

“Administrative Law is a useful tool to challenge decision-making by local authorities. We can mobilize our organizations to use administrative law to challenge decisions that affect us and our work.”



About Women in Informal Employment: Globalizing and Organizing (WIEGO)

WIEGO is a network of individuals and organizations that work to increase informal workers' voice, visibility and validity. We work with StreetNet International, which organizes street vendors' organizations across the world. We also work with waste pickers' organizations in many countries, including in South Africa.

WIEGO's Law Programme and its Organization and Representation Programme have developed this booklet. WIEGO's Law Programme empowers workers' organizations to fight for their recognition and rights as workers at a local, national and international level. WIEGO's Organization and Representation Programme works to strengthen membership-based organizations (MBOs) of informal workers, especially those that involve women as members and leaders, and to build sector-specific networks of such organizations.

For more information and WIEGO resources, visit www.wiego.org. You can also follow us on Facebook at [Facebook.com/wiegoglobal](https://www.facebook.com/wiegoglobal) and Twitter at <http://twitter.com/wiegoglobal>

Why we made this booklet

This booklet was designed for informal workers (especially street vendors and waste pickers) who work in public space in South Africa. It provides an introduction to administrative law, as a tool that workers can use to challenge discriminatory actions and decisions by municipal officials. Use this book to learn about your rights and remedies, whether you are a street vendor, waste picker, or another worker who operates in a municipal space. The book can also be used by organizers as a resource for workers' education.

The booklet is based on WIEGO Technical Brief 10, *Using Administrative Law to Secure Informal Livelihoods: Lessons from South Africa* which can be accessed on the WIEGO website [here](#) and was workshopped with street vendor and waste picker leaders who attended the WIEGO Law School on Administrative Law in February 2018.

We dedicate this booklet to street vendor leader and activist, John Makwicana (1947 – 2018). John served as Chairperson of Traders Against Crime and as Vice President of Masibambisane Traders Association (MATO). John gained a huge victory for informal workers when he won a [landmark case](#) against the Durban municipality following the impoundment of his goods by the Metro Police in 2013. His case set a legal precedent challenging the constitutionality of the impoundment of traders' goods, and gained recognition and validity of informal work globally.

Cover photos left to right: Tasmi Quazi, Asiye eTafuleni and Chris Bonner

Design by: Julian Luckham of Luckham Creative

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Photo: WIEGO



Introduction to Administrative Law

1.1 What is Administrative Law?

Administrative law is a branch of public law, which regulates the relationship between the government and ordinary people. Administrative law regulates activities of officials or bodies (administrators) that exercise public powers and perform public functions. It is designed to ensure that administrators make decisions in a fair manner. The Constitution protects your right to administrative justice, which means that administrators must take actions that are lawful, reasonable and procedurally fair.

Laws and policies are the “empowering provisions” that mandate administrators to carry out their functions. Administrators implement these provisions. Administrative law regulates the way in which public officials exercise their public functions. It allows you to challenge the manner in which administrators take decisions and actions. This helps to promote openness, accountability and due process by government officials.

1.2 Who are Administrators?

An administrator is anybody who makes decisions that affect the public. This could be a local government official in charge of issuing informal trading permits, a health inspector, a city manager, a traffic officer, or a manager of a city-owned market. It could also be a private person doing work of a public nature that local government has outsourced, e.g. sanitation, refuse removal or market management.

1.3 Where Does Administrative Law Come From?

In South Africa, there are three sources of administrative law. These are:

- Section 33 of the Constitution
- Promotion of Administrative Justice Act (PAJA) 3 of 2000
- Court decisions

1.4 What is an Administrative Action?

Not all actions by a government official are administrative actions. The PAJA defines administrative action as follows:

- An action or decision by an administrator (public official or private person exercising public power), or a failure by an administrator to act or decide.
- A decision of an administrative nature with a public power/function that:
 - ▶ applies generally to the public or a section of the public;
 - ▶ requires people to do or not do something;
 - ▶ is related to a clear legal framework and purpose;
 - ▶ arises out of public duty, not private purpose.
- Made in terms of an empowering provision, such as constitution, legislation, by-laws, common law powers, customary law, policy.
- Negatively affects people's rights.
- Not an executive action or legislative action.

