Administrative Law in South Africa
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Prior to the advent of the Constitution, the control of public power as well as private power when it exhibited public characteristics was constrained heavily by the Westminster doctrine of parliamentary sovereignty. Nonetheless, a viable body of administrative law had been built up prior to the advent of democracy. Take for example, the test set out in *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) SA 132 (A) at 152 A–D:

> 'Broadly, in order to establish review grounds it must be shown that (the administrator) failed to apply his mind to the relevant issues in accordance with the "behests of the statute and the tenets of natural justice" ... Such failure may be show by proof, *inter alia*, that the decision was arrived at arbitrarily or capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated.'

As Hoexter and Penfold note, the introduction of the Constitution of the Republic of South Africa, 1996 and, in particular section 33 thereof, together with the Promotion of Administrative Justice Act 3 of 2000 heralded the transformation of South African administrative law. Section 33, as the authors state, is not a mere codification of the common law principles of review but represented an entrenchment of rights to administrative justice.

In summary, as the authors note, the development of administrative law through the prism of the Constitution was designed to promote, as Etienne Mureinik had famously noted, a culture of justification of the exercise of power in a democratic society.

It might have been expected that the development of administrative law following the advent of the Constitution and the introduction of the PAJA would have created a certain path upon which the development of the law could have proceeded. But that has not been so. The extremely poorly drafted PAJA has vexed the courts since its introduction. For example, as Nugent JA observed in *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) at para 21, in respect of

the key definition of administrative action 'what constitutes administrative action – the exercise of the administrative powers of the state – has always eluded complete definition. The cumbersome definition of that term in PAJA serves not so much to attribute meaning to the term as to limit its meaning by surrounding it within a palisade of qualifications.'

An additional luminous example concerns the question of whether the making of regulations falls within the scope of administrative action in terms of section 33 of the Constitution. This matter vexed the Constitutional Court in *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC). While Chaskalson CJ appeared to support the view that the making of regulations fell within the scope of administrative action, that was not the approach adopted by the majority of the court. As Hoexter and Penfold note at 254:

> 'Instead of concerning themselves with foreign interpretations, then, our courts would be better advised simply to interpret "decision" broadly, in order to avoid a conflict with the constitutional meaning of administrative action. Such an approach would point towards the inclusion of rulemaking within the PAJA's definition of "decision".'

A similar problem concerns the concept of legality which has expanded over the past two decades. In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) the Constitutional Court described the principle of legality as an aspect of the rule of law and as a counterpart of the right to lawful administrative action. The concept of legality and its relationship to PAJA has vexed this body of law since that case. As the authors note concerning *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC), a bifurcated approach emerged – while previously it might have been thought to be the case that all administrative action was reviewable under PAJA, suddenly, as the authors note, now its use as a pathway is dependent on the identity of the applicant: if the applicant is not an organ of State, PAJA applies but if it is an organ of State, legality applies.

Somewhat earlier in *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) the court appeared to avoid the application of PAJA and dealt with a special pardon dispensation announced by the President under section 84(2)*(j)* of the Constitution by reference to the principle of legality and the broader concept of the rule of law. As the authors note, the court's reasoning was thoroughly subversive of the PAJA and of section 33, which mandated the enactment of this piece of national legislation.

On the other hand, as the authors write at 483:

> 'The courts' enthusiastic development of this principle [legality principle] over the last two decades suggests that (like the rule of law itself) it has

> the potential to encompass the full range of administrative-law precepts. While we have not yet arrived at that point, the legality principle and the broader concept of the rule of law play a crucial role in controlling action that the ordinary rules of administrative law do not reach (and, more worryingly, some action that they *do* reach). ... [T]he already blurred line between constitutional and administrative law is given further smudging in the process.'

Unsurprisingly, the authors spend considerable time in dealing with the principles which emerged out of *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA). As they note, it is probably the most annotated SCA judgment of recent times (at 760).

In particular, after the decision in the *Oudekraal* case the concept of the collateral challenge was further developed. As Cameron said in *Merafong City v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC) at para 23:

> 'Relying on the invalidity of an administrative act as a defence against its enforcement, while it has not been set aside, has been dubbed a collateral challenge — "collateral" because it is raised in proceedings that are not in themselves designed to impeach the validity of the act in question. While the object of the proceedings is directed elsewhere, invalidity is raised as a defence to them.'

In short, Cameron J was suggesting that in relation to collateral challenge a challenge to an administrative act emerges as a defence against enforcement where the administrative act has not been set aside in proceedings that are not designed to impeach the validity of the administrative act. There has, however, been considerable confusion in the development of the *Oudekraal* principle, particularly following *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC). Yet again, administrative law principles are shrouded in uncertainty.

There are numerous uncertainties and challenges posed by present day South African administrative law other than the ones noted in this review. They are all carefully examined and analysed by the authors. In summary, this is a monumental work which deals with all the relevant cases and controversies within the field of administrative law. Without a doubt, any judge, law teacher or practitioner dealing with administrative law will find the task immeasurably more difficult without a careful recourse to this outstanding work.

JUDGE DM DAVIS
Retired Judge President
Competition Appeal Court