'Deliver us from the mystery of administrative action! ': Understanding public power exercised by private bodies through the cases'

Paul Kaseke Snr.

It is no secret that the most difficult part of South African administrative law is not so much the content but rather when it is applied and this of course starts with the enquiry into administrative action or conduct[1]. Logically, there can be no discussion of this branch of law called administrative law, applying to action that is not administrative in nature (or administrative action to be put differently). Simply put, no administrative action, no administrative law. It is another thing to then see which pathway of review one will use when offending action or conduct has been classified as administrative in nature but the focus of this paper is not to dissect the pathways of review but rather to unpack what it is envisaged when we refer to administrative action in the most difficult of areas –the private sector. The struggle for the administrative law student, scholar and practitioner is not picking up administrative action in purely governmental areas (though these can of course be challenging in some cases, they are easily dealt with). The real challenge is to identify administrative conduct or action when a private power or party is involved. Our primitive sense is to say that private parties cannot be said to perform administrative actions because well, administrative conduct refers to the implementation of governmental policy amongst other things. This of course as noted above, is simply a basic if not elementary understanding of modern administrative law. The cases we will examine below will review why this is the case.

The Public Power Test

At the very least, we now know that administrative law involves the regulation of public power and arose out of a need to have the use of such power carefully monitored and controlled to promote an efficient administration and a culture of accountability (I will constantly refer to this as the accountability debate). In the South African context for example, we know that the awarding of tenders by the State is a matter that falls squarely in the realm of administrative law because there is the use of public power since ultimately every tender affects the general public. It is easy to see why this public power has to be closely regulated. This is an easy case and again, it would be easy for one to say that only the government can exercise public power but this oversimplification can be misleading, if not dangerous. How do we determine what public power is? Do we simply look at who the actors are? In other words, do we simply say because the government is involved then there is the use of public power? Different countries have dealt with the so called 'public power test' in different ways. The American courts have on many occasions linked the public power test to actions by the government, giving rise to the so called 'governmental approach'. This approach basically suggests that to determine if there is a use of public powers, all one has to do is to examine who is using the power and for what. The implication is simple: if the government is using the power on behalf of the people, to help the people, then it is a public power. This approach has been used in Canada, the United Kingdom and Zimbabwe.[2]Does South Africa use the 'governmental approach' to the

[1] I will make constant reference to administrative action or conduct interchangeably with administrative law because the terms though different, refer to the same concepts in that administrative law regulates administrative acts or conduct. The difference, if any, is pedantic.

[2] In fact, in the Zimbabwean context, the Administrative Justice Act (ZAJA) defines administrative conduct as any conduct that is undertaken by the government in implementing policy and providing services. It should thus be noted that this simplified approach means that there is no controversy around what constitutes

understanding of public power? The answer is both yes and no. The answer is no because of the buffet of case law that seem to ignore this approach and even seem to discourage the characterisation while advancing a more generous approach that is not confined to the simplicity of the governmental test. No clearer example of this exists in our law than that of the Constitutional Court case of *AAA Investments.* [3] In this case, the Court suggested that the approach used in the other jurisdictions as stated above, would not be useful to adopt in the South African context because there is a broadened understanding of what an organ of state is but most importantly, it would not be useful because the exercise of all public power is constrained by the principle of legality. It is useful to remember that the only reason administrative lawyers and practitioners engage in a public power test is to determine whether or not the offending conduct can be regulated in one way or the other. The CC in *AAA* answers that rather beautifully by saying in simple terms 'we don't need to go through all that because all public power is constrained by the principle of legality'. This then seems to push the idea of a governmental test out of the question when it comes to South African administrative law, or does it?

If it were not for the subsequent Supreme Court case of *Calibre Clinical Consultants (CCC),* the answer would indeed be no but *CCC* changes the narrative. Nugent JA went to great lengths to demonstrate that there is in fact jurisprudence that points to a governmental enquiry having been used to determine what public power is. It was the court's finding that public power cannot be public power unless it is linked to a governmental function, governmental system, governmental business, governmental framework or governmental existence.[4] One might be tempted to ask how the two courts differed especially because *AAA* was decided in 2006 and *CCC* in 2010 but this can be understood from two angles. The first and most obvious one is that there has always been an inherent tension between the Constitutional Court and the Supreme Court of Appeal with many tending to view the former as a reformist court pushing for wide definitions that are capable of protecting a majority and the latter court, as a conservative court that avoids broad definitions because of their tendency to create uncertainty. The governmental approach is indeed a conservative approach and has been defined by many as restrictive, formalistic, rigid and counter-transformational in its narrowed approach. The less obvious reasoning for the differences is that in CCC the court over emphasised the role played by other jurisdictions in determining what public power is for the purposes of South African administrative law. It would also seem that Nugent JA may have selectively read the AAA case as lending support to the governmental approach. These are but theories that one reads in to understand why two superior courts (noting of course that this was before the Constitutional Amendment that changes the hierarchy of the courts) would differ and seemingly contradict each other. The saving grace in the CCC case however, are the warnings by Nugent JA that there is no standard test against which public power must be determined and that courts will have to navigate this area on a case by case basis.