1.5 What is Just Administrative Action?

For administrative action to be fair or just, it must:

- Be *lawful*: the official must work within the confines of the law; be authorized to take action and not abuse or exceed his/her authority.
- Be *reasonable*: actions/decisions taken must be rational and must fit the purpose.
- Be *procedurally fair*: must include the right to a hearing and the decision-making must be impartial.

In addition, you can demand that an administrator gives you his/her decision in writing if the decision affects you.

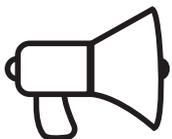
Examples of Administrative Actions



- Evicting informal traders;
- Issuing or refusing to issue permits to traders;
- Demarcating and allocating trading space;
- Impounding goods;
- Arresting informal traders;
- Imposing conditions on licenses: fees, hours, etc.;
- Imposing conditions on waste pickers' access to landfills;
- Denying waste pickers' access to landfills;
- Giving private companies contracts to collect recyclables without including waste pickers.



Photo: J. Barrett



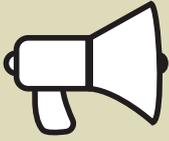
Preparing to Challenge an Administrative Action

The three most important questions to ask when you want to challenge the action of public officials are: Is it lawful? Is it reasonable? Is it procedurally fair? To answer these questions, you need to ask more detailed questions.

2.1 Is it Lawful?

- (i) Did the administrator have authority to act? Problems arise when the administrator:
- ▶ cannot show where her/his *legal authority* to act comes from, fails to point to a by-law, policy, Act of Parliament, etc. that gives him/her a mandate to take action or make a decision;
 - ▶ *acts beyond her/his authority*, e.g. a by-law allows the council to restrict the time that a trader may trade when issuing a permit. Council imposes another restriction that the law does not allow, e.g. restricting the goods that a trader can sell.
 - ▶ *changes a valid decision without consultation*, e.g. reducing the number of trading bays in a trading plan that council adopted in consultation with the traders;
 - ▶ *unlawfully delegates her/his duties* to an unauthorized person, e.g. law enforcement delegating powers to arrest offenders to a private security firm.

Ask the government officials where their power comes from



When a government official (including police) makes a decision that has a negative effect on you, you should ask:

"I have a constitutional right to know which law or regulation gives you the power to make this decision. Please show me exactly where your power comes from."

- (ii) Did the administrator act within her/his powers (jurisdiction)? An administrator has acted beyond his/her powers when the administrator:
 - ▶ fails to interpret the law that says what administrators can or cannot do;
 - ▶ fails to follow the prescribed procedure, for example adopting a trading plan without following the procedure required in the by-law or policy, such as the requirement to consult the affected parties and to publish a notice in local newspapers;
 - ▶ makes a decision or acts before making sure that the *facts that must exist before the action can be taken actually exist*, e.g. a by-law allows officers to confiscate goods if they reasonably believe that the trader does not have a permit. If an officer confiscates goods without listening to a trader's explanation or giving the trader (or trader's assistant) a fair chance to show that s/he has a permit, then the officer has acted unlawfully.
- (iii) Did the administrator abuse her/his discretion? An administrator abuses his/her discretion when the administrator:
 - ▶ *acts with an ulterior purpose* (hidden agenda), e.g. relocating traders to accommodate a new development that will directly benefit the official or their relatives;
 - ▶ *acts in bad faith* (fraud, dishonesty), e.g. officials tell a group of waste pickers that they must pay a "fine" for pushing trolleys on a public road when there is no law that provides for such a fine.
 - ▶ *fails to apply their mind* to the situation, e.g. a city council sends a trader an invoice for rentals. The trader discovers that all other traders selling similar goods in the same area pay half of what the council has charged her. When she approaches the council, they tell her that they cannot change the invoice because "the computer calculates all the rentals".

