

## How to Approach A Determination of An Administrative Action Enquiry in Terms of the PAJA

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The most confusing part of South African Administrative Law is without a doubt the administrative action enquiry in terms of the Promotion of Administrative Justice Act (the PAJA). If we are honest about this, it will emerge that there are varying ways of approaching the enquiry especially if one has regard to the Constitutional Court jurisprudence. In some cases, the Court simply skipped through the requirements in the PAJA and focussed on one element which it thought more important. This leaves one with an obvious question, how do you approach the enquiry. Here are some basics –

1. Each determination is case specific (*Minister of Defence v Motau*)
2. The enquiry is definitely complex and not to be determined hastily (*Minister of Defence v Motau; Chirwa v Transnet* etc)
3. The PAJA test is set out in s1 of the PAJA which sets out the requirements or definitions. This must be borne in mind when engaging the test (*Sokhela v MEC*)
4. The PAJA requirements are confusing even for courts (*Grey's Marine v Minister* at para 21 for example)
5. PAJA's requirements can be broken down into seven requirements (*Grey's Marine v Minister, Sokhela v MEC* and Hoexter refer to this)
6. Whatever outcome emerges from the conclusion of the administrative action enquiry in terms of the PAJA, must resonate with and be consistent with s33's definition of administrative action as determined by the courts. (*Grey's Marine v Minister*)

With reference to *Grey's Marine* and *Sokhela*, the structure to the enquiry looks like this. NB, the tests are derived from paras 21 -30 and 60-83 of the two cases respectively

### Step One

General overview of the observations noted above (as background information to set the scene for the enquiry)

### Step Two

Determine whether it is a 'decision of an administrative nature'

1. Determine if it is a decision per the definition section in the PAJA and if it is;
2. Determine if the decision can be said to be of an administrative nature  
This must be done by determining whether it would be administrative action in terms of s33

As the court in *Sokhela* noted: 'In deciding whether a decision is one of an administrative nature the appropriate starting point is to determine whether it would constitute administrative action within the meaning of s 33 of the Constitution.'

Questions have been asked about how the pre-PAJA Con Court administrative action cases come into play. This is the appropriate place to place those tests. The various factors previously raised in pre-PAJA cases can comfortably fit in here such as looking at the nature of the power, if it is implementation or formulation of policy, whether there is a wide discretion etc. After balancing the factors, you need to make a decision on whether the

decision is more tilted towards the administrative side or the executive. If it is administrative, you proceed to step three. If not, this is the end of the enquiry because the test requires the decision to be administrative in nature. If it is the exercise of public power but does not seem to be administrative in nature, then review using principle of legality is possible but not in terms of the PAJA.

### **Step Three**

Determine who the actor is (who took the decision or failed to take the decision). Is it an organ of State as defined in s239 or is it a natural or juristic person? The difference is very important as you will see below.

### **Step Four**

Determine if there is an 'exercise of public power or the performance of a public function'. If so, proceed to the next step. Note you don't need both, one of the two will suffice.

### **Step Five**

Determine on what legal basis the action was taken. If it is an organ of State then it must be in terms of either the Constitution or legislation – see s1(a) of the PAJA for this and p218, 219 of Hoexter's Administrative Law in South Africa 2<sup>nd</sup> ed.

If it is not an organ of State, then surely it is a natural or juristic person which must be identified as the actor. In this case, the natural or juristic person is expected to act in terms of an empowering provision see s1b of the PAJA and p 217 of Hoexter. An empowering provision can include customary law, a rule of the common, any other law, an agreement or document in terms of which the decision is taken (see the definition in the PAJA). Proceed to the next stage.

### **Step Six**

Determine if the decision or failure to take a decision 'adversely affects someone's rights'. *Grey's Marine* toys with the concept of the 'capacity to affect legal rights' as a meaning for this requirement. Klaaren noted that this could mean 'determination of rights' and this finds support in the *Union of Refugee Women* which similarly interpreted the requirement to mean an adverse determination of rights. If there is an adverse effect, proceed to the next stage

### **Step Seven**

Determine if there is a 'direct, external, legal effect' per *Sokhela*, *Grey's Marine*, *Joseph v City of Johannesburg* and other cases and if you are satisfied that it does have that effect then proceed to the final stage.

### **Step Eight**

Despite meeting all the requirements above, does it fall under one of the exclusions in s1 of the PAJA? If it does not, then you have administrative action and if it does then you do. Assuming there is an exclusion or that one of the requirements is missing then engage the final step

### **Step Nine**

State that while it cannot be reviewed in terms of the PAJA, it may be reviewed using the principle of legality since the exercise of public power can be reviewed under this broad principle (*Fedsure*,

*Pharmaceutical Manufacturers, SARFU, Democratic Alliance v President, Albutt* etc). It may also be reviewed using other 'pathways of review' depending on what it is i.e. it could be reviewed using the special statutory review if it applies but generally it is easier to rely on the principle of legality for review purposes.

As stated in the beginning, this not the only way of answering an administrative action question or dealing with a matter requiring PAJA review but it seems to me to be the most logical and it finds support both in judicial and academic wings.

**Disclaimer:**

The above reflects my personal views and not the views of any academic institutions or other entities I may work with. They are not a substitute for legal or academic advice and reliance on same is a choice I cannot be held liable for 😊