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## Using Administrative Law to Secure Informal Livelihoods: Lessons from South Africa

Lauren Kohn



# WIEGO Technical Briefs

The global research-policy-action network Women in Informal Employment: Globalizing and Organizing (WIEGO) Technical Briefs provide guides for both specialized and nonspecialized audiences. These are designed to strengthen understanding and analysis of the situation of those working in the informal economy as well as of the policy environment and policy options.

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The cover photograph is taken by Tasmi Quazi with permission of Asiye eTafuleni and shows John Makwicana, the courageous litigant, who challenged the City Council's confiscation of street traders' goods on behalf of Durban traders. He is depicted at his stall with a neighbouring trader, Thoko Lukhozi, in inner city Durban.

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# 1. Introduction

Despite the fact that informal workers make up the broad base of the work force in many countries, legal frameworks often fail to protect and support them adequately. Many informal workers operate within complex regulatory regimes, which are typically inconsistent, vague, and enforced by state officials in ways that are unlawful and procedurally unfair. This is particularly the case where the provisions in question afford officials wide discretionary powers. When state officials exercise these powers and/or duties vis-a-vis informal workers, administrative law generally applies.

Administrative law governs the daily business of government: typically, the application or implementation of policy after its translation into law. For this reason, Sir Thomas Holland described administrative law as the law governing “the state in motion.”<sup>1</sup> Thus, whenever the state acts in relation to informal workers, the conduct of the officials in question will typically be subject to the constraints and protections of administrative law.

Street vendors and waste pickers work in public spaces that are managed by local authorities. As a result, the actions and decisions of local authorities directly influence their working lives. This document outlines the constraints and protections that general South African administrative law provides, and how these might be used strategically by street vendors and waste pickers in their dealings with the state. To this end, this brief provides examples of court decisions and other practical examples to show how street vendors and waste pickers can use administrative law to challenge decisions and actions that negatively affect them. Although this brief presents a South African case study, it might nonetheless serve as a useful resource for informal workers in other countries with similar principles of administrative law.

This brief addresses the following broad questions:

- What is *general administrative law as a legal discipline* in South Africa and what conduct does it apply to (Part 2)?
- What is “*administrative action*” – the legal term which serves as the gateway to administrative justice relief – and how does it differ from legislative and executive action (Part 3)?
- What is the content of the right to just administrative action in South Africa? In other words, what do the following *grounds of review* broadly entail:
  - o lawfulness;
  - o reasonableness;
  - o procedural fairness; and
  - o the right to request reasons (Part 4).
- Where the conduct in question is not administrative action but is still an exercise of public power, what *other pathways to review* exist to challenge the exercise of the power (Part 5)?
- What possible *remedies* are available to an informal worker whose right to just administrative action has been breached (Parts 5-6)?

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<sup>1</sup> Sir Thomas Holland *Elements of Jurisprudence* 13 ed (1924) 374.

## 2. Administrative Law

Administrative Law is a branch of public law that regulates the activities of bodies that exercise public powers and/or perform public functions. The test for the application of administrative law is thus the *public* element of the *power or function* in question rather than the nature of the functionary.<sup>2</sup> In other words, whether the function is carried out by a state official (such as a licensing official or police officer), or a private enterprise (such as a private waste collection company), is *not* decisive of whether administrative law principles apply; function is more important than form. This distinction is significant given modern governments' tendency to outsource governmental functions – like waste collection, payment of social welfare grants, permit allocation etc. – to private entities.

The question of whether a function is of a public nature is incrementally determined by the courts, based on various considerations including the following:

- whether the rules apply generally to the public or a section of the public;
- whether they are coercive (rather than consensual) in character and effect in the sense that they mandate a particular course of action; and
- whether they are related to a clear legislative framework and purpose.<sup>3</sup>

Given that much conduct will be classified as “public” in terms of this inquiry, administrative law covers “virtually every facet of the legal system.”<sup>4</sup> For example, it applies to:

- essential service provision;
- expropriation of property;
- town planning and zoning;
- public procurement;
- the allocation of welfare benefits;
- the collection of taxes;
- the protection of the environment;
- the arrest and prosecution of criminal suspects;
- the regulation of the economy;
- and “any number of other areas of governmental activity”.<sup>5</sup>

Administrative law also applies to forms of regulation or control of street trading by the state, which primarily involves licensing: “issuing licences to street traders is the primary means of controlling street trading. Prescribing when, where and what may be traded are also standard means of regulating the sector.”<sup>6</sup> Similarly, administrative law governs the issuing of permits and/or business licenses to waste pickers.

While general administrative law covers various sectors, sectoral administrative law refers to the particular regulatory regimes governing niche areas, such as licensing, public procurement, land use planning and so on. This document focuses on the principles of general administrative law – in other words, the principles in terms of which we regulate all forms of regulation broadly speaking.

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<sup>2</sup> *President of the Republic of South Africa v South African Rugby Football Union (SARFU)* 2000 (1) SA 1 (CC) para 141.

<sup>3</sup> *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2007 (1) SA 343 (CC) para 119.

<sup>4</sup> Lawrence Baxter *Administrative Law* (1984) at 2.

<sup>5</sup> Cora Hoexter *Administrative Law in South Africa* (2012) at 10.

<sup>6</sup> *Makwicana v Ethekekwini Municipality* 2015 (3) SA 165 (KZD) para 43.

What are these principles and what do they seek to do? First, administrative law focuses on a particular part of the state system, namely the public administration,<sup>7</sup> and a particular activity of the state, namely “administrative action.”<sup>8</sup> With this as its focus, general administrative law seeks to do, at least, the following:

- to *empower* officials and give them the necessary autonomy to perform their functions efficiently and expediently;
- to *control* these powers by regulating the manner in which they may be exercised such that they do not breach fundamental rights;<sup>9</sup> and
- to provide *remedies* for maladministration<sup>10</sup> - the key (but not only)<sup>11</sup> one in the South African context being the judicial review of administrative action (and public powers more broadly) by the courts.

Section 33 of the South African Constitution entrenches administrative justice as a fundamental and justiciable (i.e. you can sue on the basis of it being infringed) human right. The courts are empowered<sup>12</sup> to judicially review administrative action that is inconsistent with the requirements of *just* administrative action as set out in section 33:

- “Everyone has the right to administrative action that is *lawful, reasonable and procedurally fair*.”
- Everyone whose rights have been adversely affected by administrative action has the right to be given written *reasons*.
- National legislation must be enacted to give effect to these rights, and must:
  - provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
  - impose a duty on the state to give effect to the rights in subsections (1) and (2); and
  - promote an efficient administration.”<sup>13</sup>

These key principles, or requirements, of general administrative law serve as the yardstick for measuring administrative action (be it by public or private actors). There are various administrative law mechanisms to ensure compliance with these principles. These include: internal appeals to administrative tribunals; access to information requests; investigations by ombud institutions such as the Public Protector; and judicial review by the courts.<sup>14</sup> In South Africa, people typically approach the courts, given their promise of more immediate, specific and binding relief, despite legal proceedings being an expensive and time-consuming option.

Judicial review empowers a court to scrutinize the decision-making process of an administrator, to ensure that the outcome in question was arrived at in an acceptable manner. So, for example, a review court might seek to address the question of whether a permit was granted in terms of a rational procedure free from bias.

<sup>7</sup> The **public administration** is the technical term for the state bureaucracy; in other words, the various functionaries of the executive branch of state that are concerned with the daily business of government: primarily, implementing laws and administering policies. Chapter 10 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”) sets out principles that govern the “public administration,” and in section 195(2), highlights that these principles apply to the administration in every sphere of government; organs of state; and public enterprises. The **public service** is a broader group of actors that includes, for example, parastatals such as Eskom, members of the security services and so on. The broader state system consists of all actors within the legislative, executive and judicial branches as well as the administration.

<sup>8</sup> See the discussion on the definition of administrative action in Part 3.1 below.

<sup>9</sup> See Cynthia Farina “Administrative Law as Regulation: The Paradox of Attempting to Control and to Inspire the Use of Public Power” (2004) 19 SA Public Law 489.

<sup>10</sup> Hoexter note 5 at 9 describes “maladministration” as “a broad term encompassing the improper exercise of administrative powers and the failure to carry out legal obligations.”

<sup>11</sup> See the discussion on Remedies and other Avenues for Relief in Parts 5 & 6 below.

<sup>12</sup> Section 165 of the Constitution vests “judicial authority” in the courts and highlights that they are “independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.” Section 172(1) empowers a court deciding a constitutional matter to “declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency” and “may make any order that is just and equitable.”

<sup>13</sup> The Constitution note 7 at section 33, Emphasis added. The national legislation pursuant to this section is the Promotion of Administrative Justice Act 3 of 2000 (“the PAJA”).

<sup>14</sup> See further below in Part 6 on Remedies.

Review, unlike the process of appeal, does not empower courts to determine whether the outcome itself is acceptable (i.e. right or wrong on the merits),<sup>15</sup> for this would entail the court stepping into the shoes of the administrator and thereby breaching the principle of the separation of powers between the executive, legislative and judicial arms of government.<sup>16</sup> It is now accepted<sup>17</sup> that, given the constitutional requirements of reasonableness and fairness, the judicial review of administrative action may involve a consideration of the merits (i.e. *substance* of a decision or action – e.g. was it reasonable to have awarded *the* permit on the facts?). However, the distinction between review and appeal remains relevant at the point of judicial intervention in practice. Thus, a court may substitute its decision for that of an administrator only in exceptional circumstances.<sup>18</sup> This means that the court process may not give an aggrieved person the favourable decision he or she may want (e.g. the allocation of trading space, the award of a licence, the return of his or her goods etc.).