AAA Investments

This case was heard by three courts – the High Court in Pretoria, the Supreme Court and the Constitutional Court. I will concern myself with a discussion of the Constitutional Court case but it is important to understand the two conflicting judgments leading up to it. The facts were not in dispute and can simply be stated as follows. The Micro Finance Regulatory Council was a body created by the

administrative conduct but it overlooks the private sector role in administrative law, which this paper will focus on.

[3] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2007 (1) SA 343 (CC).

[4] One could jokingly say that for Nugent JA in this case, public power must just be connected to something that has government in its wording –whatever it is. This just goes to show how problematic the understanding of the governmental approach, as phrased by Nugent, can be.

Minister of Trade and Industry to help regulate the micro-lending sector- a sector which had recently been legitimised by the State in order to prevent further abuses of the system. All lending institutions generally have to comply with the Usury Act but it is also possible that certain types of organisations or institutions can be exempted from compliance with the Act. Acting in terms of s 15A of the Act, AAA, a micro-lending institution operating in the Eastern Cape, was exempted from certain aspects of the Act but had to comply with specific rules for such exemption to apply to it. The Micro Finance Regulatory Council had wide sweeping powers over companies like AAA and drafted a set of rules that AAA then objected to. The objection was on many grounds but for the purposes of this paper, one of the grounds was that the powers were invasive on the right to privacy of both the lender and borrower by requesting that certain information be recorded in a national register. In order for AAA to use the right to privacy as enshrined in the Constitution and more precisely, the Bill of Rights, the Rules would have to be seen as an exercise of public power. AAA also maintained that the rules should have been subject to the Constitution because the exercise of these rules amounted to a use of public powers. It is important to note that the Council was not a government department but instead a private company entrusted with oversight over micro lending companies. In essence, AAA's contention was that the Council acted outside its powers in making these rules and in fact the action by the Council was legislative and thus unlawful because it was not its place to be making such rules. The Council submitted that this was not so and it was acting lawfully by using its regulatory role as given to it by the Minister. The question pertinent to this paper is whether or not a private entity like the Council can make such sweeping rules and whether these rules have to be consistent with the Constitution. In other words, in enacting and drafting these rules, was AAA exercising a public power (which by implication would be an administrative function)? The importance of this enquiry is that it is settled law, as Yacoob J notes, that all public power is constrained by the principle of legality (see par 38 and 39 in this regard) and thus if the rules amounted to the exercise of public power, the Council would be bound by the Bill of Rights and the Constitution more broadly.

In the High Court, the court held that there was an exercise of public power for the following reasons:

1. Every person or institution who wished to become part of the micro-lending industry had no choice but to register with the Council and this factor swayed more to the side of the Council's powers being public and not private.
2. The compulsion to join the Council brought on by the Act meant that its rules were binding on both lenders and borrowers and logically that they affected the public in general.
3. The sanction for non-compliance with the Rules included the possibility of the cancellation of the registration of a lending business with the Council; this in turn would result in the inability of that entity to carry on its business as a micro-lender. The presence of a sanction and cancellation of registration clearly points to the existence of the use of a public power.
4. The rules themselves were integral to the regulation of the Exemption Notice and are "part of the governmental regulation of micro-loans".[5]

The Supreme Court disagreed with this and felt that there was no exercise of a public power for the following reasons:

1. the Council is not a "public regulator" that exercises authority unilaterally but is a "private regulator" of lenders who consent to its authority(the concept of private regulators has been the subject of much controversy)

[5] See paragraph 23.

2. Even if there was some degree of coercion and compulsion, the source of that coercion was not the Council's Rules but the Exemption Notice which obliged micro-lenders to register in order to qualify for the exemption;
3. the validity of the Rules were in essence vested in the Council's Memorandum of association and based in company law reasoning and
4. The memorandum empowered the Council to make the Rules and not legislation- a weird reasoning as it will be seen later.

