

Administrative Action Ingredients Continued

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Recapping the ingredients

Administrative action (according to Grey's Marine , Chirwa , Hoexter and s1 of the PAJA) means :

- A decision (or failure to take one)that is **administrative in nature**
- By an organ of state (or a natural or juristic person)*
- Exercising a public power or performing a public function
- In terms of any legislation (or in terms of an empowering provision)*
- That adversely affects rights
- That has a direct , external legal effect and
- That does not fall under any of the listed exclusions



Requirements Recap

- Does an organ of State exercise administrative action when acting in terms of the common law ?
- Does an organ of State exercise administrative action when acting in terms of a contract ?
- Does a juristic person exercise administrative action when acting in terms of the common law?
- Can a natural person exercise any administrative action at all?



Admin Action Before the PAJA

- Look at source of power (Constitution or legislation?)
- Look at functionary
- Look at discretion afforded
- Is it politically sensitive
- Is it a matter that should be heavily scrutinised
- Is it implementation or formulation of policy



In terms of any legislation or empowering provision

- **Cape Metro**- cancellation of outsourcing contract on grounds of fraud by local authority . Decided under s33 of the Constitution.
- Court held there was no use of public power since the power used was a common law power even though there was legislation that would have properly covered the situation of this case.
- In **Chirwa** , Ngcobo J held that there was an exercise of public power in the case but the dismissal was contractual.
- In Langa CJ's judgment., he found that there was no legislative enactment and the power was thus contractual.



Exercising public power or performing a public function

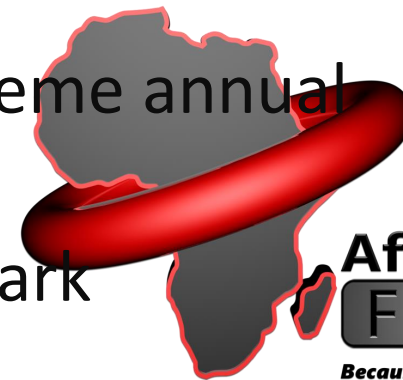
- Already explored in s 33 Constitution cases (*SARFU* , *FEDSURE* etc)
- Under the PAJA , two approaches exist : Conservative and Liberal

Conservative:

Marais v DA : public interest in matter does not make it public power or function

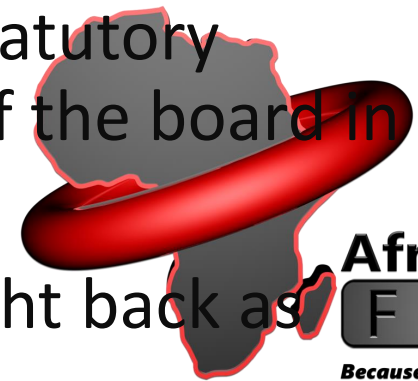
Pennington v Friedgood : decisions taken at medical scheme annual meeting no exercise of public power

NB : Hoexter critiques both judgments for missing the mark



Liberal Approach to PAJA public power

- ***Van Zyl v New National Party*** : decision to recall delegate from NCOP was public power because it has strong public component and would have effect on community
- ***Max v Independent Democrats*** : disciplinary action by party can be reviewed both under common law and PAJA
- ***Sokhela v MEC*** per Wallis J : suspending members of statutory conservation board is public power because of effect of the board in SA conservation
- ***Tirfu Raiders Rugby Club v SARU*** : public interest brought back as being significant (rejected later by CCC)



Calibre Clinical Consultants – SCA

- Tender procurement issue re: Bargaining Council for management of AIDS project
- Question : is decision to reject application administrative action io PAJA
- Bargaining Council understanding key
- Per Nugent JA :
 1. No universal list for public power or function
 2. Look at on a case by case basis
 3. No compulsion because councils are voluntary



CCC (Continued)

1. Public accountability test fails in present case because it is in private sphere
2. Not interwoven into governmental system or made to fall into governmental system
3. Bargaining Council not standing in place of government
4. No use of public money
5. No government control over council and no interest in Council
6. No supervisory role by the government
7. No obligation to tender



AAA Investments

- Microfinancing Regulatory Council , objection to rules made by Council
- AAA sought to rely on BOR and Constitutional review and as such had to prove the public power element

High Court Judgment :

