and Order v Patterson 1984 (2) SA 739 (A), discussed in the section on Civil Procedure below.

Reform in Administrative Law

Administrative law has long been neglected in South Africa; it is therefore pleasing to note that official attention is now turning toward the subject. In the Final Report of the Constitutional Committee of the President’s Council on the Adaptation of Constitutional Structures in South Africa (PC 4/1984) the President’s Council recommends that an expert investigation should be conducted into the role of the courts in judicial review, the structure and functioning of tribunals, the possible creation of an administrative court, and the possible enactment of a code of administrative procedure (paras 11.39–11.51, 13.28).

The South African Law Commission has also begun to consider administrative law. In addition to the production of its draft bill on the Limitation of Actions Against Certain Institutions, the commission has also broadened its ‘investigation into the courts’ powers of review of administrative acts’ (project 24) into a full-scale investigation into South African administrative law, though the speed of progress will depend upon the availability of research assistance (see the commission’s Eleventh Annual Report: 1983 (RP 9/1984) 22).

LITERATURE