Nevertheless, judicial review – with its promise of binding and particular relief – remains the most practically significant way to challenge maladministration and the abuse of public power more generally. Indeed, although the courts cannot (save in exceptional circumstances<sup>19</sup>) order the favourable relief a litigant seeks, a finding on the legality of the decision-making process typically prompts subsequent due process by the administrator and thus, in turn, just outcomes. This document therefore focuses on the grounds for judicial review. Before it can be so reviewed, however, the conduct must qualify as “administrative action.”

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<sup>15</sup> Lord Brightman in *Chief Constable of North Wales Police v Evans* [1982] All ER 141 (HL) at 154 famously noted that “[j]udicial review is concerned not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.” See further at Hoexter note 5 at 108 on appeal versus review.

<sup>16</sup> Constitutional Principle VI proclaimed that, “[t]here shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.” See, on the separation of powers doctrine, Lauren Kohn “The burgeoning constitutional requirement of rationality & the separation of powers: Has rationality review gone too far?” (2013) 130 *South African Law Journal* 810 at 813-8. In terms of the doctrine of separation of powers, strictly speaking, it is impermissible for an unelected judiciary to pronounce on the merits of administrative decisions, for that would entail usurping functions constitutionally attributed to the executive arm of state.

<sup>17</sup> See *Bato Star v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 45 where O'Regan J noted that review for reasonableness inevitably gives administrative-law review a “substantive ingredient”, yet the courts “must take care not to usurp the functions of administrative agencies.”

<sup>18</sup> See the discussion on remedies below in Part 6 below.

<sup>19</sup> See the discussion on remedies below in Part 6 below.

## 3. Administrative Action

The administrative justice rights in the Constitution apply to “administrative action.” The meaning of this term is thus significant, even though it is contested. The Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) was passed to give effect to the right to just administrative action and is the primary pathway to review. A litigant must therefore base his or her legal challenge on one of the grounds of review set out in the PAJA.<sup>20</sup> First however, the litigant must show that the action being challenged amounts to administrative action as defined in section 1 of the Act. Where it falls outside this definition and is instead legislative or executive action, for example, it may nonetheless be reviewed via the principle of legality.<sup>21</sup>

### 3.1 Key Definitional Elements

Section 1 of the PAJA states that: “Administrative action’ means any *decision* taken, or any *failure* to take a decision, by:

- an *organ of state*, when:
  - exercising a power in terms of the Constitution or a provincial constitution; or
  - exercising a *public power or performing a public function* in terms of any legislation;
- or a *natural or juristic person*, other than an organ of state, when exercising a public power or performing a public function in terms of an *empowering provision*, which adversely affects the rights of any person and which has a direct, external legal effect...”

This definition must be read with the related definitional elements in section 1, including a “decision”,<sup>22</sup> “failure” (which includes a refusal to decide), “organ of state,”<sup>23</sup> and “empowering provision.”<sup>24</sup>

As the definition makes clear, administrative action includes not only positive acts or decisions but also failures, or refusals, to decide or act – for example, where an authority simply refuses to issue a permit to a waste picker or deliver an eviction notice to a street vendor. The definition of “decision” is in turn extremely broad.<sup>25</sup> It explicitly includes, for example:

- the *suspension and revocation of an approval* or permission (such as a business licence);
- the *imposition of a condition or restriction* on, for example, a trading permit (or the imposition of a taxation in the form of a levy); and
- the retention of an article (e.g. where goods are impounded).

<sup>20</sup> Section 6(1) of the PAJA empowers “[a]ny person” to “institute proceedings in a court or a tribunal for the judicial review of an administrative action” and section 6(2) sets out a host of grounds, each of which is really an instance of the requirements of lawfulness, reasonableness and procedural fairness.

<sup>21</sup> See the discussion on the principle of legality in Part 6 below.

<sup>22</sup> “**Decision**” means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to— (a) making, suspending, revoking or refusing to make an order, award or determination; (b) giving, *suspending, revoking or refusing to give* a certificate, direction, *approval, consent or permission*; (c) *issuing, suspending, revoking or refusing to issue* a licence, authority or other instrument; (d) *imposing a condition or restriction*; (e) making a declaration, *demand* or requirement; (f) *retaining*, or refusing to deliver up, an article; or (g) doing or refusing to do any other act or thing of *an administrative nature*, and a reference to a failure to take a decision must be construed accordingly.” Emphasis added.

<sup>23</sup> Defined to bear the meaning assigned in section 239 of the Constitution, “**organ of state**” means any department of state or administration in the national, provincial or local sphere of government; or any other functionary or institution exercising a power or performing a function in terms of the Constitution or a provincial constitution; or exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.”

<sup>24</sup> “**Empowering provision**” means a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken.

<sup>25</sup> See note 22 for the definition of “decision.”



In relation to the latter (“retaining, or refusing to deliver up an article”), the South African courts have noted for instance, that retaining an applicant’s identity document (which had been issued but not delivered), qualified as a “decision” within the meaning of “administrative action.”<sup>26</sup> By analogy, one might argue that the retention of a street vendor’s goods, or licence, would so qualify.

### 3.1.1 Administrative Nature

The reference to “of an administrative nature” in the definition of “decision” shows that it is *the type of* function which matters, rather than the nature of the functionary. It is the “what” and “how” that matters more than the “who.” This is clear from the definition’s clear reference to “natural or juristic” private persons that perform public functions.

A decision of an administrative nature is essentially one that an administrator takes as “part of his/her job.”<sup>27</sup> This point is strengthened by the repeated reference to “public” power or function in the definition of “administrative action.” As noted above, what qualifies as a public power or function depends on the facts of the case, but essentially “‘public’ seems to have a broader meaning than ‘governmental’... [and so] public power has...been associated with the duty to act in the public interest or in carrying out a public duty rather than for private purposes.”<sup>28</sup>

In determining this, factors such as the source of the power (a law versus a contract), whether it was exercised coercively or consensually, and its effect on the public, will be borne in mind by the courts.<sup>29</sup> Thus, for example, where a private party such as a corporation that owns land on which informal workers are operating, evicts them to put the land to alternative *public* use on behalf of the state (e.g. make it an environmentally friendly park), without following due process, the action may qualify as reviewable administrative action even though the functionary is a private person. The same would hold true in the case of privatised waste removal and recycling services, which have a public nature.

Conversely, administrative law may not apply where public bodies exercise powers in a *private-law* setting. For example, in *Cape Metropolitan Council v Metro Inspection Services (Western Cape)* CC,<sup>30</sup> the court held that despite the functionary being a municipal council, its cancellation of a contract without conducting a hearing was *not* administrative action, but rather the state contracting as a market actor in a private capacity. The court seemed to rely on the apparent equality of bargaining power between the parties in reaching this conclusion.<sup>31</sup> Arguably therefore where the other party to the contract is a lay-person with minimal knowledge of the law, the administration will have more bargaining power and in such a case, a court may require that a contract (or permit) be cancelled with adherence to the requirements of administrative justice (including the right to be heard).

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<sup>26</sup> *Sibiya v Director-General: Home Affairs and 55 Related Cases* 2009 (5) SA 145 (KZP) para 13.

<sup>27</sup> Guideline on The Promotion of Administrative Justice Act, 2000 at <http://www.justice.gov.za/paja/about/action.htm> [last accessed 1/09/2016]. Emphasis added.

<sup>28</sup> Hoexter note 5 at 4.

<sup>29</sup> See further *Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry* 2010 (5) SA 457 (SCA) para 38, where Nugent JA noted the following in relation to the narrower “governmental control test”: “[t]hus, in cases concerning the scope of public-law judicial review in other countries - and most often in this country as well - courts have consistently looked to the presence or absence of features of the conduct concerned that is governmental in nature. What has been considered to be relevant is the extent to which the functions concerned are “woven into a system of governmental control,” or “integrated into a system of statutory regulation,” or that the government “regulates, supervises and inspects the performance of the function,” or it is “a task for which the public, in the shape of the state, have assumed responsibility,” or it is “linked to the functions and powers of government,” or it constitutes “a privatization of the business of government itself,” or it is publicly funded, or there is “potentially a governmental interest in the decision-making power in question,” or the body concerned is “taking the place of central government or local authorities,” and so on.”

<sup>30</sup> *Cape Metropolitan Council v Metro Inspection Services (Western Cape)* CC 2001 (3) SA 1013 (SCA).

<sup>31</sup> See Hoexter note 5 at 186 and the critique and comparative cases referred to.

### 3.1.2 Impact of the Action or Decision

With respect to the impact of the action, inaction or decision, section 1 stipulates that “rights”<sup>32</sup> must be “adversely affected” thereby and this action (or inaction) in question must have “direct, external legal effect.” The South African courts<sup>33</sup> have tended to interpret these elements of the definition to ensure that as much as possible is reviewable.

The following points may be noted:

- Typically, “directness” requires a degree of finality. Thus, a final decision, rather than a preliminary or investigative decision, is usually one that can be challenged under the PAJA. However, the courts have suggested that it is sufficient for a litigant to show that although the outcome may not yet be finalized, the action in question is clearly aimed at direct consequences.<sup>34</sup> For example, in *Oosthuizen’s Transport*,<sup>35</sup> the investigative recommendation for the suspension of operator cards for the applicants’ vehicles was held to amount to administrative action. The same might therefore apply to a preliminary recommendation to revoke a street vendor’s trading permit or increase vending fees.
- The reference to “external” means that the decision has implications outside of the bureaucracy.
- The word “legal” emphasizes that the decision should entail a legally binding determination of a person’s rights. This is supported by the reference to “rights” being “adversely affected.” Arguably, a refusal to release impounded goods, or remove a restrictive permit condition, might be said to affect rights adversely within the meaning of the PAJA given that the courts have generally allowed mere applicants (whose rights are being determined rather than deprived), to obtain the procedural protections under the PAJA.