2.2 Is it Reasonable?

Administrative actions have to be reasonable. This requirement is best illustrated by way of an example: a city council has allowed waste pickers to access a landfill site at any time. Since the council made that decision and waste pickers have had access, there have been three serious fires on the landfill, all of them at night. The city council finds out that some waste pickers stay on the landfill site to sort their waste after dark, and light fires to stay warm. The city bans all waste pickers from accessing the landfill site at any time.

To determine whether this action was reasonable, you must consider three questions.

- (i) Was the action or decision taken for a *legitimate purpose*? Yes it was: the council wanted to prevent fires on the landfill (please note: if there was no legitimate purpose, the decision would be unreasonable)

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- (ii) Was the action or decision *logically connected to this purpose*? You can assume that banning people from the landfill will reduce the chances of a fire (but if there is no connection between the decision and the purpose, then the decision would be unreasonable).
- (iii) Was the action or decision *the most appropriate way to achieve that purpose* or did it go too far? You must consider different factors; e.g. you must weigh up the reasons for the decision and the impact of the decision on the people who are affected by it. If the ban will deprive the waste pickers of their means of earning a living, you could argue that a total ban on access to the landfill site goes too far in trying to prevent fires and the council should consider other options, e.g. restricting access to the landfill site to day-time, and monitoring who is on the landfill at any time.

Since there are other means to prevent fires, you could argue that the decision is not reasonable.

2.3 Is it Procedurally Fair?

For an administrative action to be procedurally fair,

- (i) The administrator must grant the affected parties a hearing:
- ▶ Where the administrative decision *affects your individual rights or legitimate expectations, there must be*:
 - ▶▶ A hearing;
 - ▶▶ Adequate notice of the action and the purpose of the action;
 - ▶▶ A reasonable chance to make a representation;
 - ▶▶ A clear statement of the administrative action or decision once it has been taken;



Photo: J. Rajgopal

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- ▶▶ A notice telling you that you have a right to take the decision on review and to request reasons for the action;
 - ▶▶ A choice to have a representative or to appear personally.
 - ▶ Where the action affects *a group of workers or the public*, there must be a public participation process. Some informal trading by-laws and policies set out the procedures and timelines for notifications and consultation.
- (ii) The administrator must not be biased and must be open to persuasion.

2.4 Right to Request Reasons

You also enjoy a right to request reasons if your rights are affected by administrative action.

This right helps you to understand why the official made the decision so that you can decide whether and how to challenge the decision. **You must request reasons within 90 days** of finding out about the administrative action.

Request Reasons in Writing



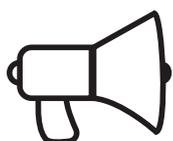
Note: Remember to request reasons in writing and to keep a copy of your letter. Your letter should have the date on it, and preferably should have a stamp showing when you delivered it to the authorities. If the municipality does not give you reasons, then a lawyer can help you take the municipality to court.

Reasons must:

- Be specific;
- Be set out in clear and plain language and in an official language(s) that most of the people in the municipal area can speak;
- Be of appropriate length and detail;
- Explain how the administrator reached the decision rather than simply saying what they decided.



Photo: WIEGO



Challenging Administrative Action: Remedies and Strategies

There are different ways of challenging and influencing an administrative decision or action. The route that you take will depend on factors such as:

- the type of action or decision;
- the principles that the administrator breached;
- your organizational strength, knowledge and resources;
- your access to support;
- your experience and knowledge of the attitude of city officials responsible.

3.1 The Legal Route: Using the Courts

There are two ways to challenge administrative action through the courts:

(i) Judicial Review

Under the Promotion of Administrative Justice Act (PAJA), the courts can assess the decision-making process to see if the outcome was reached in an acceptable manner. However, it is not an appeal process, and so the courts do not usually decide whether the outcome itself is right or wrong. If the courts find that the decision does not meet the requirements of lawfulness, reasonableness and procedural fairness, they will most often set aside the decision and ask the administrator to deal with it again in a lawful, reasonable, or procedurally fair manner.