In the Constitutional Court there were three judgments – the majority written by Yacoob J and the other two by O'Regan J and Langa CJ. For the purposes of this paper, the focus will be on the Yacoob judgment since there was no disagreement as the to the public power test. Langa CJ and O'Regan J disagreed on aspects of the judgment that are not relevant for this discussion.

The Court reminds us that all exercise of public power is subject to the Constitution and one must focus on the substance rather than the form in deciding whether or not there has been an exercise of public power. The Court quickly dispenses of the governmental approach surveyed in other jurisdictions and as a result no further discussion of this is warranted. The Court instead adopts the 'functional test'- what is the function performed and what is its nature?

In discussing the nature of the function, Yacoob J held the following:

1. The delegation of a regulatory duty by the Minister to the Council suggests that the function given to the council was in actual fact a public function.
2. The extent of the control exercised by the Minister indicates that this was more of a public body than it was private. This is so because the Minister determined how the Council should be constituted amongst other things. In doing this, Yacoob J critiques the SCA for looking at form over substance. It is not enough to simply look at the registration of an entity and see its founding or incorporation documents – one must look at what the body actually does and who controls it.
3. The functions of the Council were derived from legislative drafting and not the memorandum of association. The Council could not, on its own, act without the mandate of the Notice.
4. The overall function of the Council was regulatory in nature and played an integral part in the regulation of the micro-lending industry. In other words, the Council gave effect to not just the Notice but the Act.

So according to this case, a private body is likely to be exercising public power even it is a private entity if it:

1. Is exercising delegated regulatory functions that should ordinarily be performed by the Minister or his Department.
2. Is controlled by the Minister or his Department.
3. The existence of that entity is premised on the fulfilment of realisation of legislative drafting or a Notice
4. Exists to play a complimentary role to the regulation of a specific industry. I would, at this stage, like to play around with the 'but for' test used in causation. Would the governing legislation or rules be effective 'but for' the existence of the body in question. Applied to this case, but for the existence of the Council, would the Notice be implemented effectively? If the answer is no, then the indication is that one is dealing with the exercise of public power.

Calibre Clinical Consultants (CCC)

In this Supreme Court case, two bidders who lost out on a tender for the supply of services to a Bargaining Council for the management of one of its projects sought a review of the decision not to award them the tender in terms of the PAJA. The reason why they lost out on the tender is not necessarily important at this stage but what is important is to identify whether or not the awarding of a tender by the bargaining council qualifies as administrative action under the PAJA. It is common cause that the first step of the PAJA enquiry is to find out if the offending action in question qualifies as administrative action because if it does not then there can be no review in terms of the PAJA .

This case hinges on an understanding of what bargaining councils do in the labour industry. Before looking at the reasoning of the court, it is key to note:

1. Most sectors have many bargaining councils and one is free to choose which bargaining council they wish to belong to
2. Bargaining councils serve a key purpose in the collective labour framework by providing forums for collective bargaining, educating and training members and advocating for workers' rights in some instances.
3. They are funded by contributions from the members.
4. They may be granted special privileges by the responsible Minister.

Nugent JA's judgment goes back to that dreaded 'governmental approach' I discussed earlier and his reliance on it becomes clear in the ensuing analysis. Nugent JA concludes that the bargaining council could not be subject to the provisions of the PAJA (or in other words, its actions did not constitute administrative action). He reasoned that:

1. There is no universal test for what constitutes public power or public function and this would have to be determined with reference to the facts of each case.
2. Bargaining councils are voluntary associations by definition so unlike the AAA case, the argument of compulsion cannot succeed which in turn affects the viability of the accountability argument. At the core of the need to regulate and control the use of public power is the accountability argument. Holders of public power need to be accountable for the power that has been entrusted to them by the public (the original holders of power in a democracy) but there is little justification for the accountability argument to succeed in the private sphere.
3. Public power generally is interwoven into governmental function or systems or otherwise flows from the ordinary exercise of the government's day to day business. Applying this test to the facts, the Bargaining Council was not part of any governmental system nor was it created to sustain a governmental function. This can be juxtaposed with the *AAA* case where the Micro Financial Council was in fact interwoven into a governmental system or function.
4. The Bargaining Council was not standing in place of the government or acting as an agent of it which is the opposite of the *AAA* case.
5. There was no use of public money which automatically attracts the scrutiny of the courts in line with the accountability argument.
6. There was no government interest in the decision making of the Council which is usually indicative of public power since it is presumed the government acts on behalf of the public.
7. There was no supervisory role played by the government unlike the AAA case where the Minister served both a supervisory and executive decision making role.
8. The Bargaining Council was not obliged to put out a tender for the contract but did so out of a practice of good corporate governance. It was argued that because the tender was not

mandatory for the Council, it could not be an instance of public power and let alone administrative action because where public power is involved, tendering is not optional but mandated by both the Constitution and legislation.