### 3.1.3 Empowering Provision

Public power must be sourced in and carried out in terms of empowering law. There are various sources of administrative powers (and public powers more broadly). These include, amongst others:

- the Constitution;
- original and delegated legislation (Acts, By-laws, Regulations, Proclamations etc.<sup>36</sup>);
- common-law powers (for example, those that flow from private property ownership<sup>37</sup>);
- the rules of African Customary Law etc.<sup>38</sup>

The PAJA’s definition of “empowering provision” highlights the various legal sources of administrators’ powers to act: “Empowering provision means a law, a rule of common law, customary law, or an agreement or instrument or other document in terms of which an administrative action was purportedly taken.”

Legislation is the most frequently used source of administrative power and thus the interpretation of the empowering legislation will be the starting point in most administrative law challenges. Although big-picture

<sup>32</sup> No reference is made in the section 1 definition to “legitimate expectations”, which are protected under section 3 of the PAJA when it comes to procedural fairness. The Constitutional Court in *Walele v City of Cape Town* 2008 (6) SA 129 (CC) para 37, read this inconsistency down by noting that in the context of section 3 of the PAJA, administration action is not confined to the strict terms of section 1 and so encompasses legitimate expectations as well.

<sup>33</sup> See for example *Grey’s Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) para 23.

<sup>34</sup> See for example, *Oosthuizen’s Transport (Pty) Ltd v MEC, Road Traffic Matters, Mpumalanga* 2008 (2) SA 570 (T) para 35 in which the judge’s reasoning suggests that preliminary decisions (e.g. to revoke a licence) may nonetheless be reviewable where they lay the foundation for a final decision with serious consequences.

<sup>35</sup> *Oosthuizen’s Transport* note 34 para 35.

<sup>36</sup> See Hoexter note 5 at 31-3 regarding forms of original and delegated legislation, and when standards or quasi-legislation (such as policy determinations, guidelines, directives and circulars) may be recognized as legally binding.

<sup>37</sup> See for example the case of *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC) in which the court found that the source of the government’s power to settle flood victims on a piece of land emanated from its common-law ownership rights in the land, as well as its general constitutional duties (to ensure adequate housing for those in need).

<sup>38</sup> See Hoexter note 5 from 29 on “sources of administrative power.”

executive policy of the highest order will not constitute empowering provisions as defined, finalized, specific and publicly available policy documents issued by government may nonetheless amount to empowering provisions in terms of which administrative action is taken. For example, Ekurhuleni municipality does not have a By-law governing informal trading, but rather an “Informal and Street Trading Policy and Management Framework.”<sup>39</sup> This document would likely amount to an empowering provision for the purposes of a challenge under the PAJA.

There are many pieces of legislation that will impact upon street vendors and other workers in the informal economy. In the South African context, these include, for example:

- Nationally, section 6A(1)(d) of the Businesses Act 71 of 1991, which empowers local authorities to pass By-laws which “may, for any contravention thereof...prescribe a penalty of a fine or imprisonment for a period not exceeding three months”<sup>40</sup> and “provide for the removal and impoundment by an officer of any goods...”<sup>41</sup>
- The City of Cape Town’s “Informal Trading By-Law” which requires all informal workers (including street vendors) to trade under a valid permit. The City may charge both a trading fee and an application fee, and the By-Law empowers the City to charge “an additional fee or tariff...in its sole discretion.”<sup>42</sup>
- Another important empowering national law is the Criminal Procedure Act 51 of 1977, which enables state officials to seize articles believed to be concerned with the commission of an offence.<sup>43</sup> This would, for example, empower an officer to confiscate a street vendor’s goods where it is reasonably believed they are illegal (such as illicit tobacco products; fake designer items etc.).

Whenever state officials act under such empowering laws – which serve as sources of administrative power – the requirements of administrative justice will typically find application.

The laws themselves may also be challenged for want of constitutional compliance,<sup>44</sup> and indeed, the constitutionality of section 6A(1)(d) of the Business Act was challenged in the *Makwicana*<sup>45</sup> case.<sup>46</sup> This case involved a 65-year-old street vendor of sandals who was the sole breadwinner of a family of eight. The applicant had his goods unlawfully seized and impounded. They were eventually “disposed of” by the authorities. The authorities issued Mr. Makwicana with a notice under section 56 of the CPA for “illegal trading”<sup>47</sup> and ordered him to pay a fine of R300 (his average weekly wage) or appear in the Magistrates’ Court.<sup>48</sup>

Mr. Makwicana challenged section 6A(1)(d) on the basis that it affords police officers a free reign in determining the amount of the fine and gives “no guidelines about how ‘confiscated’ goods should be dealt with.”<sup>49</sup> The court noted that this provision breaches the principle that enabling statutory provisions “should state precisely the extent of the powers and the circumstances in which they may be exercised,”<sup>50</sup> especially those that impose penalties. Furthermore, less senior decision makers require even more guidance because “officials are often extremely busy and...the nature of their work does not permit considered reflection on the scope of constitutional rights.”<sup>51</sup>

<sup>39</sup> Available at <http://www.ekurhuleni.gov.za/207-pol-127/file> [last accessed 3 November 2016].

<sup>40</sup> Section 6A(1)(d)(i) of the Businesses Act 71 of 1991 (“Businesses Act”).

<sup>41</sup> Section 6A(1)(d)(ii) of the Businesses Act.

<sup>42</sup> Section 8 of the City of Cape Town’s Informal Trading By-law.

<sup>43</sup> Section 20 of the Criminal Procedure Act 51 of 1977.

<sup>44</sup> See below at 6.1.

<sup>45</sup> John Makwicana’s name was misspelled as Makwickana in the official judgement of his case. In this technical brief, in all instances we use Makwicana.

<sup>46</sup> *Makwicana* note 6.

<sup>47</sup> The authorities alleged that he had failed to produce a permit because neither he nor his assistant was at the stand at the relevant time.

<sup>48</sup> *Makwicana* note 6 para 13.

<sup>49</sup> *Makwicana* note 6 para 35.

<sup>50</sup> *Makwicana* note 6 para 38. See further the discussion on this principle and the related rule against vagueness below at 6.

<sup>51</sup> *Makwicana* note 6 para 36. 51 Section 1(ee) of the PAJA. 52 Section 1(bb) of the PAJA. 53 Section 1(dd) of the PAJA.

Importantly, the judgment lays the foundation for a future legal challenge to section 6A(1)(d) and similarly worded vague empowering provisions:

“A point not taken by the applicant is that section 6A(1)(d) does not provide specifically for the return of the property and payment of compensation. Nor does it enable subordinate legislation to so provide. By stipulating that disposal and not the return of impounded property should be regulated the Business[es] Act might be tipping the balance disproportionately in favour of the administration.”

### 3.2 Exclusions: Administrative Action versus Executive and Legislative Action

Aside from the strict definitional requirements canvassed above, the PAJA further curtails what qualifies as “administrative action” by delineating a number of exclusions in section 1. These largely flow from the separation of powers and so include, amongst others:

- the judicial functions of judicial officers;<sup>52</sup>
- the executive function<sup>53</sup> (associated with a high measure of policy and discretion); and
- the original law-making (i.e. legislative) function<sup>54</sup> of Parliament, provincial legislatures and municipal councils.

The distinction between administrative action and executive and/or legislative action is often difficult to draw, for it can be hard to tell where policy formulation (which typically involves a political discretion) ends, and its implementation (which is usually administrative action) begins.

This question is determined on a case-by-case basis depending on the facts as shown in these examples:

- In *Grey's Marine*, the court found that the Minister's decision to let waterfront property was an instance of policy *execution* (rather than formulation) and so amounted to administrative action.<sup>55</sup>
- In *Hayes*,<sup>56</sup> the court found that while the promulgation of zoning scheme regulations amounted to legislative action, the granting of a departure under the regulations qualified as a reviewable administrative act despite the “overtones of policy.”

Despite the grey areas that exist in South African law, Hoexter has noted that, “it is clear from the case law that action relating to procurement and licensing will ordinarily qualify as administrative action under the Constitution.”<sup>57</sup>

This suggests that decisions about the licensing of informal workers will amount to reviewable administrative action under the PAJA. Arguably, decisions to evict them, arrest them, and impound and dispose of their goods will also qualify. In relation to impoundment and confiscation, the court in *Makwicana* noted that “impoundment of street vendors' property” is administrative action as defined.<sup>58</sup>

Where the action in question amounts to the exercise of a public power but falls outside the definition of administrative action, an aggrieved trader may nonetheless pursue one of the alternative pathways to review, discussed in Part 5 of this document.<sup>59</sup>

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<sup>52</sup> Section 1(ee) of the PAJA.

<sup>53</sup> Section 1(bb) of the PAJA.

<sup>54</sup> Section 1(dd) of the PAJA.

<sup>55</sup> *Grey's Marine* note 33 para 27.

<sup>56</sup> *Hayes v Minister of Finance & Development Planning, Western Cape* 2003 (4) SA 598 (C) at 611.

<sup>57</sup> Hoexter note 5 at 184.

<sup>58</sup> *Makwicana* note 6 para 68 and 75.

<sup>59</sup> See the discussion on these alternative pathways to review below in Part 5. See Hoexter note 5 at 115 on the “five different pathways to administrative-law review: *the PAJA, s 33, special statutory review, the principle of legality and the common law.*” For the purposes of this Legal Brief, the PAJA, section 33 and the principle of legality are relevant. On the interplay between these pathways, see Lauren Kohn “Our curious administrative law love triangle: The complex interplay between the PAJA, the Constitution and the common law” (2013) 28 *SA Public Law* 22.

## 4. Just Administrative Action: Grounds of Review

To qualify as *just* administrative action, the decision or action in question must be: lawful, reasonable, procedurally fair, and may in addition require justification through the provision of written reasons. If any of these elements of the right are not met, the action can be judicially reviewed by a court (or tribunal, in other countries).