In rare cases, courts have:

- ordered a change to the actual decision;
- ordered the administrator to compensate the affected person(s);
- granted an interdict requiring the administrator to stop doing something or requiring her/him to do something.

(ii) Direct Constitutional Challenge

You can ask a *pro bono* (free) lawyer to help you to go to court to challenge the law or by-law itself if it violates any constitutional right (including the right to administrative justice).

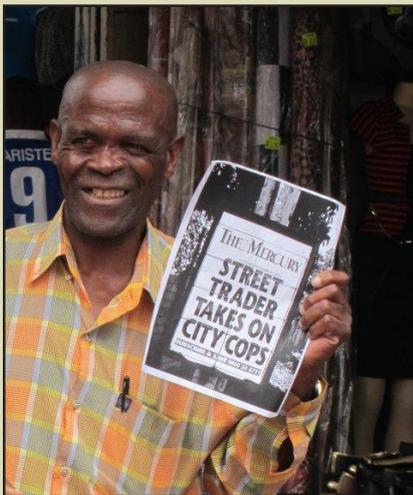
Consider Any Decision to Go to Court Very Carefully



Note: You will need to consider any decision to go to court very carefully. If you decide to go to court, you will need the support of lawyers and must be prepared for a long and costly process.

The box below explains how a street trader from Durban approached the courts when city council officers confiscated his goods.

Durban Trader Stands Up Against City By-laws



A Durban street trader, John Makwicana, who lost R775 when his goods were confiscated, won a massive victory for informal traders when the Durban High Court ruled that by-laws which give officials unrestricted power to impound and confiscate their property are unconstitutional.

Makwicana had been trading legally since 1996. Like many traders, his stock was unfairly confiscated by metro police. His goods were impounded and later “disappeared”.

The judge ruled that the confiscation of traders’ goods without notice was a violation of their rights.

The municipality was ordered to compensate Makwicana for his goods, and the responsible official was ordered to pay a portion of his legal costs.

The judge ruled that the eThekweni by-law violated traders’ rights to access property and trade and amounted to discrimination, and said the City of eThekweni needed to bring them into line and “remedy the attitude of officials” who needed to be empathetic to street trading.

The case showed the abuse street traders often suffer at the hands of city officials and showed that by-laws effectively allowed them to punish traders before a court of law had determined guilt. The judge urged the City to meaningfully engage with traders when it reformed its by-law.

SERI. Informal Trade in Johannesburg. Your Rights, p 52-53 Photo: Tasmi Quazi, Asiye eTafuleni

3.2 Other Ways to Challenge Administrative Action

There are several ways that you can use to challenge administrative action other than going to court:

(i) Right to request reasons (see above)

It is a good idea to exercise right to request reasons because it may enable you to show a court or an ombud that the decision-maker could not demonstrate reasons for their action or that the reasons were not well-founded. If the decision-maker does not demonstrate good reasons, you can argue that the administrator did not apply her/his mind (lawfulness) or that the decision was irrational (reasonableness).

(ii) Internal appeal

Many municipal by-laws, regulations or policies allow you to make or file an internal appeal. Many municipal by-laws refer to the Municipal Service Act, which allows you to appeal against a decision taken by a political structure, political office bearer, councilor, or staff member of a municipality. You must give written notice of the appeal and your reasons to the municipal manager **within 21 days** of receiving a notice about the decision. Remember to keep a copy of your notice and try to have your copy stamped when you deliver the original.

The person who hears the appeal can make a ruling about whether the administrator followed a proper process or can decide that the decision was wrong and can change the decision.

(iii) Ombuds

Some municipalities have an Ombud office or Ombudsperson where you can take your complaints. The Ombud will investigate and resolve complaints.

You can also approach the Public Protector to investigate allegations of maladministration in relation to government affairs. The Public Protector can investigate cases involving all levels of government.