Minister of Defence v Motau

Perhaps the most exciting of the administrative action cases is Minister of Defence v Motau. It also happens to be one of the most neatly packaged cases in this regard in how it deals with the jurisprudence on administrative action. In this case, General Motau along with Mrs. Mokoena were members of the Armscor Board. Armscor itself is a special branch or state controlled enterprise mandated to procure resources, equipment and machinery for the South African Defence Forces. It is indeed wholly owned by the State. The Board is appointed by the Minister of Defence and in particular, the Minister appoints two non-executive members who are appointed by virtue of their military knowledge and experience to take up the posts of Chairperson and Deputy Chairperson of the Board.

General Motau and Mrs. Mokoena were dismissed from the Board for various reasons. For the purpose of this paper, it is not necessary to deal with the grounds of dismissal nor their validity suffice to say the two sought to have the decision set aside in terms of the PAJA. Again, access to the PAJA's protection is found only when the offending conduct is deemed to be administrative action and this is our concern with this case, at least for now. Crisply stated, one of the key considerations for the Constitutional Court here was whether the decision to dismiss General Motau and Mrs. Mokoena amounted to administrative action. It was the Minister's claim that she acted in pursuance of executive authority and thus the conduct could not be said to be administrative.

The court makes some notable points below:

1. The classification of action as either executive or administrative can be confusing and overlapping. What is required then is that there is a case by case analysis of the action.
2. There are no hard and fast rules to determining what administrative action is and what is not.
3. The analysis is not on the functionary (the person carrying out the function) but rather on the actual function performed –the functional approach.
4. Executive action is seen chiefly by the creation of policy while administrative action is seen chiefly by the bringing into effect or the rolling out of such policies.
5. The scaled approach to administrative law can be useful. Using this scaled approach-the one end is formulation of policy and the other is application of such policy. The more conduct leans to formulation of policy on this scale, the more it should be seen as executive whereas the more conduct leans to the application then the more it should be seen as administrative.
6. The source of the power is indicative of the type of action it is. Where action flows directly from the Constitution then that conduct is most likely executive authority whereas where it flows from legislation, it is more likely to be seen as administrative action.
7. The degree of constraint placed on the exercise of the power is also instructive in determining the type of action dealt with. Legislation usually places severally guidelines for implementation of the powers entailed in it and this points to more of an administrative function.
8. A policy consideration of whether or not the conduct needs to be subjected to further scrutiny in administrative law is important especially because the idea behind administrative law is to place restraint and closely monitor public powers. The principle of deference becomes incredibly important in this regard because the courts are inclined to leave the more competent branch of the state to deal with a matter where it particularly sensitive. This is the

reason why matters of a largely political nature are not usually brought in terms of the PAJA as it would be stepping onto the turf of the executive's competence.

9. The court found that the action by the Minister fell into the executive realm because it involved high level scrutiny, decision making, and supervision and was closely related to formulation of policy than it was to application of the policy.

Conclusion

It can be seen that the courts seem to now be closing up the gap that once existed in this area of law but the chief problem remains the PAJA's mysterious and clumsy understanding of what administrative action is. Unless and until this is remedied, administrative law students, scholars, teachers and practitioners will always be confronted with the tedious task of determining whether something is administrative action and going through the PAJA's seven ingredients. Some common themes seem to be emerging from our jurisprudence at this stage. Chief of these is that the formulation of policy and the functions approach are more reliable ways of determining whether one is dealing with administrative action or not. The confusion comes with private entities that exercise power on behalf of the state. For instance, would a company that provides security to a maximum security prison on behalf of the state be on equal footing with another security company that has responded to the lawlessness in community X and taken it upon itself to protect the residents without seeking government permission? The answer is probably not as easy as you may think it is but as Nugent JA said in *CCC*, it will have to be determined on a case by case basis