### 4.1 Lawfulness

Lawfulness, or legality, is a fundamental principle of administrative law. Broadly speaking, lawfulness requires at a minimum that the exercise of all public power be sourced in, and exercised in strict accordance with, a lawful empowering source.<sup>60</sup> For an administrative action to be lawful, the administrator must:

- have the authority to act (the requirement of “authority”);
- not exceed his/her jurisdiction – in other words, the administrator must remain within the procedural and substantive bounds of his/her powers, and not misconstrue or stretch them (the requirement of “jurisdiction”); and
- not abuse his/her powers (“abuse of discretion”).

#### 4.1.1 Authority

Administrators cannot simply act, they must instead be empowered or authorized by law to do so. Case law reveals four key instances in which administrators breach this requirement of lawfulness:

- where there is no legal authority at all for the exercise of the power in question, i.e. no empowering provision in fact exists to allow the act in question (this is rather uncommon given that there is usually an empowering law somewhere);
- where the administrator has some sort of authority but acts beyond what the law permits (known as “exceeding authority”);
- where the administrator has made and communicated a valid final decision and then unilaterally changes the decision; and where
- the administrator who is authorized by law to act or make a decision delegates it to someone else, who is not so authorized (known as “unlawful delegation”).<sup>61</sup>

#### *Exceeding Authority*

A case which illustrates the exceeding of authority – when an administrator acts beyond his/her powers – is *Vorster v Department of Economic Development, Environment & Tourism, Limpopo*,<sup>62</sup> in which a hunting permit was issued subject to a condition that the hunt be conducted by a local hunter. The court found that the decision-makers had acted outside the scope of the provisions of section 69 of the empowering Act – and thus, unlawfully – in imposing a condition that they were “not lawfully entitled to impose.”<sup>63</sup>

Similarly, where an administrator imposes a condition upon a street vending permit (such as a restrictive condition limiting trading hours or the nature of the goods which may be traded) and this condition is *not* contemplated (i.e. authorized) by the relevant empowering law, this decision to impose the condition would be unlawful. The impoundment and confiscation of goods would also be unlawful if done in instances

<sup>60</sup> See above at Part 3.1.2 on the various sources of administrative power.

<sup>61</sup> See Hoexter note 5 from 261.

<sup>62</sup> *Vorster v Department of Economic Development, Environment & Tourism, Limpopo* 2006 (5) SA 291 (T).

<sup>63</sup> *Ibid* para 17.



not permitted by the empowering legislation. Thus in *Makwicana* the court found that the removal and impoundment of the trader's goods under section 7(2)(b) of the 1995 By-law clearly exceeded the police officer's powers in that the empowering provision did not allow the impoundment of goods where the owner failed to comply with a mere formality.<sup>64</sup>

### *Unlawful Variation of a Valid Final Decision*

Valid, final and communicated decisions cannot be revoked or varied at random. Thus, where for example, a permit has validly been granted for a particular duration, the administrator cannot prior to its expiry seek to vary this period without the statutory authority to do so and the informed consent (i.e. agreement) of the affected party.<sup>65</sup>

### *Unlawful Delegation, Dictation & Referral*

Although the South African courts recognize that governments cannot function expediently if they are barred from delegating their functions, this will be permissible only in limited instances given the need to ensure that the right actor does the right job. The courts have formulated criteria to determine whether or not a delegation of powers is acceptable. In determining whether there exists an *implied authority* in a statute to delegate a power to another, a court will consider, amongst other things:

- how extensive the delegation is (i.e. is *all* power surrendered or simply a minor or subsidiary power?);
- the extent to which the original duly empowered person continues to review the exercise of the delegated power;
- considerations of practicality and effectiveness (i.e. does the job need to get done urgently by someone on the ground in the bureaucracy?); and
- the identity of the institution or person to whom the power is delegated (i.e. are we dealing with a highly skilled individual who may be better suited for the job?).<sup>66</sup>

For example, if an empowering provision in a piece of legislation such as a By-law contemplates that "officers" (as defined) may take enforcement action against informal workers, such action may not be carried out by someone else save where authority exists for such delegation.

A further point to note is that administrators may take advice from others (particularly "experts" in a field), but must nonetheless apply their own minds before taking the final decision. In the context of the informal sector, those duly empowered to grant permits or business licences to waste pickers for example, must apply their own minds to the facts at hand and not act under the unlawful dictates of an unauthorized person.

Finally, decision-makers may not "pass the buck" by referring the decision-making to unauthorized persons. They may reasonably rely on the views of others, but must nonetheless apply their own minds to the matter.

## **4.1.2 Jurisdiction**

Not only must an administrator have the authority to act, he/she must not exceed his/her jurisdiction. In other words, the administrator must remain within the procedural and substantive bounds of his/her powers, and not misconstrue or stretch them. Administrators typically make two kinds of jurisdictional errors:

- misinterpreting the empowering law ("jurisdictional error of law"); and
- failing to follow the prescribed procedure and/or make their decision in breach of a substantive condition ("jurisdictional error of fact").

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<sup>64</sup> *Makwicana* note 6 para 48-50.

<sup>65</sup> Hoexter note 5 at 281.

<sup>66</sup> *AAA Investments* note 3 para 127.

### *Jurisdictional Error of Law*

A jurisdictional error of law arises when an administrator makes a decision that he/she would not have made had he/she not misinterpreted the empowering law in question – the incorrect interpretation has the effect of expanding his/her powers unlawfully. The error will be reviewable where it can be shown that it was material in the sense that it affected the outcome – i.e. but for the error, the administrator would have reached a different conclusion. For example, section 9 of the City of Cape Town’s Informal Trading By-law allows the permanent transfer of a trader’s permit “with the written approval of the City.” Where the administrator incorrectly interprets the provision to allow transfer with mere verbal permission, the error will render the decision reviewable.

### *Jurisdictional Error of Fact*

Jurisdictional error of fact typically occurs where an administrator fails to follow a prescribed procedure set out in the legislation and/or makes a decision in breach of a substantive condition, such as the need to formulate a reasoned opinion that a certain state of affairs exists before the decision can lawfully be taken.

An example of a **procedural jurisdictional requirement** in the street vending sector is where the relevant authority is mandated to undertake a public participation process before adopting a trading plan. The City of Cape Town’s Informal Trading By-law thus obliges the City prior to adopting such a plan, to consult with interested parties, compile a draft trading plan and publish notices in local newspapers, etc.<sup>67</sup> These are procedural jurisdictional requirements.

**Substantive jurisdictional prerequisites** entail the existence of a state of affairs. So, the empowering legislation may curtail the administrator’s jurisdiction by requiring that he/she be “of the opinion” or “satisfied” that X exists before Y can be done.

For example, section 6A(1)(d) of The Businesses Act empowers a local authority to impound goods “(aa) which he *reasonably suspects* [are] being used...in connection with the carrying on of the business of street vendor, pedlar or hawkler;” and “(bb) which he finds at a place where... the carrying on of such business is restricted or prohibited and which, *in his opinion*, constitutes an infringement of such By-law...” The emphasized words indicate that these are substantive prerequisites that must be complied with before impoundment can lawfully take place under the section.

In the past, an administrator could simply have shown that he/she held a particular opinion. Following the *Walele* judgment,<sup>68</sup> all such subjective jurisdictional facts are rendered objectively justiciable. In other words, where in the past an administrator could simply have shown that he held a particular view as a matter of fact, now he/she must actually validate it by showing that objective grounds exist to support it.

#### **4.1.3 Abuse of Discretion**

Administrators abuse their discretion when they act with an “ulterior purpose,” show “bad faith,” or simply “fail to apply their minds.”

Section 6(2)(e)(ii) of the PAJA makes administrative action reviewable where it was taken “for an **ulterior purpose or motive**.” Powers must be exercised for the lawful purposes for which they have been conferred, and for the public interest more broadly. It is thus important to read the legislation carefully to understand the purpose of a power. For example, in *Sex Worker Education & Advocacy Task Force v Minister of Safety & Security*,<sup>69</sup> the court found that public service officers had been arresting prostitutes for the ulterior

<sup>67</sup> Section 6 of the City of Cape Town Informal Trading By-law.

<sup>68</sup> *Walele* note 32 para 60.

<sup>69</sup> *Sex Worker Education & Advocacy Task Force v Minister of Safety & Security* 2009 (6) SA 513 (WCC).

motive of harassing them, rather than for the lawful purpose of prosecuting them in terms of the law. In the street vending sector, officials persist “in harassing, intimidating and unlawfully impounding their goods.”<sup>70</sup> Street vendors may challenge the actions of administrators who impound their goods for such ulterior motives instead of legitimate reasons.

Section 6(2)(e)(v) of the PAJA allows the review of administrative action that is taken “in **bad faith**,” i.e. for fraudulent and/or dishonest motives. It is important to note that even if the decision appears to be legitimate, it is still reviewable where the facts reveal dishonest motives.

A “**failure to apply the mind**” can manifest in various ways. Hoexter has referred to this ground as a “nebulous” requirement that covers “most instances of bad decision-making quite comfortably.”<sup>71</sup> For example:

- the administrator may simply fail to decide or fail to do so within a reasonable time;<sup>72</sup>
- the administrator may consider irrelevant factors or fail to consider relevant factors when making a decision;<sup>73</sup>
- the decision-maker may unlawfully fetter his/her powers by rigidly following an assurance, policy or contractual obligation when the circumstances require a more context-sensitive approach;<sup>74</sup> and/or
- by making decisions arbitrarily or capriciously.<sup>75</sup>

A practical example of the relevance of one of these grounds in the context of street vendors applying for permits would be where the City fails to consider that the applicant is unemployed – a key “relevant consideration.”<sup>76</sup>

### **Summary: Unlawful administrative action**

#### **Authority**

- The administrator failed to act under a valid applicable empowering law.
- The administrator acted beyond what the empowering law allowed the administrator to do.
- The administrator made and communicated a valid final decision and then unilaterally changed or revoked it.
- The action was taken by an unauthorized administrator, or the authorized administrator did not properly apply his own mind to the matter, instead acting under dictation or passing the buck.