(iv) Access to information

Local authorities generate and keep a lot of important information that is not publicly available, e.g. local authority's budgets or their contracts with private companies. The Promotion of Access to Information Act (PAIA) allows ordinary people to access such information. You may use PAIA to request access to information, such as fee structures in different trading areas and terms and conditions of contracts with other parties (e.g. to collect household waste or to manage designated trading areas). You can use the information that you access through PAIA to strengthen your arguments when you engage with the authorities or go to court.

(v) Public participation

Informal workers may also influence decisions by participating in public processes and inquiries before decisions are taken. Administrators should allow for public participation where their decisions will affect the public. This could, for example, be about separation at source and who has the right to collect the recyclables or about proposals for a new informal trading plan.

(vi) Negotiations and other forms of collective action

You can deal with many instances of administrative action through organizing: demanding meetings to negotiate, taking collective action and mobilizing the public.

The right to fair procedure provided for under PAJA /the Municipal Systems Act/by-laws or policies as noted above can be used in almost any challenge. These include:

- the right to a hearing, including impartiality and being open to persuasion;
- the right to information;
- the right to participation.



Photo: WIEGO

The study in the box below shows how workers can take collective action to challenge the actions of decision-makers.

Johannesburg Waste Pickers' Fight Against Privatization and Loss of Livelihoods



Johannesburg waste pickers (reclaimers) learned that the City had issued a tender to appoint private recycling companies to provide waste management services to high-income households. This was part of the process of extending the City's separation@source programme. The companies would collect and sell the recyclables for profit and also get paid by the City, taking on the work that reclaimers had been doing for years.

The impact of this was catastrophic for the reclaimers who reported that in areas where this was already in place their incomes dropped by more than half. Supported by WIEGO and South African Waste Pickers Association (SAWPA), they organized across the City. They held meetings

and formed the Interim Jo'burg Reclaimers Committee. Despite meeting with the City and Pikitup (the City waste management enterprise) to voice their concerns and demands, the City decided to go ahead.

The reclaimers took to the streets and organized a march to the office of Pikitup. This struggle strategy was effective. The new managing director of Pikitup acknowledged reclaimers as important stakeholders in the waste economy. A Task Team has been set up composed of the Interim Jo'burg Reclaimers Committee, Pikitup and the City's Environmental and Infrastructure Services Department. It is tasked with developing a framework for waste picker integration into the waste economy of the City.

(See Vanessa Pillay, "Amplifying voice, visibility and validity. Waste pickers in Jo'burg City" *South African Labour Bulletin*, Vol 41, No 4, Nov/Dec 2017) Photo: Chris Bonner

Who to Contact if You Need Legal Assistance to Challenge Administrative Action

If you think that you will need legal assistance to challenge administrative action that you believe to be unlawful, unreasonable and procedurally unfair, you can contact WIEGO's partners who provide pro bono (free) legal services in South Africa. Be sure to let them know that your organization works with WIEGO.

The Legal Resources Centre (LRC)

PBO NO: 930/003/292

NPO -023-004

Johannesburg

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20 Albert Street

Johannesburg

2001

Tel: (011) 838-6601

Fax: (011) 836-8680

Cape Town

3rd Floor, Greenmarket Place

54 Short Market Street

Cape Town

8001

P O Box 5227

Cape Town

8000

Tel: (021) 481-3000

Fax: (021) 423-0935

Durban

11th Floor, Aquasky Towers

275 Anton Lembede Street

Durban

4001

Tel: (031) 301-7572

Grahamstown

116 High Street

Grahamstown

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Tel: (046) 622-9230

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Facebook: <http://www.facebook.com/LRCSouthAfrica>

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Please let WIEGO know if you have used this booklet to challenge municipal decisions. You can e-mail: marlese.vonbroembsen@wiego.org



Photo: M. Chen

Dedicated to street vendor leader
and activist, John Makwicana (1947 – 2018).