1. Rules part of government exemption
2. Non compliance resulted in deregistration
3. Compulsion element was the requirement to register

Concluded it was public power



AAA Investments Continued

Supreme Court : disagreed with High Court and said it was not public power

1. Private regulator not public power
2. If indeed coercion existed then the source was the notice not the Council rules
3. Memo of Association gave them power to look at rules not legislation
4. Power based in company law not legislation



AAA Investment CC Judgment

- Power came from notice
- Rejects governmental test that SCA in CCC used and instead pushes for a functional test
- Delegation of regulatory function
- Control by minister present
- Look behind company documents and avoid superficial classification
- Council par of regulatory framework



That adversely affects rights

- The determination v deprivation approach debate
- Determination asks what rights one would have and these are determined by the administrative conduct
- Deprivation asks only what rights have been taken away.
- Hoexter and Mureinik believe that the correct approach should be determinationist
- Determination plus variability (see *Joseph*)



Rights to include administrative justice right

- According to *Goodman Brothers* , rights can also include the right to fair administrative action thought this is bootstrap reasoning and suspicious (see Hoexter on this)



The capacity to affect legal rights

- In ***Bullock v Provincial Government*** , the court suggested that one should not have a rigid understanding of rights and certainly should make room for rights that are not necessarily legal in nature.
- In ***Grey's Marine*** , Nugent JA suggested that rights not be taken literally in interpreting the section.
- The court went on to suggest that one should instead look at the 'capacity to affect legal rights'
- Judgment was relied on in ***Kiva v Minister of Correctional Services*** and the SCA used the principle in ***Minister of Defence v Dunn*** in deciding that a decision to not appoint was administrative action. The test was the capacity to affect legal rights.



Whose rights must be affected ?

- The applicant must be the one affected (see *Sokhela v MEC*)
- In *Grey's Marine* however , the lessee was the one whose rights were affected and it seems the broad approach will be followed ('anyone')
- Section 33 therefore seems quite clear that the rights that must be affected are those of anyone really



Direct, external, legal effect

- Last minute addition from Germany
- Overview of meanings in German Law :

Legal effect – someone's rights must be determined and involved

Direct- finality or immediacy

External – must affect outsiders and not be internalised



South African meanings

Direct effect

- Must be a final decision and not be in the process . Preliminary steps therefore don't count generally but this is a dangerous conclusion
- **Grey's Marine** : impacts immediately and directly on individuals endorsed by CC in **Viking Pony**(referring to decision to investigate lacking adverse effect in a direct and external legal effect)



External Effect Meaning in South Africa

- Dealt with extensively in the case of **Sasol Oil v Metcalfe and Botha v Matjhabeng**
- Generally looks at the concept of public impact i.e the effect must not be one that is felt only internally
- In **Sokhela** , another judgment of Wallis , it was found that a decision to suspend a statutory board was external
- **SAPU v National Commissioner** found the decision was essentially a departmental matter that was internal and thus lacked external effect



Legal Effect

- Seems to be a restatement of the fact that rights should be adversely affected
- ***Union Refugee Women***- 'immediate , final and binding impact'
- ***Joseph v City of Johannesburg*** - if the rights of applicants are materially and adversely affected , then the action has legal effect



The Exclusions

- NB : If something is not expressly excluded , it does not follow that it is admin action. One must continue with the analysis (Sokhela v MEC)
- Most excluded ones match judgments of SARFU, Fedsure , Pharmaceutical Manufacturers and Ed-U College
- Exclusion does not make it unreviewable , principle of legality still applies
- Motau **



Motau CC Judgment

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 rolling out of such policies.



Motau Continued

- 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.
- 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.
- 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 and this points to more of an administrative function.



Motau Cont.

- A policy consideration is whether or not the conduct needs to be subjected to further scrutiny .The principle of deference becomes in 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.
- 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.



Where does the pre-PAJA jurisprudence fit in?

- Some case law suggests that it is the start of the admin action enquiry thus must be interrogated before one gets into the PAJA (see ***Chirwa***)
- The more accepted position is that the requirement of a decision of an administrative nature is in fact the proper place to discuss the tests since the pre-PAJA jurisprudence shows what is administrative and what is executive (see ***Greys Marine*** and ***Sokhela***)
- Can be relevant in the exclusions
- See note on how to determine administrative action in terms of the PAJA for a demonstration of point 2