#### **Jurisdiction**

- The administrator misinterpreted the law (jurisdictional error of law) and thereby acted beyond the scope of his powers.
- The administrator failed to follow a prescribed procedure and/or made the decision in breach of a substantive condition precedent.

#### **Abuse of discretion**

- The administrator acted with an ulterior purpose.
- The administrator acted with fraudulent/dishonest motives (i.e. in bad faith).
- The administrator failed to apply his/her mind in making the decision.

<sup>70</sup> *Makwicana* note 6 para 33.

<sup>71</sup> Hoexter note 5 at 313.

<sup>72</sup> Section 6(2)(g) of the PAJA.

<sup>73</sup> Section 6(2)(e)(iii) of the PAJA.

<sup>74</sup> Although not specifically mentioned the common-law ground of fettering can be accommodated under the catch-all section 6(2)(i) of the PAJA, “otherwise unconstitutional or unlawful.”

<sup>75</sup> Section 6(2)(vi) of the PAJA.

<sup>76</sup> See section 8.5 of the City of Cape Town’s Informal Trading By-law for examples of the kinds of factors that the City is mandated to take into account in considering permit applications.

## 4.2 Reasonableness

Reasonableness is perhaps the most controversial of the grounds of review. This is because it requires a court to consider the merits of an administrative decision and may thereby cause it to slip from a review function (which assesses the decision-making *process*) into appeal (which assesses the correctness of the final decision on the merits).<sup>77</sup> Courts must be mindful in balancing their duty to give effect to the constitutional right to reasonable administrative action, with their duty to respect the separation of powers, which demands that they not usurp the administrative and executive functions of government. Under South African law, reasonableness entails at least rationality plus proportionality.<sup>78</sup> Although these are distinct grounds of review, they are interrelated and essentially require the following:

- the empowering provision must aim to achieve a legitimate purpose and the means adopted to achieve this purpose must be rationally connected to its fulfillment (rationality); and
- the means chosen must be proportionate (i.e. well-tailored) to the attainment of the purpose (proportionality).

### 4.2.1 Rationality

Rationality demands that the empowering provision in question must aim to achieve a legitimate (rather than arbitrary) purpose by way of rationally (i.e. logically) linked means.<sup>79</sup> An example of irrational conduct is where police impound street vendors' goods purely to harass them rather than for a legitimate legislative purpose such as deterring unauthorized trading. Furthermore, empowering provisions that allow administrators to deprive informal workers of their property (be it trading goods, waste products, trading space etc.), without a sufficiently compelling legal reason, will be arbitrary and thus irrational.<sup>80</sup>

### 4.2.2 Proportionality

Although not explicitly mentioned in the PAJA, proportionality (as an aspect of reasonableness) extends beyond rationality and requires that the means chosen not be excessive if less invasive means can achieve the goal. So, for example, where a fine would adequately deter and address a first-time instance of illegal trading, impoundment of goods would in the circumstances be disproportionate.

When it comes to the broader notion of reasonableness, the courts have identified the following open-list of factors to determine what amounts to an unreasonable decision:

- the nature of the decision;
- the identity and expertise of the decision-maker;
- the range of considerations relevant to the decision;
- the reasons given for it;
- the nature of the competing interests involved; and
- the impact of the decision on the lives and well-being of those affected.<sup>81</sup>

A court is likely to decide that an administrator's decision that is unnecessarily disproportionate to the law's objective, or whose effect is too onerous in the circumstances, is unreasonable.<sup>82</sup> Street vendors are regularly harassed, intimidated and subjected to the unlawful impoundment of their goods. Such conduct

<sup>77</sup> See the discussion above in Part 2 on the difference between review and appeal.

<sup>78</sup> Hugh Corder "Without Deference, With Respect: A Response to Justice O'Regan" (2004) *South African Law Journal* 438 at 443.

<sup>79</sup> Section 6(2)(f)(ii) of the PAJA sets out what this requirement of rationality means in practice: it allows for the review of administrative action, "that is not rationally connected to – (aa) the purpose for which it was taken; (bb) the purpose of the empowering provision; (cc) the information before the administrator; or (dd) the reasons given for it by the administrator."

<sup>80</sup> *Makwicana* note 6 Para 94.

<sup>81</sup> *Bato Star* note 17 para 45. Emphasis added.

<sup>82</sup> *Hoexter* note 5 at 350 citing Jowell.

will undoubtedly be held to be unreasonable. Certainly, where an offence is committed and an official impounds goods without first issuing a written warning, the *conduct* in question will be disproportionate.

In *Makwicana*, the matter of proportionality arose – albeit in the context of the property right rather than reasonableness as required by the section 33 administrative justice right. The authorities unlawfully seized, impounded and disposed of a street vendor’s goods on the basis of alleged illegal trading under the relevant By-law. The court found that the provisions of the By-law breached section 25 of the Constitution,<sup>83</sup> which prohibits the arbitrary deprivation of property. This was essentially because the provision allowed the deprivation of a trader’s goods without a compelling (or proportionate) reason. The court found that the mere failure to produce a licence was not “sufficiently compelling” or “proportional to the ends.”<sup>84</sup>

It was held that depriving the traders of their goods and livelihoods was “so invasive” of their property rights in that it impacted on their welfare and that of their families: “[f]or most the impounded goods are their only assets and means to a meal. Impoundment is therefore serious irrespective of the commercial value of the goods. Deprivation also impacts on their identity and dignity as people with property, however little that is.”<sup>85</sup>

## 4.3 Procedural Fairness

This ground of review entails two key components to ensure that a fair administrative procedure is followed:

- an affected person must be given a right to be heard; and
- the decision in question must be made by an impartial (i.e. unbiased) decision-maker.

### 4.3.1 Right to a Fair Hearing

Section 3 of the PAJA sets out various requirements, and possibilities, for ensuring a fair hearing with respect to administrative action that affects individuals. Section 4 of the PAJA provides as much for administrative action affecting the public more broadly.

#### *Administrative Action Affecting an Individual*

Where administrative action affects the rights or legitimate expectations of an individual, the administrator will typically<sup>86</sup> be required at least to provide him/her with:

- adequate notice of the nature and purpose of the proposed administrative action;
- a reasonable opportunity to make representations (be they written or oral);
- a clear statement of the administrative action;
- adequate notice of any right of review or internal appeal where applicable; and
- adequate notice of the right to request reasons under section 5.

In *Makwicana* the court held that the disposal of the informal worker’s impounded goods in the absence of a hearing – the key prerequisite of procedural fairness – made the action procedurally unfair and therefore reviewable under section 6(2)(c) of the PAJA.<sup>87</sup> The court stated that “in the context of street traders procedural fairness would require notification to the owners that they are accused of a breach of the By-law before their goods are impounded and disposed of.”<sup>88</sup>

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<sup>83</sup> *Makwicana* note 6 para 99.

<sup>84</sup> *Makwicana* note 6 para 97.

<sup>85</sup> *Makwicana* note 6 para 97.

<sup>86</sup> The Constitutional Court in *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) para 59 indicated that these so-called minimum requirements need not be applied strictly in every case given the need for variability in the application of procedural fairness.

<sup>87</sup> *Makwicana* note 6 para 74.

<sup>88</sup> *Makwicana* note 6 para 96.



In addition to the above so-called “minimum requirements,” section 3(3) of the PAJA empowers an administrator to afford the affected person: assistance (including legal representation in serious or complex cases), and a chance to appear in person and/or present and dispute information and arguments.

The PAJA necessitates compliance with the requirements of procedural fairness where both rights and “legitimate expectations” are affected.

The reference to “legitimate expectations” indicates that even where a person’s interest in the outcome falls short of a legally enforceable right, he/she is nonetheless entitled to be heard. So mere applicants (who do not actually have a right to a permit or business licence), may nonetheless have a legitimate expectation to be heard and thereby influence the outcome. A legitimate expectation may arise from:

- reasonable reliance on either a promise made by a decision-maker (e.g. “your permit will be renewed”); or
- a regular practice (e.g. the applicant has in the past readily had his/her permit renewed on several occasions) which can reasonably be expected to continue; or
- from some other similar administrative conduct.

The expectation itself may be for a specific outcome (e.g. the award of the permit), or simply for a hearing, or for both. However, once it is shown to be legitimate (i.e. reasonable on the facts), at the very least, the affected person must be afforded a fair opportunity to be heard.<sup>89</sup>

### *Administrative Action Affecting the Public*

Section 4 of the PAJA governs “administrative action affecting the public.” The “public” is defined to mean “any group or class of the public.”<sup>90</sup> This may be understood as administrative action “*with a general impact*” and “*significant effect*,”<sup>91</sup> such as an increase in the petrol price, or the re-zoning of certain public land, from business to recreational use. Under section 4, an administrator has a choice of various public participation mechanisms (such as a “notice & comment procedure” or a “public inquiry”), and may choose to follow an alternative process that is “fair but different”<sup>92</sup> or simply “appropriate”<sup>93</sup> in the circumstances.

The City of Cape Town Informal Trading By-law for example, makes provision for public participation in respect of the adoption of trading plans.<sup>94</sup> The provision contemplates a notice-and-comment process. This requires the City to consult with interested and affected role players in both the formal and informal sectors, to publish the draft trading plan in local newspapers, and to invite comments and objections at a “public meeting.”

Importantly, the PAJA allows the administration to depart from the relevant procedure where it is “reasonable and justifiable”<sup>95</sup> to do so. This may be the case where the decision needs to be taken urgently, or government efficiency is a pressing concern. The PAJA’s definition of administrative action excludes the administrator’s choice of procedure,<sup>96</sup> making it immune to review on this score.

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<sup>89</sup> See on legitimate expectation, the seminal case of *Administrator, Transvaal v Traub* [1989] 4 All SA 924 (AD), and *Walele* note 32 paras 35-7.

<sup>90</sup> Section 1 (xi) of the PAJA.

<sup>91</sup> Iain Currie *The Promotion of Administrative Justice Act: A Commentary* 2ed (2007) para 5.6-5.9.

<sup>92</sup> Section 4(1)(d) of the PAJA.

<sup>93</sup> Section 4(1)(e) of the PAJA.

<sup>94</sup> Section 6 of the City of Cape Town Informal Trading By-law.

<sup>95</sup> Section 4(4) of the PAJA.

<sup>96</sup> Section 1(i)(ii) of the PAJA.

### 4.3.2 Impartiality

Procedural fairness requires administrators to act impartially. Section 6(2)(a)(iii) of the PAJA states that administrative action that is taken by an administrator who “was biased or *reasonably* suspected of bias” can be reviewed. The test for a “reasonable apprehension” (or fear) of bias requires that: the *reasonable* (rather than hyper-sensitive) person, hold an apprehension on *reasonable grounds* that the decision-maker in question *might* be biased.<sup>97</sup>

Sources of bias vary but typically manifest in the form of a personal and/or financial interest in the outcome of a decision-making process. South African cases reveal this to be particularly problematic in the procurement and licencing sectors. For example, where a decision-maker has a financial interest in a business that is competing with an applicant, and shows personal bias against the applicant, a court may find that there is a reasonable fear of bias. In the case of *Rose*, the court found that it would be wrong for such a decision-maker to determine the application.<sup>98</sup>

Given that licensing is a key way of regulating the street vending sector, decision-makers must be impartial, in line with the constitutional requirement that members of the public service act in a professional, ethical and accountable manner.<sup>99</sup> As the court warned in *Makwicana*, “the nature of the [informal trading] sector is such that unless officials are oriented to be empathetic towards street traders, the risk of powerful officials mistreating powerless poor people is real.”<sup>100</sup> This applies equally in the waste picking sector. A recent study reported that waste pickers have “difficulty in accessing waste, and a largely hostile state, which is biased towards formal waste management systems.”<sup>101</sup>

## 4.4 The Right to Request Reasons

Section 33(2) of the Constitution states that “everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.” This is important, as an aggrieved person can meaningfully challenge administrative action only if he/she is able to understand *why* that action was taken.

Given the constitutional commitment to accountable, responsive and open governance,<sup>102</sup> reason-giving encourages sound decision-making and a “culture of justification.”<sup>103</sup> Administrators cannot simply act; they must be legally justified in doing so.

Section 5 of the PAJA entrenches a request-driven regime<sup>104</sup> to ensure administrative efficiency is not unduly hampered through the requesting and granting of reasons. Section 5(1) states:

“Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action, or might reasonably have been expected to become aware of the action, request that the administrator concerned furnish written reasons for the action.”

<sup>97</sup> *S v Roberts* 1999 (4) SA 915 (SCA).

<sup>98</sup> *Rose v Johannesburg Local Road Transportation Board* 1947 (4) SA 272 (W).

<sup>99</sup> Section 195 of the Constitution.

<sup>100</sup> *Makwicana* note 6 para 135.

<sup>101</sup> Mkhize et al ‘Waste pickers in Durban, South Africa’ (2014) Informal Economy Monitoring Study, available at <http://wiego.org/sites/wiego.org/files/publications/files/Mkhize-IEMS-Durban-City-Report-Waste-Pickers.pdf> [last accessed 5 October 2016] at 2.

<sup>102</sup> Section 1(d) of the Constitution.

<sup>103</sup> Etienne Mureinik “A Bridge to Where? Introducing the Interim Bill of Rights” (1994) 10 *South African Journal on Human Rights* 31 at 32.

<sup>104</sup> Although note that the Constitutional Court in *Koyabe v Minister of Home Affairs* 2010 (4) SA 327 (CC) held that, read together, s 33(2) and the PAJA entitled the applicants for Immigration Permits to be given reasons *even in the absence of a request*. See Hoexter note 5 at 484 for a criticism of this finding on the basis that it ignores the principle of subsidiarity.

Sub-section 2 requires that the reasons be “adequate,” which will depend on the facts of the case,<sup>105</sup> but at a minimum, case law suggests that this entails a clear explanation of why the action in question was taken.<sup>106</sup> Currie has noted that, “[a] single-line statement of reasons may quite adequately explain a straightforward decision with far-reaching consequences, while a decision involving complex assessments of fact and the exercise of considerable interpretive discretion will take a great deal more explaining, no matter what its consequences are.”<sup>107</sup>

Generally, administrators should ensure that their reasons are:

- specific;
- set out in clear language;
- of a length and detail appropriate to the circumstances; and
- consist of more than mere conclusions (i.e. “they should refer to the relevant facts and law and the reasoning process leading to those conclusions”<sup>108</sup>).

Aggrieved informal workers whose permit applications have been refused, and waste pickers who are refused access to waste without explanation, would for example, be entitled to request clear reasons for such decisions and these reasons ought to justify the outcomes reached. Note, however, that the PAJA exempts administrators from giving reasons where it is “reasonable and justifiable in the circumstances,” presumably for the sake of administrative efficiency.<sup>109</sup>

*Summary: Key questions to be asked by administrators to ensure the action meets the requirements of the right to just administrative action*



<sup>105</sup> *Rean International Supply Company (Pty) Ltd v Mpumalanga Gaming Board* 1998 (8) BCLR 918 (T) at 926F.

<sup>106</sup> See Hoexter note 5 at 476 and the cases cited.

<sup>107</sup> Currie note 90 para 6.11.

<sup>108</sup> Hoexter note 5 at 477-8.

<sup>109</sup> Section 5(4)(a) of the PAJA. And see the factors set out at section 5(4)(b) which may indicate that such a departure was reasonable and justifiable in the circumstances.

## 5. Avenues for Relief: An “Integrated System of Administrative Law”

### 5.1 Judicial Review of Administrative Action

As noted above, while the South African Constitution makes provision for various ways in which to influence administrative decision-making positively, judicial review continues to be the primary pathway for relief. This is because a judicial order is binding, specific to the problem presented by the parties and more immediate than, say, legislative intervention.

Once an aggrieved person has applied for judicial review of administrative action within the prescribed time limit,<sup>110</sup> and on any of the grounds listed in section 6 of the PAJA, a court or tribunal has a wide discretion to make any order that is “just and equitable” in the circumstances.<sup>111</sup> Under the broad heading of “justice and equity,” section 8 of the PAJA then gives specific examples of such orders, which include, amongst others, the following:

- Setting aside, with:
  - an election to remit;
  - substitution of the administrator’s decision; or
  - correction of the administrator’s decision.
- Payment of compensation.
- Declaration of rights.
- Interdicts.

#### 5.1.1 Setting Aside

The typical remedy is that of “setting aside,” where the court rules that the administrative decision is set aside and it is as if it was never made. This flows from the principle of legality, which requires that if a court finds that administrative action is invalid, it must declare it to be unlawful and set it aside. This may seem obvious, but practically it is important for any administrative action, “no matter how blatantly illegal it may appear to be, continues to have effect until such time as it is pronounced invalid by the court,”<sup>112</sup> at which point in time, it is as if the action in question never took place.<sup>113</sup> Note that setting aside does however remain a discretionary remedy. So even when faced with a clearly illegal decision, a court may elect not to set it aside where, for example, to do so would have disastrous practical implications.<sup>114</sup> On setting aside a decision, a court may:

- remit (or return) “the matter for reconsideration by the administrator, with or without directions;” or
- “in exceptional cases,” substitute or vary the administrative action or correct a defect resulting therefrom.<sup>115</sup>

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<sup>110</sup> Rule 53 of the Uniform Rules of Court governs the procedure for an application for judicial review. Section 7 of the PAJA sets out the “procedure for judicial review” and requires such proceedings to be instituted “without unreasonable delay...” Section 9 allows for variations in these prescribed time periods in certain instances.

<sup>111</sup> Section 8(1) of the PAJA.

<sup>112</sup> Hoexter note 5 at 545-6.

<sup>113</sup> Hoexter note 5 at 545-6. This is in terms of the doctrine of objective invalidity.

<sup>114</sup> See for example *Millennium Waste Management v Chairman, Tender Board: Limpopo Province* 2008 (2) SA 481 (SCA) in which the court refused to set aside the tender for the disposal of medical waste, for to do so would lead to the disruption of an important service and further expenditure.

<sup>115</sup> Section 8(1)(c)(ii)(aa) of the PAJA.

An election to remit is the usual course given the need for the courts to respect the separation of powers and so avoid stepping into the shoes of the administrator. However, in exceptional circumstances, a court will be justified in substituting its decision for that of the administrator, or correcting the decision in question. This may be where, for example:

- the outcome is a “*foregone conclusion*;”
- *delay* would cause *unjustifiable prejudice* (typically to the aggrieved applicant);
- the original decision-maker exhibited *bias or incompetence*; and/or
- the court finds itself in a position (by virtue say, of the nature of the decision and the evidence available) in which it is as *well-qualified* as the original authority to make the decision.<sup>116</sup>

### 5.1.2 Payment of Compensation

Another example of an “exceptional” remedy is the “directing [of] the administrator or any other party to the proceedings to pay compensation.”<sup>117</sup> The PAJA does not explicitly state what might qualify as such an exceptional case. Hoexter has suggested that “inexcusable incompetence” and/or “dishonesty” might suffice.<sup>118</sup> The courts have awarded such damages only in rare instances given that ultimately such awards burden the public purse.<sup>119</sup> Typically an order for the offending party to pay the applicant’s legal costs can suitably deter future violations of the right to administrative justice, particularly where the administrator acts in bad faith rather than as a result of an honest mistake.<sup>120</sup>

### 5.1.3 Declaration of Rights

A court may also order a “declaration of rights of the parties in respect of any matter to which the administrative action relates.” Such a declaratory order essentially empowers a court simply to state the legal position. This may be particularly important where there is a need to clarify the constitutional position on a matter. Thus in *Makwicana* the court declared the relevant provisions of the By-law to be “unconstitutional, invalid and unlawful”<sup>121</sup> on the basis that they unjustifiably breached various constitutional rights.

### 5.1.4 Interdicts

Finally, a court may grant a range of interdicts. These are essentially court orders that require the administration to take a particular course of action:

- a mandatory interdict directs the administrator to act or act in a *particular manner*<sup>122</sup> (e.g. reconsider the permit renewal application afresh; provide the aggrieved party with reasons for the decision etc.);
- a prohibitory interdict<sup>123</sup> is “often used to prevent the commission of threatened illegal action, such as expropriation, or to put a stop to continuing illegal action, such as police harassment;”<sup>124</sup> and
- a structural or “supervisory” interdict enables a court to retain jurisdiction over a case to supervise government’s compliance with its order.<sup>125</sup>

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<sup>116</sup> See Hoexter note 5 at 552-7 and the cases cited there. See also Lauren Kohn “The Test for “Exceptional Circumstances” where an Order of Substitution is sought: An Analysis of the Constitutional Court judgment in *Trencon* against the backdrop of the Separation of Powers” (2015) 7 *Constitutional Court Review* (forthcoming).

<sup>117</sup> Section 8(1)(c)(ii)(bb) of the PAJA.

<sup>118</sup> Hoexter note 5 at 570.

<sup>119</sup> Hoexter note 5 at 570-2.

<sup>120</sup> Section 8(1)(f) of the PAJA. See Hoexter note 5 at 574.

<sup>121</sup> *Makwicana* note 6 para 148(c)-(d).

<sup>122</sup> Section 8(1)(a) of the PAJA.

<sup>123</sup> Section 8(1)(b) of the PAJA.

<sup>124</sup> Hoexter note 5 at 560.

<sup>125</sup> Hoexter note 5 at 561.



A structural interdict is akin to the remedy of “*meaningful engagement*” which came to the fore in the seminal eviction cases, *PE Municipality*<sup>126</sup> and *Olivia Road*.<sup>127</sup>

The Constitutional Court in *Olivia Road* ordered the parties to engage with each other meaningfully to reach a fair and appropriate resolution of the matter. The court held that:

“The process of engagement will work only if both sides act reasonably and in good faith... Moreover... it is the duty of a court to take into account whether, before an order of eviction that would lead to homelessness is granted... there has been meaningful engagement or, at least, that the *municipality has made reasonable efforts towards meaningful engagement... The absence of any engagement or the unreasonable response of a municipality in the engagement process would ordinarily be a weighty consideration against the grant of an ejectment order.*”<sup>128</sup>

The same would ring true in the informal trading context, particularly where traders are evicted from trading space. Meaningful engagement is in fact especially important in this sector given its “nature.”<sup>129</sup> The Court in *Makwicana* thus held that the relevant By-law should be reformed to ensure “a functional dispute system design”<sup>130</sup> that factors in the constraints of informal workers who struggle “to secure legal representation and to litigate before their goods are disposed of.”<sup>131</sup> This calls for “a more accessible and expeditious dispute system design”<sup>132</sup> that has meaningful engagement at its core.

## 5.2 Alternative Pathways to Judicially Review all Public Powers

Where an informal worker is affected by a decision that is *not* administrative action as defined (which must be challenged via the PAJA), but constitutes, for example, legislative or executive action, such exercise of public power may nonetheless be challenged via one of the other pathways to review that operate alongside the PAJA. These include, amongst others, a direct constitutional challenge and the constitutional principle of legality.

### 5.2.1 A Direct Constitutional Challenge

In certain instances, an aggrieved person may seek to rely *directly* on the section 33 constitutional right to administrative justice and/or some other right in the Bill of Rights. This would be the case where instead of challenging the *decision or action* taken under an empowering provision, the litigant seeks to *challenge the law itself* for non-compliance with the Constitution.

This was the case in *Makwicana*,<sup>133</sup> where Mr. Makwicana successfully challenged the impugned decision<sup>134</sup> and the *constitutionality of the empowering law* on the basis that the latter breached several

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<sup>126</sup> *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC).

<sup>127</sup> *Occupiers of 51 Olivia Road, Berea Township v City of Johannesburg* 2008 (3) SA 208 (CC).

<sup>128</sup> *Occupiers Olivia Road* note 126 para 20-22. Emphasis added.

<sup>129</sup> *Makwicana* note 6 para 139.

<sup>130</sup> *Makwicana* note 6 para 143.

<sup>131</sup> *Makwicana* note 6 para 143.

<sup>132</sup> *Makwicana* note 6 para 143.

<sup>133</sup> *Makwicana* note 6.

<sup>134</sup> *Makwicana* note 6 para 74 where the court found that the removal and impoundment of the goods was unlawful and procedurally unfair administrative action.

rights. The court held that the impoundment provisions of the eThekweni Municipality: Informal Trading By-law, 2014, unjustifiably infringed Mr. Makwicana's:

- right of access to court (section 34);<sup>135</sup>
- right not to be arbitrarily deprived of his property (section 25);<sup>136</sup>
- right to freedom of trade (section 22);<sup>137</sup> and
- right not to be unfairly discriminated against (section 9(3)).<sup>138</sup>

In comparing the situation with that in *Zondi*,<sup>139</sup> the court held that:

“Unlike trespassing animals that are an inherent danger to humans and other property, non-compliance with the legal formalities of street trading such as trading without producing a permit are not such immediate threats. *There is no justification for impounding the goods of street traders for non-compliance with the legal formalities of street trading.*”<sup>140</sup>

Essentially, the court found that there were *less invasive means* to address illegal informal trading, such as imposing fines and progressively heavier ones for repeat offenders.<sup>141</sup> This is welcome judgment that sends a clear message that authorities must ensure due process and will be held accountable for arbitrary deprivations of street vendors' property. It furthermore invites reform of the law on informal trade.

## 5.2.2 The Rule of Law and Related Principle of Legality

Another significant pathway to judicial review is the constitutional principle of legality. This principle is an aspect of the rule of law<sup>142</sup> (a foundational value of our constitutional order).<sup>143</sup> It is also a legal basis for reviewing *all* forms of public power – particularly those which fall outside the definition of administrative action, such as policy decisions of the executive. At a minimum, this principle requires that public power be exercised in a lawful and rational manner: every exercise of public power must be sourced in, and be carried out in accordance with, a lawful empowering source, and must furthermore be rationally related to a legitimate purpose as set out in that source. Note, however, that recent case law suggests that the requirements of the principle of legality may in fact be more onerous than mere legality coupled with rationality, and thus closer to those of administrative law.<sup>144</sup>

South African courts<sup>145</sup> have thus used the principle of legality to curb corruption more broadly. A litigant seeking to challenge a decision under the PAJA may plead the principle of legality as an alternative basis for review should the definitional requirements of administrative action not be met on the facts.

<sup>135</sup> Section 34 of the Constitution. See from para 77 of *Makwicana* note 6 regarding this challenge.

<sup>136</sup> Section 25 of the Constitution. See from para 92 of *Makwicana* note 6 regarding this challenge.

<sup>137</sup> Section 22 of the Constitution. See from para 100 of *Makwicana* note 6 regarding this challenge.

<sup>138</sup> Section 9 of the Constitution. See from para 103 of *Makwicana* note 6 regarding this challenge.

<sup>139</sup> This case involved the confiscation, impoundment and disposal of animals that were found trespassing on property. See *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC).

<sup>140</sup> *Makwicana* note 6 para 131. Emphasis added.

<sup>141</sup> *Makwicana* note 6 para 134.

<sup>142</sup> *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 57.

<sup>143</sup> Section 1(d) of the Constitution.

<sup>144</sup> See Kohn note 16 on how recent case law shows the principle to encompass, in addition, procedural fairness, reason-giving and proportionality requirements.

<sup>145</sup> See Hoexter note 5 at 121 and the cases referred to. The Constitutional Court developed this principle to enable the review of public power that falls short of administrative action in the seminal trio of cases: *Fedsure* note 141, *SARFU* note 2 and *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC). In *Fedsure*, the court found that although the making of budgetary resolutions by a municipal council could not be reviewed as administrative action, this legislative act could be tested under the principle of legality for compliance with the requirement that the body in question act in accordance with the powers lawfully conferred on it. In *SARFU*, the court held that the President's decision to establish a commission of inquiry into rugby administration amounted to executive action rather than administrative action, but that the principle of legality requires that a decision-maker performing such action not to misconstrue his/her powers or exercise them in bad faith. In *Pharmaceuticals*, the court held that the Proclamation by the President (akin to a legislative power) was invalid under the principle of legality which requires that decisions to be rational and non-arbitrary.

A further point pertaining to the rule of law is that it requires accessibility, precision, and general application such that people can align their conduct with its requirements.<sup>146</sup> In terms of this principle, original legislation (such as Acts and By-laws), and delegated legislation (such as Regulations) which do not amount to administrative action as defined, may nonetheless be challenged for vagueness using the rule of law.<sup>147</sup>

Given these requirements of the rule of law, “any type of broad discretionary power may fall foul of the Constitution, particularly if there are no guidelines for its exercise.”<sup>148</sup> Thus, in the case of *Dawood*,<sup>149</sup> officials from the Department of Home Affairs were vested with *sweeping and unguided legislative powers to grant or refuse residence permits*. No criteria were specified in the empowering law to guide the exercise of this power. The court held that law-makers must:

- “take care when legislation is drafted to limit the risk of an unconstitutional exercise of the discretionary power it confers,” and so
- “[legislative] guidance will often be required to ensure that the Constitution takes root in the daily practice of governance.”

On this line of reasoning, empowering provisions that, for example, authorize officials to seize and impound the goods of informal workers without specifying criteria for the exercise of these invasive powers, could be challenged for vagueness in breach of the rule of law.

Indeed, in *Makwicana*, the court found section 6A(1)(d) of the Businesses Act wanting on this basis (although the provision was not held to be unconstitutional). The court noted that, “[l]egislation permitting seizure of property should also provide for the return of the property and payment of compensation in certain circumstances.”<sup>150</sup> The court also criticized section 35 of the By-Law and found it to be too broad and beyond the scope of section 6A(1)(d)(ii) of the Businesses Act in breach of the principle of legality.<sup>151</sup>

It is not just penalty provisions in empowering statutes that may offend the rule of law on this basis. Provisions allowing, for example, the imposition of a restrictive licensing condition or the withdrawal of a permit may also offend the rule of law.

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<sup>146</sup> *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 102.

<sup>147</sup> See *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) para 108: “the doctrine of vagueness is founded on the rule of law, which...is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner.”

<sup>148</sup> Hoexter note 5 at 264.

<sup>149</sup> *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) paras 48 and 54.

<sup>150</sup> *Makwicana* note 6 para 40.

<sup>151</sup> *Makwicana* note 6 para 62-4.

## 6. Alternatives to Judicial Review

Administrative law is broader than judicial review (i.e. a court process aimed at scrutinizing the legality of administrative action). It encompasses both judicial and non-judicial safeguards against maladministration,<sup>152</sup> although judicial review has tended to dominate in South Africa for the reasons expressed above.

The “new” administrative law of the constitutional era makes provision for a variety of alternative forms of control and it is important that they are harnessed because:

- judicial review has several pitfalls, e.g. it is costly, time-consuming and a retrospective response;<sup>153</sup> and
- the use of these alternative avenues may incentivize good administration *proactively* rather than *reactively*.

The inadequacy of judicial review in the context of the street vending sector was highlighted as follows in *Makwicana*:

“But for the assistance of the LRC and similar aid organizations, this right of access to courts is theoretical and illusory for street traders generally. Puran (a fellow trader whose vegetables had previously been confiscated) could not pay the fine of R1000 let alone engage legal representation to refute the charges. Street traders are required to be at their stands for three to five days in a week according to an arbitrary rule... Being away also means loss of income. The meagre income they generate goes to sustaining their large families. Employing legal assistance is not realistic. Reform of the dispute system design in the informal sector should take this into account.”

Aggrieved informal workers whose rights and/or legitimate expectations have been affected by administrative action<sup>154</sup> have the following non-judicial remedial options: internal appeal; ombud institutions; access to information requests and public participation.

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<sup>152</sup> Hoexter note 5 at 484.

<sup>153</sup> See Hoexter note 5 at 488-491.

<sup>154</sup> See general on alternative modes of control of administrative power, Hoexter note 5 chapter 2.

## 6.1 Internal Appeal

Unlike judicial review which is concerned with the decision-making process, an appeal may give an aggrieved person what he/she actually wants: namely, a favourable decision on the *merits*.<sup>155</sup>

Many empowering laws in fact make provision for appeal processes *internal to the administration*. Section 17 of the City of Cape Town Informal Trading By-law, for example, provides that “a person whose rights are affected by a decision taken by the City in terms of this By-law...may appeal against that decision in terms of section 62 of the Systems Act.”<sup>156</sup>

## 6.2 Ombud Institutions

An informal worker may wish to make use of an ombud institution, such as the office of the Public Protector, whose services are free and who has a wide mandate to investigate allegations of “maladministration in connection with the affairs of government at any level.”<sup>157</sup>

Section 182(1)(c) of the Constitution empowers the Public Protector to take “appropriate remedial action” in the face of such maladministration. As the recent Constitutional Court judgment in *Economic Freedom Fighters*,<sup>158</sup> makes clear, this action will often – but not always – be binding because the effectiveness of the office requires as much.<sup>159</sup>

An aggrieved trader might even approach an ombud office at municipal level. The City of Cape Town, for example, has established an ombud. The City ombud has the authority to investigate and resolve a range of complaints – particularly those relating to maladministration by municipal officials.<sup>160</sup>

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<sup>155</sup> See above at Part 2 on the distinction between review and appeal.

<sup>156</sup> Section 62 of the Municipal Systems Act 32 of 2000 states the following: “62 Appeals

- (1) A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or sub-delegated by a delegating authority to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision.
- (2) The municipal manager must promptly submit the appeal to the appropriate appeal authority mentioned in subsection (4).
- (3) The appeal authority must consider the appeal, and confirm, vary or revoke the decision, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.
- (4) When the appeal is against a decision taken by-
  - (a) a staff member other than the municipal manager, the municipal manager is the appeal authority;
  - (b) the municipal manager, the executive committee or executive mayor is the appeal authority, or, if the municipality does not have an executive committee or executive mayor, the council of the municipality is the appeal authority; or
  - (c) a political structure or political office bearer, or a councillor-
    - (i) the municipal council is the appeal authority where the council comprises less than 15 councillors; or
    - (ii) a committee of councillors who were not involved in the decision and appointed by the municipal council for this purpose is the appeal authority where the council comprises more than 14 councillors.
- (5) An appeal authority must commence with an appeal within six weeks and decide the appeal within a reasonable period.
- (6) The provisions of this section do not detract from any appropriate appeal procedure provided for in any other applicable law.”

<sup>157</sup> Section 6(4) of the Public Protector Act 23 of 1994.

<sup>158</sup> *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* [2016] ZACC 11 (31 March 2016), the so-called “Nkandla judgment.”

<sup>159</sup> The *Nkandla Judgment* note 157. See from para 48 on “the purpose of the office of the Public Protector.”

<sup>160</sup> See <http://www.capetown.gov.za/en/CityOmbudsman/Pages/default.aspx> [last accessed 12 September 2016] on the powers of the City Ombud.

## 6.3 Access to Information Requests and Public Participation

Informal workers may influence good decision-making through access to information requests under the Promotion of Access to Information Act 2 of 2000 (“the PAIA”) and thereby encourage sound justification for administrative decisions.<sup>161</sup> They may also proactively influence the manner in which such decisions are made by participating in processes pursuant to which laws and policies affecting them come to fruition.

As the Constitutional Court noted in *Doctors for Life*,<sup>162</sup> the duty to facilitate public involvement in the law-making process requires the law-makers to act reasonably so that affected citizens “have a meaningful opportunity to be heard in the making of laws that govern them.”<sup>163</sup> The promise of section 4 of the PAJA which governs “administrative action affecting the public,” should thus be harnessed and informal workers should participate in public inquiries into issues that will affect them. These issues might include: the allocation of informal trading space, the approval of trading plans and so on.

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<sup>161</sup> See Hoexter note 5 from 94 on access to information.

<sup>162</sup> *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC).

<sup>163</sup> *Doctors for Life* note 161 para 145.



## 7. Conclusion

When state officials exercise powers under laws in respect of informal workers (such as waste pickers and street vendors) administrative law will find application. Once it is established that the power or function in question meets the definition of administrative action in the PAJA, it must be shown to be:

- lawful;
- reasonable; and
- procedurally fair.

In addition, those traders affected by the decision in question may request written reasons for it.

For administrative action to be lawful, the administrator who takes it must:

- be duly *authorized* to do so;
- act within the *procedural and substantive bounds* of his/her powers; and
- ensure that he does *not abuse his/her discretion* by, for example, acting in bad faith or failing to apply his/her mind.

For the action to be reasonable, the administrator must ensure that:

- it was taken for a *legitimate* (and not arbitrary) purpose;
- that the means or process implemented to achieve this purpose are *rationally or logically linked* to it; and
- that they are the *most well-tailored* (or proportionate) means available, and reasonable in the circumstances.

For the administrative action to be procedurally fair, the administrator must ensure that:

- Those affected are given a *proper hearing*, which will generally entail –
  - adequate notice of the type of action and its purpose;
  - a reasonable chance to make representations;
  - a clear statement of the administrative action once it has been taken; and
  - notice of any right of review or appeal, as well as the right to request reasons.
- He/she acts in an *impartial manner* with a mind open to persuasion; and
- Where the administrative action affects the *public at large*, consideration is given to adopting a *public participation process* such as a notice and comment procedure or public inquiry.

Where written reasons are requested for the action, the administrator must provide such reasons and ensure that they are:

- *specific*;
- set out in *clear and plain language*;
- of a *length and detail appropriate* to the circumstances; and
- actually set out a *process of reasoning* rather than mere conclusions.

If any of these basic requirements of the right to just administrative action are breached, an affected party may:

- institute proceedings for judicial review of the action under the PAJA and seek one (or more) of the following remedies, including:
  - the *setting-aside* of the decision and its
    - remittal to the administrator, or

- substitution or correction by the court;
- the payment of *compensation* (awarded only in rare instances);
- a declaration of rights; and/or
- an interdict
- take the matter on appeal to try and obtain a favourable decision on the merits (e.g. the actual award of the licence, or allocation of trading space);
- lodge a complaint with the relevant ombud office;
- submit a PAIA request for access to information and/or seek to get involved in public participation processes governing policy- and law-making in the informal economy in future.

Where the power or function in issue is not administrative action as defined, an affected person may nonetheless seek to judicially review the exercise of this public power via one of the other pathways to review including:

- a direct constitutional challenge where the law / policy in issue breaches a constitutional right; or
- a challenge to the law in issue on the basis of vagueness under the rule of law; or
- a challenge under the principle of legality on the basis that the law or conduct is irrational and/or unlawful.

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